

# CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

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## HEARINGS

BEFORE THE

## COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

MARCH 24, APRIL 8, JUNE 4, AND JUNE 16, 2004

**Serial No. J-108-1**

**PART 7**

Printed for the use of the Committee on the Judiciary



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BRUCE A. COHEN, *Democratic Chief Counsel and Staff Director*



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**NOMINATION OF PAUL S. DIAMOND, OF  
PENNSYLVANIA, NOMINEE TO BE DISTRICT  
JUDGE FOR THE EASTERN DISTRICT OF  
PENNSYLVANIA**

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**WEDNESDAY, MARCH 24, 2004**

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The Committee met, pursuant to notice, at 9:13 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Present: Senator Specter.

Senator SPECTER. My apologies for being late. I now have an appreciation for women who spend laborious hours with makeup, something Karen Santorum does not have to do because she is a natural beauty.

On Saturday night, as I have said, I left a restaurant in the 200 block of Market Street. The street has been there for 315 years and it was paved 314 years ago, and there was a major defect which I did not notice and the result was a crash. My nose was not broken, but the sidewalk was, so I consider it a Pyrrhic victory.

**PRESENTATION OF PAUL S. DIAMOND, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, BY HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA**

Senator SPECTER. The Committee today will have a hearing for Paul Diamond, a very distinguished Philadelphia lawyer. And at the outset, I disclose in the interest of full disclosure my long friendship with Mr. Diamond, going back more than two decades, and state that Mr. Diamond has been my lawyer, along with his law firm, and Thomas Leonard, who is with us today. Obermeyer, Rebmann, Maxwell and Hippell have represented me in a number of matters. So I think that ought to be on the record. I do not believe that this nomination will be contentious in any way, but it is always good to have everything on the record.

Mr. Diamond went to Hunter College, graduated from Columbia University, magna cum laude, and the University of Pennsylvania Law School; served in the Philadelphia District Attorney's office as an assistant D.A., which is superb training; clerked for Justice Bruce Kauffman, of the Pennsylvania Supreme Court, a very eminent jurist who now sits on the United States District Court for the Eastern District of Pennsylvania; has been an adjunct law pro-

fessor at Temple University; and for the past 14 years has been with the firm of Obermeyer, Rebmann, Maxwell and Hippell, one of Philadelphia's longstanding, very distinguished law firms, where he is now a partner. He will take a substantial cut in pay to come to the Federal bench, but he will make as much as Senator Santorum does.

I now want to recognize my distinguished colleague from Pennsylvania, Senator Santorum, with whom I have established a non-partisan judicial nominating panel. There must be screening by that panel before Senator Santorum and I make recommendations to the President.

We have, I think, established a process which has produced extraordinary judges. The United States District Court for the Eastern District of Pennsylvania has been heralded as one of the best, if not the best court in America. Senator Santorum and I are 15 for 15 on judicial confirmations, which is a pretty good record considering what happens in the United States Senate. We have 7 confirmations waiting in the wings and we may well be 22 for 22 shortly.

Senator Santorum, my regrets for keeping you waiting. I know how busy you are and I know everyone wants to hear your comments about Mr. Diamond.

**PRESENTATION OF PAUL S. DIAMOND, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, BY HON. RICK SANTORUM, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA**

Senator SANTORUM. Thank you, Mr. Chairman, and I want to thank you for the tremendous work that you have done. When we came to the U.S. Senate, you had this procedure in place and we have worked hand-in-glove in making sure that, number one, we screened candidates both for the prior administration and for this administration, and we did so on a non-partisan basis.

In fact, we continue, I guess, the idea that you came up with Senator Heinz, the idea that even during a Democratic administration, with two Republican Senators, Republicans should have an occasional judge appointed in Pennsylvania. And even when we have two Republicans and a Republican President, the Democrats should have some representation on the judiciary.

Such as it is, we have a formula that for every four judges appointed in Pennsylvania, three are Republicans and one is a Democrat, even though there are no Democrats in the process on the Federal level, with two Republican Senators and a Republican President.

I think that does add a balance to the system and it allows the best and the brightest from both parties to rise and have an opportunity to serve. This is a case where one of the best and brightest has risen and certainly is, I think, eminently qualified to serve.

When I came into the room, I said to Paul, where is everybody? This is a situation where the fact that Paul, his wife and his partner as the only three people in the room gives you an understanding of how non-controversial this nominee is.

The number of people who show up for these kinds of hearings is directly related to the controversy surrounding them. So the fact



that there aren't a lot of people here concerned about this nominee, I think, shows the tremendous strength of Mr. Diamond, his tremendous legal experience, educational background, temperament, public service, his writings in the area of Federal practice and procedure, all of which make him eminently qualified for this position and someone whom I am very happy to be here to represent and to present to the Committee.

I thank you, Mr. Chairman, for getting this hearing scheduled, and I am hopeful that if anyone can get the next seven nominees through the process in the Senate that you are just the man to do it. I will be happy to work at your side to make that happen.

Senator SPECTER. Thank you very much, Senator Santorum, for your outstanding work in the Senate generally, leadership position number three, and for your leadership on judicial nominations and judicial selection.

I have a suspicion you have other commitments, Senator.

Mr. Diamond, I was about to say, while you are standing, just move to the podium, and if you would raise your right hand.

Do you solemnly swear that the testimony you give before this panel of the Committee on the Judiciary of the United States Senate will be the truth, the whole truth and nothing but the truth?

Mr. DIAMOND. I do.

Senator SPECTER. You may be seated.

May the record show that Mr. Diamond is accompanied by his distinguished wife, Robin Margaret Nilon Diamond, who is an assistant professor at the Temple Law School, and Thomas Leonard, who is a partner from the firm.

Mr. Diamond, would you care to amplify the introductions?

**STATEMENT OF PAUL S. DIAMOND, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Mr. DIAMOND. Yes. I am grateful to both my wife and to Mr. Leonard for coming. And I am, of course, very grateful and honored by the President for having nominated me and I am overwhelmed by the support over the years that you have shown you, Senator Specter, and that, of course, Senator Santorum has shown me.

[The biographical information of Mr. Diamond follows:]

**I. BIOGRAPHICAL INFORMATION (PUBLIC)**

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

**Paul Steven Diamond**

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

**Work: One Penn Center, 19<sup>th</sup> Floor  
1617 John F. Kennedy Boulevard  
Philadelphia, PA 19103**

**Residence: Philadelphia, PA**

3. Date and Place of Birth.

**January 2, 1953  
Brooklyn, New York**

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

**Married to Robin Margaret Nilon  
Assistant Professor  
Temple University Law School  
1719 N. Broad Street  
Philadelphia, PA 19122**

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

**University of Pennsylvania School of Law  
1974-77 J.D. 1977  
Chairman, Law School Honor Committee**

Columbia University  
 1972-74 B.A. *Magna Cum Laude* 1974 of /  
 Major: History  
 Dean's List  
 New York State Regents Scholarship

Hunter College – City University of New York  
 1970-72 Major: Special Honors  
 Grade Point Average: 3.96  
 Honors Program (One of approximately twelve students  
 selected out of entering class of approximately 3,200)  
 (Transferred to Columbia at the end of my sophomore year.)

I financed my college and law school educations through a combination of part-time employment, scholarships, and student loans.

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

January 1992 to Present Obermayer Rebmann Maxwell & Hippel – Partner  
 One Penn Center, 19<sup>th</sup> Floor  
 Philadelphia, PA 19103

March 1983 to December 1991

Dilworth, Paxson, Kalish & Kauffman – Partner/Associate  
 3200 One Mellon Bank Center  
 Philadelphia, PA 19103

1990 – 1992 Temple University School of Law – Adjunct Professor  
 1719 N. Broad Street  
 Philadelphia, PA 19122

October 1980 to February 1983

Philadelphia District Attorney's Office  
 Assistant District Attorney  
 1421 Arch Street  
 Philadelphia, PA 19102

October 1977 to February 1980

Philadelphia District Attorney's Office  
Assistant District Attorney  
1421 Arch Street  
Philadelphia, PA 19102

February 1980 to September 1980

Pennsylvania Supreme Court  
Law Clerk to Justice Bruce W. Kauffman (now a Judge  
serving on the United States District Court for the Eastern  
District of Pennsylvania)

June 1976 to September 1977

Philadelphia District Attorney's Office – Law Clerk  
1421 Arch Street  
Philadelphia, PA 19102

Summer 1975

Intern, King's County District Attorney's Office  
Brooklyn, New York

March 1970 to August 1974

New York Public Library – Page/Clerk  
5<sup>th</sup> Avenue and 42<sup>nd</sup> Street  
New York, NY

2003 to Present

Chairman, Pennsylvania Lawyers Fund for  
Client Security Board of the Supreme Court  
of Pennsylvania

2001 to 2002

Vice-Chairman, Pennsylvania Lawyers Fund for  
Client Security Board of the Supreme Court  
of Pennsylvania

1999 to 2000

Treasurer, Pennsylvania Lawyers Fund for  
Client Security Board of the Supreme Court  
of Pennsylvania

1998 to Present

Member, Pennsylvania Lawyers Fund for Client  
Security Board of the Supreme Court  
of Pennsylvania

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

NONE

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

1970            Graduated with honor, Stuyvesant High School, New York City

1970-74        New York State Regents Scholarship

1970-72        Hunter College Honors Program (one of approximately 12 students selected out of entering class of approximately 3,200).

1972-74        Dean's List Columbia University

1974            BA *Magna Cum Laude*, Columbia University

1976-77        Chairman, Student Committee on Academic Responsibility (Honor Committee), University of Pennsylvania Law School

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

American Law Institute

American Bar Association

Member, Grand Jury Committee

Vice-Chair, Amicus Curiae Briefs Committee - 1995-1999

Member, Amicus Curiae Briefs Committee – 1983-1999

Pennsylvania Bar Association

Philadelphia Bar Association

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

NONE

Please list all other organizations to which you belong.

American Philatelic Society 1991 – Present  
 Vesper Club of Philadelphia 1988 – Present  
 Columbia Club of New York 2000 – Present  
 Project Safe Neighborhoods Grant Selection Committee 2002, 2003  
 United States Supreme Court Historical Society 2001-Present

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

Supreme Court of Pennsylvania 1977

United States District Court for the Eastern District of Pennsylvania 1979

United States Court of Appeals for the Third Circuit 1978

United States Court of Appeals for the Ninth Circuit 1997

Supreme Court of the United States 1984

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

*Federal Grand Jury Practice and Procedure*  
(Prentice-Hall Law & Business 1990) (Second Edition 1993)  
(Third Edition 1995) (1997 Edition) (Anderson Publishing (Lexis-Nexis) (2001 Edition) (2003 Edition)

Commentary, *Prosecutorial Misconduct Before The Grand Jury*.  
7 United States Department of Justice Manual (1993)

Commentary, *Subpoenas of Attorneys Before Grand Juries*.  
7 United States Department of Justice Manual 52 (1993)

Commentary, *Subpoenas of Attorneys Before Grand Juries*.  
7 United States Department of Justice Manual 9.192.1 (1988)

Speeches:

Swearing-in of Legrome D. Davis as a Judge of the United States District Court for the Eastern District of Pennsylvania. July 19, 2002.

Swearing-in of Sandra Schultz Newman as a Justice of the Supreme Court of Pennsylvania. January 5, 1996.

Swearing-in of Ronald D. Castille as a Justice of the Supreme Court of Pennsylvania. January 3, 1994.

13. Health: What is the present state of your health?

Excellent.

List the date of your last physical examination.

June 9, 2003.

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

NONE

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

NONE

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

**Assistant District Attorney  
Philadelphia District Attorney's Office  
1977-1980; 1980-1983  
Appointed Office**

State (chronologically) any unsuccessful candidacies for elective public office.

NONE

17. Legal Career:

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

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

**February 1980 – November 1980 Law Clerk to the Pennsylvania Supreme Court Justice Bruce W. Kauffman (now a Judge serving on the United States District Court for the Eastern District of Pennsylvania)**

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

NONE



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

1992 – Present	<b>Obermayer Rebmann Maxwell &amp; Hippel LLP</b> <b>One Penn Center, 19<sup>th</sup> Floor</b> <b>1617 John F. Kennedy Boulevard</b> <b>Philadelphia, PA 19103</b>
	1992 – Present <b>Partner, Litigation Department</b> 1996 – Present <b>Administrative Partner, Litigation Department</b> 1992-1995 <b>Hiring Partner</b>
1983 – 1991	<b>Dilworth, Paxson, Kalish &amp; Kauffman</b> <b>3200 Mellon Bank Center</b> <b>1735 Market Street</b> <b>Philadelphia, PA 19103</b>
	1986 – 1991 <b>Partner, Litigation Department</b> 1990 – 1991 <b>Hiring Partner</b> 1983 – 1985 <b>Associate, Litigation Department</b>
1977 – 1980 1981 - 1983	<b>Philadelphia District Attorney's Office</b> <b>1421 Arch Street</b> <b>Philadelphia, PA 19102</b>
	<b>Assistant District Attorney</b>
1990 – 1992	<b>Adjunct Professor, Temple University School of Law</b>

**I taught first year students Lawyering Process and Legal Writing and Research.**

- 17 b. 1. What has been the general character of your law practice, dividing it into periods with dates, if its character has changed over the years?
- 17 b. 2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

<i>1992 – Present</i>	<i>Obermayer Rebmann Maxwell &amp; Hippel LLP</i>
<i>1983 – 1991</i>	<i>Dilworth, Paxson, Kalish &amp; Kauffman</i>

As a lawyer at Dilworth and Obermayer, I have had an extraordinarily diverse litigation practice; I am primarily responsible for litigating in the following areas of concentration:

Complex Commercial and Civil Litigation: I have worked extensively in virtually all areas of federal practice: securities, antitrust, labor, environmental, bankruptcy, regulatory, products liability, and intellectual property. I have represented innumerable companies and individuals, including Delmarva Power and Light, DuPont, Occidental Petroleum, Remington Arms, Concord Group Resources, Inc., e-Bay, Actuate Software, Ameritech, Inc., Bell Atlantic/Verizon, Inc., Certainteed, Independence Blue Cross, Crown Cork & Seal, Deloitte & Touche, Conrail, Eagle-Picher, Gallo Winery, and Westwood One, Inc.

Law Firm Break-Ups: I have represented many Philadelphia lawyers and law firms.

Civil Rights Litigation: I have represented government entities and public officials.

White Collar Criminal Matters: My practice in this area has been almost exclusively federal. I have represented companies (such as Litton Systems, Inc., Sunrise Savings and Loan Association, and others) and individuals in connection with investigations and prosecutions under environmental, False Claims Act, and other criminal laws. For instance, I was part of the team that, after a 12 week jury trial in Mississippi Federal Court, secured the acquittal of a defense contractor charged with fraud in connection with the construction of three nuclear submarines. *United States v. Litton Systems, Inc.*, 557 F.Supp. 568 (S.D. Miss. 1983), *reversed*, 722 F.2d 264 (5<sup>th</sup> Cir. 1984), *cert. denied*, 466 U.S. 973 (1984). In preparing for that highly unusual prosecution, I worked extensively with a jury consultant respecting strategies, evidence, witness preparation, and the like. I have also represented numerous companies and individuals in connection with federal grand jury investigations.

Disciplinary and Judicial Conduct Board: I have successfully represented various individuals before both these bodies.

Prosecution: As a prosecutor in the Law Division, I was assigned to a variety of matters that were considered especially consequential. For instance, I was assigned to litigation testing the constitutionality of the then-new Pennsylvania Grand Jury Act. I represented the Pennsylvania District Attorneys Association in litigation testing the constitutionality of the then-new Pennsylvania capital punishment statute. Although assigned to the Law Division, I was regularly given Trial and Investigations Division assignments. I tried felony and misdemeanor cases, evidentiary hearings, bail hearings, and federal and state habeas corpus hearings. I represented the Commonwealth of

Pennsylvania in appeals heard by the Pennsylvania Supreme, Superior, and Commonwealth Courts, the United States District Court for the Eastern District of Pennsylvania, the United States Court of Appeals for the Third Circuit, and the United States Supreme Court. I was assigned to grand jury investigations of alleged white collar crime and political corruption. I represented the District Attorney's Office in civil litigation. I instructed new prosecutors in the Office's Training Program.

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

**When I was a prosecutor, I appeared in court with great frequency, sometimes continually. In private practice I have continued to appear in court, not as frequently, but quite regularly.**

- 17 c. 2. What percentage of these appearances was in:

(a) **Federal Courts;**

**Approximately 70%**

(b) **State Courts of record;**

**Approximately 30%**

(c) **other courts.**

- 17 c. 3. What percentage of your litigation was:

(a) **Civil.** **Approximately 70%**

(b) **Criminal.** **Approximately 30%**

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

**During my career I have tried approximately three or four dozen matters to conclusion as sole or chief counsel. I have assisted in the trial of approximately two dozen matters. In addition, since 1998 I have presided over approximately ten trials conducted by the Pennsylvania Lawyers Fund For Client Security Board, on which I serve as Chair. These trials (the precise nature of which are confidential as a**

matter of law), can last an afternoon, or several days. All involve allegations that members of the Pennsylvania Bar have stolen, misappropriated, or defalcated funds from their clients. Finally, as Administrative Partner of my firm's 44 person Litigation Department, I am regularly called upon to make decisions regarding trial strategy, staffing, and the like.

17 c. 5 What percentage of these trials were:

(1) jury 10%

(2) non-jury 90%

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

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

1) *Chester County Hospital v. Independence Blue Cross*, (Civil Action No. 02-2746) (E.D. Pa.)

Judge: Honorable John Padova (United States District Court for the Eastern District of Pennsylvania)

Pendency of case: 2002 – present

My Clients: Independence Blue Cross ("IBC"), QCC Insurance Company, Keystone Health Plan East, and Keystone Mercy Health Plan

Co-Counsel: Thomas Leonard Esquire  
Obermayer Rebmann Maxwell & Hippel LLP  
One Penn Center, 19<sup>th</sup> Floor  
1617 John F. Kennedy Boulevard  
Philadelphia, PA 19103-1895  
215-665-3220

John Briggs, Esquire  
Howrey Simon Arnold & White, LLP  
1299 Pennsylvania Avenue, N.W.  
Washington D.C. 20004-2402  
202-383-7015

of /

Opposing Counsel: Lewis Olshin, Esquire  
Duane Morris LLP  
One Liberty Place, Suite 4200  
Philadelphia, PA 19103-7396  
215-979-1129

**Case Description:** This is an antitrust case brought against IBC and related companies. Chester County Hospital (“CCH”) has alleged that IBC is an illegal monopolist respecting the sale of health insurance in the Delaware Valley, and has used that monopoly to create a “monopsony” respecting the rates it pays health care providers. The scope of the case is huge, involving virtually every hospital, health care provider, and health insurance provider in the five county Philadelphia area. The matter is significant because CCH seeks to use the federal antitrust laws to change radically the way health insurance is sold and health care is provided across the country. In my role as co-counsel, I have been involved in all areas of this matter, including conducting hearings, taking discovery, and preparing for trial.

2) United States v. Klubock, 832 F.2d 649 (1<sup>st</sup> Cir. 1987) (Torruella, Campbell, Bownes, JJ.)

Baylson v. Disciplinary Board, 975 F.2d 102 (3<sup>rd</sup> Cir. 1992) (Mansmann, Cowen, Higginbotham, JJ.)

My Client (in both matters): The American Bar Association

Counsel (in Klubock): Sara Criscitelli, Assistant U.S. Attorney  
Department of Justice, Criminal Division  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001  
(212) 514-2601

Michael S. Greco, Esquire (Massachusetts Board of Bar Overseers)  
Kirkpatrick & Lockhart LLP  
75 State Street  
Boston, Massachusetts 02109  
(617) 261-3100

Benjamin Fierro, III, Esquire (Massachusetts Bar Ass'n)  
 Lynch & Fierro LLP  
 141 Tremont Street  
 Boston, Massachusetts 02111  
 617-350-4088

Max D. Stern, Esquire (Boston Bar Ass'n)  
 Stern, Shapiro, Weissberg & Garin, LLP  
 90 Canal Street  
 Boston, Massachusetts 02114-2022  
 617-742-5800

Counsel (in Baylson): Honorable Michael M. Baylson  
 601 Market Street  
 Philadelphia, PA 19106  
 (267) 299-7520

**Case Description:** In both these cases, I represented the American Bar Association and authored the briefs the ABA submitted to Circuit Courts as amicus curiae. Both cases involve the legality and constitutionality of ethical rules that limit a prosecutor's ability to subpoena a lawyer to a federal grand jury and question him or her about representation of particular clients. Klubock and Baylson are the two leading federal decisions in the country on "lawyer-subpoenas". In Klubock, the First Circuit accepted the arguments advanced in support of the ethical rules (including those I advanced on behalf of the ABA); in Baylson, the Third Circuit rejected them.

3) Barnes Foundation v. Lower Merion Township et al

Case Citations: 927 F.Supp. 874 (E.D.Pa. 1996)  
 982 F.Supp. 970 (E.D.Pa. 1997)  
 No. 96-372 (E.D.Pa. September 13, 1996)  
 (1996 U.S. Dist. LEXIS 13647)  
 No. 96-372 (E.D.Pa. November 4, 1996)  
 (1996 U.S. Dist. LEXIS 16402)  
 No. 96-372 (E.D.Pa. December 6, 1996)  
 (1996 U.S. Dist. LEXIS 18436)  
 No. 96-372 (E.D.Pa. December 19, 1996)  
 (1996 U.S. Dist. LEXIS 19472)  
 No. 96-372 (E.D.Pa. September 13, 1996)  
 (1996 U.S. Dist. LEXIS 13647)  
 No. 96-372 (E.D.Pa. January 14, 1997)  
 (1997 U.S. Dist. LEXIS 457)  
 No. 96-372 (E.D.Pa. September 13, 1996)  
 (1996 U.S. Dist. LEXIS 13647)

No. 96-372 (E.D.Pa. February 4, 1997)  
 (1997 U.S. Dist. LEXIS 1326)  
 No. 96-372 (E.D.Pa. March 20, 1997)  
 (1997 U.S. Dist. LEXIS 4050)  
 No. 96-372 (E.D.Pa. April 2, 1997)  
 (1997 U.S. Dist. LEXIS 4433)  
 No. 96-372 (E.D.Pa. April 7, 1997)  
 (1997 U.S. Dist. LEXIS 4444)  
 No. 96-372 (E.D.Pa. April 11, 1997)  
 (1997 U.S. Dist. LEXIS 5203)  
 No. 96-372 (E.D.Pa. April 15, 1997)  
 (1997 U.S. Dist. LEXIS 5202)  
 No. 96-372 (E.D.Pa. April 21, 1997)  
 (1997 U.S. Dist. LEXIS 5467)  
 No. 96-372 (E.D.Pa. April 28, 1997)  
 (1997 U.S. Dist. LEXIS 5925)  
 No. 96-372 (E.D.Pa. May 7, 1997)  
 (1997 U.S. Dist. LEXIS 6705)  
 No. 96-372 (E.D.Pa. May 9, 1997)  
 (1997 U.S. Dist. LEXIS 6705)  
 No. 96-372 (E.D.Pa. July 2, 1998)  
 (1998 U.S. Dist. LEXIS 10049)  
 No. 96-372 (E.D.Pa. November 24, 1999)  
 (1999 U.S. Dist. LEXIS 18091)  
 No. 96-372 (E.D.Pa. March 14, 2003)  
 (2003 U.S. Dist. LEXIS 4565)

No. 96-1494 (3d Cir. 1996) (Greenberg, Cowen, Alito, JJ.)  
 No. 97-1110 (3d Cir. 1997) (Becker, Alito, McKee, JJ.)  
 No. 97-1226 (3d Cir. 1997) (Stapleton, Cowen, Seitz, JJ.)  
 182 F.2d 903 (3d Cir. 1999) (98-2088) (Stapleton, Alito,  
 Roth, JJ.)  
 242 F.3d 151 (No. 99-2055) (3d. Cir. 2001) (Nygaard, Greenberg,  
 Cowen, JJ)

**Judges:** Honorable Anita Brody (United States District Court  
 for the Eastern District of Pennsylvania)  
 Honorable Diane Welsh (United States Magistrate Judge)

**Pendency of case:** 1996 – 1999

**My client:** Lower Merion Township

Co-Counsel: Paul Rosen, Esquire (representing the Lower Merion Township Commissioners)  
Spector Gadon & Rosen, P.C.  
Seven Penn Center, 7<sup>th</sup> Floor  
1635 Market Street  
Philadelphia, PA 19103  
215-241-8800

Opposing Counsel: The Late, Honorable A. Leon Higginbotham, Jr., Esquire

Robert Sugarman, Esquire  
Sugarman & Associates  
Robert Morris Building, 11<sup>th</sup> Floor  
100 N. 17<sup>th</sup> Street  
Philadelphia, PA 19103  
215-864-2500

Richard McElroy, Esquire  
Blank Rome LLP  
One Logan Square  
Philadelphia, PA 19103  
215-569-5631

**Case Description:** I served as lead counsel for the lead defendant, Lower Merion Township, in this massive civil rights case. The Barnes Foundation alleged that the Township, in a conspiracy with its sixteen Commissioners and former Commissioners and some fifteen local residents, had attempted to drive the Barnes out of existence. The Township and Commissioners counterclaimed for abuse of process, alleging that the Barnes's claim was baseless and had been brought for the ulterior purpose of securing zoning approval for a parking lot. The litigation was extensive and protracted. The Barnes sought emergency injunctive relief. The Barnes filed three separate Mandamus Petitions in the Third Circuit seeking Judge Brody's removal from the case. The litigation gave rise to almost twenty docketed decisions by Judges Brody and Welsh. The case is significant both because of the considerable public interest it generated and the legal and constitutional issues it involved. Ultimately, Judge Brody granted summary judgment in the Township's favor. Lower Merion then petitioned the Court to order the Barnes to pay the Township's legal fees incurred in defending this lawsuit. In return for the Barnes's payment to the Township of a substantial sum, the Township withdrew its counterclaim and fee petition against the Barnes. As lead counsel, I handled all aspects of the litigation, including hearings, motions, and appeals in all courts.



4) *Specter, Katz, and Baylson v. Wheat First Butcher & Singer, et al*  
(Phila. CCP, No. 9601-02916)

**Judges:** Honorable Albert W. Sheppard, Jr. (Court of  
Common Pleas of Philadelphia County)  
Honorable Allan Tereshko (Court of  
Common Pleas of Philadelphia County)

**Pendency of Case:** 1995 – 2000

**My Client:** Honorable Marvin Katz

**Co-Counsel:** Shanin Specter (representing Honorable Arlen Specter)  
Kline & Specter, P.C.  
1525 Locust Street, 19<sup>th</sup> Floor  
Philadelphia, Pa 19102  
215-772-1000

**Opposing Counsel:** James D. Moran, Esquire (Kathleen and John Groetzinger)  
1430 Land Title Building  
100 S. Broad Street  
Philadelphia, PA 19110  
215-751-1670

C. Clark Hodgson, Jr., Esquire (Merrill Lynch) (w/ Rogers &  
Wells-NY)  
Stradley Ronon Stevens & Young, LLP  
2600 One Commerce Square  
Philadelphia, PA 19103  
215-564-8026

Kevin Berry, Esquire/Margaret Clark, Esquire (First Union)  
Cozen O'Connor  
1900 Market Street  
Philadelphia, PA 19103  
215-665-2000

John Guernsey, Esquire (Wheat First Butcher & Singer)  
Conrad O'Brien Gellman & Rohn, P.C.  
1515 Market Street, 16<sup>th</sup> Floor  
Philadelphia, PA 19102-1916  
215-864-8066

Patrick O'Connor, Esquire/Karl Prior, Esquire (Mellon Bank)  
Cozen O'Connor  
1900 Market Street  
Philadelphia, PA 19103  
215-665-2000

Robert Lentz, Esquire (Reserve Fund)  
Lentz, Cantor & Massey, Ltd.  
20 Mystic Lane  
Malvern, PA 19355  
610-722-5800

Gregory Lindsay, Esquire (Allen Baumholz)  
Dozor & Auslander  
725 MacDade Boulevard  
Collingdale, PA 19023  
610-583-3654

Edward Kron, Esquire (Estelle Goldstein)  
Marion, Saltzberg, Trichon & Kogan, PC  
3000 Mellon Bank Center  
1735 Market Street  
Philadelphia, PA 19103

Joseph Marrone, Esquire (Joseph Micheli, Jr. and Sr.)  
2500 McClellan Avenue, Suite 340  
Pennsauken, NJ 08109  
215- 732-6700

**Case Description:** In December 1995, it was discovered that Kathleen Groetzinger, who had worked as a secretary for Judge Katz and Senator Specter since 1959, had stolen almost \$1.5 million from their pension and profit-sharing plans. Judge Katz and Senator Specter sued Ms. Groetzinger, the five financial institutions that administered the plans, and four individuals who had helped Ms. Groetzinger commit her crimes. On behalf of Judge Katz, I alleged that the defendants were liable for negligence, fraud, and related wrongs under the common law and the Uniform Commercial Code. The litigation proved to be quite substantial. Discovery lasted approximately three and one-half years. The large number of defendants, combined with the number of courts in which this dispute was tried, generated hundreds of pleadings and other filings. The matter finally went to a jury trial in March 2000 against Wheat First Butcher & Singer -- the only institution that did not settle. After four days of trial, the matter settled. I served as lead counsel for Judge Katz throughout and handled all aspects of this litigation.

In addition, I tried four separate actions in Bankruptcy Court to prevent the individual defendants from discharging the debts they had incurred by participating in Ms. Groetzinger's crimes:

Arlen Specter, individually and as trustee for the Specter and Katz Pension and Profit-Sharing Plans, Marvin Katz, Michael Baylson, as trustee for the Specter and Katz Pension and Profit-Sharing Plans v. Kathleen M. Groetzinger (Bkr. E.D.Pa., Adversary No. 98-0438)

In re: Kathleen Groetzinger, (Bkr.E.D.Pa.) (Case No. 96-15633 (SR) (Chapter 7)

Judge: Honorable Stephen Raslavich (United States Bankruptcy Court)

Opposing Counsel: James D. Moran (K. Groetzinger) (*see address and ph no. listed above*)

In re: Kathleen Groetzinger, (Bkr.E.D.Pa.) (Case No. 99-13547) (Chapter 13)

Judge: Judge Stephen Raslavich (United States Bankruptcy Court)

Opposing Counsel: James D. Moran (K. Groetzinger) (*see address and ph no. listed above*)

In re: John Allen Groetzinger, (Bkr. E.D Pa.) (No. 97-18842) (Chapter 7- converted from Chapter 13)

Adversary Proceeding

Judges: Honorable Bruce I. Fox (United States Bankruptcy Court)  
Honorable Joseph L. Cosetti (United States Bankruptcy Court)

Opposing Counsel: James D. Moran (John Groetzinger) (*see address and ph no. listed above*)

In Re: Joseph Micheli, (Bkr.D.N.J.)(Chapter 7) (NO. 97-12466)

Adversary Proceeding:

Judge: Honorable Judith H. Wismer (United States Bankruptcy Court)

Arlen Specter, individually and as trustee for the Specter and Katz Pension and Profit-Sharing Plans, Marvin Katz, Michael Baylson, as trustee for the Specter and Katz Pension and Profit-Sharing Plans v. Joseph Micheli (Bkr. D.N.J., Adversary No. 97-0031)

Opposing Counsel: Bruno Bellucci, III, Esquire (Joseph Micheli, Jr.)  
 2312 New Road  
 P.O. Box 283  
 Northfield, NJ 08225  
 609-601-1500

5) United States ex rel. Sullivan v. Cuyler, (E.D.Pa.) (

Judges: The Late, Honorable John M. Davis (United States District Court  
 for the Eastern District of Pennsylvania)  
 Honorable Edwin Naythons (United States Magistrate Judge)

446 U.S. 335 (1980)  
 553 F.Supp. 1236 (E.D. Pa. 1982)  
 530 F.Supp. 1353 (E.D. Pa. 1982)

Opposing Counsel: The late Marilyn Gelb

In 1967, John Sullivan was convicted of committing a double murder. Sullivan eventually appealed his conviction to the United States Supreme Court, alleging that his Sixth Amendment rights had been violated because his counsel, A. Charles Peruto, Esquire, and G. Fred DiBona, Sr. (later a state court Judge) were burdened by a conflict of interest. (I participated in the litigation of that appeal.) The matter was remanded to the District Court for an evidentiary hearing on the conflict issue. I handled that hearing, which was extended and, to an extent, became a retrial of Mr. Sullivan on these once-infamous murder charges. Among the witnesses I called to rebut Mr. Peruto's testimony were the trial prosecutor, Richard Sprague, and the trial judge, the Honorable Alexander Barbieri (who subsequently served on the Pennsylvania Supreme Court). The litigation was never concluded because of Mr. Sullivan's death in prison.

6) Ricchio v. Poesnecker,

158 Pa.Comm.w. 459, 631 A.2d 1097 (1993), alloc. denied, 538 Pa. 651, 647 A.2d 905 (1994); cert. denied, 513 U.S. 1079 (1995).

Trial Judge: The Honorable Leonard Sokolove (Bucks County  
 Court of Common Pleas)

Pendency of Case: 1992-1995

My Clients: Paul Ricchio, Frank Fedele

Opposing Counsel: Robert G. Moffett, Esquire  
415 W. Broad Street  
Quakertown, PA 18951  
215-536-1660

In this case, the courts were required to determine who should govern a religious order and its substantial assets. I represented one of two sects fighting to retain control of a religious society. I became involved as lead counsel in the case at the trial level, after the court had granted injunctive relief against my clients. I handled the continuing trial proceedings and hearings, and all appeals. The case involved fascinating questions respecting the ability of the courts to review and interpret religious doctrine without running afoul of United States and Pennsylvania Constitution provisions prohibiting the establishment of religion. Ultimately, the courts conferred control of the society upon the sect opposing my clients.

- 7) *The Patriot Party of Pennsylvania; Surrick v. Secretary of Commonwealth*, 9 F.3d 1540 (3d Cir. 1993). (Hutchinson, Cowen, Nygaard, JJ.)

I served as lead counsel in the Third Circuit for a candidate running for election in the Pennsylvania Supreme Court. I unsuccessfully sought to overturn the District Court's ruling that Pennsylvania's ballot access law was unconstitutional as applied to the 1993 Pennsylvania Supreme Court election. The case involved significant issues respecting equal protection, voting rights, and the policies underlying Pennsylvania's system of electing its appellate judiciary. As lead counsel, I briefed and argued the case before the Third Circuit.

My Client: Honorable Ronald D. Castille

Counsel: Thomas Rutter, Esquire (Robert Surrick)  
Two Commerce Square  
2001 Market Street, Suite 1100  
Philadelphia, PA 19103  
(215) 564-1775

John F. Smith, III, Esquire (Republican State Cmte)  
Reed Smith LLP  
2500 One Liberty Place  
1650 Market Street  
Philadelphia, PA 19106  
(215) 241-7920

8) Forbes v. Lower Merion Township (No. 00-CV-930 (E.D. Pa.)

Judge: Honorable William Yohn (United States District Court for the Eastern District of Pennsylvania)

Pendency of case: 2000 – 2001

My Clients: Lower Merion Township, Police Superintendent Joseph Daly

Co-Counsel: Lloyd George Parry, Esquire (representing two other police officers)  
Davis, Riter, Parry & Hartman  
1525 Locust Street, 14<sup>th</sup> Floor  
Philadelphia, PA 19102-3732  
215-732-3755

Opposing Counsel: Samuel Stretton, Esquire  
301 S. High Street  
P.O. Box 3231  
West Chester, PA 19381  
610-696-4243

Case Description: This civil rights matter raised constitutional and legal issues concerning whether Lower Merion Township and its Police Chief adequately trained and supervised the Township's Police Department in the use of deadly force. As lead counsel, I handled all aspects of the litigation, including discovery and hearings. In 2001, Judge Yohn granted my motion for summary judgment and dismissed the complaint against Lower Merion Township and Chief Daly. That decision was not appealed.

9) In re: Application of Edward G. Biesler, Jr., Attorney General for the Commonwealth of Pennsylvania, Requesting That An Order Directing That a Multi-County Investigating Grand Jury, Having Statewide Jurisdiction, Be Summoned;

Costopoulos v. Thornburgh,  
487 Pa. 438, 409 A.2d 848 (1979)

My Client: Pennsylvania District Attorneys' Association

Counsel: James J. West, Esquire (then Assistant Attorney General)  
West Long LLC  
105 North Front Street, Suite 205  
Harrisburg, Pennsylvania 17101  
717-233-5051

William C. Costopoulos, Esquire  
 Costopoulos, Foster and Fields  
 831 Market Street  
 Lemoyne, PA 17043  
 717-761-2121

Robert Hawthorne, Inc. v. County Investigating Grand Jury,  
 488 Pa. 373, 412 A.2d 556 (1980)

My Client: Commonwealth of Pennsylvania

Counsel: Wilbur Greenberg, Esquire (Retired)  
 1700 Benjamin Franklin Pkwy  
 Philadelphia, PA

In re: Investigating Grand Jury of Philadelphia County  
Appeal of: Edward Washington,  
 490 Pa. 31, 415 A.2d 17 (1980)

My Client: Commonwealth of Pennsylvania

Counsel: Francis X. Nolan, Esquire  
 Vaughan Duffy & Connors, LLP,  
 102 Pickering Way, Suite 400,  
 Exton, Pennsylvania 19341  
 (610) 524-2100

These were test cases respecting the constitutionality of the Pennsylvania's then-new Grand Jury Act. 19 P.S. §625 *et seq.* Authoring the briefs filed in all three matters, I successfully represented the Commonwealth in Washington and Hawthorne, and the Pennsylvania District Attorney's Association as amicus curiae, in Costopoulos in defending the constitutionality of the Act. The state constitutional issues involved were significant, touching on separation of powers and the desirability of granting state prosecutors the authority, both to call for the empanelment of investigating grand juries, and to conduct grand jury investigations.

- 10) Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982)

My Client: Pennsylvania District Attorneys' Association of /

Co-Counsel: Leroy Zimmerman (then Attorney General of Pennsylvania)  
Eckert, Seamans, Cherin & Mellott. LLC  
213 Market Street, Eight Floor  
Harrisburg, PA 17101  
(717) 237-6000

Opposing Counsel: Robert N. Tarman, Chief Public Defender  
106 Walnut Street  
Harrisburg, PA 17101  
(717) 238-8427

Other Counsel: Judah Labovitz, A.C.L.U.  
Wolf, Block, Schorr and Solis-Cohen LLP  
1650 Arch Street, 22<sup>nd</sup> Floor  
Philadelphia, PA 19103-2097  
(215) 977-2000

**Case Description:** This was the test case respecting the constitutionality of the Pennsylvania Death Penalty Act. 42 Pa.C.S.A. §9711. I authored the brief submitted by the Pennsylvania District Attorney's Association, as amicus curiae, defending the Act's constitutionality. The Supreme Court ultimately adopted much of the legal position I advanced. For my efforts in Zettlemoyer, I received a letter of commendation from then-Attorney General Leroy Zimmerman.

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

Among the most significant legal activities I have pursued are a) membership on the Pennsylvania Supreme Court's Lawyer's Fund for Client Security Board (the "Board"); b) writing Federal Grand Jury Practice and Procedure; c) my teaching at Temple Law School.

a) The Board: Created by the Pennsylvania Supreme Court in 1982, the Board recompenses clients whose lawyers have stolen or misappropriated money from them. The Board is funded by all active members of the Pennsylvania Bar, who pay an annual fee to the Pennsylvania Supreme Court. Typical of the Board's activities, in 2002, it reviewed 211 claims and repaid \$2.9 million to victims. The Board is comprised of seven volunteer members -- five lawyers and two non-lawyers -- all of whom were appointed by the



Pennsylvania Supreme Court. I was appointed to the Board in 1998. From 1999 to 2000, I served as the Board's Treasurer. From 2001 to 2002, I served as the Board's Vice-Chair. Since early 2003, I have served as the Board's Chair. My work on the Board has been rewarding and sobering. It is, of course, sobering to learn that lawyers steal money (sometimes a great deal of money) from their clients. It has been rewarding because of the many individuals the Board has helped. The victims who come before the Board are almost invariably disadvantaged; they are often elderly, and of extremely modest means. Their lawyers – who are usually judgment-proof – often have stolen the victims' only resources. The Board is usually the only entity that can provide any relief to these people. It is enormously rewarding to be part of such a process.

b) Federal Grand Jury Practice and Procedure:

In 1988-89, I wrote *Federal Grand Jury Practice and Procedure*, which was published in 1990 by Prentice-Hall Law & Business. At that time, it was among the few single-volume treatments of this important subject available. Approximately 400 pages in length, the book received uniformly favorable reviews in a variety of publications, and has become one of the leading works in the field. I have revised the book almost every year. Law & Business published three editions: in 1993, 1995, and 1997. In 1998, the D.C. Circuit quoted from and relied on my book in an important opinion on grand jury secrecy during the "Whitewater" grand jury investigation. *In re Sealed Case*, 151 F.3d 1059, 1073, (D.C. Cir. 1998). My book was the only secondary source the Court relied on in its opinion.

In 2003, Lexis-Nexis published the book's most recent supplement. Updating the book requires me to review virtually all new federal decisions in the areas covered by the book including: constitutional and evidentiary privileges, contempt, empanelment, investigative authority, secrecy, misconduct, immunity, perjury, and obstruction of justice.

Working on the book has provided me with a continuous education. It has been enormously rewarding.

c) Teaching at Temple Law School: From 1990 – 1992 I was an Adjunct Professor, teaching first year students legal writing and research. Over my years of practice, it became clear to me that the most common malady among young lawyers was their inability to write. A lawyer who cannot write, cannot well serve his/her clients or the court. Temple's legal writing course is one year long. Each class was comprised of approximately 14 students, who were required to write a series of memoranda and a brief. Although teaching (especially class preparation and grading papers) was very time consuming, it was extremely rewarding to see students improve from assignment to assignment.

Senator SPECTER. As Senator Thurmond would always say under these circumstances, pull the machine a little closer. That was his standard comment.

What Senator Thurmond also would say might not sound profound on its surface, but I think is very profound. In 1982, we had our first nominees in from Pennsylvania and I was sitting on the dais and Senator Thurmond was presiding. He was the Chairman, and he leaned forward into the microphone and said to two Pennsylvania nominees, Judge Caldwell and Judge Mansman, if you are confirmed, do you promise to be courteous.

Translated: If you are confirmed, do you promise to be courteous? And I thought to myself, what a question. What is anybody going to say but yes? And true to form, both nominees said yes. Then Senator Thurmond said, the more power a person has, the more courteous a person should be. The more power a person has, the more courteous a person should be.

I have always relayed Senator Thurmond's admonition, and many jurists over the years—and I have been at this for a while—have come back to me and have commented about that statement. It is something that I don't believe you need, Mr. Diamond, a reminder, but I think may who do who don the black robes and have that kind of power, life tenure.

You get up on the wrong side of the morning and somebody may be a little late or may not be directly responsive to your question or may not be too succinct in legal argument or many of the other foibles and fallibilities of people, and it is easy to become impatient. But remember Senator Thurmond.

Mr. DIAMOND. I intend to, Mr. Chairman, and I will strive, if I am fortunate enough to be confirmed, to convince everybody who appears before me that they have been treated fairly and courteously.

Senator SPECTER. Mr. Diamond, I am going to ask you the questions which are prescribed so there will be no doubt that the issues have been covered, notwithstanding my declaration of partiality.

Under what circumstances do you believe it is appropriate for a Federal court to declare a statute enacted by Congress unconstitutional?

Mr. DIAMOND. It is obviously a very, very important question, Senator. It seems to me that a statute comes to the court with an overwhelming presumption of constitutionality and courts should strike down acts of the legislature only in the rarest circumstance when something is palpably, obviously in violation of the Constitution, and that should be very rare indeed.

Senator SPECTER. In general, 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?

Mr. DIAMOND. If I am lucky or fortunate enough to be confirmed, of course, my job is to follow the direction from the Third Circuit and the U.S. Supreme Court. That is what district court judges do. If I am fortunate enough to be confirmed, that is what I will do.

Senator SPECTER. And would you make that determination even in circumstances where you personally disagree with such precedents?

Mr. DIAMOND. I will, Senator. I am obligated to, and I am not always right. Just because I think they are wrong doesn't mean they are wrong. If I am fortunate enough to be confirmed, I will do what the Third Circuit and the U.S. Supreme Court tell me to do. That is my job.

Senator SPECTER. What would you do 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 on the merits?

Mr. DIAMOND. No, no, Senator. If I am fortunate enough to be confirmed, I would be obligated to apply that decision as that decision is written.

Senator SPECTER. If there were no controlling precedent dispositively concluding an issue with which you were presented in your circuit, to what sources would you turn for a persuasive authority?

Mr. DIAMOND. If we are dealing with a statute, say, the statute itself. And since language is by its nature ambiguous, legislative history seems to me to be a rich source for the intent of the people that created the statute. The Senators and Congress people who drafted, approved, passed the statute, it seems to me, is the most obvious place to look.

Senator SPECTER. As you know, the Federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?

Mr. DIAMOND. If I am fortunate enough to be confirmed—I have always worked very, very hard all my life. I think hard work is no substitute for it, and paying attention to detail—I have to manage a client load now; I have over the last 20, 25 years. And I think with careful attention to detail, thoughtfulness and responsible delegation, I believe a caseload can be managed.

Senator SPECTER. Has your client load increased or decreased or stayed the same since it has become publicly known that you were the President's nominee for the Federal bench?

Mr. DIAMOND. It has dramatically decreased, Senator.

Senator SPECTER. How have your partners felt about that?

Mr. DIAMOND. My partners have been very supportive, fortunately.

Senator SPECTER. Do you believe that judges have a role in controlling the pace and conduct of litigation? And if confirmed, what specific steps would you take to control your docket?

Mr. DIAMOND. I believe judges do have such a role, Senator, and if I were fortunate enough to be confirmed, I believe that judges should allow lawyers to try their cases and not, as I say, ride the brake all the time and micromanage trials. But it is a judge's obligation to see that a trial goes smoothly, swiftly and fairly, because I do believe justice delayed is justice denied.

Senator SPECTER. Given your background and prior experience, could you address the subject of the role and significance of judicial temperate and indicate what elements of judicial temperament you consider to be most important?

Mr. DIAMOND. I think the element of judicial temperament I consider to be most important is the appearance of fairness, the appearance of impartiality. If the parties before a judge don't believe they have been treated fairly, even if they have been treated fairly, they are not going to believe it.

So I think that appearing to be fair and neutral and even-tempered is the most important ingredient. And if I were fortunate enough to be confirmed, I would strive to do just that.

Senator SPECTER. Mr. Diamond, I know your work ethic, how hard you work and how efficient you are. Judges really ought to focus much more than they do on prompt disposition of pending matters. You come from a big firm and you know the cost of litigation. Judges really ought to move their docket along and ought to go to the core issues and get them decided and move ahead.

The delays in both the district and appellate courts are very, very costly to the system, and that is something which this Committee may spend more attention on in the future—very, very lengthy delays. The discovery process is virtually endless and enormously expensive, and it does not have to be so constructed.

I would like to see judges take a much stronger hand in the early stage of the litigation, bring in the parties and find out what the case is really all about and see if it can be resolved one way or another, and if can't be, then to move to the core issues, have a determination of what factual discovery is necessary and get the matter concluded. You and I were involved in a matter which represented the worst in judicial management. So that is my first comment about it, but this is a privileged proceeding.

Well, I think that covers the ingredients. You have a large audience here, Mr. Diamond. You have the staffs of the Judiciary Committee and they will be scrutinizing your record very carefully. They may not know you as well as I do, so they may not have all of the same views.

Senator Leahy commented to me that he would not be here this morning. Without objection, we will enter Senator Leahy's statement for the record.

I am scanning Senator Leahy's statement, Mr. Diamond. I believe he likes you. The statement will be made part of the record.

The record will remain open for Senators to submit statements or questions to the nominee for one week, until 5:00 p.m., March 31, 2004.

It is my hope to have you confirmed and sworn in on the target date of April 15 at four o'clock in the afternoon, in the ceremonial courtroom, if all goes well.

That concludes our hearing.

Mr. DIAMOND. Thank you, Senator.

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

[Questions and answers and a submission for the record follow.]

QUESTIONS AND ANSWERS

**RESPONSES OF PAUL S. DIAMOND  
TO WRITTEN FOLLOW-UP QUESTIONS OF  
SENATOR PATRICK J. LEAHY**

QUESTION

1. I understand that you served on the Federal Judicial Nominating Commission for the Eastern District of Pennsylvania from 1993-2000, and you also served on the Magistrate Judge Merit Selection Panel for the Eastern District of Pennsylvania in 1997 and in 2000.
  - a. In your position on the Nominating Commission for the Eastern District of Pennsylvania, did you support the recommendation of any of the following of President Clinton's nominees to the Eastern District who were blocked in the Senate under Republican leadership: Robert Freedberg; Judge Legrome Davis; David Fineman; and Stephen Lieberman?

RESPONSE

- 1a. As a member of the Nominating Commission, I supported the nominations of all the individuals listed: Robert Freedberg; Judge Legrome Davis; David Fineman; and Stephen Lieberman. Indeed, Legrome Davis - - whom I have known since 1977 - - is the judge I most admire presently on the United States District Court for the Eastern District of Pennsylvania.

QUESTION

- b. Given your experiences in judicial selection, what do you think are the three most important characteristics for a federal judge to possess?

RESPONSE

- 1b. I believe knowledge of the law, legal experience, and temperament are the three most important qualities for a federal judge to possess.

QUESTION

2. In describing your experience in the judicial selection process in your Senate Questionnaire, you state that, when you were interviewed by White House counsel, you were asked a series of general questions about why you wanted to be a judge and your judicial philosophy, and I would appreciate hearing your answers to those same questions.
  - a. How would you describe your judicial philosophy?

RESPONSE

- 2a. My philosophy as a District Court Judge would be to follow the law and precedent to resolve the cases before me. In civil and criminal cases I would rule on motions quickly. In all cases I would strive to be fair and impartial.

QUESTION

- b. What two judges do you most admire and why?

RESPONSE

- 2b. I most admire Henry Friendly and Learned Hand. These two judges were not only brilliant, their opinions were written clearly, with an eye toward making the law comprehensible. In the area of federal grand jury practice, both issued superb opinions clarifying murky areas of the law. I discuss these opinions in my book, Federal Grand Jury Practice and Procedure.

QUESTION

- c. Why do you want to be a lifetime federal judge?

RESPONSE

- 2c. When I left the Philadelphia District Attorney's Office in 1983, I had always intended to return to public service. Having been in private practice for 21 years, I would like to return something to my profession and my Country. Serving as a federal judge would allow me to do both.

QUESTION

3. In your Senate Questionnaire, you state that you have experience in many areas of the law, including complex corporate and civil litigation, civil rights cases, and environmental cases. You also mention that you have represented individuals, corporations and public entities over the course of your career. However, in most of the ten most significant matters that you describe, you represented corporations or public entities, and in many defended such corporations in corporate or civil litigation. To help us have a more complete understanding of your career, please describe a civil rights case in which you represented an individual plaintiff. Also, please provide a few examples of cases involving environmental law issues.

RESPONSE

3. In Ricchio (Case 6 among my ten most significant matters), I represented five plaintiffs whose First Amendment rights had been violated. I urged the courts to intercede and provide greater protection for my clients' constitutional rights. In Baylson and Klubock (Case 2 among my ten most significant cases), I urged the courts to provide greater constitutional protections to federal grand jury witnesses and their counsel. In addition, I have represented individuals who have been the focus of federal criminal investigations. Such representation necessarily involves advocacy for individual rights. Finally, as a member and Chairman of the Supreme Court of Pennsylvania's Lawyer's Fund For Client Security, I spent six years trying to protect individuals who had been victimized by their lawyers. Although these people were not plaintiffs in civil rights cases, they came to the Fund seeking redress for the very real harms they had suffered at the hands of their lawyers. In supervising the repayment of millions of dollars to these individuals -- many of whom were poor and elderly -- I believe I helped protect their civil rights.

I was hired twice by companies to conduct internal investigations to determine whether these businesses had violated any federal environmental laws. In both instances I concluded, after thorough investigations, that they had not. The environmental matter I have worked on most recently is Tinicum Developers v. Sun Pipe Company (Del. Cty, C.P. Civ. Action No. 02-12867). In this action, I represented five individual plaintiffs, their partnership, and their business (a small hotel), alleging that Sun and other corporate entities were liable when their pipe ruptured under the plaintiffs' business, leaking over 15,000 gallons of gasoline. My clients have sought both equitable and compensatory relief for the environmental contamination caused by the gasoline discharge.

## SUBMISSION FOR THE RECORD

**Statement of Senator Patrick Leahy  
Ranking Member, Senate Judiciary Committee  
Hearing on Judicial Nominations  
March 24, 2004**

Today, the Judiciary Committee is holding its seventh judicial nominations hearing of 2004. This is more than the total number of hearings for judicial nominations in all of 1996 when President Clinton was in the White House. Indeed, at this point in 1996, the last year of that presidential term, the Committee had held only one hearing to consider judicial nominees. By that measure, this year we have proceeded seven times as fast. We have moved forward with hearings this year in spite of the investigation into the spying and stealing by Republican staff of the computer files of Democratic Senators from the Judiciary computer server beginning no later than 2001 and continuing into 2003 before it was discovered.

The American people understand that Democrats on this Committee have shown great restraint and extensive cooperation in the confirmation of 173 of this President's judicial nominations and by continuing to move forward this year. The Senate has confirmed another four lifetime judges in the first weeks of this year. That is four more than at this point in 1996 when the first confirmation did not occur until July. I have every confidence that, with cooperation from the Administration, we will be able to meet and even exceed the total of 17 judges confirmed in 1996.

Today's hearing is to consider the nomination of Paul Diamond to the U.S. District Court for the Eastern District of Pennsylvania. Mr. Diamond comes to us with a unanimous rating of "Well-Qualified" from the American Bar Association, and significant experience serving as an assistant district attorney in Philadelphia for six years and serving as a litigator in private practice for over 20 years. He is supported by the senior Senator from Pennsylvania, for whom I have great respect.

A look at the federal judiciary in Pennsylvania shows how President Bush's nominees have been treated far better than President Clinton's and how Democrats have worked in a bipartisan way to fill vacancies in that State.

Mr. Diamond makes the 20<sup>th</sup> judicial nominee of President Bush from Pennsylvania to receive a hearing – more than for any other State in the nation. In just the 108<sup>th</sup> Congress, he is the sixth Pennsylvania district court nominee to receive a hearing and the eighth for the federal courts in Pennsylvania. The Senate, with Democratic cooperation, has already confirmed 13 Pennsylvania district court nominees of President Bush. By doing so, we did what the Republican majority refused to do in the years 1995 through 2000 when there was a Democratic President and they refused to proceed on nine judicial nominees from Pennsylvania.

President Bush's nominees now account for 15 of the 40 active federal judges in Pennsylvania. He has appointed 37 percent of the Pennsylvania federal bench in a little



over three years. On the Pennsylvania district court, President Bush has had even a stronger influence, since his nominees now hold 13 of the 33 active seats, or 40 percent. If the nominees on the Senate Executive Calendar are considered and confirmed, President Bush's nominees will make up half of the federal courts in Pennsylvania and appointees of Republican presidents will outnumber those of Democratic presidents by nearly two to one.

With this hearing, all of President Bush's district and circuit court nominees from Pennsylvania have now received hearings. This is in sharp contrast to the way vacancies in Pennsylvania were left unfilled during Republican control of the Senate when President Clinton was in the White House. Republicans denied votes to nine of President Clinton's nominees in Pennsylvania alone. Despite the efforts and diligence of the senior Senator from Pennsylvania to secure the confirmation of all of the judicial nominees from every part of his home state, there were nine nominees by President Clinton to Pennsylvania vacancies who never got a vote. Despite how well-qualified these nominees were, many of their nominations sat pending before the Senate for more than a year without consideration. Such Republican obstruction provided this President with an opportunity to shape the bench according to his partisan and ideological goals.

Recent news articles have emphasized that these vacancies allowed President Bush in his first term to reshape the federal bench in Pennsylvania. For example, on November 27, 2003, the Philadelphia Inquirer noted that the significant number of vacancies on the Pennsylvania courts "present Republicans with an opportunity to shape the judicial makeup of the court for years to come." They have created that opportunity and now taken advantage of it.

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**NOMINATION OF WILLIAM DUANE BENTON,  
OF MISSOURI, NOMINEE TO BE CIRCUIT  
JUDGE FOR THE EIGHTH CIRCUIT; ROBERT  
BRYAN HARWELL, OF SOUTH CAROLINA,  
NOMINEE TO BE DISTRICT JUDGE FOR THE  
DISTRICT OF SOUTH CAROLINA; GEORGE P.  
SCHIARELLI, OF CALIFORNIA, NOMINEE TO  
BE DISTRICT JUDGE FOR THE CENTRAL  
DISTRICT OF CALIFORNIA; AND CURTIS V.  
GOMEZ, OF THE VIRGIN ISLANDS, NOMINEE  
TO BE DISTRICT JUDGE FOR THE DISTRICT  
COURT OF THE VIRGIN ISLANDS**

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**THURSDAY, APRIL 8, 2004**

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:03 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Lindsey Graham, presiding.

Present: Senator Graham.

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

Senator GRAHAM. Good morning, everyone. We will call the Committee to order. I know this is a big day for a lot of people and their families, and there are a lot of distinguished Senators here who need to do other things. And we are glad to have everyone here, so I am going to call the Committee to order, and we are glad to have everyone, as I said.

Our first nominee today is to the Eighth Circuit Court of Appeals, William D. Benton. He is well prepared to join the Federal bench. He presently serves as a judge on the Supreme Court of Missouri. With an excellent academic record, he holds four degrees: an LLM from the University of Virginia School of Law, a JD from Yale Law School, and an MBA from Memphis University—he has been a busy fellow—and a BA from Northwestern University.

After graduating from law school, Judge Benton served in the United States Navy, then as an administrative assistant to Congressman Wendell Bailey, then moved to the private sector where

he practiced general law with an emphasis in civil, State and local taxation, and appellate work.

In 1989, Judge Benton became the first Director of Revenue for the Missouri Department of Revenue and was responsible for administering a large State agency.

In 1991, he was appointed to the Supreme Court of Missouri and served as its Chief Justice from 1997 to 1999. Judge Benton is also an adjunct professor at Westminster College and the University of Missouri School of Law. He has received a unanimous rating of "Well Qualified" from the American Bar Association.

Rather than reading about the other nominees at this point, I am going to defer to Senator Bond because I know you are a very busy Senator, and we will allow you to testify at this point in time.

**PRESENTATION OF WILLIAM DUANE BENTON, NOMINEE TO BE CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT, BY HON. CHRISTOPHER S. BOND, A U.S. SENATOR FROM THE STATE OF MISSOURI**

Senator BOND. Mr. Chairman, I very much appreciate the opportunity to testify at the beginning. I am supposed to be chairing an appropriations hearing due to start at 10 o'clock, and I thank you very much for giving me the opportunity to present to you a very distinguished Missourian, as you have indicated, Hon. Duane Benton, who has been nominated by the President to serve on the United States Court of Appeals for the Eighth Circuit.

Judge Benton is a very respected jurist, a committed public servant, and a fine person that I know quite well. I am very pleased that President Bush has nominated him for this important position.

You have already mentioned many of his accomplishments, but I am confident that the Members of the Committee will find Judge Benton to have an impressive record of public service and an exemplary judicial record. And I would share my belief that he would be an excellent addition to the Federal judiciary.

Judge Benton currently serves on the Supreme Court of Missouri, having been appointed, as you indicated, in 1991, and he has also served as Chief Judge. He has participated in a number of important decisions. Throughout his career, he has earned a reputation as a judge with a distinguished intellect who has a skill for uniting his colleagues on difficult questions. His work ethic, approach, and reasoning are highly regarded by the lawyers of Missouri.

In addition to his service on the judiciary, he has an impressive breadth of experience coupled with a judicial record giving him a command of a wide range of legal matters. He is a certified public accountant, I understand the only CPA serving on any Supreme Court in the United States. He had, as you indicated, served as the top tax collector, Director of the Missouri Department of Revenue, where, while holding the otherwise unpopular position of chief tax collector, he earned a reputation as an effective and efficient administrator. He has also lent his expertise to the multi-State Tax Commission where his colleagues elected him Chair.

He was, as you said, a member of the United States Navy, serving as a judge advocate. In addition to that, he was in private legal

practice where he primarily represented associations, nonprofits, cities, localities, school districts, and private entities, appearing in State and Federal court.

You have mentioned his educational background. He was editor of a Yale law journal and has a master's of business administration from Memphis State. And I am proud to say that he also earned his master's of law at my law school alma mater, the University of Virginia.

He found the time to be active in communities. They are too numerous to name, but he has done everything from coach baseball to serve on the Board of Regents of Central State Missouri State University.

He retired from the U.S. Navy as a captain after 30 years of active and reserve duty. He is a Vietnam veteran, a member of the VFW, the American Legion, the Navy League, the Vietnam Veterans, and the Missouri Military Advisory Commission.

As Members of this Committee know, the U.S. Court of Appeals truly is the second most important court in the land. Nearly every Federal case ends up before the court in some manner, and its decisions impact every aspect of society.

To these positions, I believe it is imperative that the President nominate people of distinguished intellect and character with a breadth of legal experience. That has been far surpassed with the nomination of Judge Benton. With his knowledge and experience, he will be an outstanding addition to the Federal judiciary.

I respectfully request that my colleagues promptly review his accomplishments and experience. Upon doing so, no other conclusion could be reached than that Judge Benton is extremely well qualified and fit for this position.

I ask you to move on his nomination quickly and move it to the floor for an up-or-down vote by the full Senate.

I thank you, Mr. Chairman, and the Committee for your kind consideration.

Senator GRAHAM. Well, thank you, Senator. Thank you very much for that statement.

At this point we will allow Senator Hollings, my senior Senator, to testify, and then we will go to Senators Talent and Boxer. But I would like to introduce Judge Harwell just a moment before Senator Hollings testifies.

Robert Bryan Harwell, who has been nominated to the District of South Carolina, has exceptional qualifications for the Federal bench. Upon graduation from the University of South Carolina School of Law, Bryan clerked for State Circuit Judge Rodney Peeples and then for U.S. District Judge G. Ross Anderson. After his clerkships, Mr. Harwell entered private practice at the law firm of Harwell, Ballenger and DeBerry, where he currently practices. I will have more to say about Mr. Harwell later, but at this point in time I would like to recognize the senior Senator from South Carolina, Senator Hollings.

**PRESENTATION OF ROBERT BRYAN HARWELL, NOMINEE TO  
BE DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CARO-  
LINA, BY HON. ERNEST F. HOLLINGS, A U.S. SENATOR FROM  
THE STATE OF SOUTH CAROLINA**

Senator HOLLINGS. I thank the distinguished Chair, and if the Chair would permit, I would like to recognize in the audience not only the nominee, Bryan Harwell, and his wife, Debra, and two children, but we have our distinguished former Chief Justice of our State Supreme Court, Chief Justice David Harwell, and his wife in the audience. We are delighted to have him, and if Bryan can do as good as the Chief Justice did, we have got a winner.

Let me commend you, Mr. Chairman, on your selection. I had the distinction some years back of driving Maximum John, Judge John Sirica, around while he was writing his book. He was visiting down there in the low country. And as we rode about, he said, "Now, Senator," he says, "don't ever select a judge unless he has been in the pits." He said, "You know, I had difficulty getting out of law school, took the bar exam three times before I passed it, and by the time I did pass it," he said, "there wasn't any law firm that was looking for me. I had to go down to the magistrate's court and take what cases I could find."

And he said, "I did that, and I got pretty good at trying cases, and everything else like that, which caused Hogan and Hartson to get me to try their cases." And he said, "After that first day of the Watergate hearings, I could tell exactly what was going on, having been in the pits. And I called those lawyers into my chambers at the end of the day and said, 'Now, if you continue with that line, both sides, I am going to find you in contempt and put you in jail. There is not going to be any fine. You are going right straight to jail. You are not going to make a mockery of this court.'" And he said that broke the Watergate case.

That is what I like about the distinguished Chairman's choice of Bryan Harwell. He has been in the pits. As the Chairman says, he not only was an outstanding student at the law school, causing both the State Judge Peebles and the Federal Judge Anderson to choose him as a law clerk, but he immediately, in both Marion and Darlington—Florence and Darlington, and Marion and Darlington, as you were, Florence and Marion Counties, get into the pits. He got into the family court matters, workmen's compensation, insurance, product liability, malpractice, negligence cases. He was both in general practice for individuals and small business, and at the end of all of that experience, he ends up with the highest rating from Martindale-Hubbell.

And I think that perhaps it helped him also to be in the JAG section of the National Guard. I know the affinity that my Chairman has for that JAG section. But he not only did that and served with distinction, but he has been a professor over at my technical college, Florence-Darlington. I started that one as well as 15 others. And he has been a business law professor over there. So you cannot get a better rounded, more experienced young judge than Bryan Harwell. And it is my pleasure to commend you for your choice, and I look forward to his confirmation.

Senator GRAHAM. Thank you, Senator Hollings. Thank you very much. Thank you for your statement.

At this time, Senator Talent, would you like to testify on behalf of Judge Benton?

**PRESENTATION OF WILLIAM DUANE BENTON, NOMINEE TO BE CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT, BY HON. JAMES M. TALENT, A U.S. SENATOR FROM THE STATE OF MISSOURI**

Senator TALENT. I sure would, Mr. Chairman. I would love to say a few words, and I will keep this brief because Senator Bond covered the waterfront so well. But Duane Benton has been a friend of mine for a long time and an outstanding public servant, and I wanted to just add my endorsement to Senator Bond's views.

I hope the Committee will expeditiously consider and recommend him to the Senate, and I will just say three things about Duane.

One of them is he is just one of the smartest people I have ever met. And if you look at his record, you will see what I am talking about. He is just a brilliant guy. And if you check around Missouri lawyers of all different kinds, they will all say that. And I think that is helpful on the bench.

He has a great sense of humor and a good sense of humble, too, which is very important. It is one of the reasons, as Senator Bond mentioned, he is very good at the collegial aspects of serving on an appellate court. He knows how to get people together, and that is, sadly, lacking very often in the system today. And a lot of it is that he has a good sense of humor. He doesn't take himself too seriously.

Then the third thing with that I think is so important, he has the right temperament to be a judge. You know, Mr. Chairman, you practiced law and so did I, and I always used to be frustrated by judges who were rude to people because, you know, when you are in that position, it is kind of cowardly, really, to be rude to somebody when they are not in a position to be rude back to you. And I think judges ought to show especial restraint. To be firm, that is very important, to run the courtroom, but to be at least civil to the attorneys and, of course, to the litigants who come before them. And Judge Benton has just been unfailingly of the right temperament as a judge, and I know he will do the same thing on the Court of Appeals.

So I really want to recommend him highly to the Committee for expeditious consideration and, I hope, approval.

Senator GRAHAM. Thank you very much, Senator Talent, for that statement.

One of our panel members will be George P. Schiavelli—I apologize to the family there—our nominee to the Central District of California. He has an admirable record and is a great choice for the Federal bench. After graduating from UCLA Law School in 1974, Mr. Schiavelli spent the next 20 years in private practice with distinguished law firms in the Los Angeles area. From 1994 until 2000, Mr. Schiavelli served as a Los Angeles Superior Court judge. Since 2000, Mr. Schiavelli has practiced principally in the area of alternative dispute resolution and has been of counsel to the appellate group of Reed and Smith.

We are delighted to have him at today's hearing, and it is my understanding that Senator Boxer is here to testify on his behalf.

**PRESENTATION OF GEORGE P. SCHIAVELLI, NOMINEE TO BE  
DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALI-  
FORNIA, BY HON. BARBARA BOXER, A U.S. SENATOR FROM  
THE STATE OF CALIFORNIA**

Senator BOXER. I am, Mr. Chairman. Thank you so much. I am very pleased to offer my support for this nominee for the Central District Court of California, George P. Schiavelli, Judge Schiavelli. And with your permission, Mr. Chairman, I would like him to stand, as well as his wife, Holli, his son, Peter, and his daughter, Olivia.

I just want to say what a great day I know it is for the family, and I am very happy to be supporting you, Judge.

Judge Schiavelli is very well regarded by those who know him and know his work. He has a reputation which is just terrific. He has a reputation as a very tolerant and a very kind person as well as very skilled.

I am confident that, should he be confirmed, which I very much hope he will be, he will discharge his responsibilities with dignity, integrity, and intelligence.

I would like to briefly comment on the process that brought this accomplished individual before you today, Mr. Chairman. In a truly bipartisan fashion, something that we seek more and more around here, we, Senator Feinstein and I, worked together with the White House Counsel to create four judicial advisory committees for our State, one in each Federal judicial district in the State, so that when we come up here with nominees for the district court, you will see always that the Democrats and Republicans support the nominee, because each Committee has a membership of six individuals, three appointed by the White House and three appointed by Senator Feinstein and me. Each member's vote counts equally, so a majority is necessary for recommendation of a candidate. The nominee before you today was reviewed very carefully by the Central District Committee and strongly recommended. I continue to support this excellent bipartisan process and the high-quality nominees it has produced, including the one before you today.

Judge Schiavelli has deep roots in my State. He is a graduate of Stanford University and UCLA Law School, where he graduated first in his class. UCLA, first in his class—I think that says a lot. It is a tough school. From there, he has embarked on a very impressive legal career and served the people of our State with distinction.

Before returning to private practice, he served on the L.A. Superior Court. In both private practice and on the bench, the judge developed an equally respected reputation due to his character, his decency, and his legal expertise.

So, in sum, the Central District will benefit greatly from the exemplary service of Judge Schiavelli, and I fully support his nomination and his quick confirmation.

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

Senator GRAHAM. Thank you very much, Senator Boxer, for that statement. Thank you.

Our final nominee, Curtis V. Gomez, has been nominated to be judge for the District Court for the Virgin Islands. This position is for a term of 10 years. A native of St. Croix, Mr. Gomez graduated



from George Washington University and Harvard University Law School. He has practiced law in both the private and public sector. He presently served as an Assistant United States Attorney in the United States Attorney's Office for the District of the Virgin Islands and previously served as an Assistant U.S. Attorney in the Eastern District of Virginia.

We welcome Mr. Gomez and note that he will be introduced by his supporter, Hon. Donna M. Christensen, Delegate of the United States Virgin Islands, to whom we also extend a special welcome. Thank you very much, Delegate Christensen, and if you would like to make a statement at this time, you may do so.

**PRESENTATION OF CURTIS V. GOMEZ, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT COURT OF THE VIRGIN ISLANDS, BY HON. DONNA M. CHRISTENSEN, A DELEGATE IN CONGRESS FROM THE VIRGIN ISLANDS**

Delegate CHRISTENSEN. Thank you and good morning, Mr. Chairman. And I thank you for the honor to appear before the Committee this morning and for the extraordinary honor and pleasure to be able to present Attorney Curtis V. Gomez, the nominee to the U.S. District Court of the Virgin Islands. This is not only a proud day for his wife, Simone, who is with him in the audience, other family and friends, but for our entire Territory. Curtis is widely respected and loved, and we are all proud to have such an outstanding son of the soil being nominated to this position of high respect, authority, and influence. I assume you, colleagues, that despite his relative youth, the gentleman whom you will hear from later this morning, educated, as you have said, in some of the best schools in our Nation, including my alma mater, the George Washington University, and then Harvard University School of Law, is fully equal to the task.

Not born to privilege, Curtis is from a hardworking family of public servants, including his dad, Victor Gomez, and sister, Judy, a former Virgin Islands Senator.

Having served in both the private and public practice of law as an Assistant U.S. Attorney, Curtis does bring a broad array of experience to the post, and that experience includes private practice here in D.C. with the well-known firm of Patton, Boggs and Blow, and as an Assistant U.S. Attorney for the Commonwealth of Virginia.

His former V.I. firm of Dudley, Topper and Feuerzeig as well as his colleagues from the U.S. Attorney's Office in the Virgin Islands are among those beaming with pride today.

There has also been greater diversity in the cases he has successfully handled, from contract to other civil litigation, including criminal cases involving crimes of violence, illegal alien smuggling, and drug trafficking. His courtroom demeanor, diligence, and effective practice of the law have earned him the respect of other counsel, of his opponents before the bench, of the Federal and local judiciary, and of the general public. He comes to you with a highly qualified recommendation of the V.I. Bar, and I would ask permission to submit the written letter of support from its current president, Attorney Amos Carty, who holds Curtis in the highest regard.

Senator GRAHAM. Without objection, the statement will be introduced.

Delegate CHRISTENSEN. Thank you.

Others, such as retired Territorial Court Judge Ishmael Meyers, whose opinion reflects those of his colleagues on the territorial bench, spoke to me of his competence and exemplary temperament, well suited to the bench.

Retired Senator Eric Dawson, whose testimony I also request unanimous consent to introduce into the record, speaks of his steadfast determination, love of the practice of law, excellence in understanding of it, and his commitment to his home, the U.S. Virgin Islands, and to this Nation.

The U.S. Attorney, David Nissman, under whom he now serves, is quoted as saying, "He has a keen intellect, a good work ethic, and he cares deeply about the community."

One of his peers whose counsel I often seek, my brother, Attorney Adam Christian, echoed all of these sentiments and spoke fondly of his calm and imperturbable manner, his generous spirit, and his humility.

While our community is more often divided than united on some issues, and the issue of Federal appointments has frequently been a matter of controversy and conflict, on the nomination of Curtis Gomez we speak with one voice of solid support, a voice that crosses party lines and expands across the breadth and depth of our community.

Members of the Committee, I began my political life fighting for the opportunity for our local attorneys to have their fine qualities, their talents and skills, their years of exemplary service, their demonstrated knowledge of the law and commitment to upholding it to be recognized and rewarded with the opportunity to serve on the Federal judiciary. Beyond the recognition of the individual lawyer, it says so much about respect for us, your fellow Americans. Such appointments further highlight those who, like Curtis, are role models for our children, thus inspiring them to strive just that little bit harder and to give them hope.

Finally, let me say that the first native Virgin Islander to serve as a judge of the U.S. District Court in the Virgin Islands, my father, Judge Almeric Christian, who led the way so that fine young men and women like Curtis Gomez could be here today seeking confirmation before this august body, if he were alive today, would be pleased with this nomination and would be among Curtis' strongest supporters.

Chairman and Members of the Committee, on behalf of the people of the U.S. Virgin Islands whom I am privileged to represent in the Congress, I thank President George W. Bush for nominating this excellent lawyer, great human being, and dedicated public servant, and I am proud to present Attorney Curtis Vincent Gomez to you with our highest recommendation and unqualified support for confirmation to the U.S. Court, the District of the Virgin Islands. And we know that after hearing from Attorney Gomez, you will concur with us.

Thank you.

[The prepared statement of Delegate Christensen appears as a submission for the record.]

Senator GRAHAM. Thank you for that outstanding statement. Thank you very, very much.

Also for the record, I will introduce statements from our ranking member, Senator Leahy, and from Senator Feinstein, to make their statements part of the record.

At this time I guess we will start with Judge Benton, if you would please come forward.

Please raise your right hand.

Do you solemnly swear that the testimony you are about to give before this Committee is the truth, the whole truth, and nothing but the truth, so help you God?

Judge BENTON. I do.

Senator GRAHAM. Welcome to the Committee, Judge. You have a distinguished background and we're honored to have you here. If you would like to make a statement at this time, you may do so.

**STATEMENT OF WILLIAM DUANE BENTON, NOMINEE TO BE  
CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT**

Judge BENTON. I have no opening statement, but I would, if the Chair would permit, introduce to you, of course, my loyal spouse of many years, an educationally mentally handicapped nurse educator, Sandra Benton, Grant Benton, my son, Megan Benton, listening somewhere in college, hopefully doing homework. Bryan Tramont is at the FCC, a former clerk of mine, and Linda Coffen, who has been with a couple of law firms here in D.C., another former clerk of mine.

Senator GRAHAM. Welcome to you all.

Judge BENTON. That would conclude my opening remarks.

[The biographical information of Judge Benton follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

William Duane Benton; Duane Benton
2. Address: List current place of residence and office address(es).  

Residence: Jefferson City, MO

Office: Supreme Court of Missouri, 207 West High Street,  
P.O. Box 150, Jefferson City, MO 65102
3. Date and place of birth.  

Springfield, Missouri; September 8, 1950
4. Marital Status (include maiden name of wife, or husband's name).  
List spouse's occupation, employer's name and business address(es)  

Married to Sandra Aline Snyder Benton, R.N., M.Ed.  
School Nurse  
School District of Jefferson City  
315 E. Dunklin, Jefferson City, MO 65101
5. Education: List each college and law school you have attended,  
including dates of attendance, degrees received, and dates degrees  
were granted.  

University of Virginia, School of Law 6/93-8/93 & 6/94-8/94  
LL.M. May 1995

Memphis University, Business School 9/76 - 12/79 (nights)  
M.B.A., with highest honors December 1979

Yale Law School 9/72 - 5/75  
J.D. May 1975

Northwestern University 9/68 - 6/72  
B.A., summa cum laude June 1972

Naval War College  
 Command and Staff Program 9/96 - 9/99 (correspondence)  
 Diploma September 1999

New York University School of Law  
 The Institute of Judicial Administration  
 Appellate Judges Seminar 7/92 - 7/92  
 Diploma July 1992

Harvard University, John F. Kennedy School of Government  
 Program for Senior Executives in State and Local Government  
 7/90 - 7/90  
 Diploma July 1990

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

August 1991 to present	Supreme Court of Missouri Judge [Chief Justice 7/97 - 6/99]
September 1998 to present	Westminster College Adjunct Professor
January 1998 to present	University of Missouri-Columbia School of Law Adjunct Professor
1998 to 2001	Missouri Baptist Foundation, Director
1993 to 1999	United Way of Central Missouri, Director 1993 -1999; Treasurer 1997-99
1989 to 1993	Missouri State Employees' Retirement System - Board of Trustees
February 1989 to July 1991	Missouri Department of Revenue Director of Revenue
1990 to 1991	Multistate Tax Commission, Chair

1987 to 1989	Central Missouri State University Member Board of Regent
January 1983 to January 1989	Tettlebaum Law Office Attorney
January 1981 to December 1982	United States House of Representatives Administrative Assistant to Congressman Wendell Bailey (MO)
February 1980 to December 1980	Bailey for Congress Campaign Manager

Between Law School Graduation (1975) and February 1, 1980 I was on active military duty.

Attended law school upon graduation from college. While in law school, 1972-1975, I was a JAG student assigned to US Navy-Naval Legal Service office, Naval Submarine Base - New London, Groton, CT. During the school year, I was in an excess-leave, unpaid status. During summers, I worked as a paid JAG student.

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

U.S. Naval Reserve	February 1980 to July 2002
Highest Rank: Captain, JAGC, USNR (retired)	
Honorable Discharge	

U.S. Navy - active duty	June 1975 to January 1980
Highest Rank: Lieutenant, JAGC, USN	
Honorable Discharge	

Delay of Active Duty	June 1972 to May 1975
Excess Leave - Law (unpaid)	

Naval ROTC	September 1970 to June 1972
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COMMENDATIONS:

Vietnam Service Medal	July - August 1971
National Defense Medal	July - August 1971 (and various other periods)

Meritorious Service Medal September 1999 and July 2002

Navy Commendation Medal May 1995

Military Outstanding Volunteer Service Medal April 1996

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

Managing Editor, *Yale Law Journal*, Volume 84, 1974-1975

Editor, *Yale Law Journal*, Volume 83, 1973-1974

Winner, Michael Egger Prize for best student note or comment,  
*Yale Law Journal*, June 1974

Phi Beta Kappa

Beta Gamma Sigma (honorary business society)

Distinguished Non-Alumnus of the University of Missouri- Columbia,  
School of Law

Danforth Fellow to John F. Kennedy School of Government,  
Harvard University, July 1990.

LL.D. (honorary) Westminster College, May 1999

LL.D. (honorary) Central Missouri State University, December 1994

Attended college and law school on various scholarships.

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

American Bar Association 1989 - present

The Missouri Bar 1975 - present

Cole County Bar Association 1983 - present

Conference of Chief Justices 1997 - 1999

National Center for State Courts  
Joint Technology Committee 1999 - present

Liaison to various Missouri Supreme Court and Missouri

Bar committees:  
Professionalism Committee  
Gender Fairness Implementation Task Force 1994-1995  
Board of Law Examiners  
State Court Automation

Joint Interim Committee on Judicial Resources 2003  
(established by legislative resolution and judicial order)

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

American Institute of Certified Public Accountants,  
1983-present  
Missouri Society of Certified Public Accountants,  
1983-present  
Rotary International,  
member since 1989,  
president of local club 1996-97,  
district governor 2002-03  
American Legion,  
member local post since 1984,  
chair of state Oratorical Commission 1993-present  
Missouri Baptist Convention,  
member of Committee on Continuing Review 1993-96, 2003-present  
First Baptist Church of Jefferson City MO,  
deacon and trustee 1990-present  
Veterans of Foreign Wars,  
member since 1984  
Navy League,  
member since 1989  
Naval Reserve Association,  
member since 1990  
Boy Scouts of America,  
local membership chair 1999-present,  
member of central Missouri membership committee 1999-present

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

Supreme Court of the United States      Admitted: April 1985



**United States Tax Court**

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

"Recent Developments Contributing to Improved Appellate Justice,"  
in **The Improvement of the Administration of Justice**, Gordon  
M. Griller and E. Keith Stott, Jr., eds, pp. 77-86, Chicago  
IL, American Bar Ass'n, 7<sup>th</sup> ed., 2002. (with Bill L.  
Thompson).

"CPAs find niche as Judge, Clerk at Supreme Court of Missouri,"  
**The Asset**, p. 17 (July 2002) (edited interviews in state CPA  
journal).

"State of the Judiciary Address," *Journal of the Missouri Bar*,  
vol. 55, pp. 10-12 (1999).

"Chief Justice's Address to the Missouri Bar," *Journal of the Missouri Bar*, vol. 54, pp. 302-03 (1998).

"State of the Judiciary Address," *Journal of the Missouri Bar*,  
vol. 54, pp. 11-13 (1998).

"Remarks of Chief Justice to the Missouri Bar," *Journal of the Missouri Bar*, vol. 53, pp. 345-46 (1997).

"NonJudicial Punishment in the Naval Reserve," **Naval Reserve Ass'n News**, p. 19 (Nov. 1997).

**"The Administrative Hearing Commission: A New Power Over Administrative Regulations," *Journal of the Missouri***

Bar, vol. 47, p. 411 (1991).

"Procedural Considerations," **Missouri Consumer Law**, Chap. 19  
Supp. (Mo. Bar 1990).

"Local Use Tax in Missouri," **Missouri Municipal Review**, pp. 10-11  
(Oct.-Nov. 1990).

"Evidence and Burden of Proof," **Missouri Administrative Law**, 2d  
Edition, Chap. 3 (Mo. Bar 1990).

"Procedure -Department of Revenue," **Missouri Taxation Law and  
Practice**, Chap. 25 Supp. (Mo Bar 1989).

"Reliability of Corporate Earnings Estimates," **Proceedings  
of the American Institute for Decision Sciences**, March  
1979.

Book Review, "Developments in the Law - Legal Citation," 86  
**Yale L.J.** 197 (1976).

Noted in "The Blue Book Is Crimson," 64 **A.B.A. J.**  
139 (1978)

Note, "Congressional Perquisites and Fair Elections: The  
Case of the Franking Privilege," 83 **Yale L.J.** 1022,1055  
(1974).

Author, identified as "Duane Benton, Sunday School teacher,  
First Church, Jefferson City" of 26 weekly sunday-school  
lessons in **Word & Way**, journal of the Missouri Baptist  
Convention, published between August 24, 2000 and February  
15, 2001. Each lesson is about 800 words long.

Prepare syllabi for undergraduate courses in Constitutional Law and  
American Jurisprudence I teach at Westminster College, as well  
as the law school class on Appellate Advocacy at University of  
Missouri - Columbia School of Law.

Commencement addresses:

(None of these speeches discuss constitutional law or legal policy)

Central Missouri State University - Warrensburg Missouri  
December 17, 1994

University of Missouri - Columbia School of Law  
May 9, 1998

Southwest Missouri State University - West Plains  
May 16, 1998

University of Missouri - Kansas City School of Law  
May 7, 1999

Westminster College - Fulton Missouri  
 May 8, 1999  
 William Jewell College - Liberty Missouri  
 May 10, 2003

Annual Update on Legislation - Bar Association of Metropolitan  
 St. Louis: June 26, 1998; June 9, 1999; June 29, 2000; June  
 18, 2001; June 11, 2002; and June 19, 2003. [Luncheon speaker  
 on annual continuing legal education program; no written  
 materials.]

I often welcome tour groups to the Supreme Court Building. There  
 is no written text, and comments are very general. Occasionally, I  
 present a program to civic clubs and community organizations  
 describing the Supreme Court and judiciary in general terms.

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

**Excellent. October 10, 2003**

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

**August 1991 to present Judge, Supreme Court of Missouri**

**July 1997 to June 1999 Chief Justice (rotating two-year term)**

**Appointed under Missouri Non-Partisan Court Plan; retained by 60%  
 vote of the people in November 1992 General Election.**

**The Supreme Court of Missouri is the court of last resort in the  
 Missouri judicial system. It has general supervisory authority  
 over all courts, and appellate jurisdiction of all cases of general  
 interest and importance, where there is a conflict among the  
 districts of the Court of Appeals, or where there is a  
 constitutional issue. The Supreme Court also admits and  
 disciplines attorneys and serves as the trial court for impeachment  
 of state office holders.**

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

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

(1) Ten Most Significant Opinions

- a) *State v. Seibert*, 93 S.W.3d 700, 708-14 (Mo. banc 2002) (dissenting).  
Certiorari granted on May 19, 2003, sub nom *Missouri v. Seibert*; (123 S.Ct. 2091) case argued on December 9, 2003.
- b) *Columbia Athletic Club v. Director of Revenue*, 961 S.W.2d 806, 811-16 (Mo. banc 1998) (dissenting).  
adopted by majority as the law of Missouri in *Wilson's Total Fitness Ctr., Inc. v. Director of Revenue*, 38 S.W.3d 424 (Mo. banc 2001).
- c) *Akin v. Missouri Gaming Commission*, 956 S.W.2d 261 (Mo. banc 1997).
- d) *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. banc 1997).
- e) *Rodriguez v. Suzuki*, 936 S.W.2d 104 (Mo. banc 1996).
- f) *Jungerman v. City of Raytown*, 925 S.W.2d 202 (Mo. banc 1996).
- g) *Helsel v. Noellsch*, 107 S.W.3d 231, 233-35 (Mo. banc 2003) (dissenting).
- h) *Thomas v. Siddiqui*, 869 S.W.2d 740 (Mo. banc 1994).
- i) *Wollen v. DePaul Health Center*, 828 S.W.2d 681 (Mo. banc 1992).
- j) *Girdley v. Coats*, 825 S.W.2d 295 (Mo. banc 1992).

(2) Opinions Reversed or Questioned

I authored the opinion in *State v. Shurn*, 866 S.W.2d 447, 464 (Mo. banc 1993). The other judges unanimously concurred. The United States Supreme Court denied certiorari at 513 U.S. 837 (1994). On collateral review, the Eighth Circuit in *Shurn v. DeLo*, 177 F.3d 662, 667 (8<sup>th</sup> Cir. 1999), disagreed with the application of *Newlon v. Armentrout*, and affirmed in part and reversed in part.

I authored the opinion in *State v. Parker*, 886 S.W.2d 908, 930 (Mo. banc 1994). The other judges unanimously concurred. The United States Supreme Court denied certiorari at 514 U.S. 1098 (1995). On

collateral review, the Eighth Circuit in *Parker v. Bowersox*, 188 F.3d 923, 931(8<sup>th</sup> Cir. 1999) disagreed with the analysis of the effectiveness of penalty phase counsel.

(3) Significant Opinions on Constitutional Issues

*Keller v. Marion County Ambulance District*, 820 S.W.2d 301 (Mo. banc 1991).

*Leisure v. State*, 828 S.W.2d 872 (Mo. banc), cert. denied, 506 U.S. 923 (1992).

*State v. Whitfield*, 837 S.W.2d 503 (Mo. banc 1992).

*Easter v. Ochs*, 837 S.W.2d 516 (Mo. banc 1992), cert. denied, 507 U.S. 987 (1993).

*State v. Tolliver*, 839 S.W.2d 296 (Mo. banc 1992).

*State v. Griffin*, 848 S.W.2d 464 (Mo. banc 1993), superseding 818 S.W.2d 278 (Mo. banc 1991).

*State v. Debler*, 856 S.W.2d 641 (Mo. banc 1993).

*State v. Shurn*, 866 S.W.2d 447 (Mo. banc 1993), cert. denied, 513 U.S. 837 (1994).

*State ex rel. Haley v. Goose*, 873 S.W.2d 221 (Mo. banc 1994).

*Asher v. Lombardi*, 877 S.W.2d 628 (Mo. banc 1994).

*State v. Parker*, 886 S.W.2d 908 (Mo. banc 1994), cert. denied, 514 U.S. 1098 (1995).

*Smith v. State*, 887 S.W.2d 601 (Mo. banc 1994), cert. denied, 514 U.S. 1119.

*State v. Chambers*, 891 S.W.2d 93 (Mo. banc 1994).

*State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995).

*State ex rel. Cavallaro v. Goose*, 908 S.W.2d 133 (Mo. banc 1995).

*Artman v. State Bd. Of Registration for the Healing Arts*, 918 S.W.2d 247 (Mo. banc 1996).

*Johnson v. State*, 925 S.W.2d 834 (Mo. banc 1996).

- State v. Roll*, 942 S.W.2d 370 (Mo. banc), cert. denied, 522 U.S. 954 (1997).
- State v. Taylor*, 944 S.W.2d 925 (Mo. banc 1997).
- Fisher v. State Highway Comm'n of Mo.*, 948 S.W.2d 607 (Mo. banc 1997).
- Gibson v. Brewer*, 952 S.W.2d 239 (Mo. banc 1997).
- Akin v. Missouri Gaming Comm'n*, 956 S.W.2d 261 (Mo. banc 1997).
- State v. Clay*, 975 S.W.2d 121 (Mo. banc 1998), cert. denied, 525 U.S. 1085 (1999).
- State v. Clark*, 981 S.W.2d 143 (Mo. banc 1998).
- State v. Storey*, 986 S.W.2d 462 (Mo. banc), cert. denied, 528 U.S. 1085 (1999).
- State v. Middleton*, 998 S.W.2d 520 (Mo. banc 1999), cert. denied, 528 U.S. 1167 (2000).
- In re Hill*, 8 S.W.3d 578 (Mo. banc 2000).
- State v. Wolfe*, 13 S.W.3d 293 (Mo. banc 2000).
- President Riverboat Casino v. Mo. Gaming Commission*, 13 S.W.3d 635 (Mo. banc 2000).
- State v. Revels*, 13 S.W.3d 293 (Mo. banc 2000).
- Johnson v. State*, 22 S.W.3d 183 (Mo. banc), cert. denied, 531 U.S. 935 (2000).
- State v. Black*, 50 S.W.3d 778 (Mo. banc 2001), cert. denied, 534 U.S. 1153 (2002).
- Kneese v. State*, 85 S.W.3d 628 (Mo. banc 2002).
- State v. Baumruk*, 85 S.W.3d 644 (Mo. banc 2002) (dissenting).
- State v. Marlowe*, 89 S.W.3d 464 (Mo. banc 2002).
- State v. Seibert*, 93 S.W.3d 700 (Mo. banc 2002) (dissenting); cert. granted, 123 S.Ct. 2091, (May 19, 2003); argued

December 9, 2003.

*State v. Gilbert*, 103 S.W.3d 743 (Mo. banc 2003).

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

Director, Missouri Department of Revenue, February 1989 through August 1991; appointed by Governor; confirmed by Missouri Senate

Chair, Multistate Tax Commission 1990-1991; appointed as member by Governor; confirmed by Missouri Senate; elected chair by members from 32 other states.

Chair, Board of Trustees, Missouri State Employees' Retirement System; 1989-1993; appointed by Governor; confirmed by Missouri Senate

Member, Board of Regents, Central Missouri State University; 1987-1989; appointed by the Governor; confirmed by Missouri Senate

Republican Committeeman, Ward 5, Jefferson City MO - elected for two-year terms in August 1986, August 1988, and August 1990

Vice-Chair, Cole County (MO) Republican Committee; 1987-1991; elected by other members of committee

17. Legal Career:

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

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

No.

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

No.

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

Naval Legal Service Office Memphis, Millington TN, June 1975 - January 1980, JAG officer.

United States Congress, January 1981 - January 1983, administrative assistant to Representative Wendell Bailey.

Tettlebaum Law office, 215 E. High St., Jefferson City MO 65101. January 1983 - February 1989. Attorney in law office.

Director of Revenue, state of Missouri, February 1989 - August 1991. Truman office building, Jefferson City MO 65105.

Judge, Supreme Court of Missouri, August 1991 to present.

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

1975-1980. Military law. Served as defense counsel or trial counsel in over 200 courts-martial. Also served as command adviser, and legal assistance officer.

1981-1982. Administered congressman's office.

1983-1989. General practice of law. Mostly civil, with state-and-local-taxation, and appellate emphases.

1989-1991. Administered large state agency.

1991-present. Judiciary - state supreme court.

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



Represented statewide associations and groups, including the Missouri Baptist Convention, and several trade associations.

Represented taxpayers, mostly small-to-medium business.

Represented the school districts of Missouri in tax cases about the validity of the savings-and-loan, and bank taxes.

Represented CPAs and other licensees in disputes with state government.

Represented small cities, and small school districts.

Represented inmates by appointment of federal court.

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

**Frequently from 1983 through 1989**

2. What percentage of these appearances was in:  
 (a) federal courts;  
     **5%**  
 (b) state courts of record;  
     **95%**  
 (c) other courts.
3. What percentage of your litigation was:  
 (a) civil;  
     **99%**  
 (b) criminal.  
     **1%**
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Over 39, almost all as sole counsel.

5. What percentage of these trials was:
  - (a) jury;  
10%
  - (b) non-jury.  
90%

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

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

- (1) **Barnes v. Bailey**, 706 S.W.2d 25 (Mo. banc 1986).

Challenge to constitutional amendment, authorizing pari-mutuel wagering. Main basis - that the pari-mutuel amendment conflicts with lottery amendment passed at same election, in violation of Article III, sec. 51 of the Missouri Constitution (which provides that if two amendments approved at the same election conflict, the one with the most votes prevails).

Client - appellant Jeff J. Barnes

I served as sole counsel, at trial and on appeal.

Final disposition - appeal rejected by Supreme Court of Missouri 5-2.

- (a) November 1984 - March 1986
- (b) Cole County Circuit Court - James F. McHenry, J.  
Supreme Court of Missouri - Per Curiam by Higgins,  
Billings, Donnelly and Welliver, JJ. and Dowd, Sp. J.  
Dissent by Robertson and Rendlen, JJ.
- (c) Phillip K. Gebhardt, then-Assistant Attorney General,  
2486 Wesford Dr, Maryland Heights MO 63043, 314-275-8097

- (2) **Centerre Bank of Crane v. Director of Revenue**, 744 S.W.2d 754 (Mo. banc 1988).

Banks challenged bank tax as violating federal statute, argued that sales/use taxes should be a credit against bank tax, and that they deserved deductions for subsidiary banks payments to the parent, to equal federal-income-tax paid by the parent.

Client - School District of Kansas City

Sole counsel for District at administrative trial, and on direct appeal to Supreme Court

Final disposition - bank tax upheld, credits not allowed, but deductions allowed.

- (a) January 1983 - January 1988
- (b) Administrative Hearing Commission, Hugh A. Sprague, C. Supreme Court of Missouri - Edward D. Robertson, Charles B. Blackmar, Albert L. Rendlen, Andrew J. Higgins, Robert T. Donnelly, Warren D. Welliver, JJ. and James R. Reinhard, Sp. J.
- (c) Juan D. Keller, Bryan Cave, 211 N. Broadway, St. Louis MO 63102, 314-259-2000. Melodie Powell, then-Assistant Attorney General, Evans & Dixon, 1100 Main St., Kansas City MO 64105, 816-472-4600.

- (3) **Emma Caroline McIntosh v. City of California**, Western District of Missouri. No. 82-4359-CV-C-5, Judgment on jury verdict October 23, 1984; unreported.

Mother sued, under 42 U.S.C 1983, for denial of visitation by county and city police.

I represented the city and county.

I was sole counsel, with significant motion practice, ending in a full, three-day, jury trial, in United States District Court.

Final disposition - verdict for defendants

- (a) October 1983 - January 1985
- (b) United States District Court, Western District of Missouri, Scott O. Wright, J.
- (c) Walter H. Bley, Jr., 1001 Cherry St #104, P.O. Box 997, Columbia MO 65205, 573-443-8385.

- (4) ***Christiansen v. Missouri State Board of Accountancy***, 764 S.W.2d 943 (Mo. App. 1988); ***Christiansen v. Missouri State Board of Accountancy***, 764 S.W.2d 952 (Mo. App. 1988).

Disciplinary proceeding against CPA, with ancillary request for access to investigation of CPA by Board.

Client - Paul A. Christiansen, C.P.A.

Sole counsel for C.P.A. at trial in circuit court, and on appeal to the Court of Appeals.

Final disposition - Access to investigation granted, and discipline vacated.

- (a) January 1986 - December 1988
  - (b) Circuit Court of Cole County - James F. McHenry, J. Missouri Court of Appeals, Western District - Donald L. Manford, Gary A. Fenner, and Fernando J. Gaitan, Jr.
  - (c) Curtis F. Thompson, Assistant Attorney General, P. O. 899, Jefferson City MO 65102, 573-751-3321
- (5) ***Community Federal Savings & Loan Ass'n v. Director of Revenue***, 752 S.W.2d 794 (Mo. banc 1988), *cert. denied*, 488 U.S. 893 (1988).

Several savings banks sought refunds of intangible-property taxes paid under a statute later held unconstitutional.

Clients - three school districts, of Kansas City, Lee's Summit, and North Kansas City.

Sole counsel for school districts at the administrative trial, and on direct appeal to Supreme Court.

Final disposition - refunds allowed by Supreme Court (5-2).

- (a) January 1984 - June 1988
- (b) Administrative Hearing Commission - William Campbell, C. Supreme Court of Missouri - Higgins, Billings, Blackmar, Robertson, Rendlen and Covington; Welliver and Donnelly, JJ., dissent.
- (c) John S. Pletz and Alex Bartlett, P.O. Box 1048, Jefferson City MO 65102, 573-635-8500 (Pletz) and 573-635-9118 (Bartlett) for savings banks. Melodie Powell, then-Assistant Attorney General, Evans & Dixon, 1100 Main St., Kansas City MO 64105, 816-472-4600.

- (6) **Payne v. Kirkpatrick**, 685 S.W.2d 891 (Mo. App. 1984).

Mandamus action to force Secretary of State to put proposed constitutional amendment on the ballot, after the Secretary determined that the proposal lacked sufficient signatures.

Client - Opponent Gary D. Collins

Sole counsel for Collins before the circuit court, and on appeal to the Court of Appeals. Lengthy trial in circuit court, with meticulous analysis of petitions.

Final disposition - Court of Appeals issued mandamus (2-1)

- (a) August 1984 - March 1985
- (b) Circuit Court of Cole County - Byron L. Kinder, J. Court of Appeals, Western District - Donald L. Manford, Charles Shangler, and William E. Turnage (dissenting).
- (c) Edward D. Robertson, Jr., then-Assistant Attorney General, 200 Madison, Jefferson City MO 65101, 573-769-4454. Alex Bartlett, P.O. Box 1251, Jefferson City MO 65102, 573-635-9118.

- (7) **Associated Industries of Missouri v. State Tax Commission**, 722 S.W.2d 916 (Mo. banc 1997).

Business group attacked state and federal constitutionality of statute distinguishing "residential" from "commercial" property, for tax purposes. Attacks included due process, equal protection, and uniformity.

Client - Missouri Merchants & Manufacturers Association, a business group that supported the statute.

Sole counsel for MMA at circuit court trial, and on direct appeal to Supreme Court of Missouri.

Final disposition - statute upheld

- (a) June 1983 - February 1987.
- (b) Circuit Court of Cole County, A. J. Seier, J.; Supreme Court of Missouri, Edward D. Robertson, Charles B. Blackmar, Albert L. Rendlen, Andrew J. Higgins, Robert T. Donnelly, Warren D. Welliver, JJ. and J. P. Morgan, Sp. J.
- (c) Richard L. Schnake, 1949 E. Sunshine, Springfield MO 65808, 417-882-9090. Richard L. Wieler, then-Assistant Attorney General, 2401 W. Broadway, Columbia MO 65201,

573-445-7300. James C. Owen, 16141 Swingley Ridge Rd.,  
Chesterfield MO 63017, 636-532-7100.

- (8) **Tichenor v. Missouri State Lottery Commission**, 742 S.W.2d 170  
(Mo. banc 1988).

Challenge to Missouri's joining the Multistate Lottery, in  
view of Missouri constitution and various statutes.

Client - challenger W. B. Tichenor

Sole counsel for Tichenor at circuit court trial, and on  
direct appeal to Supreme Court of Missouri.

Final disposition - challenge rejected (5-2). [Supreme Court  
commends, in written opinion, "excellent briefing and oral  
argument."]

- (a) January 1987 - January 1988
- (b) Circuit Court of Cole County - James F. McHenry, J.  
Supreme Court of Missouri - Edward D. Robertson, Charles  
B. Blackmar, Albert L. Rendlen, Andrew J. Higgins,  
Robert T. Donnelly, Warren D. Welliver, William H.  
Billings, JJ.
- (c) David G. Edwards, then-Assistant Attorney General, P. O.  
Box 1806, Jefferson City MO 65102. 573-634-8883, 573-  
634-3401.

- (9) **Ervin v. Blackwell**, 733 F.2d 1282 (8th Cir. 1984).

Inmate sued to recover deductions from his prison earnings,  
claiming the State lacked authority to take his earnings.

Client - Tomas Ervin.

I wrote the brief submitted to the Eighth Circuit.

Final disposition - deductions were allowed.

- (a) June 1983 - May 1984
- (b) United States Court of Appeals for the Eighth Circuit -  
John R. Gibson, Theodore McMillian, and Pasco Bowman,  
JJ.
- (c) Co-counsel, Kenneth M. Romines, now-Circuit Judge, 7900  
Carondelet, Clayton MO 63105, 314-615-1510.  
Opposing counsel, Jerry L. Short, then-Assistant  
Attorney General, 400 E. 9th St., Kansas City MO 64106.  
816-426-3130.

(10) **Icahn v. Blunt**, 612 F. Supp. 1400 (W.D. Mo. 1985).

Challenge to Missouri law intended to prevent Carl C. Icahn's purchase of TWA, on both federal and state constitutional grounds.

Client - Carl C. Icahn.

I was co-counsel, along with St. Louis, New York, and Kansas City law firms. I was responsible for the briefing and argument of all state constitutional issues.

Final disposition - law ruled unconstitutional on commerce clause and supremacy grounds

- (a) May 1985 - June 1985
- (b) United States District Court for the Western District of Missouri, Brook C. Bartlett, J.
- (c) Co-counsel - Andrew Rothschild and Barry Short, Lewis & Rice, 500 N. Broadway, St. Louis MO 63102, 314-444-7600. Frederick H. Riesmeyer II, 4700 Belleview Ave, Kansas City 64105, 816-753-6000. James C. Wirken, 2600 Grand Blvd, Kansas City MO 64108, 816-471-0330. Opposing Counsel - Phillip K. Gebhardt, then-Assistant Attorney General, 2486 Wesford Dr, Maryland Heights MO 63043, 314-275-8097. John C. Noonan, 1201 Walnut St., Kansas City MO 63141, 816-842-8600. Jim J. Shoemaker, 100 S. 4th St., St. Louis 63102, 314-241-6890.

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

I represented numerous licensees - such as physicians, a chiropractor, auto dealers, CPAs, a manicurist, psychologists, pharmacists, a realtor, a nursing home administrator, and a hearing-aid dealer - in disputes with state agencies. Most disputes were resolved without litigation, but did require negotiation with the agency, enabling many clients to continue operating their business.

I represented several taxpayers in disputes with the local

assessor/collector, the State Tax Commission (real property taxation), and the Department of Revenue (sales/use/income taxes). Many disputes were resolved without litigation, but did require negotiation with the agency, generally resulting in a lower tax payment.

Member, Joint Technology Committee of National Center for State Courts. This committee serves as the technology advisor to the Center and recommends national standards and best practices for court automation.

I teach two courses -- Constitutional Law and Jurisprudence - at Westminster College to undergraduate students considering law as a career.

Each spring I co-teach the course in Appellate Advocacy at the University of Missouri-Columbia School of Law. This class covers all aspects of appellate practice.



William Duane Benton

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

As Judicial Retirement from the State of Missouri, I am vested and will receive, at age 60, one-half the compensation in effect at the time I end employment as a judge. I also participate in the state's Deferred Compensation Plan.

As a retired member of the U.S. Naval Reserve, I am vested and will receive, at age 60, an annuity equal to roughly one-fourth the pay of a Navy Captain (O-6) as of my 60<sup>th</sup> birthday.

I have no other arrangements for future/deferred compensation/benefits derived from any of the above-listed relationships.

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

To determine potential conflicts, I review each filing in every case in which I participate. That is, when my copy of any filing - brief, motion, letter, etc. - arrives in my chambers, I skim it for conflicts. My staff is also alert to potential conflicts.

Generally, the guidelines I will follow are those in 28 U.S.C. § 455, and in the Code of Conduct for United States Judges.

William Duane Benton

Specifically, I will not participate in any review of a decision of the Supreme Court of Missouri in which I previously participated.

Beyond that, I have had no clients since 1989, so conflicts based on prior representation are very rare.

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

No.

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

See my Financial Disclosure Report.

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

See my Financial Net Worth Statement, and attached schedules.

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

Campaign Manager, Wendell Bailey for Congress, 1980 and 1982.

Local volunteer coordinator/worker for many Republican candidates in 1984, 1986, 1988 and 1990.

Elected Republican Committeeman, Ward 5, Jefferson City, MO August 1986, August 1988, and August 1990.

William Duane Benton

Vice-Chair, Cole County, MO, Republican Committee, 1987-1991.

Treasurer, Bailey for Congress Committee, 1987-1989  
(retiring debt).

Attorney, Missouri Republican Party, 1983-1989.

## FINANCIAL STATEMENT

NET WORTH  
of Duane and Sandra Benton  
as of November 30, 2003

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

ASSETS		LIABILITIES	
Cash on hand and in banks	\$ 1,934	Notes payable to banks-secured	-
U.S. Government securities	-	Notes payable to banks-unsecured	-
Listed securities* - schedule A	147,591	Notes payable to relatives	-
Unlisted securities	-	Notes payable to others	-
Accounts and notes receivable:	-	Accounts and bills due	-
Due from relatives and friends	-	Unpaid income tax	-
Due from others	-	Other unpaid income/interest	-
Doubtful	-	Real estate mortgages payable-schedule E	\$63,527
Real estate owned - schedule B	159,500	Chattel mortgages and other liens payable	-
Real estate mortgages receivable	-	Other debts-itemize:	
Autos and other personal property	44,000	Margin account balance*	16,635
Cash value-life insurance	157,899		
Other assets (restricted):			
Duane Benton IRA -schedule C	27,645		
Sandra Benton IRA-schedule D	54,141		
MOST 529 plans for education	4,025	Total liabilities	\$ 80,162
State 457 Deferred Comp plan	26,080	Net Worth	\$ 542,652
<b>Total Assets</b>	<b>\$622,814</b>	<b>Total liabilities and net worth</b>	<b>\$ 622,814</b>
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	None	Are any assets pledged? *EXCEPT stock in margin account	No
On leases or contracts	None	Are you defendant in any suits or legal actions?	No
Legal Claims	None	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	None		
Other special debt	None		

Duane and Sandra Benton

**Schedule A - Listed securities owned**

Stocks:	
TALX Corp. common	\$104,804
General Electric common	8,601
USBank Corp. common	3,074
Catalyst Intl common	763
WorldCom common	4
Bonds:	
St. Charles Co. Water Dist #2	5,004
NE Independent School Dist TX	4,798
Mutual Funds:	
Wells Fargo Small Cap Fund A	10,024
Federated Am Leaders Fund B	8,272
Oppenheimer Main St. Fund A	2,247
TOTAL	<u>\$147,591</u>

**Schedule B - Real estate owned**

Residence - Jefferson City MO	159,000
Undeveloped lot - Norfolk Lake Estates, Mtn. Home, Ark	<u>500</u>
TOTAL	<u>\$159,500</u>

**Schedule E - Mortgages payable**

Wells Fargo - 1st mortgage	\$29,527
Exchange Bank - home equity	<u>34,000</u>
TOTAL	<u>\$63,527</u>

**Schedule C - IRA #1**

FT Unit 682 Small Cap	15,325
TALX common	10,664
Hewlett-Packard common	1,370
Evergreen Money Market Fund A	282
WorldCom common	<u>4</u>
TOTAL	<u>\$27,645</u>

**Schedule D - IRA #2**

TALX common	24,118
WalMart common	20,043
Hewlett-Packard common	1,406
FT Unit 682 Small Cap	6,267
Federated Am Leaders Fund B	2,157
Evergreen Money Market Fund A	<u>150</u>
TOTAL	<u>\$54,141</u>

AO-10  
Rev. 1/2002FINANCIAL DISCLOSURE REPORT  
Nomination Report  
~~FOR CALENDAR YEAR 2003~~Report Required by the Ethics  
in Government Act of 1978,  
(5 U.S.C. App. §§101-111)

1. Person Reporting (Last name, first, middle initial) <b>Benton, William Duane</b>		2. Court or Organization <b>U.S. Court of Appeals Eighth Circuit</b>		3. Date of Report <b>February 12, 2004</b>	
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) <b>Circuit Judge - nominee</b>		5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date <b>Feb 12, 2004</b> ____ Initial ____ Annual ____ Final		6. Reporting Period <b>January 1, 2003 - January 31, 2004</b>	
7. Chambers or Office Address <b>207 W. High St. Jefferson City MO 65101</b>		8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.  Reviewing Officer _____ Date _____			

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

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

	POSITION	NAME OF ORGANIZATION/ENTITY
<input type="checkbox"/>	NONE (No reportable positions.)	
1	Judge	Supreme Court of Missouri
2	Adjunct Professor	Westminster College
3	Adjunct Professor	University Of Missouri School of Law

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

	DATE	PARTIES AND TERMS
<input type="checkbox"/>	NONE (No reportable agreements.)	
1	None	Judicial Retirement, State of Missouri: I am vested and
2		will receive, at age 60, one-half the compensation in
3		effect at the time I end employment as a judge.

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

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/>	NONE (No reportable non-investment income.)		
1	2004	Supreme Court of Missouri (state judge)	\$ 10,250
2	2004	Westminster College (adjunct Professor)	\$ 700
3	2002-2004	School District of Jefferson City (school nurse)	\$
4	2003	Supreme Court of Missouri (state judge)	\$ 123,000
5	2003	Westminster College (adjunct Professor)	\$ 6,300

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Benton, William Duane

Date of Report

Feb. 12, 2004

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

SOURCE

NONE (No such reportable reimbursements.)

DESCRIPTION

Exempt



1

2

3

4

§

6

7

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

SOURCE

NONE (No such reportable gifts.)

DESCRIPTION

Exempt

VALUE

11

1

2

3

4

5

3

5

3

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

**NONE** (No reportable liabilities.)

DESCRIPTION

VALUE CODE\*

1

2

3

4

§

Cutter & Co. Inc.

Margin account balance

K

*Value Codes:	J=\$15,000 or less	K=\$15,001-\$50,000	L=\$50,001-\$100,000	M=\$100,001-\$250,000	N=\$250,001-\$500,000
	O=\$500,001-\$1,000,000	P=\$1,000,001-\$5,000,000	Q=\$5,000,001-\$25,000,000	R=\$25,000,001-\$250,000,000	
	S=\$5,000,001-\$50,000,000	T=\$50,000,001-\$1,000,000,000			

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Benton, William Duane	Date of Report Feb. 12, 2004

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

A. Description of Assets (including trust assets)  <i>Place "X" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	(1)	If not exempt from disclosure			
	Amt. Code1 (A-H)	Type (e.g., div., rent or int.)	Value Code2 (J-P)	Value Method Code3 (Q-W)	Type (e.g., buy, sell, merger, redemption)	(2) Date: Month- Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets,							<u>Exempt</u>		
1 TALX common stock	B	div	M	T					
2 GE common stock	A	div	J	T					
3 St. Charles Co Muni. bond water dist #2	A	int	J	T					
4 NE Independent School District TX bond	A	int	J	T					
5 Federated American Leaders Fund B	A	div	J	T					
6 Oppenheimer Main Street Fund A	A	div	J	T					
7 Wells Fargo Small Cap Fund A	A	div	J	T					
8 US Bank Corp Common stock	A	div	J	T					
9 Catalyst Intl Common stock	A	div	J	T					
10 WorldCom common stock	A	div	J	T					
11 MOST 529 plan fund	A	div	J	T					
12 Missouri state 457 deferred comp plan	B	div	K	T					
13 AIG American General universal life policy	D	int	M	T					
14 IRA #1	A	div	K	T					
15 -TALX common stock									
16 -FT Unit 682 small cap fund									
17 -Hewlett-Packard common -Evergreen Money Market fund A									
-WorldCom common stock									

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



FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Benton, William Duane	Date of Report Feb. 12, 2004

**VII. Page 2 INVESTMENTS and TRUSTS -- income, value, transactions** (Includes those of spouse and dependent children. See pp. 34-37 of Instructions.)

A. Description of Assets (including trust assets)  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	(1)	If not exempt from disclosure			
	Amt. Code1 (A-H)	Type (e.g., div., rent or int.)	Value Code2 (J-P)	Value Method Code3 (Q-W)	Type (e.g., buy, sell, merger, redemption)	(2) Date: Month- Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets,									
1 IRA #2	B	div	L	T					
-TALX common stock									
2 -WalMart common stock									
3 -Hewlett Packard common stock									
4 -Ft Unit 682 small cap fund									
5 -Federated American Leaders fund B									
6 -Evergreen Money Market fund A									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									

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

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting	Date of Report
Benton, William Duane	Feb. 12, 2004

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

6.	2002	Supreme Court of Missouri (state judge)	\$123,000
7.	2002	Westminster College (adjunct Professor)	6,300

(was not paid by UM School of Law)

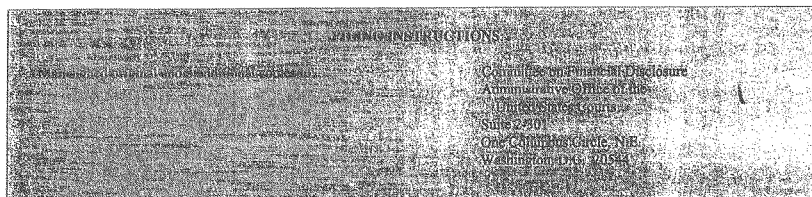
**IX. CERTIFICATION.**

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

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

Signature Will. Duane Benton  
WILLIAM DUANE BENTONDate February 12, 2004

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



William Duane Benton

### III. GENERAL (PUBLIC)

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

As Chief Justice of Missouri, I sent a letter to each attorney in Missouri, encouraging them to provide pro bono service to those in need. I requested they complete a form to report pro bono activities. In addition, I encouraged attorneys to volunteer with Legal Services.

Recently, I assisted the Samaritan Center (a local community based charitable services provider) in a new program "Legal Care." Under this program, people with legal needs who cannot afford an attorney and who do not qualify for Legal Services assistance, consult with a volunteer attorney, who evaluates the claim. The evaluator then refers the client to a pro bono (or reduced-fee) provider. The evaluator may also assist the client to represent themselves in small claims court, etc.

I teach, without compensation, a class on Appellate Advocacy at the University of Missouri- Columbia, School of Law.

I guest-lecture at Lincoln University, at least annually, on various topics, including administrative or constitutional law, or professional/business ethics.

I judge the Missouri Bar's statewide competition, "We the People." This nationally-recognized program encourages high school students to learn more about the United States Constitution. Teams prepare testimony for mock Congressional hearings. I serve on judging panels that evaluate their knowledge, and ability to respond to questions and challenges. In addition, I have participated in the Summer Institute for We the People. In this session, teachers learn to lead their classes in the We the People

curriculum. The teachers spend three days in intensive effort to develop the same sort of mock Congressional testimony as students are required to prepare. They then present and defend their testimony in a setting like that required of students.

I judge moot court competitions at all four Missouri law schools, and at John Marshall Law School in Chicago, Illinois.

I frequently interact with students who visit the Supreme Court of Missouri on tours. Last year over 20,000 visited our court, most of whom were school children. I tell the children about Missouri's courts, encourage them to participate in civic activities, and tell them what they need to do to become a judge or a lawyer.

On a personal level, I manage a youth baseball team each summer, and am a Commissioner of Upward Basketball in our city. These programs reach over 400 youth, many of whom are disadvantaged.

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

No.

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

No selection commission.

On Friday, November 21, 2003, an attorney from the Office of Counsel to the President called and asked if I was

interested in interviewing for the Eighth Circuit. I said "Yes".

On November 24, 2003, I interviewed at the White House.

On December 19, 2003, an attorney from the Office of Counsel to the President called to inform me that the White House was going forward in considering me. I have completed a number of forms as part of the nomination process.

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

No.

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

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

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

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

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

Each branch of our government has a separate but co-equal role. Congress passes laws and appropriates money; the Executive carries out, enforces, and implements laws. The Judiciary's role is to interpret the law. Since *Marbury v. Madison*, 5 U.S. 137 (1803), the Judiciary's duty has been clear: to apply the law to the facts of the case before the Court.

Applying the law is not an unlimited power. Courts should apply the clear language of Congress. Congressional intent is the key to interpreting federal law. There are cases that do not directly involve a law passed by Congress. In these cases, to the extent possible, courts should follow precedent and *stare decisis*.

Senator GRAHAM. Judge, you do have a very distinguished background, and Senators Talent and Bond spoke glowingly of you. I think you will make an outstanding circuit court judge.

Tell me a little bit about being the only Certified Public Accountant. How has that influenced you as a lawyer, good or bad.

Judge BENTON. When the tax cases come to our court, they all look to me. Some attorneys are allergic to numbers. I'm not.

Senator GRAHAM. I'm one of those, yes.

Judge BENTON. My first few years of practice, Mr. Chairman, I was able to help support my family, because in several complicated cases I was hired where there were a lot of numbers. So it's been very good. It makes you understand that there are a lot of statistics.

Of course, statistics can be used in a lot of different ways, as Mark Twain, a native Missourian, said more colorfully. But I like numbers.

Senator GRAHAM. Outstanding.

Being Chief Justice, that has a certain requirement beyond just serving. Could you enlighten the Committee a bit about how that job requires you to bring people together and how you think judges should interact? What experience does that bring to your job?

Judge BENTON. In our court, the Chief Justice leads the discussion and tries to forge a consensus. I have been fortunate, in that all the chief justices I have worked with on our court have done that, and I tried very hard to do that.

In addition, the Chief Justice presents a face to the public. It was during my 2 years as Chief Justice that I really learned what supports the judiciary is public faith and confidence in the judiciary. I have never turned down going to speak to a chamber of commerce, a civic club, a service organization, and I think that's important, too.

Being chief does make you feel more and more that you do need to speak with one voice. I am very proud that in my 13 years we've only had one case on our court where we did not muster a majority, a clear four, five, six or seven vote majority. I might add that sometimes I've been in the dissent. But only in one case in that time. That is collegiality, so we can speak to the Bar in Missouri with one voice.

Senator GRAHAM. Outstanding.

You have been on the edge of legal reform. How do you see the development of the law in terms of how can we make the process more user friendly and more professional?

Judge BENTON. Thank you for the question, because I am very committed to computerizing our courts. When I came to our court system in Missouri, there were no computers, or almost no computers, in two-thirds or three-fourths of Missouri's courts. Now almost all our courts have computers.

Not only do we have computers, but we have an infrastructure to support the computers. We have procedures, standards, and we would like to think we're a leader in court automation.

Senator GRAHAM. Outstanding.

Now, this is a part of your legal experience that is near and dear to me. I was a Judge Advocate in the Air Force, serving on active duty, the Guard and Reserves. I am still part of that body.

As a military lawyer, can you tell me how that experience has helped you develop as a lawyer and how does it play in your current role that you're seeking?

Judge BENTON. Well, the great thing about being a military lawyer is, as you may know, I finished Justice School and went to do legal aid. The military calls it legal assistance, but it's truthfully legal aid. It is the servicemember who has been ripped off by the car dealer, it is the then door-to-door sales—I date myself there, Senator, sorry. It was the door-to-door sales rip off, and several other rip offs of that kind. That's what I did the first year.

Then in the second year, a typical military career progression, as you well know, I was a defense lawyer. I defended people accused of crimes, a few very serious crimes, mostly serious misdemeanors, to be frank. Most of them, the maximum they could get was 6 months to a year in jail. So that was the next stage.

Then next I was prosecuting a little bit, and then after that I advised commands. In the last 20, 25 years, being in the Navy, I advised commands of various size, sort of like small businesses. Of course, some were pretty big businesses. I was a JAG as a reserve for the Sea Bees up and down the Atlantic Coast and Europe, which was a very big job. So I really appreciated the breadth of experience that it does give you.

Senator GRAHAM. Thank you. I totally concur. It is a great way to be introduced to the law and a good value system.

One final question. When I use the word or term "strict constructionist", what does it mean to you and how does it apply in your philosophy?

Judge BENTON. Well, in think in terms of statutory construction, it means finding the legislative intent, and the legislative intent is most clearly expressed in plain language is where we start, and the plain meaning of words. So that's where I start with it, Senator.

Senator GRAHAM. Thank you.

The fact that no one else is here is good news. Because we have found a consensus apparently in you. People are very busy in this job, just like everyone out in the audience, having a thousand things to juggle every day. The Senate schedule from the time you get off the plane until the gavel bangs and you go back home is running from one event to the other. But you come highly recommended by the two Senators from your State, and colleagues who have served with you have a high regard for you. You are obviously a well-qualified person.

To you and your family, I wish you the best because you're embarking on a great journey where our Nation needs well-qualified and reasonable judges now more than ever. So God bless and the best of luck to you.

Judge BENTON. Thank you, Mr. Chairman, for your charity.

Senator GRAHAM. The next panel, please, if the other judges will come forward. I would like to have each of you sworn in. Would you please raise your right hands.

Do you, Robert Harwell, George Schiavelli, and Curtis Gomez, each swear that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. HARWELL. I do.



Judge SCHIAVELLI. I do.

Mr. GOMEZ. I do.

Senator GRAHAM. Please be seated. Welcome to you all, and we'll give you a chance to introduce your families properly here and make any statements you would like before the Committee.

We will start with Mr. Harwell.

**STATEMENT OF ROBERT BRYAN HARWELL, NOMINEE TO BE  
DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA**

Mr. HARWELL. Thank you, Mr. Chairman.

I don't have an opening statement, but I would like to introduce my wife, Debbie, my two children, Carson and Sarah Nell, if they would stand. They're a little shy.

Senator GRAHAM. It's a handsome group there.

Mr. HARWELL. Thank you. And, of course, my father, David Harwell, a retired Chief Justice from South Carolina—

Senator GRAHAM. We're not going to hold that against you.

Mr. HARWELL. —and his wife, Debbie.

[The biographical information of Mr. Harwell follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)  
**Robert Bryan Harwell; R. Bryan Harwell**
2. Address: List current place of residence and office address(es).  
**(R) Florence, S.C**  
**(O) 205 N. Irby Street, Florence, S.C. 29501**
3. Date and place of birth.  
**June 4, 1959 in Florence (Florence County), S.C.**
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).  
**Married to Debra Bailey Flake, housewife/mother.**
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.  
**University of South Carolina School of Law, 1980-1982; Juris Doctor, December, 1982.**  
**Clemson University, 1977-1980; Bachelor of Arts, Political Science, May, 1980.**
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.  
**1984 to present: Harwell, Ballenger, Barth & Hoefer, LLP-Partner (Formerly known as Harwell, Ballenger, DeBerry, Barth & Hoefer), and; also (Harwell, Ballenger & DeBerry)-Partner**  
**1995 (approx) to 2001 Marion County Law Office of Kevin M. Barth and R. Bryan Harwell, LLP-Partner**

- 1990 (approx) to present  
 Florence Darlington Technical College-Trustee, Chairman-July, 1997 to July, 1999
- 1988 (approx)  
 Francis Marion College-Instructor, Business Law Course
- 1985 (approx) to present  
 Harwell family related closely held corporations: (Serve as officer and/or director in all of the following)  
 Harwell Farms & Investment, Inc.,  
 Harwell Properties, Inc, and Harwell Development Co, Inc.
- 1983 -1984  
 U.S. District Court, Law Clerk to U.S. District Judge G. Ross Anderson, Jr.
- 1983  
 S.C. Judicial Department, Law Clerk to S.C. Circuit Court Judge Rodney A. Peeples
- 1981-1982  
 Whaley, McCutchen, Blanton & Rhodes-Law Clerk
7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.
- Yes. 1987 to 1993, South Carolina Army National Guard,  
 JAG Captain  
 1993 Transferred to inactive reserve  
 1996 Honorably discharged
8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.
- Recipient of The Order of the Palmetto from S.C. Governor David Beasley
9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.
- S.C. Supreme Court related committees:  
 Board of Commissioners on Grievances and Discipline 1984-1987  
 Judicial Council 1990-1992

Joint Commission on Alternative Dispute Resolution	1995-1997
American Bar Association	1983 to present /
South Carolina Bar Association	1983 to present
Florence County Bar Association (Elected Officer/Secretary 2003 Treasurer 2004 which rotates offices annually to President)	1984 to present
Marion County Bar Association	approx. 1995 to 2001
S.C. Bar House of Delegates	1991-1993
S.C. Bar Lawyer Referral Services Committee	1992-1993

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

Lobbying Organizations:

Florence Darlington Technical College  
South Carolina Trial Lawyers Association  
Association of Trial Lawyers of America  
National Rifle Association  
S.C. Republican Party  
Association of S.C. Claimant's Attorney's for Workers'  
Compensation  
Ducks Unlimited  
American Bar Association  
S.C. Bar Association

Other Memberships:

Florence County Bar Association  
First Presbyterian Church of Florence, S.C.  
Country Club of S.C.  
Country Club of S.C. Homeowner's Association  
American Board of Trial Advocates  
Pack Hunting Club

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

The Supreme Court of the United States	10/31/94
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United States Court of Appeals for the  
Fourth Circuit 2/21/84

United States District Court for the  
District of South Carolina 1/27/84

State of South Carolina Supreme Court  
and all courts of South Carolina 5/7/83

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

None.

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

Good. Date of last physical examination was 12/11/03.

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

None.

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

N/A.

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

Commissioner/Trustee Florence Darlington Technical College  
(1990-present), appointed.

No candidacies for elective office.

17. Legal Career:

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

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

Upon graduation six (6) months early from the University of South Carolina Law School in December of 1982, I clerked for State Circuit Judge Rodney A. Peebles in Barnwell, S.C. for approximately six (6) months, 1983. I then began a clerkship with United States District Judge G. Ross Anderson, Jr. in Anderson, S.C. for approximately one (1) year, 1983 to 1984.

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

Not applicable.

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

In 1984, I returned to my home in Florence, S.C. and began practicing with the law firm of Harwell, Ballenger & DeBerry, now known as Harwell, Ballenger, Barth & Hoefer, LLP, located at 205 N. Irby Street, Florence, S.C., 29501, where I am a partner, and where I continue to practice law. Approximately 1995, one of my partners and I opened an additional satellite office in an adjoining county, Marion, S.C., which remained open until approximately 2001. This satellite office was known as The Marion County Law Office of Kevin M. Barth and R. Bryan Harwell, LLP, located at 105 Harlee Street, Marion, S.C. 29571, where I was a partner. My primary law office continues to be in Florence, S.C.

- b. 1. What has been the general character of your law

practice, dividing it into periods with dates if its character has changed over the years?

The small size of my firm (4 attorneys) is such that it often times affords unique peripheral exposure and involvement in areas of the law which one may not usually focus. Most of my clients have been individuals, or small businesses. The general character of my law practice has been that of a "general practice" law firm. When I first began practicing in Florence, S.C. in 1984, it involved all aspects of the practice of law, including civil litigation, criminal work, family court, workers' compensation matters, etc. I handled matters in all courts from City and Magistrate's Court, to State Circuit Court, Family Court, State Administrative bodies or Commissions, Federal Court, and various appellate courts, state and federal.

Over the past ten(10) to fifteen (15) years, and as our law practice evolved, each of the four (4) lawyers in our office, including myself, developed a particular area of concentration. For example, two (2) of my partners developed a heavy criminal practice, and I developed my primary practice and focused in the area of civil litigation, and handle all types of civil cases, including personal injury, auto related torts, business torts, workers' compensation or employment issues, contractual disputes, insurance litigation, premises and products liability, professional negligence, etc., and continue to do so today. I also continued to handle Family Court matters until approximately 1998, but still practice there on court appointed cases. The Martindale-Hubbell Law Directory, which is a nationally used directory of attorneys gives me its highest rating, (AV), on legal ability and general ethical standards.

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

Most of my clients have been individuals, or small businesses. My practice involves a general practice of law with emphasis on civil litigation.

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

**When I started practicing law, due to the wide variety of matters I was handling, I was in court frequently. However, as my practice developed into more of a civil litigation practice, with less family court and criminal matters, court appearances, would probably best be described as regular.**

2. What percentage of these appearances was in:  
a) federal courts;

**10%**

- b) state courts of record;

**85%**

- c) other courts.

**5%**

3. What percentage of your litigation was:  
(a) civil,

**95%**

- (b) criminal.

**5%**

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

**I estimate that over the last 19 years, I have tried to verdict or judgment in courts of record in excess of approximately 150 cases, which include cases in State Circuit Court, Federal Court, Family Court, and Administrative bodies. In most cases, I was sole counsel and a small number as co-counsel or associate counsel.**

5. What percentage of these trials was:  
(a) jury;

**approximately 20% to 25%**

- (b) non-jury.

**approximately 75% to 80%**



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

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

- (1) Wilkes v. Young and County of Florence, 28 F.3d 1362 (4th Cir. 1994), cert.denied 115 S.Ct. 1103, 513 U.S. 1151. Represented the Plaintiff as sole counsel in this constitutional rights claim under 42 USC §1983, and also state law tort claims arising from plaintiff's alleged wrongful arrest resulting from the failure to pay a parking ticket. Jury verdict rendered for plaintiff, but reversed in a 2 to 1 decision. Petition for hearing en banc denied in a 6 to 6 decision, and cert. denied by U.S. Supreme Court. Although unsuccessful in financial recovery for plaintiff, the defendant county subsequently changed its practices after this suit.

- a) the date of representation;

1993

- b) the name of the court and the name of the judge or judges before whom the case was litigated; and

U.S. District Court, Florence Division, Judge William B. Traxler, Jr.

- c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Opposing counsel: Gordon B. Baker, Jr. Esq., and W. Reynolds Williams, Esq., 248 W. Evans Street, Florence, S.C. (843) 662-3258

- (2) Moore v. Unum Provident, C/A No.: 4:01-4185-25, U.S. District Court, S.C. Appeal pending, Fourth of Circuit, Appeal No.03-2311. Represented the plaintiff as sole counsel in ERISA action for accidental death insurance benefits and involving various policy exclusions. Plaintiff awarded benefits. Case on appeal.

a) the date of representation  
2001 and continuing.

b) the name of the court and the name of the judge or judges before whom the case was litigated; and

U.S. District Court, Florence Division, Judge Terry L. Wooten.

c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Opposing counsel: Theodore D. Willard, Jr., Esq., 1517 Hampton Street, Columbia, S.C. 29201 (803) 779-3500.

- (3) Brewer v. Wal-Mart, Inc., C/A No.: 4-89-1929-15, U.S. District Court, S.C. Represented plaintiff as sole counsel in this premises liability claim. Plaintiff suffered injuries as a result of falling on defendant's premises. Issues were negligence and proximate cause. Defendant denied liability. Plaintiff awarded judgment. No appeal.

a) the date of representation  
1990

b) the name of the court and the name of the judge or judges before whom the case was litigated; and

U.S. District Court, Florence Division, Judge Clyde H. Hamilton

c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Opposing counsel: David W. Keller, Jr., Esq.,  
1831 W. Evans Street, Florence, S.C. (843)  
662-9008.

- (4) Oliver v. S.C. Dept of Highways and Public Transportation, 309 S.C. 313, 422 S.E.3d 128 (1992).

Represented the plaintiff as co-counsel in this motorcycle accident tort claim against the S.C. Highway Department for failing to keep its right-of-way clear from obstructions resulting in paraplegic injury to motorcyclist. Negligence and proximate cause issues presented. I assisted in preparation of case for trial, and preparation of witnesses for direct examination, prepared cross-examination questions of witnesses, prepared closing argument, and generally assisted law partner/co-counsel during trial. Also assisted in drafting appellate brief. Verdict for plaintiff affirmed, but court reversed on issue of taxing costs.

- a) the date of representation

1992

- b) the name of the court and the name of the judge or judges before whom the case was litigated; and

Court of Common Pleas, State Circuit  
Court Judge Ralph K. Anderson, Jr.

- c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Co-Counsel: Kevin M. Barth, Esq., (Law Partner)

Opposing counsel: Joseph P. McLean, Esq.,  
and Brown W. Johnson, Esq., 640 W. Evans  
Street, Florence, S.C. (843) 669-2401.

- (5) Robinson, et al. V. S.C. Dept. of Revenue and the State of S.C., Opinion No. 25731 Supreme Court of S.C., filed October 13, 2003, petition for rehearing denied. I originally represented some of the plaintiffs (dry cleaning businesses) who

were claiming that the sales tax imposed upon them was unconstitutional because it was not imposed upon all "service" providers, only dry cleaners. Because there were multiple plaintiffs with different lawyers, the plaintiffs and their lawyers consolidated their efforts and brought one lawsuit, collaborating their efforts. Although chief counsel was primarily responsible for the litigation, as associate counsel, I assisted in development of arguments, review of drafts of pleadings, briefs, etc. The State Supreme Court affirmed the trial court in a 3-2 decision, holding that the sales tax did not violate the equal protection clause.

- a) the date of representation

2003

- b) the name of the court and the name of the judge or judges before whom the case was litigated; and

Court of Common Pleas, State Circuit Judge  
Thomas W. Cooper, Jr.

- c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Chief Counsel for Plaintiff: A. Camden Lewis,  
Esq. and Thomas A. Pendarvis, Esq., P.O. Box  
11208, Columbia, SC 29211 (803) 771-8000

Other Associate Counsel: Gary W. Poliakoff,  
Esq., P.O. Box 1571, Spartanburg, S.C. 29304  
(864) 582-5472; William J. Quirk, Esq.,  
Main Street, Columbia, S.C.

Opposing counsel: Attorney General Henry  
D. McMaster, P.O. Box 11549, Columbia,  
S.C. 29211 (803) 734-3970; Harry T. Cooper,  
Jr., Esq. Ronald W. Urban, Esq.,; Milton  
G. Kimpson, Leonard P. Odom of S.C. Department  
of Revenue, P.O. Box 125, Columbia, S.C.  
29214 (803) 898-5130

- (6) Norwood v. American Tobacco, 296 S.C. 415, 373 S.E.2d 694 (1988) Represented the plaintiff/appellant as co-counsel in this workers' compensation appeal concerning

dependency and entitlement to benefits. A new potential defendant was discovered after a determination had already been made by the S. C. Workers' Compensation Commission regarding dependents of a deceased employee and their entitlement to death benefits. Issues of proper notice, redetermination of dependents, sufficiency of evidence. I was primarily responsible for arguments and brief. Court of Appeals ruled against plaintiff/appellant holding additional new dependent was entitled to claim benefits in addition to plaintiff/appellant.

- a) the date of representation

1988.

- b) the name of the court and the name of the judge or judges before whom the case was litigated; and

Court of Common Pleas, State Circuit Judge  
Dan Laney

- c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Co-counsel: Charles E. Godwin, Esq.,  
P.O. Box 1658, Lake City, S.C. 29560 (843)  
394-3515

Opposing Counsel: Brown W. Johnson, Esq.,  
P.O. Box 1865, Florence, S.C. 29503

- (7) Harris Davis v. W.L. Cheezem, M.D., 89-CP-33-203, Court of Common Pleas, Marion County, S.C. Represented plaintiff as sole counsel in action for professional medical negligence due to failure to refer patient to orthopaedic surgeon, or use proper internal fixation hardware for treatment of arm fracture injury resulting in subsequent surgery, permanent impairment and loss of income to plaintiff. Jury verdict for plaintiff, case settled.

- a) the date of representation

1989

- b) the name of the court and the name of the

judge or judges before whom the case was litigated; and

Court of Common Pleas, State Circuit Judge  
JOHN H. WALLER, JR.

- c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Opposing Counsel: John S. Wilkerson, III Esq.,  
P.O. Box 22129, Charleston, S.C. 29413 (843)  
576-2801

- (8) Redbone Alley of Columbia, Inc., d/b/a Redbone Alley Restaurant and Bar v. Florence Restaurant and Supply,  
C/A No. 00-CP-21-902, Court of Common Pleas,  
Florence, S.C. Represented plaintiff as co-counsel in action for business losses incurred, and ultimate closure of plaintiff's restaurant as result of alleged breach of contract, negligence and breach of warranty arising from defective or improperly installed equipment. I assisted in preparation of case for trial, participated in direct and cross-examination of witnesses, arguments, etc. Verdict for plaintiff, case settled.

- a) the date of representation

2003

- b) the name of the court and the name of the judge or judges before whom the case was litigated; and

Court of Common Pleas, State Circuit Judge  
James E. Brogdon, Jr.

- c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Co-Counsel, Kevin M. Barth, Esq. (Law Partner)

Opposing counsel: Ronald B. Diegel, Esq., P.O.  
Box 6648, Columbia, S.C. 29260 (803) 782-4100

- (9) Nether Bishop v. Keith Kinard and First Federal Savings and Loan Association of Walterboro, S.C., C/A No. 94-CP-15-617. Court of Common Pleas, Walterboro, S.C. represented elderly plaintiff as co-counsel in an action involving embezzlement of her life savings by relative who was bank officer employee who improperly utilized power of attorney. Responsible for direct and cross-examination of all witnesses and arguments. Verdict for plaintiff, case settled.

a) the date of representation

1996

b) the name of the court and the name of the judge or judges before whom the case was litigated; and

Court of Common Pleas, State Circuit Judge  
Sidney T. Floyd

c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Co-counsel: Hugh M. Claytor, Esq., P.O. Box  
10208, Greenville, S.C. 29601 (864)255-5417

Opposing counsel: Richard S. Rosen, Esq.,  
P.O. Box 893, Charleston, S.C. 29402 (843)  
577-6726

- (10) State v. Richard Gould, C/A No. 86-GS-21-295. Represented as co-counsel City Police Officer charged with murder in the shooting death of an individual who had a history of psychiatric problems and who threatened violence on a 911 call, and then resisted arrest and attacked officers when they responded to call. Officer Gould shot in self-defense. Issues of reasonable and excessive force and self-defense. Assisted in preparation of trial, including preparation of witnesses for direct examination and preparation of cross-examination questions of witnesses, and generally assisted law partner/co-counsel during trial. Not guilty verdict. (Several years later, Officer Gould was killed in the line of duty).

a) the date of representation

1986

- b) the name of the court and the name of the judge or judges before whom the case was litigated; and of /

Court of General Sessions, State Circuit  
Judge Julius H. Baggett

- c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Co-counsel: D. Michael Ballenger, Esq., (Law Partner)

Opposing Counsel: Solicitor Dudley Saleeby, Jr., Florence City County Complex, 180 N. Irby Street, Florence, S.C. 29501 (843) 665-3091

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

Upon graduation from law school, I clerked for both a state and federal trial judge. Over the past 19 to 20 years of practice, I have probably represented over 2000 clients. Due to the broad range of my practice, I am regularly involved in all aspects of civil litigation, handling extensive pre-trial discovery in many of them. Also, because of the small size of my firm, I am regularly consulted by my partners on substantive and evidentiary questions, both civil and criminal. I am regularly associated by other attorneys. Because of my experience, I am often requested to serve as a mediator or arbitrator for parties, and have served in that capacity on both small and large cases for various parties involving individuals, corporations, or governmental entities. I have served as an adjunct instructor of business law for a local university. I have also served as a JAG Officer in the National Guard. During my career, I have also made time to serve the State Bar and my local Bar Association in various capacities, as well as serving on various committees for the S.C. Supreme Court, ranging from the Board of Grievances and Discipline, to the Alternative Dispute Resolution Commission. Recently, I was co-counsel in representing the County's State Court Magistrates in a pay dispute that was resolved without litigation.



II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

I anticipate receipt from my law partners the value of my interest in the law office (real estate) to be paid within two (2) years. I also anticipate payment from my partners for my interest in pending files which I have been handling with the exact amount of payment unknown at this time due to the contingent nature of the fees. I anticipate it will take approximately two (2) to three (3) years for this deferred compensation to be completed.

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

In the event of a conflict, or an appearance of a conflict, I would recuse myself and follow applicable rules or regulations, including the Judicial Code of Conduct. I clearly could not hear any matters involving my former partners, until any deferred compensation arrangements have ended. In the event it came to my attention that a prior client was a litigant before me, I would recuse myself. With regard to any relatives who are attorneys, in the event their firm is before me, I would recuse myself as appropriate, or required by the Code. I anticipate preparing a recusal list for those companies I own stock in, other than in a mutual fund. I will be sensitive to any potential appearance of a conflict-of-interest that could result in a poor reflection on the office.

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

No, other than to serve as an officer/director of some family related closely held corporations.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current

calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

**See attached Financial Disclosure Report.**

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

**See attached Net Worth Statement.**

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

**None, other than contributor or co-host of fundraisers for various local, state or national candidates.**

<b>AO-10</b> <b>Rev. 1/2002</b>		<b>FINANCIAL DISCLOSURE REPORT</b> Calendar Year 2003		Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)
1. Person Reporting (Last name, First name, Middle initial) Harwell, Robert B		2. Court or Organization U.S. District Court of S.C.		3. Date of Report 1/21/04
4. Title (Article III Judges indicate active or senior status; <i>Magistrate Judge's Honorable Court of partnership</i> U.S. District Judge-Nominee		5. Report Type (check appropriate type) <input checked="" type="radio"/> Nomination      Date      1/20/04 <input type="radio"/> Initial <input type="radio"/> Annual <input type="radio"/> Final		6. Reporting Period 1/1/02 to 1/1/04
7. Chambers or Office Address 205 North Irby Street Florence, S.C. 29501		8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer _____ Date _____		
<b>IMPORTANT NOTES:</b> The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each where you have no reportable information. Sign on last page.				

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

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

POSITION	NAME OF ORGANIZATION/ENTITY
1. Officer/Director	Harwell Farms and Investment, Inc.
2. Officer/Director	Harwell Properties, Inc.
3. Officer/Director	Harwell Development Co., Inc.
4. Commissioner/Trustee	Florence Darlington Technical College
5. Partner	Harwell, Ballenger, Barth & Hoefer, LLP
6. Trustee	Trust #1
7.	

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

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

DATE	PARTIES AND TERMS
1. 1/15/04	Harwell, Ballenger, Barth & Hoefer, LLP- My law partners and I have agreed that I will be paid 25% of the contingent fees generated on specifically
2.	designated fees existing at the time of my departure, to be completed within three (3) years. My interest in the real estate has been agreed upon and
3.	will be paid within two (2) years of departure. There is no retirement account.

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

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

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
------	-----------------	---------------------------------------

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

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

	DATE	SOURCE AND TYPE	GROSS INCOME (years, not spouse's)
1.	2003	Harwell, Ballenger, Barth & Hoefel, LLP	500,508.00
2.	2002	Barth & Harwell Partnership	5,836.00
3.	2002	Harwell, Ballenger, Barth & Hoefel, LLP	377,820.00
4.	2001	Barth & Harwell Partnership	118,436.00
5.	2001	Harwell, Ballenger, Barth & Hoefel, LLP	462,193.00

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting Harwell, Robert B	Date of Report 1/21/04
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**IV. REIMBURSEMENTS** – transportation, lodging, food, entertainment.

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

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

	<u>SOURCE</u>	<u>DESCRIPTION</u>
I.	Exempt	

**V. GIFTS.** (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)☐ **NONE** - (No such reportable gifts.)

	<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
I.	Exempt		

**VI. LIABILITIES.** (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)☐ **NONE** - (No reportable liabilities.)

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE</u>
I.	First Reliance	/PCDG, LLC/note & mtg./limited liability	J

**FINANCIAL DISCLOSURE REPORT****Page 1 of 4**Name of Person Reporting  
Harwell, Robert BDate of Report  
1/21/04**VII. INVESTMENTS and TRUSTS** — income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	Amount Code 1 (A-H)	Type (e.g. div. rent. or int.)	Value Code 2 (J-P)	Value Method Code 3 (Q-W)	Type (e.g. buy, sell, merger, redemption)	(2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
Place "00" after each asset exempt from prior disclosure									
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
1. Charles Schwab/Sweep Acct	A	Interest	L	T	EXEMPT				
2. Common WB	A	Dividend	K	T					
3. Common TSFG	B	Dividend	L	T					
4. BB&T MMA & CD'S	D	Interest	O	T					
5. First Reliance MMA & CD'S	B	Interest	N	T					
6. Harwell Farms & Investment, Inc. (12 1/2%)	A	Dividend	K	U					
7. Harwell Properties, Inc. (12 1/2%)	C	Distribution	L	U					
8. Harwell Development Co., Inc. (12 1/2%)	D	Distribution	K	U					
9. PCDG, LLC (10%) 1997-\$32,500		None	K	R					
10. Charles Schwab (RA #1	A	Dividend	L	T					
11. -DFA Intl Small Co Port									
12. -DFA Value III Port									
13. -DFA Large Cap Intl Port									
14. -DFA Large Cap Value III									
15. -DFA US Large Co Intl									
16. -DFA US Small Cap. Port									
17. -DFA US Small Cap Port									
18. -DFA US Small Cap Value									

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

## FINANCIAL DISCLOSURE REPORT

Page 2 of 4

Name of Person Reporting Harwell, Robert B	Date of Report 1/21/04
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## VII. INVESTMENTS AND TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets)  Place "XX" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	Amount Code 1 (A-H)	Type (e.g. div. rent. or int.)	Value Code 2 (J-P)	Value Method Code 3 (Q-W)	Type (e.g. buy, sell, merger, redemption)	(2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
19. Trust #1	A	Dividend	L	T	EXEMPT				
20. -BB&T Corp									
21. -Vanguard short-term tre									
22. Richland County Zero 8/1/2005	B	Interest	L	T					
23. Berkeley Co., SC Zero 6/1/2012	C	Interest	L	T					
24. Clemson University, SC Zero 5/1/2010	A	Interest	L	T					
25. Piedmont Mun. Power Zero 1/1/2008	A	Interest	J	T					
26. Piedmont Mun. Power Zero 1/1/2013	A	Interest	K	T					
27. Piedmont Mun. Power Zero 1/1/2013	A	Interest	K	T					
28. Richland Co. S.C. Zero 8/1/2009	C	Interest	L	T					
29. Richland Co., SC Zero 8/1/2007	A	Interest	J	T					
30. S.C. Zero 7/1/2011	A	Interest	L	T					
31. Three Rivers Solid Zero 1/1/2009	B	Interest	K	T					
32. Three Rivers Solid Zero 1/1/2011	B	Interest	K	T					
33. Three Rivers Solid Zero 1/1/2012	B	Interest	K	T					
34. Three Rivers Solid Zero 1/1/2013	B	Interest	K	T					
35. Piedmont Mun. Power Zero 2/1/2015	A	Interest	L	T					
36. DFA Tax Man US Mktwde	A	Dividend	J	T					

1. Income/Gain Codes: (See Columns B1 and D4)	A = \$1,000 or less	B = \$1,001-\$2,500	C = \$2,501-\$5,000	D = \$5,001-\$15,000	E = \$15,001-\$50,000
2. Value Codes: (See Columns C1 and D3)	F = \$50,001-\$100,000	G = \$100,001-\$1,000,000	H1 = \$1,000,001-\$5,000,000	H2 = More than \$5,000,000	
3. Value Method Codes: (See Column C2)	I = \$15,000 or less	J = \$15,001-\$50,000	K = \$50,001-\$100,000	L = \$100,001-\$250,000	M = \$250,001-\$500,000
	N = \$500,001-\$1,000,000	O = \$1,000,001-\$5,000,000	P1 = \$5,000,001-\$10,000,000	P2 = \$10,000,001-\$25,000,000	P3 = \$25,000,001-\$50,000,000
	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

**FINANCIAL DISCLOSURE REPORT****Page 3 of 4**Name of Person Reporting  
Harwell, Robert BDate of Report  
1/21/04**VII. INVESTMENTS and TRUSTS** -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-37 of filing instructions.)

A. Description of Assets (including trust assets)  Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code 1 (A-H)	(2) Type (e.g. div, rent, or int.)	(3) Value Code 2 (J-P)	(4) Value Method Code 3 (Q-W)	(5) Type (e.g. buy, sell, merger, redemption)	(6) Date: Month - Day	(7) Value Code 2 (J-P)	(8) Gain Code 1 (A-H)	(9) Identity of buyer/seller (if private transaction)
37. Charles Schwab IRA#2	A	Dividend	M	T	EXEMPT				
38. -DFA Intl Small Co Port									
39. -DFA Intl Value Ill Port									
40. -DFA Large Cap Intl Port									
41. -DFA US Lg.Co. Inst Index Port									
42. -DFA Us Small Cap Port									
43. -DFA US Small Cap Value									
44. Rental Property #1, SC		None	M	R					
45. Rental Property #2, W. VA	C	Rent	M	R					
46. David W.Harwell & Sons Prop LP (Cherry Grove, Beach, SC 49%)		None	M	R					
47. 205 N. Irby St., Florence, S.C. (25%) purchase of previous	B	Rent	L	V					
48. partner's interest									
49. College Fund#1	A	Dividend	K	T					
50. -College Bound Fund									
51. -Bank of America Strategic Growth									
52. -Mid Cap Brown Port. Class A									
53. -Small Co. Port Class A									
54. -Bond Port Class					EXEMPT				

1. Income/Gain Codes:	A = \$1,000 or less (See Columns B1 and D4)	B = \$1,001-\$2,500	C = \$2,501-\$5,000	D = \$5,001-\$15,000	E = \$15,001-\$50,000
2. Value Codes:	F = \$50,001-\$100,000 (See Columns C1 and D3)	G = \$100,001-\$1,000,000	H = \$1,000,001-\$5,000,000	I = \$5,000,001-\$25,000,000	J = More than \$25,000,000
3. Value Method Codes:	K = \$15,001-\$50,000	L = \$50,001-\$100,000	M = \$100,001-\$500,000	N = \$500,001-\$1,000,000	O = \$1,000,001-\$5,000,000
	P = \$5,000,001-\$25,000,000	Q = \$25,000,001-\$50,000,000	R = \$50,000,001-\$100,000,000	S = \$100,000,001-\$250,000,000	T = \$250,000,001-\$500,000,000
	U = \$500,000,001-\$1,000,000,000	V = \$1,000,000,001-\$5,000,000,000	W = \$5,000,000,001-\$25,000,000,000	X = \$25,000,000,001-\$50,000,000,000	Y = More than \$50,000,000,000
	Z = Appraisal	AA = Cost (Real Estate Only)	AB = Anticipation	AC = Cash/Market	AD = Estimated
	AE = Book Value	AF = Other	AG = Other	AH = Other	AI = Other



## FINANCIAL DISCLOSURE REPORT

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Name of Person Reporting Harwell, Robert B	Date of Report 1/21/04
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## VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets)  Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1) Amount Code 1 (A-H)	(2) Type (e.g. div. rent. or int.)	(1) Value Code 2 (J-P)	(2) Value Method Code 3 (Q-W)	(1) Type (e.g. buy, sell, merger, redemption)	(2) Date - Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
55. Clausen Farms, S.C.		None	M	R	EXEMPT				
56. Western Carolina Sewer Zero 3/1/03	D	Distribution							
57. College Fund #2									
58. -College Bond Fund									
59. -Small Co. Port Class A									
60. -Bank of America Strategic Growth									
61. -Bond Port Class									
62. -Mid Cap Growth Port Class A									
63. Richland Co., S.C. 8/1/03	E	Distribution							
64. Clemson University, 2002	E	Distribution							
65. Florence Co., S.C. 11/1/03	E	Distribution							
66. Richland Co., S.C. 12/1/03	D	Distribution							

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

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting Harwell, Robert B	Date of Report 1/21/04
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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Harwell, Robert B

Date of Report

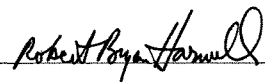
1/21/04

## IX. CERTIFICATION.

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

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

Signature



Date

1/21/04

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

## FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

**FINANCIAL STATEMENT**

12/07/03

NET WORTH

ROBERT BRYAN HARWELL

of /

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

ASSETS			LIABILITIES		
Cash on hand and in banks "A"	958	300	Notes payable to banks-secured	0	
U.S. Government securities - add schedule	0		Notes payable to bank-unsecured	0	
Listed securities - add schedule "B"	553	200	Notes payable to relatives	0	
Unlisted securities - add schedule "C"	151	500	Notes payable to other	0	
Accounts and notes receivable:			Accounts and bills due	5	000
Due from relative and friends	0		Unpaid income tax	0	
Due from others	0		Other unpaid income and interest	0	
Real Estate owned - add schedule "D"	1	460	000	Chattel mortgages and other liens payable	0
Real Estate mortgages receivable	0		Other debts - itemize:	0	
Autos and other personal property	125	000	PCDG, LLC/note/mtg. limited liability	10	200
Cash value - life insurance	0				
Other assets - itemize	0				
Dependents #1 and 2 College Funds "E"	37	400			
RBH/Educational Trust "F"	99	800			
Robert B/Debra Harwell/JTWROS "G"	90	000	Total Liabilities	15	200
IRA "H"	336	300	Net Worth	3	796
Total Assets	3	881	500	Total liabilities and net worth	3
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor	no		Are any assets pledged? See above PCDG,LLC	yes	
On leases or contracts	no		Are you defendant in any suits or legal actions?	no	
Legal claims	no		Have you ever taken bankruptcy?	no	
Provision for Federal Income Tax	no				
Other special debt	no				

ROBERT B. HARWELL  
12/07/03

SCHEDULE "A" CASH ON HAND:

Checking Accounts:	
BB&T MMA's	\$138,800.00
BB&T Checking	\$ 14,200.00
BB&T Checking	\$ 1,700.00
First Reliance MM	<u>\$119,000.00</u>
	\$273,700.00
Brokerage account:	
Charles Schwab MMF	\$ 72,600.00
Certificates of Deposits:	
BB&T	\$400,000.00
First Reliance	\$200,000.00
Wachovia	<u>\$ 12,000.00</u>
	\$612,000.00
	<u>\$958,300.00</u>

SCHEDULE "B" LISTED SECURITIES:

Robert Bryan Harwell	
DFA Tax-Man US Mktwd (DFMVX)	\$ 15,300.00
Richland County, SC 8/1/2005	\$ 87,600.00
Berkeley County, SC 6/1/2012	\$ 53,200.00
Clemson University 5/1/2010	\$ 53,000.00
Piedmont Mun Pwr 1/1/2008	\$ 9,000.00
Piedmont Mun Pwr 1/1/2013	\$ 16,000.00
Piedmont Mun Pwr 1/1/2013	\$ 23,000.00
Richland County, SC 8/1/2009	\$ 58,600.00
Richland County, SC 8/1/2007	\$ 14,000.00
South Carolina 7/1/2011	\$ 53,600.00
Three Rivers Solid 1/1/2009	\$ 21,300.00
Three Rivers Solid 1/1/2011	\$ 19,100.00
Three Rivers Solid 1/1/2012	\$ 18,000.00
Three Rivers Solid 1/1/2013	\$ 17,000.00
Three Rivers Solid 1/1/2015	<u>\$ 70,500.00</u>
	\$ 529,200.00
Debra F. Harwell	
Wachovia Corp	\$ 24,000.00
	<u>\$ 553,200.00</u>

SCHEDULE "C" UNLISTED SECURITIES

Harwell Properties, Inc. (12 ½ %) compiled 12/31/02 Financial Statements book value	\$ 69,100.00
Harwell Development Co. Inc. (12 ½%) compiled 12/31/02 Financial Statements book value	\$ 48,000.00
Harwell Farms Investment, Inc. (12 ½%) compiled 12/31/02 Financial Statements book value	<u>\$ 34,400.00</u>
	\$ 151,500.00

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SCHEDULE "D" REAL ESTATE

Property #1, Florence, S.C .	\$ 300,000.00
Property#2, Manning, S.C.	\$ 250,000.00
Property #3, N. Myrtle Beach, S.C.	\$ 250,000.00
Property #4,, Snowshoe, W. Virginia	\$ 185,000.00
Claussen Farm, Florence, S.C.	\$ 150,000.00
205 N. Irby Street, Florence, SC (25%)	\$ 75,000.00
PCDG, LLC (10%)	\$ 50,000.00
David W. Harwell & Sons, LP (49%)	\$ <u>200,000.00</u>
	\$1,460,000.00

SCHEDULE "E" COLLEGE BOUND FUNDS

Dependent #1:	
College Bound Fund #1502-5290354638	\$ 9,000.00
Strategic Growth Port Class A	\$ 2,400.00
Midcap Growth Port Class A	\$ 2,400.00
Small Co. Port Class A	\$ 2,600.00
Bond Port Class	\$ <u>2,300.00</u>
	\$ 18,700.00
Dependent #2:	
College Bound Fund #1502-5290354639	\$ 9,000.00
Strategic Growth Port Class A	\$ 2,400.00
Midcap Growth Port Class A	\$ 2,400.00
Small Co. Port Class A	\$ 2,600.00
Bond Port Class	\$ <u>2,300.00</u>
	\$ 18,700.00
	\$ 37,400.00

SCHEDULE "F" ROBERT B. HARWELL EDUCATIONAL TRUST

BB&T Corp (BB&T)	\$ 49,800.00
Vanguard Short-term Tre (VFISX)	\$ 49,500.00
Cash/Charles Schwab MMS	\$ <u>500.00</u>
	\$ 99,800.00

SCHEDULE "G" ROBERT B. & DEBRA F. HARWELL JTWROS

South Financial Group (TSFG)	\$ 78,300.00
Cash/Charles Schwab MMS	\$ <u>11,700.00</u>
	\$ 90,000.00

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SCHEDULE "H" IRA'S

Robert Bryan Harwell	
DFA Intl Small Co. Port (DFISX)	\$ 3,700.00
US Large Co. Insti. (DFUSX)	\$ 16,500.00
DFA Large Cap Value III (DFUVX)	\$ 20,700.00
DFA US Small Cap (DFSTX)	\$ 36,000.00
DFA US Small Cap Value (DFSVX)	\$ 36,000.00
DFA Large Cap Intl. Port (DFALX)	\$ 3,400.00
DFA Intl. Value III Port (DFVIX)	\$ 3,700.00
Cash/Charles Schwab MMS	\$ <u>1,300.00</u>
	\$ 121,300.00
Debra F. Harwell	
DFA Intl. Small Co Port (DFISX)	\$ 10,000.00
DFA U.S. Large Co. Insti (DFUSX)	\$ 43,900.00
DFA Large Cap Value III (DFUVX)	\$ 39,300.00
DFA US Small Cap (DFSTX)	\$ 34,700.00
DFA US Small Cap Value (DFSVX)	\$ 52,600.00
DFA Large Cap Intl Port (DFALX)	\$ 9,400.00
DFA Intl Value III Port (DFVIX)	\$ 10,100.00
Cash/Charles Schwab MMS	\$ <u>15,000.00</u>
	\$ 215,000.00
	<hr/>
	\$ 336,300.00

## III. GENERAL (PUBLIC)

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

**The very nature of my practice lends itself towards providing uncompensated advice, counsel or representation to many disadvantaged individuals. Part of a general law practice necessitates assisting those who cannot afford help. In addition to handling court appointed cases, for many years I agreed to serve as a referral attorney for Carolina Regional Legal Services which provided free legal representation for indigents with minimal compensation. I spend a couple of hours a week giving free advice to those who cannot afford it. I have participated in service projects such as Ask-A-Lawyer for the local bar association which provides free legal advice to the public. As an officer of my local bar association, and as another possible public service project, we are considering arranging for volunteers, and participating in a possible Latino Legal Aid Clinic with interpreters available.**

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

**No. However, while in college at Clemson University in 1977-1980, I was in a fraternity, Kappa Alpha Order, but am unaware of any discriminatory by- laws. Since 1997, I have also been a member of a small private hunting club, Pack Hunting Club, which has no discriminatory by-laws.**

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

**There is no selection commission in my jurisdiction. It is my understanding that my name was submitted along with several others for interviews with the White House Counsel's Office on recommendation of Senator Lindsey O. Graham. After several interviews, I was advised that my name was being submitted. The interview process itself was relatively pleasant. I completed forms, underwent an FBI background investigation, and was nominated on January 20, 2004.**

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

**No.**

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



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

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

- a. A tendency by the judiciary toward problem solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

**The Judicial branch certainly has a separate and distinct role from that of the Executive and Legislative branches of government. A judge's duty is not to create policy or law, but rather to interpret and apply the law as enacted. In other words, a judge is not a policy maker or law creator, but a law applicator or interpreter. Judges have a responsibility to determine if the parties have legal standing, and if the issues are truly ripe for the Court's adjudication. Judges should follow existing precedent and the doctrine of stare decisis, as this gives stability in the law, and helps the public to know what is expected. The House and Senate are the elected representatives of the people. As such, an expansive judicial role could have the effect of, in essence, the public losing their right to representation.**

Senator GRAHAM. Welcome to you all.

To our former Chief Justice, I know this is a huge day in your family's life, and I have great admiration for you, sir. Justice Harwell was the Chief Justice of our Supreme Court and I have an intimate working knowledge of his legal background. Bryan, you have a wonderful family and I'm glad to have you here today. I will speak about you in just a moment.

Judge SCHIAVELLI.

**STATEMENT OF GEORGE P. SCHIAVELLI, NOMINEE TO BE DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA**

Judge SCHIAVELLI. Thank you. I have no official opening statement at this point. I do want to again thank the President, and I want to thank Senator Boxer for her very kind introductory remarks, and for Senator Feinstein's statement. I thank the Committee for having this hearing.

I would also again like to introduce my family here. My wife, Holli, my daughter Olivia, my son Peter, and a very close friend of 30 years, Roy Wuchitech from the firm of Sheppard, Muller, Richter and Hampton in Los Angeles.

[The biographical information of Mr. Schiavelli follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

George P. Schiavelli

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

Residence: Encino, California 91436

Office: Reed Smith LLP  
355 South Grand Avenue, Suite 2900  
Los Angeles, California 90071-1514

3. Date and place of birth.

June 15, 1948  
Miami Beach, Florida

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

Married: Holli Curé Schiavelli  
Maiden Name: Holli Lynn Curé  
Occupation: Homemaker

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

Law School:

UCLA Law School, 1971-1974, Juris Doctorate -June 1974

Undergraduate:

Stanford University, 1966-1970, A.B. Degree-June 1970

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

08/00 to Pres. <u>Of Counsel</u>	Reed Smith LLP 355 S. Grand Avenue, Suite 2900 Los Angeles, California 90071-1514
08/00 to Pres. <u>Arbitration/Mediation</u> <u>Neutral</u>	Alternative Resolution Centers 11601 Wilshire Boulevard, Suite 1950 Los Angeles, California 90025 Tel.: (310) 312-6002
11/03 to Pres. <u>Arbitration/Mediation</u> <u>Neutral</u>	Action Dispute Resolution Services 1900 Avenue of the Stars, Suite 250 Los Angeles, California 90067
1994 to 07/00 <u>Judge</u>	Los Angeles Superior Court 111 North Hill Street Los Angeles, California 90012
03/86 to 02/94 <u>Partner</u>	Horvitz & Levy 15760 Ventura Boulevard, 18th Floor Encino, California 91436
09/76 to 02/86 <u>Partner</u>	Ervin, Cohen & Jessup 9401 Wilshire Boulevard, Ninth Floor Beverly Hills, California 90212
09/74 to 08/76 <u>Associate</u>	O'Melveny & Myers LLP 400 South Hope Street Los Angeles, California 90071

06/70 to 09/71 <u>Periodical Sales</u>	Saticoy Newsstand <u>Note:</u> Newsstand no longer exists.
11/70 to 06/71 <u>Parking Attendant</u>	Smoke House Restaurant Encino, California <u>Note:</u> Restaurant no longer exists.
1996-2001  Member, Board of Directors UCLA Law School	UCLA School of Law 405 No. Hilgard Ave. Westwood, California  My work with the Board of the Law School was voluntary. It did not involve compensation.
1993  Member, Board of Directors, Federated Italo-Americans of Southern California	The Federated Italo-Americans of Southern California is the umbrella organization coordinating activities of more than sixty organizations promoting Italo-American cultural and community affairs in Southern California. My work on this board was voluntary. It did not involve compensation.

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

I have never been in the military.

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

Professional:

- (a) Certificate of Commendation from the City of Los Angeles for work as Deputy General Counsel of Rampart Independent Review Panel. The panel was charged with investigating allegations of misconduct by Los Angeles Police Department officers, particularly those involved in the Rampart Division anti-gang, or "CRASH" unit.
- (b) Recognition as one of Southern California's "Super Lawyers" by Law & Politics Media, Inc. published in the February 2004 issue of Los Angeles Magazine.
- (c) Award in recognition of service as member of California Judges Association Executive Board.
- (d) Award in recognition of service as President of the UCLA Law Alumni Association.
- (e) Award in recognition of service on the Executive Committee of the Litigation Section of the Los Angeles County Bar Association.
- (f) In 1976, in response to an invitation from the Committee of Bar Examiners, I acted as a Bar Examination grader.

UCLA School of Law:

- (a) Order of the Coif
- (b) Recipient, UCLA Alumni Award for Academic Distinction
- (c) Graduated first in a class of approximately 300 students
- (d) Moot Court Honors Program
- (e) Assisted in creating student legal aid office on campus.

Stanford University:

- (a) Dean's List
  - (b) National Merit Scholarship Finalist
9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.
- (a) Member: Judicial Council Appellate Advisory Committee (2000-2003)
  - (b) Member: Judicial Council Civil and Small Claims Advisory Committee
    - (i) Case Management and Delay Reduction Subcommittee
    - (ii) Legislative Issues Subcommittee
    - (iii) Uniform Rules Working Group.
  - (d) Deputy General Counsel: Rampart Independent Review Panel (2000)
  - (e) Los Angeles County Bar Association
    - (i) State Appellate Judicial Evaluations Committee (1990 to 1994; 2001 - present.)
    - (ii) Executive Board, LACBA Litigation Section (2001-2003)
    - (iii) Board of Directors LACBA Dispute Resolution Services (2002-Present)
    - (iv) Delegate, Conference of Delegates to State Bar Conference (2002-Present)
    - (v) Member Executive Board of the County Bar Delegation (2003-Present)
    - (vi) Member and current Vice-Chair, Appellate Courts Committee
  - (f) California Judges Association (1994-Present)

- (g) Executive Board of the California Judges Association (1999-2000)
- (h) CJA Liaison to Ethics Committee (1999-2000)
- (i) Phi Alpha Delta Legal Fraternity Justice, Los Angeles Alumni Chapter (2002)
- (j) Panelist California Judges Association Annual Meeting, October 1998. Topic: Evidence.
- (k) Panelist/Moderator California Judges Association Annual Meeting, October 1997. Topic: Operations of the California Supreme Court.
- (l) Panelist California Judges Association Annual Meeting, October 1996 and September 1995. Topic: Felony Sentencing.
- (m) Member: California Judges Association Organizational Committee for the 1996 and 1997 Annual Meetings.
- (n) Member: Los Angeles Superior Court BAJI Committee, 1997- 2000.
- (o) Member: Superior Court's Bench/Bar Committee, 1997- 2000.
- (p) Member: Superior Court's Judicial Orientation Committee, 1998-1999.
- (q) Panelist on the topic of the "Three Strikes" legislation post-Romero, presented to Superior Court Judges in September, 1996.
- (r) Panelist on the topic of the "Three Strikes" legislation presented to Superior and Municipal Court judges in June 1995.
- (s) Speaker at various bar association, Inns of Court and community functions. (1994-Pres.)
- (t) Member: Los Angeles Superior Court Appellate Courts Committee and Experts Committee.



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

I am a member of the California Judges Association. That Association does engage in lobbying on issues relevant to the judicial branch of government. I have not personally engaged in any lobbying. That is the only organization to which I have belonged which engages in lobbying.

Other organizations to which I belong or have belonged include:

- (a) Elected to the Board of Governors of the UCLA Foundation, 2000
- (b) U.C.L.A. Law Alumni Association,
  - (i) Board of Directors, 1996 to 2001
  - (ii) President, 2000
  - (iii) Vice President, 1999
  - (iv) Secretary/Treasurer, 1998
- (c) City Club, Los Angeles, 1996-Present (A copy of the By-laws is being provided herewith as Exhibit 1.)
- (d) Federated Italo-Americans of Southern California, Board of Directors 1993. (This is the umbrella organization which coordinates the activities of more than sixty organizations promoting Italo-American cultural and community affairs in Southern California.) (A copy of the By-laws is being provided herewith as Exhibit 2.)
- (e) National Italian American Foundation.
- (f) A group of myself and about ten friends have formed an investment club called MOOLA Brothers. We meet once a month to discuss investment plans.

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

- (a) California State Courts, Admitted December 1974
- (b) United States District Court for the Central District of California, Admitted December 1974
- (c) United States Court of Appeals, Ninth Circuit, Admitted 1975
- (d) Supreme Court of the United States, Admitted 1979

The only period when I would not have been authorized to appear before any of those courts as counsel would have been the time when I was serving as a judge of the Los Angeles Superior Court between 1994 and 2000.

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

- (a) Co-Author: California Civil Appellate Practice, Preserving the Record for Appeal (Cont. Ed. Of the Bar 3d ed.) Chapter 2A.
- (b) Author: "Technology In The Courtroom," California Bar Journal (February 1999). (The article was published also as an MCLE Self-Study lesson.)
- (c) Author of the Judicial Perspective for the chapter on privilege in the CEB treatise on civil discovery. California Civil Discovery Practice, Privileges? (Cont. Ed. Of the Bar 3d ed.) Chapter 2.

- (d) Co-Author: Attorneys' Guide to the Law of Competitive Business Practices (1st ed. Cont.Ed.Bar 1981) "Availability of Preliminary Relief," Chapter 2.

Copies of the foregoing articles are being provided herewith as Exhibit 3 collectively.

While I have done a good deal of speaking on programs and panels involving substantive legal topics, e.g., alternate dispute resolution procedures, requirements of disclosure of neutral arbitrators, appellate procedures, etc., relating to the continuing legal education ("CLE") of the bar, I have made no speeches on issues involving constitutional law or legal policy.

I have also given voluntary time to participating in Law Day activities. My involvement has been to act as a trial judge, generally of the trial in "*Goldilocks v. The Three Bears*," in order to educate elementary school students on the operation of the legal system.

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

My health is excellent. My last physical was done in May 2003.

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

Judge, Los Angeles Superior Court (1994-2000). I was appointed to the court in 1994. The Los Angeles Superior Court is a court of general jurisdiction.

In 1995, I sat by assignment of the Chief Justice in the California Court of Appeal, Second District, Division 7.

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

(1)

- (a) *People v. DeJesus et al.*, (1995) 38 Cal.App.4th 1, Court of Appeal, Second District, Division 7. (A copy of this opinion is provided as Exhibit 4.)
- (b) *People v. Garland, et al.*, Case No. B070950, Court of Appeal, Second District, Division 7 (1995). (A copy of this opinion is provided as Exhibit 5.)
- (c) *People v. Williams, et al.*, Case No. B066142, Court of Appeal, Second District, Division 7 (1995). (A copy of the Opinion is provided as Exhibit 6.)
- (d) *Pro Value Properties v. John A. Christenson*, Case No. BV22198, Appellate Division, Superior Court (1999). (A copy of the Opinion is provided as Exhibit 7.)
- (e) *Richard Meaglia v. Tom Kelly, et al.*, Case No. BV22630, Appellate Division, Superior Court (2000). (A copy of the Opinion is provided as Exhibit 8.)
- (f) *Larry Morhar v. Mark S. Branner*, Case No. BV22589, Appellate Division, Superior Court (2000). (A copy of the Opinion is provided as Exhibit 9.)
- (g) *Alaska Petroleum Environmental Engineering, Inc. v. Mark Slotkin*, Case No. BV22317, Appellate Division, Superior Court (1999). (A copy of the Opinion is provided as Exhibit 10.)

- (h) *People v. Emma Rios Talavera*, Case No. BR40127, Appellate Division, Superior Court (2000). (A copy of the Opinion is provided as Exhibit 11.)
- (i) *People v. Armando Castaneda*, Case No. BR39622, Appellate Division, Superior Court (2000). (A copy of the Opinion is provided as Exhibit 12.)
- (j) *TIC, Inc. v. Il Byun*, Case No. BV22615, Appellate Division, Superior Court (2000). (A copy of the Opinion is provided as Exhibit 13.)

(2)

- (a) *People ex rel. Department of Transportation v. Southern California Edison Co.*, (2000) 22 Cal.4th 791. This was one of the most complex civil trials over which I presided while in a civil trial court. Indeed, the trial lasted about seven weeks and involved intricate issues of contract, eminent domain and inverse condemnation.

In the 1960's CALTRANS had built the 605 Freeway between the 10 and 210 Freeways. The land was undeveloped and was owned by Edison for use as a corridor to deliver power to Southern California. At the time the freeway was to be built, the parties entered into a contract providing for the use of the land as a freeway and that the land would be appraised and compensation paid, pursuant to certain limits, without unnecessary delay.

Over twenty-five years later, no appraisal had been done and no compensation paid. In the first phase of the trial, I concluded that CALTRANS had breached the agreement to provide compensation and the initial agreement was of no further force or effect. In the second phase, tried to a jury, Edison recovered approximately \$50 million for the property and severance damages. At that point, Edison invoked its right to interest pursuant to CCP § 1268.310 which would have amounted to approximately \$500 million.

I denied the statutory interest on the basis that eminent domain recovery is circumscribed by constitutional limitations of "just compensation." In addition, given the unique circumstances of the

case, including the execution of the original agreement, the equal bargaining and financial condition of the parties, the delay by Edison in asserting its rights, and the fact that Edison itself had the power of eminent domain as did CALTRANS, the purpose and policy behind the interest statute would be undermined by such an award. The case was, in fact, analogous to an inverse condemnation proceeding under which the award of interest is within the sound discretion of the court. Division 5 of the Court of Appeal, Second District unanimously affirmed my determination, and the California Supreme Court granted review on the interest issue.

The Court affirmed my rejection of the application of the interest statute. The Court did reverse on one very small matter. Since I had not used the statutory interest, which would have run from the taking 25 years earlier, I had permitted interest to run from the date of valuation in 1995. The Supreme Court concluded that the date should have been a year earlier, in 1994, based upon the date Edison requested that CALTRANS commence legal proceedings.

- (b) *The People v. Superior Court (Sholes)*, Case No.: B087468 (1995) (L.A.S.C. Case No. BA085281.) In this case, the defendant was charged with murder in an information filed in March 1994. In July 1994 The People amended the information after the preliminary hearing, to allege four prior convictions one of which was for second degree murder. A prior murder conviction constituted a "special circumstance." This meant the defendant now confronted the death penalty or life in prison without parole.

Inasmuch as the priors had not been charged during the course of the preliminary hearing, and since the defendant had a right to deal with those priors at the preliminary hearing, the People sought to remand the case to the Magistrate without setting aside the information pursuant to the provisions of California Penal Code Section 995a, subd. (b)(1). Under that section a minor error which is easily correctable is subject to a

limited hearing without the need to set aside the existing information.

An alternative available to the People would have been to dismiss the action and refile anew alleging the special circumstance. In such a case, there would be a new preliminary hearing which would have included a probable cause showing with respect to the alleged priors. The People declined to take that avenue.

Inasmuch as the People were relying on section 995(a), the Defendant on August 12, 1994 filed opposition to the remand and a motion to set aside the special circumstance allegation.

I concluded that, while the error, i.e., the failure to allege the specific circumstance, was readily correctable, the fact that the case was now a capital case with the possible imposition of the death penalty meant that the proposed change was not "minor" for purposes of implementing the streamlined procedure under section 995(a).

The Court of Appeal concluded that the term "minor" had an evidentiary meaning, i.e., whether the change was relatively unimportant balanced against the evidence required to hold the accused to answer. (There were two other issues which were raised by the parties for the first time on appeal. As to those claims, the Court denied the petition.)

Interestingly, the California Supreme Court denied Mr. Sholes' petition for review, but the Court directed that the Court of Appeal's decision not be published in the official reports. (A copy of the Court of Appeals decision is provided as Exhibit 14.)

- (c) **Artner v. Parker, Milliken, Clark, O'Hara & Samuelian**, Court of Appeal Case No. B104147. (L.A.S.C. Case No. BC082635.)

In this case, the plaintiff sued the defendant law firm for legal malpractice arising out of the defendants' representation of the plaintiffs in an action relating to alleged construction defects in

their home. On appeal, the plaintiff/appellant contended that it was error to allow the introduction of evidence relating to a method of repair considerably less expensive than that sought by plaintiffs because insufficient disclosure of that alternative repair method had been made during discovery.

Though I concluded the issue was not free from doubt, I determined that the conduct of the parties during the course of discovery, and especially the delay by the plaintiffs' experts in formulating and disclosing their theories of what had occurred and what the costs would be, made it appropriate for the defendants to introduce their evidence. I also concluded that the parties did have notice prior to trial of the defendants' theory of damages inasmuch as motions in limine had been made by the plaintiff to exclude them. I also concluded that the discovery conducted by the plaintiff had not specifically sought the type of information relating to the repairs testified to at trial. The appellate proceedings also involved a cross-appeal by the defendants from my denial of its motions for non-suit and for judgment notwithstanding the verdict.

As to the evidentiary issue, the Court of Appeal reversed my determination. In doing so it noted the lack of sufficient record citations given by appellants in their opening brief as required by the California Rules of Court. On the issue of disclosure, the Court of Appeal determined that the breadth of discovery was sufficient to embrace the theory of damages asserted by the defendants at trial, and consequently reversed with directions. The Court of Appeal affirmed my denial of the post-trial motions. (A copy of the Court of Appeals Opinion is provided as Exhibit 15.)

(3) There are no such cases.



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

Other than my judicial office, I have held no public offices.

17. Legal Career:

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

After graduation from law school in 1974, I began work as an associate in the Los Angeles office of the law firm of O'Melveny & Myers where I stayed until 1976. During my first year of practice, the firm required that new associates rotate through up to four departments. I rotated through litigation, labor, corporate and entertainment. During the second year, I settled in as a litigation associate with a focus on commercial litigation.

In 1976 I joined the law firm of Ervin, Cohen & Jessup where I remained until 1986. I started as an associate and in 1980, was made a partner in the firm. I was in the litigation department which focused principally upon unfair competition and unfair business practice claims. The firm represented both plaintiffs and defendants.

In 1986 I was hired as a partner in the law firm of Horvitz & Levy where I remained until I was appointed the bench in 1994. Horvitz & Levy, a law firm which practices exclusively in the appellate arena. Thus, between 1986 and 1994, my practice was devoted exclusively to appellate and appellate related matters.

In 1994 I was appointed to the Los Angeles Superior Court where I remained until the year 2000. Becoming a judge was a goal to which I had aspired since I was a child. Unfortunately, in 1994, my mother began developing the symptoms of Parkinson's Disease. Those symptoms progressed

until, by 1998, she required 24-hour care. By the year 2000, it was clear to me that the cost of that care combined with the expenses generated by the education of two young children would deplete our financial resources. As a result, I retired from the Superior Court bench.

Between my retirement from the Bench in 2000 and the present, I have practiced principally in the area of alternative dispute resolution, acting as a mediator, arbitrator, referee, and special master. I began working with a dispute resolution provider organization, Alternative Resolution Centers when I retired from the bench. Last November, I was solicited by and began also working with Action Dispute Resolution Services.

Since my retirement from the bench, I have been practicing law as well. I am Of Counsel to the Appellate Group of Reed Smith LLP. In that capacity, I have practiced exclusively in the area of appellate and appellate related matters.

At the beginning of 2003, my mother was diagnosed as having advanced lung cancer. As a result of the Parkinson's Disease, none of the treatment modalities for cancer could be implemented. She passed away at the end of March 2003. As a result of her passing, my financial situation changed significantly inasmuch as I had anticipated providing for her care for the next decade. As a result of that unexpected change in circumstances, I decided to again seek a judicial position.

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

I have not clerked for a judge.

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

I have not practiced alone.

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

(a)

08/00 to Pres. <u>Of Counsel</u>	Reed Smith LLP 355 S. Grand Avenue, Suite 2900 Los Angeles, California 90071-1514
08/00 to Pres. <u>Arbitration/Mediation</u> <u>Neutral</u>	Alternative Resolution Centers 11601 Wilshire Boulevard, Suite 1950 Los Angeles, California 90025 Tel.: (310) 312-6002
11/03 to Pres. <u>Arbitration/Mediation</u> <u>Neutral</u>	Action Dispute Resolution Services 1900 Avenue of the Stars, Suite 250 Los Angeles, California 90067
1994 to 07/00 <u>Judge</u>	Los Angeles Superior Court 111 North Hill Street Los Angeles, California 90012
03/86 to 02/94 <u>Partner</u>	Horvitz & Levy 15760 Ventura Boulevard, 18th Floor Encino, California 91436
09/76 to 02/86 <u>Partner</u>	Ervin, Cohen & Jessup 9401 Wilshire Boulevard, Ninth Floor Beverly Hills, California 90212
09/74 to 08/76 <u>Associate</u>	O'Melveny & Myers LLP 400 South Hope Street Los Angeles, California 90071

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

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

Between 1974 and 1986, I practiced in the area of commercial/business litigation. From 1976 to 1986 the focus of that litigation was in the area of unfair competition and unfair business practices. Typical clients during that period were medium to large businesses, and, as indicated, we represented those businesses both as plaintiffs and defendants.

From 1986 to 1994, my practice was exclusively focused on civil appellate proceedings. Again, my representation included insurance carriers, and medium to large businesses. My clients were both appellants and respondents depending on the appeal.

In 1995, I sat in the Court of Appeal by assignment.

From 1994 to 2000, I was a bench officer in the Los Angeles County Superior Court. My assignments included a criminal trial court, a long cause court, an independent calendaring court, and the appellate division of the Superior Court. During 1999 and 2000, I was appointed by the Chief Justice of California as the Presiding Judge of the appellate division.

From 2000 to the present, I have focused principally on alternative dispute resolution proceedings and the practice of civil appellate law.

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

Between 1974 and 1986 I appeared frequently in the trial courts. Cases involving unfair competition and unfair business practices

often involve significant court appearances at the outset because provisional relief is often at issue. I would estimate that 75% of those appearances were in the California State courts and approximately 25% in the Federal courts.

Between 1986 and 1994, my court appearances were principally at the appellate level. Approximately 75% of those appearances were in the California Court of Appeal and approximately 25% in the United States Court of Appeals, Ninth Circuit.

Obviously, between 1994 and 2000, I was, as a judge in court every day. I have presided over hundreds of criminal and civil trials and reviewed hundreds of records of trials as an appellate judge.

Since my retirement from the bench in 2000, my court appearances have been strictly in the Court of Appeal. However, most of my work has been outside of the courts through various dispute resolution proceedings.

With respect to trials, virtually all of the cases in which I was involved as a commercial litigator were either settled, or, since I was a relatively new lawyer, tried by more senior counsel in my firm. However, as indicated, as a judge I have presided over hundreds of criminal and civil trials, including very complex civil cases. Moreover, as an appellate judge and practitioner, I have reviewed hundreds more trials and assessed their propriety.

2. What percentage of these appearances was in:

- (a) federal courts;
- (b) state courts of record;
- (c) other courts.

From 1974 to 1986, 75% of my appearances were in state courts and 25% in Federal Courts.

From 1986 to 1994, 75% of my appearances were in the State Supreme Court and Court of Appeal, and 25% of my appearances were in the United States Court of Appeals, Ninth Circuit.

From 1994 to 2000, all of my time was spent on the Los Angeles Superior Court bench.

From 2000 to the present, 65% of my professional time has been devoted to alternative dispute resolution. The balance of my time has been devoted to appellate advocacy. Of that time, 75% has been in the California Court of Appeal, and 25% in the United States Court of Appeals, Ninth Circuit.

3. What percentage of your litigation was:

- (a) civil;
- (b) criminal.

As an advocate, all of my litigation was civil. As a trial and appellate bench officer, I presided over or reviewed hundreds of criminal and civil trials and proceedings.

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

5. What percentage of these trials was:

(a) jury;

(b) non-jury.

During the time I handled commercial litigation from my graduation from law school in 1974 until 1986, I did not try any cases to verdict for two reasons. First, during that period, almost all of the cases were settled prior to trial, and, second, with respect to the few that did not settle, I was the junior lawyer in the firm on the file, and, therefore, did not try the cases.

Beginning in 1986, my practice was devoted exclusively to appellate matters. I have handled many appeals through to ultimate determination.

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

(a) the date of representation;

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

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *Hartford Fire Insurance Company, Plaintiff and Respondent v. Irene Macri, Defendant and Appellant; California Supreme Court, 4 Cal.4th 318 (1992)*

Court:

Judges: Chief Justice Lucas, Justices Mosk, Kennard, Arabian, Baxter and George.

Other Counsel:

- a. John A Luetto, Esq.  
Helen M. Luetto, Esq.  
615 Civic Center Drive, Suite 300  
Santa Ana, California 92701  
Tel.: (714)558-9000  
Fax: (714)558-0152
- b. James T. Linford, Esq.  
Post Office Box 210598  
San Francisco, California 94121  
Tel.: (415)831-8761  
Fax: (415)831-8762
- c. Jean M. Lawler, Esq.  
Bryan M. Weiss, Esq.  
Murchison & Cumming  
801 S. Grand Avenue, 9th Floor  
Los Angeles, California 90017  
Tel.: (213)623-7400

Discussion:

I was retained to file an Amicus Curiae brief in the California Supreme Court on behalf of the insurance carrier in this case, which involved a determination of a novel question relating to uninsured motorist laws in California. The question was whether Insurance Code Section 11580.2 requiring an insured to obtain the written consent of the insurer before the insured made any settlement against an uninsured motorist also



applied in an underinsured motorist situation. The Supreme Court held against the carrier. However, in a concurring opinion, Justice Penelli noted that unfair results occurred by treating the uninsured and underinsured situations differently. In his opinion, Justice Penelli adopted almost verbatim the arguments I had asserted and even relied upon an example I had urged at oral argument.

2. *Ralph S. Slottow, et al., Plaintiffs, Counter-defendants and Appellees v. American Casualty Company of Reading Pennsylvania, et al., Defendants, Counter-claimants, and Appellants; United States Court of Appeals for the Ninth Circuit, 1 F3d 912 (1993)*

Court:

Judges: Kozinski, Browning and Hug

Other Counsel:

- a. Christina J. Imre, Esq.  
Sedgwick, Detert, Moran & Arnold  
801 S. Figueroa St. 18th Fl.  
Los Angeles, Calif.  
Tel.: (213) 615-8049
- b. Hon. Dennis M. Perluss  
Presiding Justice  
California Court of Appeal  
Second District, Div. 7  
300 South Spring Street  
Los Angeles, California 90013  
Tel.: (213) 830-7000  
(Justice Perluss was opposing  
counsel at the time of the appeal.)

Discussion:

This case arose out of a dispute over coverage under a directors and officers policy. The principal issue raised was the availability of punitive damages when a carrier contests coverage under a policy insuring a large financial institution.

There were additional issues relating to attorneys fees for a prevailing party and to allocation of settlement responsibility for purposes of maximizing liability on the D&O carrier. This, in turn, raised issues concerning the propriety of a finding of good faith settlement between a, defalcating bank director and the insured bank.

The Ninth Circuit held in our favor for the carrier and reversed the findings of bad faith and punitive damages, reversed the award of attorney's fees to the insured bank and concluded the settlement was not in good faith.

3. *Virginia E. Hyland, Plaintiff and Appellant v. Hughes Aircraft Company, et al., Defendants and Respondents*  
California Supreme Court Case No. S078408,  
Court of Appeal, Second Appellate District;  
Division Seven Case No. B120575 (2002)

The Court:

Justices Lillie (now deceased), Johnson and Woods

Other Counsel:

- a. Alfredo X. Jarrin, Esq.  
Hughes Electronics Corp.  
200 N. Sepulveda Boulevard  
El Segundo, California 90247  
Tel.: (310) 364-6000
- b. Rick Richmond, Esq.  
Kirkland & Ellis  
777 South Figueroa Street  
Suite 3700  
Los Angeles, California 90017  
Tel.: (213) 680-8400

c. Rafael Chodos, Esq.  
 Law Offices of Rafael Chodos  
 21800 Oxnard Street, Suite #840  
 Woodland Hills, CA 91367  
 Tel.: (818) 716-3084

Discussion:

In this case, I was retained to file a petition for rehearing in the Court of Appeal and petition for review in the California Supreme Court on behalf of Hughes Aircraft Company. The case involved a claim that Hughes had failed to pay the plaintiff's deceased father amounts due under a contract he allegedly had with Hughes Aircraft. Hughes had raised a statute of limitations defense, and contended that a significant delay in bringing the action after the decedent's passing violated the six month statute of limitations under the Probate Code. The trial court bifurcated the statute of limitations issued for initial trial and, after that trial, held that the action was barred by the statute of limitations.

The Court of Appeal reversed and held that due to belated discovery of the cause of action, the statute of limitations did not bar the action. However, the Court of Appeal also went on to conclude, *sua sponte*, that any additional evidence in the trial on the merits would be cumulative and, therefore, not only reversed the statute of limitations determination but remanded the case to enter judgment for plaintiff on the merits.

Hughes, which had not had an opportunity to try the case, retained me to seek rehearing in the Court of Appeal which was denied. We then filed for review in the California Supreme Court which denied review.

4. *Paramount Developers & Contractors Inc., etc.  
Appellant and Cross-Respondent, vs. M.B.  
Administrative Services and Manufacturers  
Bank, Respondents and Cross-Appellant  
California Court of Appeal  
Second Appellate District, Div. 2  
Case No. B155076*

The Court:

Justices: Nott, Boren and Ashmann-Gerst

Other Counsel:

- a. Philip W. Bartenetti, Esq.  
Clark & Trevithick  
800 Wilshire Boulevard, 12th Floor  
Los Angeles, California 90017-2604  
Tel.: (310) 473-7000  
Fax: (310) 473-1730
- b. Robin Meadow, Esq.  
Greines, Martin, Stein & Richland LLP  
5700 Wilshire Boulevard, Suite 375  
Los Angeles, California 90036  
Tel.: (310) 859-7811

Discussion:

I was retained by the Respondents/Cross-appellant, M.B. Administrative Services and Manufacturers Bank to handle an appeal. The issues involved complex questions relating to remedies for an anticipatory repudiation of a commercial lease.

My clients were the lessees of space under a lease created twenty years ago. The space was built out as a bank branch. In the late 1990's, bank regulators determined that many banks had spread themselves too thin and ordered branches be closed. As a result, my clients closed the branch and sought to negotiate a "buy out" of the remaining term or find a sublessee pursuant to lease provisions authorizing a sublease.

The landlord peremptorily rejected a proposed lessee in 1998, and the Bank treated that act as an anticipatory repudiation of the landlord's duty under the lease. As a result, the Bank deducted the rent the sublessee would have paid from and after January 1999 from the monthly lease payments.

The trial judge concluded the Bank acted properly and that it was entitled to attorney's fees. I briefed and argued the case, and, in an opinion filed on February 5, 2004, the Court of Appeal affirmed the judgment in favor of my clients.

5. *Sargon Enterprises, Inc., Plaintiff-Appellant and Petitioner, vs. Terry Donovan, et al., Defendants and Respondents*  
*California Court of Appeal*  
*Second Appellate District; Division One*  
*Case Nos. B156587, B159736 and B157167*

The Court:

Justices: Ortega, Vogel and Mallano

Other Counsel:

Jay S. Bloom, Esq.  
 16133 Ventura Boulevard, Suite 700  
 Encino, California 91436  
 Tel.: (818) 995-9111  
 Fax: (818) 995-9177

Discussion:

This case arose out of a clinical trial conducted by the University of Southern California Dental School relating to an allegedly novel implant created by Sargon Enterprises. Sargon, unhappy with how the clinical trials were being conducted and the result thereof, has filed a series of lawsuits seeking to collect millions of dollars in alleged damages.

In this case, I represented the University of Southern California and several doctors concerning claims for breach of contract, intentional interference with perspective advantage, trade disparagement and unfair trade practices. I represented the defendants on appeal. The defendants had prevailed on various motions for summary judgments and summary adjudication. Sargon appealed, and the Court of Appeal affirmed the trial court's ruling.

6. *Kenneth Schapiro, Plaintiff, Respondent, Cross-Appellant, Appellant, and Cross-Respondent, vs. Morgan Creek Productions, Inc., et al.,*  
California Court of Appeal  
Second Appellate District; Division Two  
Case No. B164011

The Court:

Justices: The Honorable David Minning (Superior Court Judge), the matter is still in the briefing process on appeal.

Other counsel:

- a. Mr. Howard Kaplan  
Morgan Creek Productions  
4000 Warner Boulevard  
Building 76  
Burbank, California 91522  
Tel.: (818)954-2011
- b. Bert H. Deixler, Esq.  
Jennifer M. Wade, Esq.  
Proskauer Rose LLP  
2049 Century Park East, Suite 3200  
Los Angeles, California 90067

Discussion:

This case involves a claim by a former vice president of Morgan Creek Productions that when he left the company, his termination bonus of \$500,000 was not paid and that he was defrauded by Morgan Creek and Morgan Creek representatives. At trial, the jury awarded plaintiff the \$500,000 termination bonus amount and also a \$500,000 amount relating to fraud. The fraud award carried with it punitive damages in an amount of approximately \$400,000.

I was retained at the trial level to handle the post-trial motions and appeal on behalf of Morgan Creek. The trial court granted my motion for judgment notwithstanding the verdict based upon a finding that the fraud and contract awards were duplicative, that the evidence at trial did not support a fraud verdict and that therefore the punitive damage award could not be assessed.

The matter is currently on appeal, and the briefing should be completed within the next two months.

7. *Nancey Silvers, Plaintiff and Appellee, vs. Sony Pictures Entertainment Inc., Defendant and Appellant, 330 F.3d 1204 (2003), United States Court of Appeals for the Ninth Circuit; Case No. 01-56069*

Judges: Hug, Brunetti and O'Scannlain

Other counsel:

- a. David DeJute, Esq.  
Senior Counsel  
Sony Pictures Entertainment Inc.  
10202 W. Washington Blvd.  
Culver City, CA 90232  
Tel.: (310)280-8079  
Fax: (310)280-1557

b. Steven Glaser, Esq.  
 Gelfand Rappaport & Glaser, LLP  
 11111 Santa Monica Boulevard, Suite 1000  
 Los Angeles, California 90067  
 Tel.: (310) 477-7446  
 Fax: (310) 473-0906

Discussion:

This case presents a novel issue relating to the standing requirements to bring an action for copyright infringement. The plaintiff in the case is the author of a made for television movie. However, she authored the movie as a "work for hire" which meant that her employer owned the copyright. Our client, Sony Pictures Entertainment, released a film which the plaintiff contended violated the copyright in the film she wrote.

Plaintiff's employer refused to bring the infringement action, but, instead, assigned to plaintiff the cause of action without an assignment of any interest in the copyright itself.

A motion to dismiss for lack of standing was filed in the trial court. The motion was premised upon the fact that the plaintiff had no interest in the copyright, which is generally a prerequisite to an infringement action. The motion was denied, but the trial court certified the issue for interlocutory appeal and the Ninth Circuit accepted the appeal.

I briefed and argued the issue in the Ninth Circuit. The appellate court affirmed the determination of the trial court. We have filed a petition for rehearing *en banc* which is still pending.



8. Cedars-Sinai v. Superior Court (Henderson),  
Case No. B036208, California Court of Appeal,  
Second Appellate District, Division 5  
Published opinion at 206 Cal.App.3d 414  
(1988).

Court:

Justices: Ashby, Boren and Kennard.

Other Counsel:

- a. Linda Miller Savitt, Esq.  
Ballard, Rosenberg, Golper & Savitt LLP  
10 Universal City Plaza 16th Floor  
Universal City, California 91608-1097  
Tel.: (818) 508-3700
- b. Jean Corey Ballantine, Esq.  
12228 Venice Boulevard, Suite 152  
Los Angeles, California 90066  
Tel.: (310) 398-5462  
Fax: (310) 398-1956

Discussion:

This case involved our filing a writ petition challenging the trial court's failure to grant summary judgment in favor of our client in a malicious prosecution action.

The Court of Appeal granted a peremptory writ in the first instance in a published opinion clarifying the concept of initiation of an action for purposes of a malicious prosecution.

9. *Binder v. Superior Court (Neufeld)*, Case No. F007643. Published opinion at 196 Cal.App.3d 893 (1987).

Court:  
Fifth Appellate District

Justices: Hamlin, Best and Ivey

Other Counsel:

- a. John A. Jurich, Esq.  
Patterson, Ritner, Lockwood, Zanghi  
and Gartner  
5000 California Avenue, Suite 202  
Bakersfield, California 93309-0651  
Tel.: (805) 327-4387  
Fax: (805) 327-9041
- b. Jon C. Hall, Esq.  
Klein, Wegis & Dugan (now known as,  
Klein, Wegis, Denatale, Hall, Goldner  
& Muir)  
4550 California Avenue  
2nd Floor (Box 1172)  
Bakersfield, California 93389-1172  
Tel.: (805) 395-1000

Discussion: In this case, we represented the defendant in a medical malpractice action. The case went to the Court of Appeal on our petition for a writ of mandate to overturn a trial court order compelling discovery of photographs maintained by the defendant doctor of each of his patient's skin disorders. The Court of Appeal agreed with our contention that the discovery order compelling production of pictures of numerous patients was not relevant to the subject matter of the action and was an invasion of the nonparty patients' rights of privacy and issued the writ.

10. *Boeckmann Charitable Foundation v. United Cable TV, Case No. 8037652.*

Court:  
Second Appellate District, Division Five

Justices: Lucas, Boren and Ashby

Other Counsel:

- a. Gary L. Barr, Esq.  
Alpert & Barr  
6345 Balboa Boulevard, Suite 300  
Encino, California 91316-1560  
Tel.: (818) 881-5000  
Fax: (818) 881-1150
- b. Alan J. Skobin, General Counsel  
Galpin Motors, Inc.  
15505 Roscoe Boulevard  
Sepulveda, California 91343  
Tel.: (818) 787-3800
- c. Peter Ostroff, Esq.  
Sidley & Austin  
555 W. 5th Street, 40th Floor  
Los Angeles, California 90013-1010  
Tel.: (213) 896-6612

Discussion:

We represented the plaintiff seeking contract and fraud damages arising out of an agreement requiring the defendant to make donations to a charity in return for the plaintiff's efforts to obtain a cable franchise for the defendant. The defendant obtained a summary adjudication that the contract claim could not stand because the plaintiff had not registered as a lobbyist pursuant to provisions of the Los Angeles Municipal Code. We filed a petition for writ of mandate from that ruling contending that there were equitable defense to the claim that the plaintiff had violated the Municipal Code. The Court of Appeal issued a peremptory writ of mandate in the first instance in which it

agreed with our position and reversed the summary adjudication.

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

1. Ashland v. Grant, Genovese & Baratta, et al.

- a. Ralph F. Hirschmann, Esq.  
Bernard C. Barmann, Jr., Esq.  
Eric L. Compere, Esq.  
Law Offices of Ralph F. Hirschmann  
707 Wilshire Boulevard, Suite 4910  
Los Angeles, California 90017  
Tel.: (213) 891-1700  
Fax: (213) 891-1556
- b. Gregory H. Halliday, Esq.  
Charles N. Hargraves, Esq.  
Guy J. Gorlick, Esq.  
Sedgwick, Detert, Moran & Arnold LLP  
3 Park Plaza, 17<sup>th</sup> Floor  
Irvine, California 92614-8540  
Tel.: (949) 852-8200  
Fax: (949) 852-8282
- c. David C. Grant, Esq.  
Grant, Genovese & Baratta, LLP  
2030 Main Street  
Suite 1600  
Irvine, California 92614

Discussion:

This is an arbitration in which I am one of the panel of three arbitrators. The case involves massive claims of legal malpractice relating to alleged securities issues in the ouster of the plaintiff from control of a company.

2. **Bronwood LLC v. Tahoe Reno Utility Services, Co., et al.**

- a. Kris P. Thompson, Esq.  
Thompson & Alessio  
2550 Fifth Avenue, Suite 518  
San Diego, California 92103  
Tel.: (619) 233-9100  
Fax: (619) 233-9400
- b. Pierce H. O'Donnell, Esq.  
O'Donnell & Shaeffer  
550 S. Hope Street, Suite 2000  
Los Angeles, California 90071-2627  
Tel.: (213) 532-2000  
Fax: (213) 532-2020

Discussion:

This was a mediation I conducted involving complex issues relating to the provision of power a real estate development.

3. **Dent Wizard International Corp. v. Dent-Ology, et al.**

- a. Elissa D. Miller, Esq.  
Sulmeyer, Kupetz, Baumann & Rothman  
300 South Grand Avenue, 14th Floor  
Los Angeles, California 90071  
Tel.: (213) 626-2311  
Fax: (213) 629-4520
- b. Ira Gutt, Esq.  
Behar, Gutt & Glazer, P.A.  
2999 North East 191st Street, Suite 500  
Miami, Florida 33180  
Tel.: (305) 931-3771  
Fax: (305) 931-3774
- c. John H. L'Estrange, Jr., Esq.  
Joseph T. Ergastolo, Esq.  
Wright & L'Estrange  
701 B Street, Suite 1550  
San Diego, California 92101  
Tel.: (619) 231-4844  
Fax: (619) 231-6710

- d. Janet Sobel, Esq.  
Post Office Box 261114  
San Diego, California 92196  
Tel.: (858) 578-5577  
Fax: (858) 578-0764

Discussion:

This is a case in which I am currently a discovery referee. The case has involves significant claims of unfair competition trade secret in the automotive repair industry.

4. In re the Matter of the Mark Hughes Family Trust

- a. Dan M. Forman, Esq.  
Manatt, Phelps & Phillips, LLP  
11355 West Olympic Boulevard  
Los Angeles, CA 90064  
Tel.: (310) 312-4000  
Fax: (310)-312-3789
- b. Don Mike Anthony, Esq.  
Hahn & Hahn  
301 E. Colorado Boulevard, 9th Floor  
Pasadena, CA 91101-1977  
Tel.: (626) 796-9123  
Fax: (626) 449-7357
- c. Conrad Lee Klein, Esq.  
10100 Santa Monica Boulevard  
Suite 800  
Los Angeles, CA 90067  
Tel.: (310) 203-2387  
Fax: (310) 557-3939
- d. Adam F. Streisand, Esq.  
Loeb & Loeb, LLP  
10100 Santa Monica Boulevard, Suite 2200  
Los Angeles, CA 90067  
Tel.: (310) 282-2000  
Fax: (310) 282-2200

- e. Lynard C. Hinojosa, Esq.  
Hinojosa, Khougaz & Wallet  
2215 Colby Avenue  
Los Angeles, CA 90064-1504  
Tel.: (310) 473-7000  
Fax: (310) 473-1730
- f. Marcus A. Torrano, Esq.  
Morrison & Foerster LLP  
555 W. 5th St, Suite 3500  
Los Angeles, CA 90013-1024  
Tel.: (213) 892-5200  
Fax: (213) 892-5454

Discussion:

This was a significant case arising out of the death of Mark Hughes who founded the Herbalife Company. There were numerous litigation matters arising out of that death; this one involved a claim by Mr. Hughes' former wife and mother of his son relating to alleged corporate defalcations and mismanagement of the family trust.

- 5. **Dr. Warren Grundfest v. Cedars Sinai Medical Center**
  - a. Richard A. Love, Esq.  
Law Offices of Richard A. Love  
11601 Wilshire Boulevard, Suite 2000  
Los Angeles, California 90025-1756  
Tel.: (310)477-2070  
Fax: (310)477-3922
  - b. Scott L. Gilmore, Esq.  
Raymond W. Thomas, Esq.  
Suzanne J. Holland, Esq.  
Hill, Farrer & Burrill LLP  
One California Plaza, 37th Floor  
300 South Grand Avenue  
Los Angeles, California 90071-3147  
Tel.: (213)620-0460

Discussion:

I was a mediator in this case involving claims by the plaintiff that he had been wrongfully terminated.

6. Homestore v. About.com

- a. Edward Gartenberg, Esq.  
Thelen Reid & Priest  
333 S. Grand Avenue, Suite 3400  
Los Angeles, California 90071  
Tel.: (213) 621-9800  
Fax: (213) 623-4742
- b. Eve Triffo, Esq.  
Hennelly & Grossfeld LLP  
17383 Sunset Boulevard, Suite 420  
Pacific Palisades, California 90272  
Tel.: (310) 573-7800  
Fax: (310) 573-7806

Discussion:

This was an action which I mediated involving breach of contract claims concerning a contract whereby the plaintiff alleged it was to have a certain level of advertising on the internet.

7. Walter Neubauer v. Andrew Goldfarb, et al.

- a. Dale F. Kinsella, Esq.  
Michael J. Kump, Esq.  
Matthew N. Falley, Esq.  
Greenberg Glusker Fields Claman  
Machtiger & Kinsella LLP  
1900 Avenue of the Stars, 21<sup>st</sup> Floor  
Los Angeles, California 90067-4590  
Tel.: (310) 553-3610  
Fax: (310) 553-0687
- b. Phillip L. Bosl, Esq.  
William E. Thomson  
Gibson, Dunn & Crutcher LLP  
333 South Grand Avenue  
Los Angeles, California 90071  
Tel.: (213) 229-7000



Discussion:

This is a case in which I acted as a mediator involving sophisticated securities and contract issues. In essence, the plaintiff contended that he was induced by fraud to convey shares in a corporation, in which he was a minority shareholder, for a small fraction of what the remaining shareholders received for their shares. The case involves issues relating to the viability of certain option agreements, duties of shareholders under Delaware law, issues of reliance, and issues relating to the measure of damages.

8. **Tristar Risk Management v. Meridian Insurance Company, LTD**

- a. Richard S. Conn, Esq.  
Musick, Peeler & Garrett LLP  
One Wilshire Boulevard, Suite 2000  
Los Angeles, California 90017-3383  
Tel.: (213) 629-7600  
Fax: (213) 624-1376
- b. Michael Blumenfeld, Esq.  
Todd M. Lander, Esq.  
Freeman, Freeman & Smiley, LLP  
3415 Sepulveda Boulevard, Suite 1200  
Los Angeles, California 90034-6060  
Tel.: (310) 255-6100  
Fax: (310) 391-4042
- c. Scott Lichtig, Esq.  
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Lewis, Brisbois, Bisgaard & Smith LLP  
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Los Angeles, California 90012  
Tel.: (213) 250-1800  
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Discussion:

This is an action I mediated which contained highly complex claims relating to the handling of workers' compensation insurance provided by the employer via the mechanism of

offshore entities. There were numerous contracts and coverage disputes alleged in the mediation.

9. **Union Pacific Railroad Company v. Los Angeles County Metropolitan Transportation Authority, et al.**

- a. Rickey Ivie, Esq.  
Eulanda L. Matthews, Esq.  
James A. Busalacchi, Jr., Esq.  
Ivie, McNeill & Wyatt  
201 N. Figueroa Street, 11<sup>th</sup> Floor  
Los Angeles, California 90012  
Tel.: (213) 482-8890
- b. William H. Pohle, Jr., Esq.  
Union Pacific Railroad Company  
Law Department  
10031 Foothills Boulevard, Suite 200  
Roseville, California 95747-7101  
Tel.: (916) 789-6400  
Fax: (916) 789-6227
- c. Hon. Robert L. Roberson, Jr.  
Judge of the Superior Court, Ret.  
495 West Loma Alta Drive  
Altadena, California 91001  
Tel.: (626) 398-9489  
Fax: (626) 794-8742
- d. John Corrigan, Esq.  
538 Torwood Court  
Los Altos, California 94022  
Tel.: (650) 948-2676  
Fax: (650) 948-2676

Discussion:

In this case, I was the neutral arbitrator on a three arbitrator panel. The case involved complex claims of indemnity between the Union Pacific Railroad Company and Los Angeles County Metropolitan Transit Authority arising out of the death of a pedestrian on the Union Pacific tracks.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

Commencing in 2013, I will be eligible to begin receiving my retirement benefits relating to my service as a Los Angeles Superior Court Judge. I believe, as of now, the amount I will receive will be approximately 13% of whatever a Los Angeles Superior Court Judge is earning at that time.

I have no other arrangement for any deferred or future income, stock, options, uncompleted contracts or other future benefits.

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

I do not now anticipate any particular areas which will create the threat of any conflicts of interest during my initial service. I will comply fully with the Code of Judicial Conduct.

I will, of course, be carefully reviewing my investments and financial portfolio to ensure that I avoid any potential conflicts with respect to parties appearing before me. I will also maintain a list of all clients and a list of all parties and attorneys who have appeared before me in alternate dispute resolution capacities in order to permit me to take appropriate steps to recuse or disclose any such relationships should they be pertinent to any matter coming before me.

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

I have always enjoyed teaching, and I anticipate that I might seek to lecture or teach at the law school level at some point in the future. I have no specific plans at this juncture.

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

I am providing herewith a copy of the financial disclosure report as Exhibit 16.

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

The schedule has been completed.

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

I have never held such a position or role in a political campaign.

## FINANCIAL STATEMENT

## NET WORTH

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

ASSETS		LIABILITIES	
Cash on hand and in banks	\$218,589.73	Notes payable to banks-secured	none
U.S. Government securities-add schedule	\$97,262.70	Notes payable to banks-unsecured	\$50,000.00
Listed securities-add schedule	\$114,162.88	Notes payable to relatives	none
Unlisted securities-add schedule	none	Notes payable to others	none
Accounts and notes receivable:	none	Accounts and bills due	none
Due from relatives and friends	none	Unpaid income tax	none
Due from others	none	Other unpaid income and interest	none
Doubtful	none	Real estate mortgages payable-add schedule	\$826,000.00
Real estate owned-add schedule	\$1,100,000.00	Chattel mortgages and other liens payable	none
Real estate mortgages receivable	none	Other debts-itemize:	
Autos and other personal property	\$49,000.00	Unsecured credit card debt	\$60,000.00
Cash value-life insurance	\$19,000.00		
Other assets itemize:			
Reed Smith Profit Sharing	\$36,557.48		
CNB IRA	\$170,294.63		
MOOLA Partnership Interest	\$7,330.45		
ING IRA Account	\$123,211.85	Total liabilities	\$936,000
Household Items	\$250,000.00	Net Worth	\$1,249,409.72
Total Assets	\$2,185,409.72	Total liabilities and net worth	\$2,185,409.72

CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	none	Are any assets pledged? (Add schedule)	none
On leases or contracts	none	Are you defendant in any suits or legal actions?	no
Legal Claims	none	Have you ever taken bankruptcy?	no
Provision for Federal Income Tax	none		
Other special debt	none		

## SCHEDULES RE: FINANCIAL STATEMENT

REAL PROPERTY:

The only real property I own is our residence.

At this time, there is a first trust deed on the property of approximately \$700,000 in favor of City National Bank and a second trust deed of approximately \$126,000 in favor of CIT Group.

Listed Securities:

Intel Corp.	\$18,770.00
Microsoft Corp.	\$21,896.00
Amer. Elec. Power Co.	\$10,068.30
BF Goodrich Co.	\$ 9,034.08
Dominion Resources Inc.	\$ 8,383.00
L.A. Cy. Public Works Bds.	\$21,099.00
Ca. St. Various Purpose GO	\$24,912.50

U.S. Government Issues:

Fed. Natl MTG Assoc.	\$43,075.20
Fed. Home Ln. Bk. Cons. Bonds	\$32,137.50
Fed Home Ln. Bks. Cons. Bd.	\$22,050.00

IRA Account:

The listed IRA account consists solely of long and short term funds. There is no listing of individual issues. Please see attached Ethics in Government Act financial statement.

## III. GENERAL (PUBLIC)

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

Every year the California mock trial competition is sponsored by the Constitutional Rights Foundation of California and co-sponsored by the California Department of Education, State Bar of California and the California Young Lawyers Association. The program is a competition among high schools in various California counties, including Los Angeles, in which the students are given a factual pattern and compete in mock trial situations.

In the competition, each school has two teams (one to try each side of the case) the students must prepare an opening statement, direct examination, cross-examination and closing argument. The students also act as witnesses in the case. Moreover, each year the factual pattern includes an issue of constitutional significance which is the subject of a pretrial motion to admit or exclude certain evidence. The students are expected to prepare to argue either side of the motion and to know the applicable cases (which are provided in the case materials) and how to apply them.

For approximately 11 years, I have been one of the coaches for James Monroe High School located in the Northridge area of the San Fernando Valley. The school has a government Magnet program allowing the students to study various areas of Government, including law. The demographics of the student population of the school are principally Hispanic and African American. I estimate that each year my coaching responsibilities occupy about 75-100 hours of pro bono time.

My work with the mock trial team at Monroe High School has been very personally rewarding to me. I have been very pleased to work with the new groups of students each year and to establish contacts with the ongoing participants. As a result of my ongoing work with the Monroe High School

Magnet Program, I was asked to and did deliver the commencement address at the graduation ceremonies several years ago, and I had the extreme pleasure of administering the oath to the first attorney who graduated from that program. I think I was more excited than she when I administered the oath to admit her to the Bar.

In addition to the work with Monroe High School, I believe that my work as Deputy General Counsel to the Rampart Independent Review Panel also was of assistance to the disadvantaged. The Review Panel was, in part, charged with analyzing and assessing the relationship of the Los Angeles Police Department with the members of minority communities existing throughout the city. I believe that the Review Committee generated proposals which would go a long way to enhancing relations between law enforcement and the minority communities. My work on that committee was during the year 2000-2001, and probably involved 100-150 hours of pro bono time.

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

The only organization that I have ever belonged to which discriminated on the basis of gender was my fraternity in college. At Stanford, I was a member of the Kappa Sigma Fraternity, which, of course, did not admit women. I was a member between 1967 and 1970.

To my knowledge, no other organization of which I have been a member has discriminated on the basis of race, sex or religion.

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



from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

I was interviewed by a bipartisan commission in California, the Judicial Advisory Committee for the Central District, in connection with my application for appointment to the Federal Bench. I appeared before that Committee on December 18, 2003.

My experience in the selection process was as follows:

- (a) I filed my application with the Judicial Advisory Committee on November 26, 2003. During the morning of December 18, 2003, I was interviewed by the bipartisan committee.
- (b) On January 22, 2003, I was interviewed by Gerald Parsky, the California Advisor to the President, and Eric M. George, an attorney, former counsel to the Senate Judiciary Committee and son of the Chief Justice of California. On December 30, 2003, I traveled to the White House where I was interviewed by two members of the Office of White House Counsel and an attorney from the U.S. Department of Justice.
- (c) A few days later, I was informed that the President would send my name to the Federal Bureau of Investigation for a background check upon completion of documents. A background check was also conducted at the same time by the Department of Justice.
- (d) On January 20, 2004, I was informed that the President had nominated me for the District Court for the Central District of California and had sent the nomination to the Senate.

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

I have had no such discussion and no one has, directly or indirectly, asked how I would rule on any issue that might come before me on the District Court.

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

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

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

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I take to heart the goal of the framers of our Constitution that the branches of government should be co-equal and that each should have certain powers that allow for a system of checks and balances among the branches. When a branch intrudes upon the powers reserved to the other branches, it undermines the constitutional framework under which this country operates.

Accordingly, the goal of District Court judge is to fairly and even-handedly apply the law to the parties properly before the court and resolve the

existing disputes. That resolution must be made based upon the law, and not upon the proclivities of the judge applying the law.

Senator GRAHAM. Welcome. Welcome to you all. Thank you.  
Mr. GOMEZ.

**STATEMENT OF CURTIS V. GOMEZ, A NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT COURT OF THE VIRGIN ISLANDS**

Mr. GOMEZ. Good morning, and thank you, Mr. Chairman.

I also do not have an opening statement, but I would like to introduce some family and friends who are here.

I would like to start with my wife, Simone Francis, who has traveled from St. Thomas; her aunt, my aunt-in-law, Betty Dawson and her husband, Eric Dawson, who live in the Virginia area; my friends who I practiced with in the Eastern District of Virginia, Morris Parker and Rebecca Bellows, who are still at the Eastern District of Virginia, U.S. Attorneys Office. I see my friends from many years ago who are also in the D.C. metro area, Maria Wallace and Dean Wallace. I hope I didn't miss anyone.

Also, Mr. Chairman, I would like to thank my Delegate, who I understand was in the middle of conducting a health forum in the Virgin Islands and came up just for this. I truly appreciate her doing that. I appreciate the opportunity to be here.

[The biographical information of Mr. Gomez follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Curtis Vincent Gomez

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

Residence: St. Thomas, VI.

Office: U.S. Attorney's Office, Ron De Lugo Federal Building and U.S. Courthouse, 5500 Veterans Drive, St. Thomas, VI 00802.

3. Date and place of birth.

March 26, 1963, St. Croix, VI

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

Simone Francis; Lawyer: Ogletree, Deakins, Nash, Smoak & Stewart, LLC, The Tunick Building, 1336 Beltjen Road, Suite 202, St. Thomas, VI 00802.

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

Harvard University Law School; September 1986-June 1989; JD;  
George Washington University; September 1983-August, 1984; BA;  
Dickinson College; September 1981-June 1983; Transfer/no degree.

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

Intern/Law Clerk: Landis, Cohen, Rauh & Zelenko: 4-85 to 11-85.

Personnel Management Specialist: U.S. Department of Agriculture: 11-85 to 8-86

Summer Associate: Spiegel & McDiarmid: Summer, 1987.

Summer Associate: Patton, Boggs & Blow: Summer, 1988.

Associate: Patton, Boggs & Blow: 9-89 to 9-93.

Associate: Dudley, Topper & Feuerzeig: 9-93 to 7-97.  
 Assistant United States Attorney: U.S. Attorneys Office, District  
 of the Virgin Islands: 7-97 to 7-01; and 11-02 to present.

Assistant United States Attorney: U.S. Attorneys Office, Eastern  
 District of Virginia: 7-01 to 11-02.

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

No.

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

National Merit Scholarship; Hess Scholarship; Virgin Islands  
 Academic and Cultural Award Endowment Scholarship; Drug  
 Enforcement Administration Certificate for Outstanding  
 Contributions In The Field of Drug Law Enforcement; Virgin  
 Islands Territorial Court and Virgin Islands Bar Association  
 Dedicated Service Award; Several Certificates of Appreciation  
 from the Public High Schools and from the St. Thomas St. John  
 School District for volunteer efforts; Several Certificates of  
 Appreciation from the Lions Club for volunteer efforts.

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

Virginia Bar;  
 District of Columbia Bar;  
 Virgin Islands Bar: Secretary: 1999-2000; President: Young Lawyers  
 Section: 1994-1995.

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

I am not a member of any organization of which I am aware that is  
 active in lobbying before public bodies.

I am a member of the Sydney's Fancy Homeowners' Association.

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

administrative bodies which require special admission to practice.

Virginia State Courts (Fall, 1989); District of Columbia Courts (Spring, 1991); Virgin Islands Territorial Court (Spring, 1994); Virgin Islands District Court (Spring, 1994); U.S. District Court for the Eastern District of Virginia (Summer, 2001); U.S. Court of Appeals for the Fourth Circuit (Spring 2002).

Dates are approximate.

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

None.

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

My health is generally good. My last exam was in 2002.

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

None.

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

N/A.

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

appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.



17. Legal Career:

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

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

I did not serve as a clerk.

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

I never practiced alone.

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

From September, 1989 to September 1993. I was an associate at the law firm of Patton, Boggs & Blow (now Patton Boggs LLP). Patton Boggs is located at 2550 M Street, N.W., Washington, DC 20037.

From September, 1993, to July, 1997, I was an associate at the law firm of Dudley, Topper and Feuerzeig, which is located at 1A Frederiksberg Gade, St. Thomas, VI 00802.

From July, 1997 to July, 2001, I was an Assistant United States Attorney at the United States Attorney's Office for the District of the Virgin Islands, which is located at the Ron De Lugo Federal Building and U.S. Courthouse, 5500 Veterans Drive, St. Thomas, Virgin Islands 00802.

From July, 2001 to November, 2002, I was an Assistant United States Attorney at the United States Attorney's Office for the Eastern District of Virginia, which is located at 2100 Jamieson Avenue, Alexandria, Virginia.

From November, 2002, to the present, I have been an Assistant United States Attorney at the United States Attorney's Office for the District of the Virgin Islands, which is located at the Ron De Lugo Federal Building and U.S. Courthouse, 5500 Veterans Drive, St. Thomas, Virgin Islands 00802.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

After law school, I joined the law firm of Patton, Boggs & Blow (now Patton Boggs LLP) in September, 1989 as an associate. Patton Boggs is located at 2550 M Street, N.W., Washington, DC 20037. I was part of the government contracts litigation group. We served a variety corporate clients including Bath Iron Works and MCI.

I left that firm in September, 1993, when I joined the law firm of Dudley, Topper and Feuerzeig, which is located at 1A Frederiksberg Gade, St. Thomas, VI 00802. While there, I was part of the litigation group. Clients included banks (Banco Popular de Puerto Rico and Citibank), various local businesses, and individual litigants (both civil and criminal).

In July, 1997, I joined the United States Attorney's Office for the District of the Virgin Islands, which is located at the Ron De Lugo Federal Building and U.S. Courthouse, 5500 Veterans Drive, St. Thomas, Virgin Islands 00802. I was part of the criminal section and did a wide range of criminal prosecutions, including prosecutions of violent crimes, narcotics crimes, public corruption, economic crimes, and immigration crimes.

In July, 2001, I joined the United States Attorney's Office for the Eastern District of Virginia, which is located at 2100 Jamieson Avenue, Alexandria, Virginia. I was part of the narcotics section. I prosecuted a variety of narcotics crimes. All of the work was criminal.

In November, 2002, I returned to the United States Attorneys Office in the Virgin Islands. While I continue to prosecute a variety of crimes, I now focus a considerable amount of my time on public corruption. All of the work is criminal.

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

While at Patton, Boggs, I appeared in Court or some other tribunal quite infrequently.

While at Dudley, Topper and Feuerzeig, I appeared in court fairly regularly.

While at the United States Attorney's Office for the District of the Virgin Islands and at the United States Attorney's Office for the Eastern District of Virginia, I appeared, and continue to appear, in court very often; and regularly do appellate work.

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

While at Patton, Boggs, all of my cases were in federal tribunals.

While at Dudley, Topper and Feuerzeig, about 75% of the cases were in federal court. The remaining 25% were in the territorial court.

While at the United States Attorney's Office for the District of the Virgin Islands and at the United States Attorney's Office For the Eastern District of Virginia, all of my cases were in federal court.

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

While at Patton, Boggs, all of the litigation was civil and occurred in a federal tribunal.

While at Dudley, Topper and Feuerzeig, about 85% of the work was civil. The remaining 15% involved representing court appointed clients who were defendants/respondents in criminal cases or family court cases.

While at the United States Attorney's Office for the District of the Virgin Islands and at the United States Attorney's Office For the Eastern District of Virginia, about 99% of the work was criminal, the remainder was civil financial litigation.

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

Since leaving Patton Boggs, I have tried approximately 21 cases to verdict or judgment. Of those, I was sole counsel in 17; lead counsel in 3; and co-counsel in 1.

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

Of the total cases tried, 5 were bench trials. The remaining 16 were jury trials.

Of the total cases tried to judgment, I have not included those cases at Patton Boggs that were before the GSA and the various Boards of Contract Appeals. I was an associate and part of a government contracts litigation team that litigated several matters to judgment for clients. Appearance before the tribunal was unusual. The matters were tried primarily on the pleadings.

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

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

U.S. v. Irvine Hodge, et al., Appeal No. 99-3331, mem. op. (3d Cir. Jan. 7, 2000) (Judges: Roth, Rendell, Pollack; 267-299-4924): This case involved the murder of a trial witness just before trial. One of the defendants asked his lawyer about the result if a specific witness was unavailable. Shortly thereafter, the witness was executed. I subpoenaed the lawyer under the crime fraud exception to testify before a federal grand jury. The lawyer refused and the client/defendant asserted the lawyer/client privilege. I argued the matter at the district court level, then on emergency appeal to the U.S. Court of Appeals for the Third Circuit, which accepted my argument that the lawyer could testify before the grand jury pursuant to the crime fraud exception. Counsel on appeal was Bernard Van Sluytman. Address: No. 1 4<sup>th</sup> St., Sugar Estate, P.O. Box 6878, St. Thomas, VI 00804; Phone: 340-776-2688.

U.S. v. Brenda Hendricks, et al., Crim. No. 1998-204 (D.V.I.) (sentenced on guilty plea May 9, 2000) (Judge: Thomas K. Moore; 340-774-1800): This case involved a department of motor

vehicles employee who sold drivers' licenses primarily to illegal aliens. She along with several other brokers and customers were convicted in the Virgin Islands District Court. Counsel for Brenda Hendricks was Leonard Francis. Phone 340-774-7861; Address: 4A Dronningens Gade, P.O. Box 8838, St. Thomas, VI 00801.

U.S. v. Alec Dizon, Crim No. 2001-173 (D.V.I.) (sentenced on guilty plea April 19, 2002) (Judge: Thomas K. Moore; 340-774-1800): This case involved the director of the Virgin Islands lottery who misappropriated lottery funds for personal gain. The defendant used such funds for items including strip clubs. The defendant was convicted in the Virgin Islands District Court. Counsel for the defendant was Gordon Rhea. Phone: 340-719-6100; 843-991-8826; 843-881-9673; Address: 211 Bennett, Mount Pleasant, South Carolina 29464; Law Offices of Gordon Rhea, 17 Church St. Suite 205, Christiansted, St. Croix, VI 00820.

U.S. v. Darwin Regio, et al., Crim. No. 02-283-A (E.D. Va.) (Judge: T.S. Ellis; 703-299-2114): This case involved an ecstasy distribution ring primarily run by nationals of the Philippines. The investigation involved several wiretaps. Conspirators in Canada distributed the ecstasy, along with other narcotics, through New York and into Virginia. The first indictment charged 13 defendants. One defendant remains a fugitive. The remainder were all convicted in the District Court in the Eastern District of Virginia. The second indictment charged 6 defendants, all of whom were convicted in the District Court in the Eastern District of Virginia. Three related defendants from New York were also convicted. Jeremy Kamens represented Kate Cho. Phone 703-600-0848; Address: Federal Public Defender's Office, 1650 King St. Suite 500, Alexandria, VA 22314; James C. Love represented Ramir Magbanua. Address: 10615, Judicial Drive, No. 203, Fairfax, VA 22030; Phone: 703-385-5317.

U.S. v. Shelton Brooks Seldon, III, Crim No. 01-298-A (E.D. Va.) (Judge: James C. Cacheris; 703-299-2110): This case involved a reverse sting of a cocaine trafficker. The defendant previously had been thrice convicted of felonies, including a conviction for murder while being a part of a violent drug trafficking gang in Washington, D.C. Shortly after early release from prison, he attempted to exchange approximately \$250,000 in cash for cocaine in a parking area close to Bistro Bistro in Shirlington, Virginia. Seldon was convicted in the District Court in the Eastern District of Virginia and approximately \$250,000 was forfeited. David Smith represented Seldon. Phone: 703-548-8911; Address: English & Smith, 526 King Street, Alexandria, VA 22314.

U.S. v. Chan See Ming and Chan Hak So, Crim. No. 99-34, (D.V.I.) (awaiting sentencing, pled guilty June 13, 2001) (Judge: Thomas K. Moore; 340-774-1800): This case involved alien

smuggling. For a period of years numerous Chinese nationals were smuggled into the United States through the Virgin Islands. The defendant facilitated the smuggling operation from Northern Virginia. The aliens were eventually transported to New York where they were held hostage until family members paid the smugglers fee of approximately \$30,000 to \$40,000. The defendant, was convicted of alien smuggling and hostage taking. A co-defendant, Chan Hak So, who was responsible for the overseas operation of the smuggling venture, was extradited from Hong Kong and convicted of hostage taking and alien smuggling in the Virgin Islands District Court. Peter John Porrata represented Chan See Ming. Phone: 787-763-6500; Address: Capital Center Building, South Tower, Suite 602, 239 Arterial Hostos Ave., San Juan, PR 00918-1480.

U.S. v. Rufino Rodriguez Sanchez, et al., Crim. No. 2001-298 (D.V.I.) (awaiting sentencing, guilty verdict returned Jan. 16, 2003) (Judge: Thomas K. Moore; 340-774-1800): This case involved the smuggling of 500 kilograms of cocaine into the United States from St. Maarten. Several foreign governments were involved in this case, including the Dutch and British. The defendants were apprehended after a high speed night time boat chase involving 2 Coast Guard cutters, a Coast Guard helicopter and a British vessel. The trial included Dutch wiretaps. All 8 defendants charged were convicted in the Virgin Islands District Court. Stephen Brusch represented Rufino Rodriguez Sanchez. Phone: 340-776-2237; Address: The Brusch Law Firm, P.O. Box 988, St. Thomas, VI 00804.

U.S. v. Clifford, et al., Crim. No. 01-435-A (E.D. Va.) (Judge: T.S. Ellis; 703-299-2114): This case involved the distribution of a controlled substance analogue. The litigation helped to define the parameters for such charges. Three defendants in this matter pled guilty to distribution of controlled substance analogues after they sold what they purported to be ecstasy to a confidential informant. After three hearings and several briefs, however, the court outlined its view of the appropriate parameters of the analogue statute. The defendants ultimately were convicted of theft of government property in the District Court in the Eastern District of Virginia. Alan H. Yamamoto was among defense counsel. Address: 108 N. Alfred Street, Alexandria, VA 22314; Phone: 703-684-4700.

U.S. v. Kevin White and Ira Haywood, Crim. No. 2000-29 (D.V.I.) (guilty verdict returned Dec. 12, 2000; sentenced Sept. 26, 2001 (White), Oct. 24, 2001 (Haywood)) (Judge: Thomas K. Moore; 340-774-1800): This case involved a Hobbs Act violation that involved a daylight high speed chase of two armed individuals. At the conclusion of the trial, the defendants were convicted in the Virgin Islands District Court for a variety of gun charges as well as a Hobbs Act violation.

Gary Alizzeo was counsel for Ira Haywood. Phone: 814-724-2243 ext. 15; Address: General Counsel, Sipco Molding Technologies P.O. Box 725, 1099 Morgan Village Road, Meadville, PA 16335-6725. Patricia Schrader Cooke was counsel for Kevin White. Phone: 340-773-3585; Federal Public Defender, 1115 Strand St., P.O. Box 3450, Christiansted, St. Croix, VI 00822.

Tip Top Construction v. Government of the Virgin Islands, Civil No. 34-1997, (V.I. Terr.Ct., St. Thomas/St. John Div., Feb. 7, 1997) (Judge: Brenda Hollar; 340-693-6424): This involved a challenge to the Virgin Islands procurement process that erroneously failed to award a contract to my client Tip Top Construction. We sought a preliminary injunction; and had a trial on the merits. At the conclusion, we prevailed. Thereafter my client was awarded the contract. The representation occurred primarily during the month of January, 1997. The case was tried before Judge Brenda Hollar in the Territorial Court of the Virgin Islands in St. Thomas. Among government counsel was Sheena Conway, Phone: 340-774-5666; Address: Office of the Attorney General, Virgin Islands Department of Justice, St. Thomas, VI 00802. Susan Bruch Moorehead, 340-774-1320, represented the interested awardee that was stripped of the contract. Address: Grunert Stout & Bruch, 24-25 Kongens Gade, P.O. Box 1030, St. Thomas, VI 00804-1030.

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

In addition to some of the matters discussed above, I would add the following:

-Most of my significant legal activities involved the grand jury.

-I have served as a trial advocacy instructor on several occasions at trial advocacy courses offered to prosecutors at the National Advocacy Center (NAC) and the Virgin Islands Attorney General's Office.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

I do not anticipate receipt of any funds from deferred income arrangements, with the exception of a return of any amounts I may have contributed to 401(k) plans or equivalent plans for federal employees, when I reach retirement age. I do not know the amount of any such payments.

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

I am not aware of any financial arrangements that would create any potential conflicts of interest during my initial service to the position to which I have been nominated. The only category of cases that could create potential conflicts of interest, to the best of my knowledge and belief, would be (1) cases handled by the U.S. Attorneys Office in which I personally was involved, or which arose prior to my appointment. I anticipate that it may be necessary to recuse myself from any such cases; (2) cases in which my spouse, or members of her current firm, represent a litigant. I also would recuse myself from any such cases; (3) cases involving family, friends or clients I represented while in private practice. I anticipate that there would be relatively few such cases, but I would make appropriate disclosures, and would recuse myself if warranted. In all matters I will follow the guidelines in the Code of Judicial Conduct.

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

No.

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



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

See attached Financial Disclosure Report.

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

See attached Net Worth Statement.

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

No.

## FINANCIAL STATEMENT

## NET WORTH

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

ASSETS		LIABILITIES	
Cash on hand and in banks	558,000	Notes payable to banks-secured	n/a
U.S. Government securities-add schedule	\$50 savings bond	Notes payable to banks-unsecured	n/a
Listed securities-add schedule	n/a	Notes payable to relatives	n/a
Unlisted securities--add schedule	n/a	Notes payable to others	n/a
Accounts and notes receivable:	n/a	Accounts and bills due	n/a
Due from relatives and friends	n/a	Unpaid income tax	n/a
Due from others	n/a	Other unpaid income and interest	n/a
Doubtful	n/a	Real estate mortgages payable-add schedule	
		Firstbank (Mortgagor) Property 2	\$180,000 approx.
Real estate owned-add schedule		Chattel mortgages and other liens payable	n/a
Property 1	30,736		
Property 2	500,000		
Property 3	30,975		
Property 4	148		
Property 5	205 approx.		
Real estate mortgages receivable	n/a	Other debts-itemize:	n/a
Autos and other personal property			
1987 sedan	2,100		
1998 suv	10,255		
2003 sedan	17,835		
Cash value-life insurance	n/a		
Other assets itemize:			
Misc. Personal Property	12,000		
		Total liabilities	180,000
		Net Worth	982,303
Total Assets	1,162,303	Total liabilities and net worth	1,162,303
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	n/a	Are any assets pledged? (Add schedule)	no
On leases or contracts	n/a	Are you defendant in any suits or legal actions?	no
Legal Claims	n/a	Have you ever taken bankruptcy?	no
Provision for Federal Income Tax	n/a		
Other special debt	n/a		

<b>AO-10</b> <b>Rev. 1/2002</b>		<b>FINANCIAL DISCLOSURE REPORT</b> <b>Calendar Year 2002</b>		<b>Report Required by the Ethics</b> <b>in Government Act of 1978</b> <b>(5 U.S.C. app. §§ 101-111)</b>
1. Person Reporting (Last name, First name, Middle initial) Gomez, Curtis V		2. Court or Organization District Court, Virgin Islands		3. Date of Report 12/1/2003
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) District Judge-Nominee		5. Report Type (check appropriate type) <input checked="" type="radio"/> Nomination      Date 11/25/2003 <input type="radio"/> Initial <input type="radio"/> Annual <input type="radio"/> Final		6. Reporting Period 1/1/2002 to 11/2/2003
7. Chambers or Office Address U.S. Attorney's Office 5500 Veterans Drive St. Thomas, VI 00802		8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer _____ Date _____		
<b>IMPORTANT NOTES:</b> The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.				

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

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

<u>POSITION</u>	<u>NAME OF ORGANIZATION/ENTITY</u>
1. Officer	Sydney's Fancy Homeowners' Association

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

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

<u>DATE</u>	<u>PARTIES AND TERMS</u>
1.	

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

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

<u>DATE</u>	<u>SOURCE AND TYPE</u>	<u>GROSS INCOME</u> (yours, not spouse's)
1. 2002	Self Employed Lawyer (spouse)	
2. 2003	Ogletree, Deakins, Nash, Smoak & Stewart, LLC (spouse)	
3. 2002	Ogletree, Deakins, Nash, Smoak & Stewart, LLC (spouse)	

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting  
Gomez, Curtis V

Date of Report  
12/1/2003

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

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

	<u>SOURCE</u>	<u>DESCRIPTION</u>
1.	Exempt	

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

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

	<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
1.	Exempt		

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

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

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE</u>
1.	First Bank	Mortgage	M

**FINANCIAL DISCLOSURE REPORT****Page 1 of 1**Name of Person Reporting  
Gomez, Curtis VDate of Report  
12/1/2003**VII. INVESTMENTS and TRUSTS** -- income, value, transactions (includes those of the spouse and dependent children. See pp. 24-57 of filing instructions.)

A. Description of Assets (including trust assets)  Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	(1)	If not exempt from disclosure			
	Amount Code 1 (A-H)	Type (e.g. div. rent or int.)	Value Code 2 (J-P)	Value Method Code 3 (Q-W)	Type (e.g. buy, sell, merger, redemption)	(2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> <b>NONE</b> (No reportable income, assets, or transactions)									
1. Justice Federal Credit Union Interest Bearing Accounts	B	Interest	M	W	exempt				
2. Merrill Lynch Interest Bearing Accounts	C	Interest	N	W	exempt				
3. Banco Popular Interest Bearing Accounts	D	Interest	M	W	exempt				
4. Patton Boggs, LLP 401(k)	A	Interest	L	W	exempt				
5. Dudley, Topper 401(k)	B	Interest	L	W	exempt				
6. IRA	A	Interest	J	W	exempt				
7. Ogletree, Deakins 401(k)	A	Interest	J	W	exempt				

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

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting Gomez, Curtis V	Date of Report 12/1/2003
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**VIII. ADDITIONAL INFORMATION OR EXPLANATIONS** (Indicate part of Report.)

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Gomez, Curtis V

Date of Report

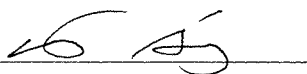
12/1/2003

## IX. CERTIFICATION.

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

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

Signature



Date

12/1/03

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

## FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

## III. GENERAL (PUBLIC)

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

I have served as an instructor for the Street Law Class at the local high schools. Additionally, I have served as a coach for the Territorial Court's High School Moot Court competition. I also have regularly spoken at anti drug gatherings as part of the United States Attorney's community outreach program. Also, in 1995, when I served as president of the Virgin Islands Young Lawyers, I helped organize a free legal assistance program, staffed by Virgin Islands Bar members, in the wake of Hurricane Marilyn.

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

No.

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

There is no selection commission to my knowledge. I was encouraged to submit a resume for consideration. After doing so, I was invited for an interview. Thereafter, I was advised that others were interviewed. Subsequently, I was informed that I was selected to advance through the process. The FBI then conducted a background investigation. During this part of the process, I also was interviewed by the Department of Justice, which also conducted its own background investigation. Thereafter, I was nominated.



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

No.

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

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

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

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The Federal government is comprised of three branches: the executive, the legislative and the judicial. The Constitution recognizes that each branch is separate and equal in power. The Constitution also outlines the role of each branch.

While the Constitution charges the legislative branch with creating laws, it has charged the courts that comprise the judicial branch with interpreting those laws. The role of the judiciary has been further delineated by Congress.

Matters presented to the courts must be ripe and present a case or controversy. In determining a matter, lower courts are bound by the law as well as the controlling precedent of superior courts.

The judicial system, as outlined, creates public confidence in a predictable resolution process.

Senator GRAHAM. Welcome to you all. She made a very good statement on your behalf.

Before we start—and we'll try to make this as short as possible—I would like to make a statement on behalf of Mr. Harwell.

**PRESENTATION OF ROBERT HARWELL, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA, BY HON. LINDSEY GRAHAM, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA**

Senator GRAHAM. Senator Hollings and I have had two opportunities to recommend people to President Bush for opening since I've been in the Senate in the last year-plus. Senator Hollings is the senior Senator from South Carolina, a member of the Democratic party.

I would just like to state for the record that he has been a joy to work with on such matters. He is a larger than life figure, as you can understand from his testimony. We have worked well together, and in a fashion that I think most South Carolinians would appreciate. He will be retiring at the end of this term and he has served his State and Nation with great distinction. I want to publicly acknowledge all the help he has been to me and the great service he has given to our State.

When it came time to find a suitable nominee for the Florence region, one of the reasons that we recommended together Bryan Harwell is that I have known Bryan for many years. His association as a judge advocate in the National Guard led us together. I was a judge advocate in the Air Force, the Air National Guard, and had an opportunity to work with Bryan on numerous occasions regarding National Guard issues and attended many forums with him.

When it comes time to pick a judge and make a recommendation to the President, you want someone who, number one, won't embarrass you, two, that will serve your citizens well, and three, wear the robe humbly. I am totally convinced that Bryan Harwell has all those qualifications.

He will wear the robe humbly. He's a lawyer's lawyer. He's been in the courtroom representing many interests, big and small. He is a well-grounded person who has contributed to his community. Once you put the robe on, service to the community doesn't stop. There are many ways that you can serve your community, and I would expect that to continue.

I know his family very well. They are extremely decent people. I know, Bryan, you will serve the citizens of South Carolina well. You have an awesome challenge ahead of you, and all the experiences that you've had in life will come together, from being a good lawyer, a good member of the military, a good husband, and a good father, and will serve our State well.

I am so pleased that President Bush agreed to this request and has nominated you, and I want to publicly thank President Bush and his team for allowing this to happen.

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

Senator GRAHAM. At this point in time I will ask a few questions of our panelists. I do appreciate you all being here. This is a big

day for you and your families and we join you and relish the opportunity to be part of it with you.

As I mentioned to Judge Benton, when I mentioned the term “strict constructionist”, could you tell the Committee what that means to you? We’ll start with Mr. Harwell.

Mr. HARWELL. Thank you, Mr. Chairman. Yes, sir.

I believe my interpretation is to give something its plain meaning, its plain ordinary meaning, not to torture its meaning.

Senator GRAHAM. Well said.

Judge Schiavelli?

Judge SCHIAVELLI. Yes, thank you, Mr. Chairman. It’s a matter of concern, of course, for everyone on the judiciary.

I view the role of the District Judge as one of learning a law and applying the law and not of making the law, and in doing that, I think the first place you look is to the plain meaning or the words of the statute that you are construing. The legislature is well capable of saying what it means, and I think the starting place is to assume the legislature has said what it means, that you all know how to say what you want us to apply, our job to apply it, and to look first to the terms of the statute.

Senator GRAHAM. Thank you.

Mr. Gomez?

Mr. GOMEZ. Thank you, Mr. Chairman. I believe the term refers to a statutory construction principle and looking to the four corners of the document for the plain meaning of the statute.

Senator GRAHAM. Mr. Harwell, you spent most of your time as a private attorney. You have done some arbitration mediation. How do you see the challenge of ascending to the bench without any prior judicial experience? How do you think your time as a lawyer has prepared you for the role that lies ahead?

Mr. HARWELL. Mr. Chairman, I think my practice over the past 20 years has been varied. I’ve had a lot of different legal issues thrown at me, and I think, as a judge, you will have a variety, a broad spectrum of issues thrown at you. So I think my practice, in and of itself, has very well prepared me for the challenge that lies ahead.

I have also, as you know, Mr. Chairman, served as an arbitrator in a number of cases. I would expect that that experience would be of some help to me as well.

Senator GRAHAM. Judge Schiavelli, as a member of the Los Angeles Superior Court, could you maybe share with us one of your more challenging cases and tell us how you think that will prepare you for the next step in terms of the Federal judiciary?

Judge SCHIAVELLI. I think one of the more challenging cases—and I believe its in the materials we have submitted—was a seven week trial involving an eminent domain situation between Southern California Edison and CALTRANS, regarding the taking of a freeway back in 1969.

In that case, the question was whether or not compensation was going to be paid and from what point. It was an area that I had never had experience with, and that’s one of the things that I think that you learn very quickly on the bench, when you’re suddenly down the road but you don’t have any more knowledge than you did before. You really do have to look to the lawyers to educate you.

In that complicated eminent domain case, I was very much looking and, luckily, had very able lawyers on both sides in litigating that case.

I think that experience, plus the other experience on the Superior Court, is educational, in teaching that you do really have to take the time and to spend the time once you go on the bench to learn the law. You don't stop reading the advance sheets, learning what the developing law is, working with the attorneys and recognizing that you do need their assistance, that they are there to help educate you and you have to be willing to accept that education. I think that's a critical criteria to take to the bench, and I think the experience on the Superior Court has been a big help in that regard.

Senator GRAHAM. Thank you.

Mr. Gomez, tell us about the Street Law class and what that whole program is about.

Mr. GOMEZ. Thank you, Mr. Chairman. Certainly.

I was born and raised in the Virgin Islands. It's a small community. One of the things that I think is important in any community, especially a small one, is community service.

One of the things that the U.S. Attorneys Office in the Virgin Islands does is teach a street law class. What we do is we staff a class with lawyers, who teach various principles of the law to high school students. It's a program that we've been running for several years, and it's an adjunct to our other program which we have, which is to coach high school students in moot court competitions.

Senator GRAHAM. You have been an Assistant U.S. Attorney in a variety of capacities. Could you tell us how you think that experience will help you in your new job?

Mr. GOMEZ. Certainly, Mr. Chairman. If I'm fortunate to be confirmed, I would hope that the breadth and depth of my various experiences in my career would help me.

In the U.S. Attorneys Office in the Virgin Islands, I was responsible for the financial litigation unit. That was responsible for getting all collections for the United States on judgments. I was also responsible for criminal prosecutions, a wide variety of criminal cases, violent crime, white collar, public corruption.

In addition to that, though, Mr. Chairman, there has been considerable experience where I worked in the private sector, starting in the Washington, D.C. area with Patton Boggs, and then in the Virgin Islands as well. I think that breadth and depth of that experience will certainly help, should I be confirmed.

Senator GRAHAM. To each of the nominees, we have two more questions.

As you know, the Federal courts are facing enormous pressure as their caseload mounts. If confirmed, how do you intend to manage your caseload? Let's start with Mr. Harwell.

Mr. HARWELL. Mr. Chairman, I think alternative dispute resolution is always helpful, and that is being pushed in our particular district right now. I would continue to encourage mediation by the parties, or ADR. I think that has to be continued.

Senator GRAHAM. As a judge, what role do you believe you would serve beyond mediation arbitration in terms of making people move the process along? What's going to be your philosophy there?

Mr. HARWELL. Well, I think judges can certainly encourage mediation. Some judges issue standing orders in our district for mediation. So I think the judges, as a rule, can certainly encourage the parties to use other processes.

Senator GRAHAM. Judge Schiavelli?

Judge SCHIAVELLI. Thank you, Mr. Chairman.

The problem of court management is a big one in the Los Angeles Superior Court, that being the court, the largest general jurisdiction court in the world actually. At one time, many of our judges had up to 500 cases in their inventories at a given time on the civil side, so we were very concerned about that.

There are a number of things that I think can be helpful. First, there's an old saying, and that is that nothing settles as case faster than an open courtroom. By that I mean, if trial dates are certain, that people know they're going to trial and not going to be continued, absent reasonable circumstances—I'm not saying never continued—but as long as they know, when they get a trial date, that's going to be a trial date, that moves cases along.

I think the judge has to take an active role. We changed from a master calendar to a direct calendaring system, and it cut the caseload tremendously. The judge has to be involved in the case, keeping abreast of what's going on, moving the case towards settlement at every chance, using, as has been mentioned, the ADR techniques, which are mandatory in many cases in Los Angeles now, depending on the size of the case. That is very helpful, both mediation and arbitration.

Finally, enforcing the rules, ensuring that the lawyers are observing the rules and are following those rules, because that's what moves cases along.

Senator GRAHAM. Thank you.

Mr. Gomez.

Mr. GOMEZ. Thank you, Mr. Chairman.

I would adopt the comments made by the other nominees, but I would also add this. I think it's important that the District judge have a good working relationship with the magistrates who serve with the District judge. I think that's one way, where you can set a clear objective and a clear goal to moving your calendar.

Senator GRAHAM. A final question. Given your background and prior experience, could each of you speak for a moment about the role and significance of judicial temperament and indicate what elements of judicial temperament you consider to be the most important..

Mr. HARWELL. I think, Mr. Chairman, that judicial temperament is very important. I think judges should be respectful of the litigants, the lawyers, and the jurors. You know, jurors are giving up a lot of their time and it's inconvenient to a lot of them. We have to be ever mindful of that fact and we cannot forget that.

In South Carolina, I have appeared in front of some judges who have suffered from the disease of "robitis", that we call. I think judges, when they step into the courtroom, or whether they're in chambers, or whether out in public, I think they've got to have a good disposition and a good temperament.

Judge SCHIAVELLI. Thank you, Mr. Chairman. I think that is an issue of great importance. I think that the atmosphere of the court-

room flows from the bench outward. I think that's from the appellate bench or from the trial bench. I think there is no excuse for a judge to lose his or her temper, to refuse to be courteous, and I think the lawyers and the participants take their cue from that.

I think the judge must remain in control of the courtroom at all times, to be sure, but also can do that while remaining courteous and fair to the people before him or her. I believe that when a judge loses his or her temper, the judge has, in fact, lost the control of the courtroom and is now being reactive instead of proactive. So I think judges have a duty to be courteous to the litigants and also among themselves. I think it sends a bad message.

I have seen situations where courts on appeal, for example, where judges have gone after each other personally in various opinions. I think that sends a bad message as well to the litigants and to the bar. Thank you.

Mr. GOMEZ. Mr. Chairman, thank you.

In addition to what the other nominees have said, I would add this. That it's important that any trial court judge be mindful of everyone to whom they speak in their courtroom, not just the litigants and the jurors, who are integral parts of the process of any ongoing trial, but also the people in the audience. As a prosecutor, there are so many times when I have seen parents crying at sentencing hearings, and a loose word by a judge has such a profound effect on those people and the other people who may be watching. So I think it's important not just to be mindful of the things you do and say to those who appear before you as parties and jurors who are involved in the process, but also those who may be witness to your actions.

Senator GRAHAM. Thank you all very much. You have given outstanding testimony to the Committee and you all have unique and very solid backgrounds to be an integral part of a democracy, where the rule of law is our foundation. As we look throughout the world, there are many places who would love to have a courthouse to go to, where you had no fear, you could be heard and listened to, regardless of your station in life, where your fellow citizens have a chance to evaluate the merits of your claim, where someone would preside with dignity and with a humble hand. That is missing in many places on Earth, but it thrives here in the United States. I think all of you will be a great addition to that concept.

The record will remain open for one week, on 5:00 o'clock, April 15th, for further statements or questions for the record.

If there is no further business, the Committee is adjourned.

[Whereupon, at 10:50 a.m., the Committee adjourned.]

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

QUESTIONS AND ANSWERS

**William Duane Benton**  
**Jefferson City, Missouri**

April 13, 2004

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Hatch:

Enclosed are my responses to the written questions of Senator Patrick Leahy.

Thank you for scheduling my hearing last week.

Sincerely,



William Duane Benton

c: The Honorable Patrick J. Leahy  
Ranking Member, Committee on the Judiciary  
United States Senate  
152 Dirksen Senate Office Building  
Washington, DC 20510



Responses of William Duane Benton to the Written Questions of  
Senator Patrick Leahy

1. On your questionnaire, you list the case of *McIntosh v. City of California*, a federal case you tried in 1984, and *Ervin v. Blackwell*, a case you argued to the Eighth Circuit that same year. Could you tell us how many other federal cases you tried to verdict?

The *McIntosh* case was tried to a jury verdict. *Ervin* was decided on summary judgment. I tried three cases to verdict before a federal judge, as active co-counsel. See: *MHDC v. Brice*, No. 86-1574-C-5 (E.D. Mo. 1988); *Norfleet v. Pelzer*, No. 83-4053-CV-C-5 (W.D. Mo. 1983); *Icahn v. Blunt* (questionnaire response on page 20).

In addition, I prosecuted or defended over 200 courts-martial.

How many times you have argued in front of the U.S. Court of Appeals for the Eighth Circuit?

I have not participated in oral argument before the Eighth Circuit. However, I have participated in three cases before the Eighth Circuit. I wrote the brief submitted in *Ervin v. Blackwell*, 733 F.2d 1282 (8<sup>th</sup> Cir. 1984). In addition, I requested special leave to argue an interlocutory appeal in *MHDC v. Brice*, No. 87-8030 (8<sup>th</sup> Cir. 1987). After full briefing, the case was decided without oral argument. Although not counsel in the case, I was the named party in *United States v. Duane Benton, Director of Revenue*, 975 F.2d 511 (8<sup>th</sup> Cir. 1992), vacated and remanded in 508 U.S. 957 (1993). While Director of Revenue, I participated in all aspects of this case, except oral argument.

2. I notice that you have written for a majority of the Supreme Court of Missouri nine times in reversing a death sentence. Do you think that record makes you "pro-criminal," or proves that you are a judge, "with a tremendous bent toward criminal activity or with a bent toward excusing or providing second chances or opportunities for those who have been accused in those situations?"

No. I decided each of the nine cases based upon the Constitution of the United States, and applicable federal and state laws, as applied on the facts of each case.

William Duane Benton  
 Responses to Questions from Sen. Leahy  
 Page 2 of 3

3. Sometimes judges who reverse death sentences in cases where the defendant has been convicted of killing a law enforcement officer are more harshly criticized in those cases than in others. While all of us mourn the loss of any officer under any circumstance, does the law applicable to capital cases in Missouri allow for a separate standard when examining challenges to death sentences imposed for the killing of law enforcement personnel?

Missouri law does not specify a separate standard for examining challenges to death sentence imposed for the killing of law enforcement personnel. However, Missouri law, for murder in the first degree, prescribes as a statutory aggravating circumstance that the murder was committed against a "peace officer." *Section 565.032.2(5), (8), Missouri Revised Statutes (2000)*. In all capital cases, section 565.035.3 requires the Supreme Court of Missouri to determine :

- (1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
- (2) whether the evidence supports the jury's finding of a statutory aggravating factor, and
- (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering the crime, the strength of the evidence, and the defendant.

**If you thought that reversible error had occurred in the imposition of a death sentence for such a killing, would you be willing to vote to reverse it?**

As you noted above, I have written for a majority of the Supreme Court of Missouri nine times in reversing a death sentence. When the Constitution of the United States, and federal and state law, required reversal of the death sentence under a set of facts, I ruled accordingly. If I am fortunate enough to be confirmed as a Circuit Judge, I will continue to rule in death penalty cases as required by the Constitution and federal and state law.

4. You wrote an opinion in a case called *In re: The Honorable Ronald Hill*, in which you ruled that a judge should have recused himself from a case involving the daughter of the mayor in their town, with whom the judge was in the middle of a contentious political dispute. You said that the various relationships between the parties caused the judge's impartiality to reasonably be questioned. Can you tell us whether this was a case not only about judicial impropriety but also about the appearance of impropriety and why the canons of ethics teach us to treat the latter as seriously as the former?

The case of *In re Hill* was decided on the basis of judicial impropriety, not the mere appearance of impropriety.

Both types of violations are serious. The basis for the Code of Judicial Conduct is: "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges." *Missouri Supreme Court Rule 2.03, Canon 1 (Commentary)*.

To retain and foster public confidence in the judiciary, the Code of Judicial Conduct requires judges to avoid impropriety and the appearance of impropriety. Judicial impropriety involves violations of law and court rules, while the test for appearance of impropriety is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." *Missouri Supreme Court Rule 2.03, Canon 2A (Commentary)*.

Curtis Gomez  
Ron deLugo Federal Building  
5500 Veteran's Drive  
St. Thomas, VI 00802

April 9, 2004

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

Re: Responses of Curtis Gomez To Follow-Up Questions of Senator Patrick J. Leahy

Dear Chairman Hatch:

Thank you for allowing me the opportunity to appear before the Senate Committee on the Judiciary on April 8, 2004. It was truly an honor.

I have since received two follow-up questions. My responses to those questions are enclosed with this letter.

Kindest regards,

Curtis Gomez

cc: The Honorable Patrick J. Leahy

## Responses of Curtis Gomez to the Written Questions of Senator Patrick J. Leahy

1. As an Assistant United States Attorney, you have prosecuted a wide range of cases, including narcotics crimes, economic crimes, immigration crimes, and public corruption. When you choose to prosecute a defendant, you are the advocate for one side; impartiality is not expected. As a judge, you will be expected to rule in similar cases with complete impartiality and fairness. How will you ensure that your judicial decisions are made with an open mind and unbiased perspective?

**Response**

The role of the judiciary is to be absolutely fair and impartial. Indeed, the judiciary represents no party, and can bring no personal interest or agenda into any matter before the court. If I am fortunate to be confirmed, I would zealously adhere to that principle and those outlined in the Code of Conduct for United States Judges that require impartiality and fairness.

2. In *U.S. v. Irvine Hodge*, one of the defendant's asked his attorney what would happen if a witness failed to testify against him; the witness was murdered shortly thereafter. You subpoenaed the attorney under the crime fraud exception to compel his testimony before a federal grand jury. The attorney refused, asserting attorney/client privilege. You were able to successfully argue that the attorney could testify against his client pursuant to the crime fraud exception. How important do you think attorney/client privilege to our legal system? Under what circumstances is it acceptable to compel an attorney to testify against his or her client?

**Response**

The attorney/client privilege is extremely important to our legal system. The privilege fosters the free flow of information between attorneys and their clients; and thereby promotes the significant interest of competent zealous representation. The privilege is such an important part of our legal system that any effort to compel disclosure of privileged information is not undertaken lightly. Indeed, such an effort should only be considered in very few limited circumstances as outlined by controlling appellate precedent. One of those circumstances arises when a client communicates with counsel, and the purpose of that communication is to further some criminal conduct. See, e.g., *United States v. Zolin*, 491 U.S. 554, 563 (1989) ("It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime.") (citations omitted).

HARWELL, BALLENGER, BARTH & HOEFER, L.L.P.

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PHONE: 843-662-5301  
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April 13, 2004

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Nomination of Robert Bryan Harwell to be U.S.  
District Judge for the District of South Carolina

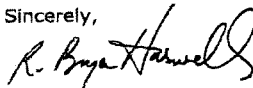
Dear Senator Hatch:

Please find attached my written responses to the additional written  
questions submitted by Senator Leahy.

Thank you for your kind attention to this matter.

With kindest regards, I am

Sincerely,



R. BRYAN HARWELL

RBH:gn  
Enclosures  
cc: The Honorable Patrick J. Leahy

RESPONSES OF ROBERT BRYAN HARWELL TO ADDITIONAL WRITTEN  
QUESTIONS FROM SENATOR LEAHY

**Q. Question II. 6 of the Senate Questionnaire that you answered asked you to identify the particulars of any political campaigns you have been involved in, including the name of the candidate, your title and your responsibilities within the campaign. You responded that you have not had such involvement in political campaigns "other than contributor or co-host for various local, state or national candidates." Can you please provide a more complete response to this question, including who these candidates are, the nature and size of the events you co-sponsored, and what your responsibilities were as co-sponsor of these events?**

A. As a co-host or co-sponsor of local fundraising events, I was asked to make a contribution of a certain level and to invite friends to also attend the reception and make a contribution, with the hope of reaching a certain fundraising goal. My name, along with many others, would then be listed on an invitation to a reception/fundraiser in Florence, S.C. for a particular candidate. For a national or statewide candidacy, there would be many more individuals listed on the invitation, as compared to a local candidacy.

To the best of my recollection, I have been a co-host of the following events. I was a co-host of a fundraiser/reception for Rev. Mack Hines, (D) Candidate for the S.C. State House of Representatives. This was attended by less than 50 people, and I was asked to introduce him. Several years ago, my law partner and I had a small campaign debt reduction function for Jim McGee, (R) S.C. State House of Representatives. I think this function was attended by less than 25 people. With regard to statewide and national political campaigns, I had no responsibilities, organizational or otherwise, other than making a contribution at a co-sponsors level, and/or being requested to call friends to attend the local fundraiser/reception, and consider making a contribution to a candidate's campaign. This was done on George Bush's Presidential campaign, Lindsey Graham's Senate campaign, and David Beasley's Governor's campaign. As best as I can recall, the Bush Campaign fundraiser/reception had several hundred people in attendance, and had a large number of people listed on the invitation. The Graham and Beasley events had probably less than 200 in attendance with a smaller number listed on the invitation.

**Q. In Wilkes v. Young and County of Florence, you brought a claim against the County under 42 U.S.C. Sec. 1983 on behalf of a client who claimed to have been wrongfully arrested for failing to pay a parking**

RESPONSES OF ROBERT BRYAN HARWELL TO ADDITIONAL WRITTEN  
QUESTIONS FROM SENATOR LEAHY

**ticket. Do you feel that this was an instance of government officials overstepping their powers and infringing upon constitutional rights, and do you see such overzealous enforcement tactics as a larger problem in this country and one which the courts should be concerned about?**

A. In representing Ms. Wilkes as her lawyer and advocate, I believed she had a meritorious claim infringing upon her constitutional rights. I do not have statistics or data to indicate to what extent or degree this issue may exist in this country. However, the courts should always be concerned about the protection of the constitutional rights of all parties that come before them.



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**ReedSmith**

Hon. George P. Schiavelli  
 Direct Phone: XXXXXXXXXXXX  
 Email: gschiavelli@reedsmith.com

355 South Grand Avenue  
 Suite 2900  
 Los Angeles, CA 90071  
 213.467.8000  
 Fax 213.457.8080

April 14, 2004

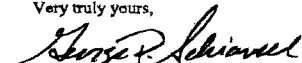
The Honorable Orrin G. Hatch  
 Chairman  
 Committee on the Judiciary  
 United States Senate  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

Dear Senator Hatch:

I am pleased to enclose herewith my responses to the written follow-up questions posed by Senator Leahy for the Committee's consideration. I am also sending a copy of the responses directly to Senator Leahy.

Again, my thanks to the Committee for the work it is doing in connection with the confirmation process.

Very truly yours,



Hon. George P. Schiavelli

GPS/ajl  
 Enclosure

cc: The Honorable Patrick J. Leahy

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**Responses of George Schiavelli to the  
Written Questions of Senator Patrick J. Leahy**

1. **Last year you said that you believed the television show *Traffic Court* was "closer to how a ... court should be run in real life" and you commented on an "appropriate judicial demeanor." When Strom Thurmond was Chair of this Committee he would ask judicial nominees if they would promise to be courteous if confirmed as a judge. He said that the more power a person has, the more courteous a person should be. Please share with us your thoughts on the importance of treating all persons who appear before you with courtesy and how you intend to instill public confidence in our federal government and our federal justice system.**

The quote from me referenced in the question was generated as a result of a conversation I had with the publisher of the Los Angeles Metropolitan News Enterprise. He and I are both "television trivia buffs," and he had been discussing some of the early television programs involving judicial officers, one of which was "Traffic Court." That show was on television in 1958, and I recall watching it regularly. The "Judge" on the show was Edgar Allen Jones, Jr., an Assistant Dean at the UCLA School of Law. During my conversation about the television show, I remarked that I thought Dean Jones comported himself much more professionally and in a manner more appropriate to how a court should be run than do the current crop of television jurists. I was contrasting Dean Jones' judicious temperament to the often rude, snide, and sarcastic demeanor that seems to have been adopted by many of the "judges" on today's television programs. I was asked if it was all right to quote me on that point, and I agreed.

I completely agree with the quotation from Senator Thurman referenced in the question, and I promise that I would be courteous in carrying out my judicial duties if confirmed. In my view, it is the judge who sets the tone for the courtroom, and, thus, creates the perception of the judicial system that the lawyers, parties, jurors, witnesses and others take with them. It is imperative that a judge at all times be courteous, patient and fair. This does not mean that the judge must give up control of the courtroom. However, maintaining control does not require the adoption of an inappropriate temperament. A judge who has lost control of his or her composure is a judge who has lost control in the courtroom.

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2. **In your Committee questionnaire, you reveal that you worked on the Legislative Issues Subcommittee of the Judicial Council Appellate Civil and Small Claims Advisory Committee. Specifically what type of legislative recommendations did this Committee make during your tenure with it?**

During my tenure as a state court judge, I served on two judicial counsel advisory committees. The first was the Judicial Counsel Civil and Small Claims Advisory Committee. The second was the Judicial Counsel Appellate Advisory Committee. My work on the Legislative Issues Subcommittee was while I was a member of the Civil and Small Claims Advisory Committee.

The California Judicial Council is the policy making body for the California courts. Its purpose is to work with the Administrative Office of the Courts regarding potential changes in the operation and procedures of the courts statewide. In order to carry out its charge, the Judicial Council has created several advisory committees composed of judges and lawyers to report in various areas.

The Civil and Small Claims Advisory Committee is one such committee. It focuses on issues relating principally to court procedures and case management. The regulation of court procedures and case management is primarily accomplished through the California Code of Civil Procedure and the California Rules of Court. Thus, within the Civil and Small Claims Advisory Committee, recommendations from practitioners and judges for change in the Code of Civil Procedure are first directed to the Legislative Issues Subcommittee. Similarly, the Rules Committee performs the same function with respect to proposed modifications of the California Rules of Court.

Thus, most of the work of the subcommittees is in reviewing proposed changes to court procedures, usually involving such things as time for notice, form and format of papers, modifications to judicial forms for various procedures, etc.

Probably the most noteworthy issue that arose during my tenure on the Civil and Small Claims Advisory Committee related to controlling local rules in the various counties in California. While California has enacted statewide rules of court, it was the practice for each county to enact its own set of rules supplementing the state rules. Moreover, it was not uncommon for individual judges within the counties to enact their own rules in addition to the state and county rules.

Obviously, this created a labyrinthine "trap for the unwary" for practitioners. In California, it is common for attorneys to conduct their practices in numerous counties. All too frequently, an attorney who thought he or she had complied with the state rules would find himself or herself in violation of a county rule or a rule of a particular judge. It was very difficult for attorneys to keep abreast of all of these rules, many of which were not published.

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Accordingly, the Civil and Small Claims Committee proposed California Rule of Court, Rule 981.1 "Presumption of Local Rules." This rule, which has been adopted statewide by the Judicial Council and the Administrative Offices of the Courts provides that no county or court may operate under a rule relating to pleadings, demurrers, ex parte applications, motions, discovery, provisional remedies or the form and format of papers which had not been approved by the Judicial Council. This rule has gone a long way to ensuring the efficient administration of justice by preventing the confusion and consternation caused by local court rules.

3. **You have impressive experience in the areas of civil and appellate law, but you do not have a similarly lengthy background in criminal matters, which comprise a great deal of the cases you would hear as a District Court judge. How will you prepare yourself to rule on these types of matters and what relevant experience do you have that will assist you in these cases?**

During my tenure on the state court bench, I had a great deal of exposure to criminal matters both in the trial court and at the appellate level. From March 1994 until the end of 1995, my assignment was a felony calendar court in the Criminal Courts Building in Los Angeles. In that capacity, my case load consisted entirely of felony criminal cases. I handled hundreds of criminal matters from felony arraignment pre-trial procedures, trial, sentencing, and post-trial motions.

During 1995, I sat by assignment in the California Court of Appeal, Second Appellate District, Division 7. While serving on the Court of Appeal, I exclusively reviewed criminal proceedings.

Finally, I sat in the Appellate Division of the Superior Court for approximately three years and was elected the Presiding Justice in two of those years. The court handled over 800 cases per year and the majority of the matters coming to the appellate division were appeals in criminal cases.

In preparing for my duties as a United States District Judge, I recognize that I will confront issues and procedures that differ from those in the state court. I view it as the job of any judge, whether at the federal or state level, to ensure that he or she keeps abreast of the law and its developments. Accordingly, as I did when I was assigned to a felony trial court, if confirmed, I intend to spend a great deal of my time, both at the court and at home, "getting up to speed" on federal procedures, both civil and criminal.

## SUBMISSIONS FOR THE RECORD

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April 7, 2004

The Honorable Orinn Hatch  
Chairman, Senate Judiciary Committee  
224 Dirksen Senate Office Building  
United States Senate  
Washington, D.C. 20510

**RE: Nomination of Curtis Gomez, Esq. as District Court Judge**

Dear Mr. Chairman:

I have been notified that the Senate Judiciary Committee has set the confirmation hearing on the nomination of Curtis V. Gomez, Esq., Assistant United States Attorney for the Virgin Islands, to become the next United States District Court Judge for the Virgin Islands, St. Thomas St. John District. Due to the fact that I am unable to attend the hearing which is scheduled for Thursday, April 8<sup>th</sup>, I am submitting this letter in support of Attorney Gomez's nomination. I respectfully request that my letter be read into and made a part of the official record of the hearing.

As President of The Virgin Islands Bar Association, I am extremely pleased to inform you and the Judiciary Committee of the widespread support for Attorney Gomez within our Association to fill this position. In this regard, the Association conducted a poll of its members when the White House initially released the nomination of Attorney Gomez. The poll was conducted pursuant to the standard practices of our Association regarding all judicial nominations. The results of the poll were overwhelmingly in favor of Attorney Gomez's nomination. Specifically, the members of the Bar Association gave him qualified or highly qualified ratings in the areas of legal competence, judicial demeanor, reputation in the community and courtroom experience.

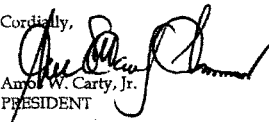
As such, speaking on behalf of The Virgin Islands Bar Association, I can assure you that the confirmation of Attorney Gomez's nomination will be welcomed by the members of our Association. On a personal note, I know Curtis very well. We served together as officers of the Bar Association and worked on several issues affecting our Association and the Virgin Islands community. I am

The Honorable Orinn Hatch - Chairman  
Senate Judiciary Committee  
April 7, 2004  
Page 2

especially proud to endorse Attorney Gomez, a Virgin Islander, as our next District Court Judge. He will definitely uphold the legacy of the Honorable Almeric L. Christian, the first Virgin Islander to serve as Chief Judge of the District Court of the Virgin Islands. With his confirmation, Attorney Gomez will join another eminently qualified Virgin Islander on the Federal bench of the Virgin Islands, our esteemed Chief District Court Judge, Raymond L. Finch. Together, I am confident that these two outstanding Virgin Islands jurists will dispense justice fairly to the people of the Virgin Islands.

I, therefore, strongly endorse Attorney Gomez's nomination to be the next United States District Court Judge for the Virgin Islands. I respectfully urge the Senate Judiciary Committee to confirm his nomination unanimously and without hesitation. I am available to provide any additional information to the Judiciary Committee as you deem appropriate. Thank you.

Cordially,



Arnold W. Carty, Jr.  
PRESIDENT

cc: The Honorable Donna M. Christian Christensen, MD - Member of Congress

**HON. DONNA M. CHRISTENSEN**

Upon Attorney Curtis Gomez graduating from High School in the Virgin Islands, the dream of becoming a lawyer fermented into the decisional stage to attend one of the country's best Law Schools and which would help him to realize the aspiration of becoming a judge, preferably in the federal judiciary. Steadfastness and determination, love of the practice of law, excellence in understanding American Jurisprudence and the urgent quest to serve the community where he was born and raised, the (U. S. Virgin Islands) has brought Attorney Curtis Gomez before the Senate's Judiciary Committee today. Attorney Gomez is known to be affable and has an admirable reputation among his peers and others wherever worked.

Since his graduation from Harvard University Law School, Attorney Gomez has had the opportunity to endeavor in the practice of law in the private sector, here in Washington, D.C. as well as in the U. S. Virgin Islands. In all areas where he has practiced he has done commendably well. Subsequent to the time spent in private practice, he has spent a number of years in the public sector in the Office of the U.S. Attorney for the Virgin Islands where he is presently employed as an Assistant U. S. Attorney.

Mr. Chairman and members of the committee, it is important that a federal judge in the U.S. Virgin Islands understand the folkways as well as the history as it has evolved in this Caribbean territory of the United States of America. Historically, from the transfer of the ownership of the islands from Denmark to the United States eighty-seven years ago, the citizens of the islands have been proud to be U. S. citizens. During World War II, they petitioned the Congress to include them in the draft so that they could serve their country.

Attorney Gomez is familiar with the social, economic and philosophical issues of the Virgin Island, and such knowledge will

be extremely helpful in making decisions as a Federal Judge. Besides his knowledge and familiarity with federal jurisprudence, he is equally familiar with territorial jurisprudence. Additionally, it is my belief that he possesses the necessary judicial temperament which will guide him in rendering well reasoned and legally supported decisions.

Mr. Chariman and members of the Senate Judiciary Committee, without reservations, I support the nomination of Attorney Gomez who has been recommended by the President of the United States to become a Federal Judge for the District Court of the U. S. Virgin Islands. I respectfully urge that this nomination be reported favorably to the full body.



**DMCGVI00**

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**From:** Clendinen, Monique  
**Sent:** Tuesday, April 06, 2004 5:13 PM  
**To:** DMCGVI00  
**Cc:** cw4\_ret@msn.com  
**Subject:** Dawson's comments on Gomez

-----Original Message-----

**From:** EDawson37@aol.com [mailto:EDawson37@aol.com]  
**Sent:** Tuesday, April 06, 2004 5:08 PM  
**To:** Clendinen, Monique  
**Subject:** Re: Curtis Gomez hearing is Thursday in the Senate Judiciary Committee

Upon Attorney Curtis Gomez graduating from High School in the Virgin Islands, the dream of becoming a lawyer fermented into the decisional stage to attend one of the country's best Law Schools and which would help him realize the aspiration of becoming a judge, preferably in the federal judiciary. Steadfastness and determination, love of the practice of law, excellence in understanding American Jurisprudence and the urgent quest to serve the community where he was born and raised, the (U. S. Virgin Islands) has brought Attorney Curtis Gomez before the Senate's Judiciary Committee today. Attorney Gomez is known to be affable and has an admirable reputation among his peers and others wherever worked.

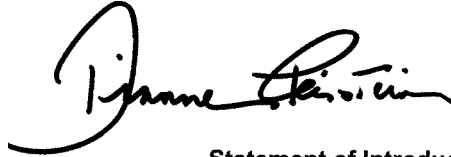
Since his graduation from Harvard University Law School, Attorney Gomez has had the opportunity to endeavor in the practice of law in the private sector, here in Washington, D.C. as well as in the U. S. Virgin Islands. In all areas where he has practiced he has done commendably well. Subsequent to the time spent in private practice, he has spent a number of years in the public sector in the Office of the U.S. Attorney for the Virgin Islands where he is presently employed as an Assistant U. S. Attorney.

Mr. Chairman and members of the committee, it is important that a federal judge in the U.S. Virgin Islands understand the folkways as well as the history as it has evolved in this Caribbean territory of the United States of America. Historically, from the transfer of the ownership of the islands from Denmark to the United States eighty-seven years ago, the citizens of the islands have been proud to be U. S. citizens. During World War II, they petitioned the Congress to include them in the draft so that they could serve their country.

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Mr. Chairman and members of the Senate Judiciary Committee, without reservations, I support the nomination of Attorney Gomez who has been recommended by the President of the United States to become a Federal Judge for the District Court of the U. S. Virgin Islands. I respectfully urge that this nomination be reported favorably to the full body.

4/8/04



Senator Dianne Feinstein

**Statement of Introduction for George Schiavelli**  
**Nominations Hearing**

Mr. Chairman. I am pleased to introduce to the Committee, the Honorable George Schiavelli, who is nominated to be a judge for the Central District of California.

Like other nominees from California, Judge Schiavelli was nominated through our State's bipartisan judicial selection process. He earned the unanimous endorsement of the Central District's Bipartisan Judicial Advisory Committee.

Judge Schiavelli is joined today by his wife Holli, his son Peter (age 17), his daughter Olivia (age 9), and his close friend Roy Wuchitech, a partner at the firm of Sheperd, Mullen, Richter, and Hampton. Could you all please rise so the Committee can acknowledge you?

Judge Schiavelli has impressive academic credentials. He attended Stanford University in the late 1960s. He then obtained his law degree from the UCLA School of Law, where he graduated first in a class of approximately 300 students and earned Order of the Coif honors.

Judge Schiavelli spent the next twenty years as an attorney in the private sector for such prominent Los Angeles firms as O'Melveny

& Myers; Ervin, Cohen & Jessup; and Horvitz & Levy. At Ervin, Cohen & Jessup, he specialized in unfair competition and unfair business practice disputes. Later, at Horvitz & Levy, he practiced as an appellate litigator.

In 1994, Judge Schiavelli achieved a life-long dream by obtaining an appointment to the Los Angeles Superior Court. Judge Schiavelli served on the Superior Court for six years. Due to his extensive appellate expertise, the Court appointed him to the Appellate Division. He then became the Division's Presiding Judge.

Due to the growing medical expenses of his ailing mother and the education costs of his children, Judge Schiavelli reluctantly retired from the Bench in 2000 and returned to private practice. Since his retirement, he has acted as a mediator and arbitrator for several alternative dispute resolution firms and joined the firm of Reed, Smith, Crosby, and Heafy as Of Counsel.

Judge Schiavelli made a decision to try to return to the bench when his mother passed away in March, 2003.

Based on the testimonials of his legal peers, this return is welcome and eagerly anticipated

- Associate Justice of the California Supreme Court, Joyce Kennard, said that Judge Schiavelli's appellate background, *"coupled with his superb intellect, capacity for hard work, and a*

*terrific judicial temperament, would make him an outstanding judge on the Central District Court."*

- Associate Justice Carlos Moreno of the California Supreme Court similarly said of Schiavelli, *"he has the right balance of temperament, experience, diligence, and intelligence to make an excellent"* district court judge.
- Associate Appellate Justice Katherine Todd encapsulated the views of a number of the Judge's supporters when she described his impressive courtroom demeanor: *"Judge Schiavelli's courtroom demeanor is excellent .. [h]e is low key, respectful of litigants as well as litigators, puts people at ease, is always well prepared, and maintains complete control of the courtroom in a friendly and forthright manner."*

Judge Schiavelli also has found the time during his busy legal career to actively volunteer in the community. He has served as President of the UCLA Law School Alumni Association, on the Board of Directors of the Federated Italo-Americans of Southern California, and has served as a coach for the James Monroe High School mock trial team.

In sum, I believe Judge Schiavelli has the experience and skills necessary to serve on the Federal bench with distinction. I urge the Committee to support his nomination.

ORRIN G. HATCH, UTAH, CHAIRMAN

CHARLES E. GRASSLEY, IOWA  
 ARLEN SPECTER, PENNSYLVANIA  
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BRUCE ARTIM, CHIEF COUNSEL AND STAFF DIRECTOR  
 BRUCE A. COHEN, DEMOCRATIC CHIEF COUNSEL AND STAFF DIRECTOR

## United States Senate

COMMITTEE ON THE JUDICIARY  
 WASHINGTON, DC 20510-6275

### Statement of Senator Orrin G. Hatch Chairman, Committee on the Judiciary

#### Before the United States Senate Committee on the Judiciary on the Nominations of

**William Duane Benton to be United States Circuit Judge  
 for the Eighth Circuit**

**Robert Bryan Harwell to be United States District Judge  
 for the District of South Carolina**

**George P. Schiavelli to be United States District Judge  
 for the Central District of California**

**Curtis V. Gomez to be Judge for the District Court  
 of the Virgin Islands**

April 8, 2004

We are delighted today to welcome before the Committee four outstanding nominees who are exceptional choices and will prove to be valuable assets to the federal bench. These nominees include William Duane Benton to be United States Circuit Judge for the Eighth Circuit, Robert Bryan Harwell to be United States District Judge for the District of South Carolina, George P. Schiavelli to be United States District Judge for the Central District of California, and Curtis V. Gomez to be Judge for the District Court of the Virgin Islands for a term of ten years.

I am pleased that the Committee continues to hold hearings and report out the President's highly qualified nominees, and appreciate the cooperation of all Committee members. However, the current confirmation record of judicial nominations is woefully inadequate. The United States Senate is far behind the average confirmation pace of judicial nominations for Presidential Election years. The average confirmation number for April in an Election year is 14. So far in 2004 the Senate has only confirmed 4 (4 vs. 14). In the six presidential election years from 1980 to 2000, the Senate confirmed an average of 45 judicial nominees (37 district, 8 appeals) and confirmations continued well into the fall during five of the past six presidential election years.

In fact, if we compare apples to apples, by April of their fourth year in office, the Senate had confirmed 184 nominees for President Clinton and more than 200 for President Carter. In the same time frame, the Senate has confirmed 173 of President Bush's nominees, fewer than both previous Democratic presidents.

A more troubling statistic remains – the number of judges blocked on the Senate floor. In addition to the unprecedented filibusters of last year, we are now faced with a complete shutdown of all judicial nominations and most executive nominations. Nevertheless, I am optimistic that the Senate will be able to overcome this obstruction and confirm many of the judges that are currently stalled on the floor as well as the nominees before the committee today.

Let me say a few words about the nominees before us today.

Judge **William Duane Benton** has been nominated to serve on the Eighth Circuit Court of Appeals. He is an ideal nominee and is well suited for the federal bench. Judge Benton is currently a judge on the Supreme Court of Missouri, where he has served for 13 years, including two years as chief justice of the court. He is highly respected by his peers, has broad bipartisan support, and received a unanimous “Well Qualified” rating from the American Bar Association. Both of Judge Benton’s home state senators, Senators Bond and Talent, enthusiastically support his nomination to the Eighth Circuit.

Before I go on, I want to note here that Judge Benton is the *only* certified public accountant serving on any state supreme court in the United States.

Judge Benton has an outstanding academic record and I want to list a few of his accomplishments: He graduated *summa cum laude* from Northwestern University, where he became a member of Phi Beta Kappa. He then attended Yale Law School, where he distinguished himself as both an editor *and* managing editor of the Yale Law Review. While on active duty in the Navy, he attended business school at night at the University of Memphis and received his master’s in business administration—with highest honors. And in 1995, he received an L.L.M. from the University of Virginia.

Judge Benton has been a dedicated public servant throughout most of his career, serving in all three branches of the government at the state or federal level. He was confirmed by the Missouri Senate for many of those positions: Director of Revenue for the Missouri Department of Revenue; the Chair of the Board of Trustees for the Missouri State Employees’ Retirement, and Member of the Board of Regents for Central Missouri State University. Additionally, the governor of Missouri appointed Judge Benton to the Multistate Tax Commission prior to his service on the bench. The Missouri Senate also confirmed him for that position, and members from 32 other states elected him chair of the commission. Judge Benton also served as chief of staff to Missouri Congressman Wendell Bailey in the U.S. House of Representatives.

In addition to his many years as a public servant, Judge Benton maintained a law practice. During the 1980s, he had a general civil practice representing clients such as statewide associations and groups, small businesses, and local governments. He also represented several federal inmates on a pro bono basis.

I would also note Judge Benton’s military career. From 1975 to 1979, he served with the U.S. Navy as a judge advocate. A Vietnam veteran, Judge Benton retired from

the U.S. Naval Reserve at the rank of Captain following 30 years of active and reserve service.

As I noted, Judge Benton is nominated to serve on the Eight Circuit. Another nominee to this court, Raymond W. Gruender, remains on the Senate Executive Calendar awaiting confirmation. I would hope that both of these nominees would get an up or down vote on the Senate floor. Now there have been some issues raised in the past regarding President Bush's nominees from Missouri, always in connection with a Clinton nominee from Missouri, Justice Ronnie White. I would note that Justice White is currently a colleague of Judge Benton's on the Missouri state supreme court. It is my understanding that Justice White supports this nomination.

Justice White is an example of my fair treatment of judicial nominees who have been opposed by home state senators. He was nominated for the United States District Court for the Eastern District of Missouri by President Clinton. Justice White was, in the end, opposed by both home state senators, Senator Ashcroft and Senator Bond. During the deliberation on the nomination of Justice White, I considered the deference due to the President and the deference due to the senators from the nominee's home state. I stated during the debate, and still believe, the President is due a large degree of deference, and therefore, even though I did not support Justice White's nomination, I moved his nomination forward.

Accordingly, I held a hearing on his nomination and Justice White was reported out of Committee. Senator Ashcroft, who was a member of the Judiciary Committee, voted against reporting the nomination. Significantly, despite their opposition to his nomination, neither Senator Ashcroft nor Senator Bond mounted an effort to filibuster the White nomination. Obviously, this is quite unlike the situation we have this Congress, where nominees are filibustered or otherwise blocked from receiving a vote on the Senate floor.

Justice White *was* given an up or down vote by the full Senate. After reviewing his record and consulting with home state senators, I voted against the nomination. It was unfortunate that following the defeat of Justice White by the full Senate, there were statements made that women and minority candidates were treated unfairly by the Senate.

Let me emphasize that in the case of Justice White, as in every nomination, I give careful consideration of the position of the nominee's home state senators. These senators are in a unique position to evaluate whether a nominee instills the confidence in the people of a state necessary to be a successful Federal judge in that state. This is particularly true for a district judge nominee whose jurisdiction, if confirmed, would be wholly limited to that particular state. There have been several other instances, notwithstanding serious reservations on my part, that I have supported contested district court nominees after considering the views of home state senators.

This is not the case with Judge Benton. He has the support of both home state senators, wide support of members of the Missouri bar, as well as community organizations such as the Jefferson City Branch of the N.A.A.C.P.

Judge Benton has a solid reputation for possessing a high level of integrity, and for being personable and engaging. I'm sure that my colleagues will agree that Judge Benton brings unmatched expertise, as well as experience to the federal bench. And I welcome him this morning.

Today's hearing also includes three nominees for district court positions. **Robert Bryan Harwell** is nominated to serve on the District Court of South Carolina. Mr. Harwell graduated from the University of South Carolina School of Law, after which he clerked consecutively for South Carolina Circuit Judge Rodney A. Peebles and U.S. District (South Carolina) Judge G. Ross Anderson, Jr. He has also served as a Judge Advocate General officer in the South Carolina National Guard. In addition to practicing law, he serves as a mediator or arbitrator for individuals, corporations and governmental entities. Mr. Harwell brings 20 years of legal experience which no doubt has prepared him well for the district court bench.

**Judge George P. Schiavelli** has been nominated to serve as a district court judge for the Central District of California and will be a great addition to the federal bench. Judge Schiavelli was recommended by a bipartisan committee that reviews potential district judges throughout California and will succeed Judge Lourdes Baird when he steps down on May 12, 2004. Judge Schiavelli's impressive credentials are reflected in his unanimous American Bar Association rating of Well Qualified.

Judge Schiavelli received his undergraduate degree from Stanford where he was a teammate of Heisman Trophy winner Jim Plunkett. After graduating from Stanford he went on to UCLA Law School graduating first in his class.

Much of his legal career has been devoted to appellate work. After a stint at O'Melveny & Myers, he became a partner at Ervin, Cohen & Jessup and later at Horvitz & Levy, before he began his distinguished career in public service. He joined the Los Angeles Superior Court in 1994 where he served until 2000. Judge Schiavelli also has extensive experience as a mediator, arbitrator, referee, and special master.

The nominee for the Virgin Islands, **Curtis V. Gomez**, comes before the committee with an excellent reputation as an Assistant United States Attorney. He is a native of the Virgin Islands, born on St. Croix. He earned his bachelor's degree from the George Washington University, and law degree from Harvard. After graduating in 1989, Attorney Gomez joined the law firm of Patton Boggs & Blow (now Patton Boggs LLP) in Washington DC. In 1993 Attorney Gomez joined the Virgin Island law firm Dudley, Topper & Feuerzeig until 1997.

In addition to being an Assistant United States Attorney in the Virgin Islands he has also served as an AUSA for the Eastern Virginia District. Mr. Gomez has earned the respect of those in his community and the attorneys who know him best. In fact the Virgin Island Bar Association recently sent a letter expressing that Mr. Gomez had the "overwhelming" support of its members, and that Mr. Gomez received "qualified or highly qualified ratings in the areas of legal competence, judicial demeanor, reputation in



the community and courtroom experience.” In short, Mr. Gomez will be an outstanding addition to the federal bench.

I look forward to hearing from all of our nominees, and I thank them for appearing before the committee today.



**FOR IMMEDIATE RELEASE**  
Thursday, April 8, 2004

Contact: Ilene Zeldin at (202) 224-6654  
<http://hollings.senate.gov>

**Statement of Senator Hollings Before the Judiciary Committee  
Regarding the Nomination of Robert Bryan Harwell  
for the District Court of South Carolina**

Mr. Chairman, thank you for the opportunity to provide a statement on the nomination of Bryan Harwell to be a federal judge in the Low Country of our home state of South Carolina.

You and I continue to work together well, on a bipartisan basis, to make sure only qualified judicial nominees with the right temperament end up on South Carolina's federal bench. The rest of the country has been mired in conflict over a few judicial nominees, so your willingness to choose excellent, balanced nominees for our bench in South Carolina is heartening.

As you know, I support nominees from both parties no matter who is President, but I don't believe this nation's courts should be filled with judges who are advancing a political agenda. We need to stay above politicizing the courts for short-term political gain.

Bryan Harwell has distinguished himself as a trial lawyer with a law firm in Florence and Marion, representing individuals and small businesses in general civil, criminal, workers compensation, and family court matters. In particular, he has developed expertise in torts and insurance, product liability, malpractice and other negligence cases. His Martindale-Hubbell Rating is AV, the highest possible.

After distinguished performance at our own University of South Carolina Law School, Bryan Harwell clerked for both a state and a federal judge. He has developed broad experience and expertise as a trial practitioner that will translate well as he begins a career as a trial judge.

As a veteran, I appreciate Mr. Harwell's service for a number of years in South Carolina's Army National Guard, during which he rose to the rank of JAG Captain.

He has also contributed to his community as a Trustee of the Florence Darlington Technical College and as a business law professor there. His career has been distinguished and well rounded, and he has been an asset to his community.

-more-

Mr. Chairman, I am not much interested in what political leanings a nominee has in his personal life. But I have been disturbed by a few of the nominees this Committee has voted out, who have been outside the judicial mainstream, or are only marginally qualified, or are tainted by conflicts and their past political work.

You and I need to continue making sure that our federal bench in South Carolina stays well above this fray. Your input in nominating our state's best lawyers, such as Bryan Harwell, to sit on our bench, has been indispensable to preserving the quality of this bench that I have worked for 38 years to maintain.

I also want to recognize the distinguished nominee's wife Debra and their family. This nomination is a testament to the efforts of your entire family, and you all have much to be proud of this morning.

Mr. Chairman, I am quite satisfied with Bryan Harwell's nomination, which I gladly endorse. I thank all the Committee members for considering him.

# # #

**Statement of Senator Patrick Leahy  
Ranking Member, Senate Judiciary Committee  
Hearing on Judicial Nominations  
April 8, 2004**

Today, the Judiciary Committee is holding its eighth judicial nominations hearing of 2004. This is 33 percent more hearings for judicial nominees than were held in all of 1996 when President Clinton was in the White House. Indeed, by this date in 1996, the last year of that presidential term, the Committee had held only two hearings to consider judicial nominees. The comparison to the number of hearings in 2000, another presidential election year, is also striking. That year only eight nominations hearings were held all year. So by the standards set by Republicans in the last two presidential election years, we would be finished with judicial nominations hearings for the year-- and it is early April.

When the American people hear partisan speeches accusing Senate Democrats of obstructing this President's judicial nominees, they should recognize it as purely political rhetoric, signifying nothing. The facts are that Senate Democrats have been much more cooperative with this President than Republicans were when President Clinton was in the White House. Democrats on this Committee and in the Senate have shown great restraint and extensive cooperation in the confirmation of 173 of this President's judicial nominations. We have reduced circuit court vacancies to the lowest level since the Republican Senate leadership irresponsibly doubled those vacancies in the years 1995 through 2001. We have already reduced overall federal court vacancies to the lowest levels in 14 years. We continue to move forward this year at a rapid-fire pace in Committee, light years faster than any even approached in the Clinton years.

Today we are considering the nominations of four people to seats on the federal bench. William Duane Benton of Missouri, nominated to the U.S. Court of Appeals for the Eighth Circuit, Robert Harwell to the U.S. District Court in South Carolina, George Schiavelli for the U.S. District Court in the Central District of California, and Curtis Gomez, for the U.S. District Court in the Virgin Islands.

Today's nominee for the Circuit Court, Judge Benton, currently serves on the Supreme Court of Missouri. He has a reputation as a conservative, but fair-minded judge. As an attorney he had experience in a variety of areas of law, and on the State Supreme Court has handled complex criminal and civil cases. He has written a number of opinions, and they are really quite good, laying out the facts and the law with no hint of any personal bias. Judge Benton shows a willingness to listen to all litigants and to be fair.

I was especially struck by his fairness in death penalty cases. Far too often judges, especially elected judges, yield to the pressure of those who would sacrifice important constitutional principles in capital cases. As I look at his record, I see that of the 21 published opinions Judge Benton has written in death penalty cases, he has affirmed 12 and reversed nine. Whether I agree or disagree with his decisions in each of these cases,

I do think such his record indicates some sense of equity. I think it is telling that he is willing to see beyond what are always terrible facts in these cases to ensure that justice and important constitutional safeguards are preserved.

I hope that my praise for his work in death penalty cases will not hurt Judge Benton's nomination. I remember not so long ago when another judge on the Supreme Court of Missouri, now-Chief Justice Ronnie White, was before this Committee as a nominee to a seat on the federal bench. Sadly, Judge White's willingness to uphold the Constitution and ensure fair process in death penalty cases led to his being defeated by a party line vote of Republican Senators. His record was twisted and distorted for purposes of partisan politics.

Judge White was twice nominated by President Clinton to fill a seat on the U.S. District Court. This Committee held two hearings on his nomination and at both of those hearings, Judge White was introduced enthusiastically by Senator Bond, and after each of these hearings the Committee voted favorably to report his nomination to the full Senate. Despite this bipartisan support, however, his nomination was delayed for months and then years. When the time finally came for a vote on the Senate floor, Judge White was ambushed and he was rejected in a party line vote during which Republicans who had supported his nomination previously reversed position to scuttle it before the Senate.

The biggest distortions of Judge White's record were in death penalty cases. His record on the whole compares favorably to Judge Benton's. According to testimony at Attorney General Ashcroft's confirmation hearing, Judge White voted to affirm the death penalty in 69 percent of the cases he heard. Looking just at the opinions Judge Benton has authored, we see him writing to affirm the death penalty 58 percent of the time. If we factor in cases in which he did not write the opinion but voted to affirm a capital sentence, I am sure the percentage is higher, and approaches Judge White's record.

For opposing a capital sentence in dissent in a small minority of the cases he heard, Judge White was vilified. Then-Senator Ashcroft took to the Senate floor and pointed to Judge White's record in death penalty cases as evidence that White was "pro-criminal," further describing Ronnie White as a judge, "with a tremendous bent toward criminal activity or with a bent toward excusing or providing second chances or opportunities for those who have been accused in those situations." These were outrageous things to say about a man who had devoted his life to the law, who had served many years on the State's highest court, and who had voted to reverse a small number of death sentences in order to preserve the integrity of the Constitution. When Judge White came to testify at Attorney General Ashcroft's confirmation hearing, Senator Specter offered him an apology for the way in which he was treated.

I mention all of this, as I said, because it provides such a stark contrast to the treatment that Judge Benton is getting and I daresay will get as his nomination proceeds through the Senate. I doubt anyone will look at the nine cases in which he wrote to reverse a death penalty -- 50 percent more cases than those Judge White voted to reverse -- and accuse him of being "pro-criminal". I will be surprised if, because he has found reversible error in the imposition of nine different death sentences, each one involving terrible crimes and

horrific facts, any Member of this Committee or this Senate will accuse him of having a, "tremendous bent toward criminal activity." I will be shocked if, because he exercised his best judgment and followed the law as he understood it, he will be vilified and humiliated in a sneak attack in the manner that Judge Ronnie White was treated.

Of course, none of that should happen to Judge Benton, just as none of that should have happened to Judge White. I hope that one day Judge White's name can come back before this Committee and the Senate and that he can be treated with honesty, integrity and respect, just as we do today treat Judge Benton.

We will also hear today from three nominees to district courts, two for lifetime appointments and one for a 10-year appointment to an Article I Court in the U.S. Virgin Islands. Mr. Schiavelli is another Bush nominee to have been nominated and have a hearing in advance of the time the vacancy he is nominated to fill even exists. I look forward to hearing from these nominees today, as well.

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**NOMINATION OF MICHAEL H. WATSON, OF  
OHIO, NOMINEE TO BE DISTRICT JUDGE  
FOR THE SOUTHERN DISTRICT OF OHIO**

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**FRIDAY, JUNE 4, 2004**

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:06 a.m., in Room SD-226, Dirksen Senate Office Building, Hon. Michael DeWine, presiding.

Present: Senator DeWine.

**OPENING STATEMENT OF HON. MICHAEL DEWINE, A U.S.  
SENATOR FROM THE STATE OF OHIO**

Senator DEWINE. The Committee will come to order.

It is my pleasure and honor today to introduce Judge Michael Watson, who currently serves on the Tenth District Court of Appeals in Franklin County, Ohio. President Bush has nominated Judge Watson to serve as a Federal judge in the Southern District of Ohio.

Before I speak about Judge Watson, I would like to welcome to the Committee several people who are here today to support him. Judge Watson's wife, Lori Watson, is here. We would like to welcome her. His two staff attorneys, Dorci Gass and Carrie Wambaugh, and his administrative assistant, Karen Waldrop, we would welcome all of them here. We thank you all for coming.

I am sorry that none of Judge Watson's three sons could make it today. Grant and Tommy are both at Ohio State and Harrison is at Thomas Worthington High School. All are either taking or preparing for final exams this week.

Judge Watson has had a long and distinguished career as a public servant. He has been a judge on the Tenth District Court of Appeals in Franklin County since Governor Bob Taft appointed him in May of 2003.

From 1996 to 2003, Judge Watson served on the Franklin County Common Pleas Court, a position he was appointed to by then Governor George Voinovich, and to which he was re-elected twice.

In Ohio, the Common Pleas Court is the highest trial bench. It is a court that tries all the major civil and criminal cases. During his last 3 years on the trial court, Judge Watson served as administrative judge with responsibility for the administrative management of the 16-member court and its staff. He dealt with literally thousands of cases during his time as a State trial court judge.

Before serving on the bench, Judge Watson worked for the office of then Governor George Voinovich, first as Deputy Chief Legal Counsel and then, from 1994 to 1995, as Chief Legal Counsel. Prior to that, he was Chief Legal Counsel to the Director of the Ohio Department of Commerce.

Judge Watson also spent several years in private practice, focusing primarily on personal injury litigation, employment disputes, workers compensation, and criminal defense.

Without question, Judge Watson has had an impressive legal career. What really impresses me about him is how hard he has worked throughout his entire life. Judge Watson has genuinely lived the American dream. He has lived that dream by working hard and overcoming odds. He came from a working class family, where he was the first in his family to graduate from college. Now he is here before us as a nominee of the President of the United States, to be a Federal District Court Judge.

When we get to questioning, I will ask Judge Watson about his beginnings, his humble beginnings. I would like for him to fill in the gaps about his life for us. But for now, I just want to say to Judge Watson that he should be very, very proud of his achievements.

Judge Watson, I believe, will be a fine addition to the District Court. In his time on the Ohio Court of Common Pleas and on the Ohio Court of Appeals, Judge Watson has distinguished himself through his thoughtful legal reasoning and his great integrity. This experience and his temperament make Judge Watson highly qualified for the Federal District Court.

Let me at this point ask Judge Watson to come forward. Judge, if you will remain standing, and raise your hand and take the oath.

Judge do you swear that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge WATSON. I do.

Senator DEWINE. Judge, if you will please be seated, you can make any opening statement you would like to make, or introduce anyone else that you would like to introduce at this point, and then I will get to our questions.

#### **STATEMENT OF HON. MICHAEL H. WATSON, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF OHIO**

Judge WATSON. Thank you, Mr. Chairman.

First of all, I want to thank you personally for holding this hearing today, and the other members of the staff of the Committee for being present today. It is a distinct privilege to be in the United States Senate this morning, having the opportunity to talk about my beginnings and where I have come from. So I very much appreciate that. I also want to extend my thanks to President Bush for nominating me for this position.

In addition to the individuals you previously identified, Mr. Chairman, I have with me today two law school classmates of mine, Hon. John M. Peterson, who is sporting the "ZZ Top" beard in the back, and along with him is Mr. David Ahrendt.

Senator DEWINE. We welcome them.



Judge WATSON. Thank you. They have always been great supporters of mine and it really touches me that they are here this morning. So thank you very much for the opportunity.  
[The biographical information of Judge Watson follows.]

**QUESTIONNAIRE FOR NOMINEES REFERRED  
TO THE  
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY**

**I. BIOGRAPHICAL INFORMATION**

1. Full Name (include any former names used.)  
Michael Harrison Watson
  
2. Address: List current place of residence and office address(es)  
  
 Residence: Worthington, Ohio  
 Office: Tenth District Court of Appeals  
 373 S. High Street, 24<sup>th</sup> Floor  
 Columbus, Ohio 43215
  
3. Date and place of birth.  
  
November 7, 1956, Akron, Ohio
  
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).  
  
 Lori Lynn (Eckert) Leavitt Watson  
 Vice-President Flag Lady, Inc.  
 Flag Lady, Inc.  
 4567 N. High Street  
 Columbus, Ohio 43214
  
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.  
  
 (a) The Ohio State University  
 January, 1979 to March, 1983  
 B.A. in Political Science  
 March 18, 1983  
  
 (b) Capital University School of Law  
 August, 1983 to May, 1987  
 J.D.  
 May 17, 1987
  
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you

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were connected as an officer, director, partner, proprietor, or employee since graduation from college.

- (a) 1983 to 1988  
Franklin County Court of Common Pleas  
Bailliff/Law Clerk, the Honorable Tommy L. Thompson
- (b) 1988 to 1990  
Lane, Alton & Horst, L.L.C.,  
Associate
- (c) March, 1990 to December, 1990  
Delligatti, Hollenbaugh, Briscoe & Milless, L.P.A.  
Associate  
  
January, 1991 to February, 1991  
Climaco, Seminatore, Delligatti & Hollenbaugh  
Associate  
  
The Delligatti Firm merged with the Climaco Firm in January, 1991  
Firms have disbanded
- (d) February, 1991 to May, 1992  
Ohio Department of Commerce  
Chief Legal Counsel
- (e) May, 1992 to March, 1994  
Office of the Governor  
Deputy Chief Legal Counsel
- (f) 1992 to 1998  
Children's Hospital Development Board  
Member
- (g) March, 1994 to December 31, 1995  
Office of the Governor, Chief Legal Counsel
- (h) 1994 to present  
Worthington Youth Boosters  
Member, 1994 to present  
Secretary, 2001 to 2002  
President, 2002 to 2003  
Ex-officio, 2003 to present

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- (i) January 1, 1996 to April 30, 2003  
Franklin County Court of Common Pleas  
Judge
  - (j) 1999 to 2001(approximately)  
Catholic Social Services Board of Trustees  
Member
  - (k) 2001 to present  
Alvis House Board of Trustees  
Member
  - (l) May 1, 2003 to present  
Tenth District Court of Appeals  
Judge
- 7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.
  - (a) United States Air Force  
July 7, 1975 to September 23, 1978  
Rank: E4 upon discharge  
Honorable discharge
  - (b) Ohio Air National Guard  
September 24, 1978 to September 24, 1984 (approximately)  
Rank: E5 upon discharge  
Honorable discharge from active duty and Ohio Air National Guard upon expiration of my enlistment in the Guard.
- 8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.  
  
Not applicable
- 9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.
  - (a) Ohio State Bar Association, Member, June, 1988 to present.
  - (b) Columbus Bar Association, Member, June, 1988 to present.
  - (c) Franklin County Court of Common Pleas, Administrative Judge, January 1, 2001 to April 30, 2003

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- (d) Franklin County Court of Common Pleas, Personnel Committee Chair, 2000
  - (e) Ohio Judicial Conference, Administration and Court Reform Committee, 2002 to present.
- 10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.
  - (a) Lobbying: Ohio State Bar Association  
Columbus Bar Association
  - (b) Other: Alvis House, Member Board of Trustees  
Worthington Youth Boosters, Member, 1994 to present,  
Secretary, 2001-2002, President, 2002-2003, Ex-officio,  
2003-present
- 11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.
  - (a) Supreme Court of Ohio, May, 1988, good standing.
  - (b) United States District Court, Southern District of Ohio, Fall, 1988, good standing
- 12. Published Writings: List the titles, publishers, and dates of books, articles, reports or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.
  - (a) *In re Plain Township Water and Sewer District* (1997), 93 Ohio Misc.2d 1, 701 N.E.2d 470. Copy attached.
  - (b) *State v. Myers* (2003), 153 Ohio App.3d 547, 795 N.E.2d 77. Copy attached
  - (c) *DiMarco v. Shay* (2003), 154 Ohio App.3d 141, 796 N.E.2d 572. Copy attached.
  - (d) *Rumbaugh v. Ohio Department of Commerce* (2003), 155 Ohio App.3d 288, 800 N.E.2d 780. Copy attached.

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

Overall health is very good. Most recent physical examination completed on February 14, 2004.

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

- (a) January 1, 1996 to April 30, 2003  
Franklin County Court of Common Pleas  
Appointed by Governor George V. Voinovich  
Elected for unexpired term in November, 1996  
Elected for full term in November, 1998. Served until April 30, 2003.  
Highest state trial court, with civil jurisdiction (excluding probate, domestic and juvenile) and criminal felony jurisdiction.
- (b) May 1, 2003 to present  
Tenth District Court of Appeals  
Appointed by Governor Bob Taft  
Term expires December 31, 2004  
Appeals from all state courts of record. Original jurisdiction of petitions for extraordinary writs, including mandamus, habeas corpus, prohibition and procedendo.

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

- (a) (1) *Independent Insurance Agency of Ohio, Inc. v. Harold T. Duryee, in his official capacity as Superintendent of Insurance of the Ohio Department of Insurance, et al.*, 96CV5010, Decision and Entry on Motion of Plaintiff for Preliminary and Permanent Injunctive Relief after Consolidated Trial on the Merits. Copy attached.

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- (2) *Shamansky v. Shamansky, et al.*, 97CV8669, 97CV8670, 97CV8671, 97CV8672, 97CV8673, Decision and Entry Adopting in Part and Modifying in Part the December 11, 2000 Commissioners' Report; Decision and Entry Sustaining the December 29, 2000 Objections of Defendants Samuel C. and Gale M. Shamansky to Commissioners' Report; Decision and Entry Sustaining in Part and Denying in Part the December 29, 2000 Objections of Plaintiff Robert N. Shamansky to Commissioners' Report; Decision and Entry Sustaining the September 10, 2001 Motion of Defendants Samuel C. and Gale M. Shamansky to Substitute Shamansky Real Estate Holdings, L.L.C. for Defendants Samuel C. and Gale M. Shamansky; Decision and Entry Sustaining the October 29, 2001 Motion of Plaintiff Robert N. Shamansky to Strike the Unsworn, Out-of-Court Assertions Set Forth in the Post-hearing Brief of Defendants Samuel C. and Gale M. Shamansky and Shamansky Real Estate Holdings, L.L.C. Copy attached.
- (3) *Caren Baier v. Bellows & Associates, Inc.*, 96CV2160, Decision and Entry Denying Defendants' January 20, 1998 Second Motion to Sanction and Award of Attorney Fees. Copy attached.
- (4) *P.I.E. Insurance Company Consolidated Litigation*, 98CV5242, 98CV7172, 98CV8302, 98CV8328, 98CV8925, Decision and Entry Regarding the April 19, 1999 Motion of Defendants Benesch, Friedlander, Coplan & Aronoff, L.L.P. for Clarification of Status of Attorney-Client Privilege. Copy attached.
- (5) *P.I.E. Insurance Company Consolidated Litigation*, 98CV5242, 98CV7172, 98CV8302, 98CV8328, 98CV8925, Decision and Entry Denying the July 1, 1999 Motion of Defendant Benesch, Friedlander, Coplan & Aronoff, L.L.P. for Summary Judgment; Decision and Entry Denying the September 9, 1999 Motion of Plaintiff to File *Instantly* the Attached Surreply in Opposition to the Motion of Defendant Benesch, Friedlander, Coplan & Aronoff, L.L.P. for Summary Judgment; Decision and Entry Deeming as Moot the September 21, 1999 Motion of Defendant Benesch, Friedlander, Coplan & Aronoff, L.L.P. for Protective Order; Decision and Entry Deeming as Moot the October 8, 1999 Motion and Accompanying Memorandum of Plaintiff for Extension of Time. Copy attached.
- (6) *P.I.E. Insurance Company Consolidated Litigation*, 98CV5242, 98CV7172, 98CV8302, 98CV8328, 98CV8925, Decision and Entry Sustaining in Part and Denying in Part the January 28,

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- 1999 Motion of Plaintiff to Strike Certain Affirmative Defenses; Decision and Entry Deeming as Moot the December 1, 1999 Motion of Plaintiff for Default Judgment; Decision and Entry Deeming as Moot the December 1, 1999 Motion of Plaintiff for Show Cause Order; Decision and Entry Denying the December 1, 1999 Motion of Plaintiff for Sanctions; Decision and Entry Sustaining the January 24, 2000 Motion of Plaintiff to Compel; Decision and Entry Sustaining in Part and Denying in Part the January 27, 2000 Motion of Plaintiff to Strike Affirmative Defenses; Decision and Entry Deeming as Moot the January 27, 2000 Motion of Plaintiff for Judgment on the Pleadings; Decision and Entry Sustaining in Part and Denying in Part the February 10, 2000 Motion of Plaintiff for Protective Order; Decision and Entry Denying the March 30, 2000 Motion of Non-Party J. Lee Covington II, in His Capacity as Superintendent of the Ohio Department of Insurance, for a Protective Order; Decision and Entry Deeming as Moot the April 14, 2000 Motion of Non-Party Craig R. Mayton for Protective Order. Copy attached.
- (7) *Ohio River Pipe Line, L.L.C. v. Virgil H. Sidner, et al.*, 99CV8347, Decision and Entry Sustaining the October 6, 1999 Verified Complaint of Plaintiff for Appropriation of Easement Interest in Real Property; Decision and Entry Denying the January 13, 2000 Motion of Defendants to Dismiss; Decision and Entry Denying the March 15, 2000 Motion of Non-Party Pleasant Township Board of Trustees to Intervene; Motion of Hearing on January 5, 2001. Copy attached.
- (8) *State v. Kareem Jackson*, 97CR1902, Decision and Entry Denying the April 19, 1999 Post-conviction Petition of Defendant. Copy attached.
- (9) *State v. David Braden*, 98CR4601, Decision and Entry Denying the June 9, 2000 Post-conviction Petition of Defendant. Copy attached.
- (10) *State v. Timothy Howard*, 76CR3207(B), The April 16, 2003 Decision and Entry Sustaining the September 20, 1996 Post-conviction Petition of Defendant. Copy attached.
- (11) *Ex Rel. State of Ohio, Heartland Jockey Club, Ltd., dba Beulah Park v. Ohio State Racing Commission*, 2000CV1091, 2000CV447, Decision and Entry Denying the December 4, 2000 Motion of Petitioner for Summary Judgment; Decision and Entry Sustaining the December 4, 2000 Motion of Intervening



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Respondent for Summary Judgment; Decision and Entry  
Sustaining the December 4, 2000 Motion of Respondent for  
Summary Judgment.

- (b) (1) *Watts v. Taco Bell* (January 21, 1997), Franklin App. No. 96AP-1021, unreported.

Summary: Appellate court reversed entry of summary judgment in favor of defendants. Held defendant had a duty to warn plaintiff of dangerous condition and the adequacy of the warning was a fact question for the jury because, given the evidence, reasonable minds could differ on that issue.

- (2) *Thatcher v. Fields* (1997), 118 Ohio App.3d 63, 691 N.E.2d 1103.

Summary: Appellate court reversed judgment of trial court. Held trial court abused its discretion in imposing guardian ad litem fees as there was no statutory authority for requiring the first minor, as a prevailing plaintiff to pay the fees.

- (3) *Lieberman v. Screen Machine Advertising* (February 4, 1997), Franklin App. No. 96AP-665, unreported.

Summary: Appellate court reversed order of trial court. Concluded plaintiff's petition was outside scope of civil rules.

- (4) *Miller v. Walker* (June 12, 1997), Franklin App. No. 96AP-1070, unreported.

Summary: Appellate court reversed grant of summary judgment to defendant. Held, based on the record before it, could not determine whether the driver's actions were a material breach and prejudiced the issuer.

- (5) *Community Insurance Company v. Sullivan* (June 30, 1997), Franklin App. No. 96AP-1750, unreported.

Summary: Appellate court reversed denial of defendant's motion for relief from judgment. Determined trial court failed to distinguish between a void judgment and a voidable judgment.

- (6) *Moore v. City of Columbus* (August 19, 1997), Franklin App. No. 97AP-360, unreported.

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Summary: Appellate court reversed trial court order affirming decision of the Board of Industrial Relations. Held Board's order was based on an arbitrary and unreasonable standard.

- (7) *Cseplo v. Steinfels* (September 4, 1997), Franklin App. No. 97AP-433 unreported.

Summary: Appellate court reversed granting of summary judgment to defendants. Held genuine issues of material fact precluded summary judgment.

- (8) *Thatcher v. Grubler* (November 25, 1997), Franklin App. No. 97AP-733, unreported.

Summary: Appellate court affirmed in part and reversed in part. Held issue of fact existed on the advice provided to the insured to not be legally represented.

- (9) *Montgomery v. John Doe 26* (December 22, 1998), Franklin App. Nos. 98AP-534, 98AP-623, unreported.

Summary: Appellate court reversed granting of default judgment and injunctive relief. Appellate court held default judgment was entered without notice. Also, granting of injunction constituted an interference with the federal court's exclusive jurisdiction.

- (10) *State v. Green* (March 18, 1999), Franklin App. No. 98AP-633, unreported.

Summary: Appellate court concluded defendant's right to a fair trial was violated when the prosecution referred to a nontestifying witness' videotaped statement fingering defendant and trial court's curative instruction did not cure the damage.

- (11) *Thomas v. Shaevitz* (September 16, 1999), Franklin App. No. 98AP-1370, unreported.

Summary: Appellate court affirmed in part and reversed in part granting of summary judgment. Plaintiffs demonstrated existence of a genuine issues of material fact with respect to their claim that defendants overcharged for management and maintenance of the complex and that individual appellee provided contradictory statements in his deposition and affidavit.

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- (12) *Duryee v. PIE Mutual Ins. Co.* (September 23, 1999), Franklin App. Nos. 98AP-1255, 98AP-1256, unreported.

Summary: Appellate court reversed holding arbitration clauses were broad enough to encompass defendant's claims.

- (13) *Swiggum v. Ameritech Corp.* (September 30, 1999), Franklin App. Nos. 98AP-1031, 98AP-1040, unreported.

Summary: Appellate court affirmed in part and reversed in part. Reversed denial of motion for judgment notwithstanding the verdict because plaintiff failed to establish prima facie requirements for age discrimination.

- (14) *State v. Copeland* (November 16, 1999), Franklin App. No. 98AP-1579, unreported.

Summary: Appellate court held trial court erred in overruling defendant's motion to suppress. Concluded plaintiff failed to present evidence of any standardized procedure or established routine for conducting inventory searches.

- (15) *State v. Richardson* (December 7, 1999), Franklin App. No. 98AP-1500, unreported.

Summary: Appellate court reversed as trial court erred in overruling defendant's motion to suppress. Police officers were not justified in conducting a warrantless search of defendant.

- (16) *Liberty Savings Bank v. Biscello* (January 13, 2000), Franklin App. No. 98AP-1398, unreported.

Summary: Appellate court vacated judgment. Trial court erred in considering plaintiff's motion for summary judgment since it lacked a sufficient certificate of service.

- (17) *State v. Mullins* (June 30, 2000), Franklin App. No. 99AP-671, unreported.

Summary: Appellate court affirmed in part and reversed in part. Held trial court failed to follow requisite statutory provisions because trial court did not offer any insight into why consecutive sentences were imposed.

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- (18) *Shamansky v. Shamansky* (July 13, 2000), Franklin App. Nos. 99AP-547, 99AP-549, 99AP-550, 99AP-551, 99AP-552, unreported.

Summary: Appellate court concluded, while no particular form was required, some form of commissioners' report had to be filed before the trial court had authority to act on it.

- (19) *Bertolini v. Whitehall City School District Board of Education* (2000), 139 Ohio App.3d 595; 744 N.E.2d 1245.

Summary: Appellate court reversed concluding school board had insufficient facts to support defendant's decision to terminate plaintiff's employment.

- (20) *Montgomery v. John Doe* 26 (2000), 141 Ohio App.3d 242; 750 N.E.2d 1149.

Summary: Appellate court affirmed summary judgment in part and reversed in part. Statutes of limitations and tolling provisions applied, however, laches did not, to the common law and other claims subrogated to the state, since the applicable statute, prior amendment, did not grant the state an independent right to recover.

- (21) *National Association of Forensic Counselors v. Fleming* (2001), 143 Ohio App.3d 811; 759 N.E.2d 389.

Summary: Appellate court reversed granting of summary judgment. Held statute pertaining to certification of chemical dependency counselors by credentialing board met the requirements for a constitutional delegation of legislative authority as the statute established an adequate procedure for review of the credentialing process.

- (22) *State v. Moody* (March 13, 2001), Franklin App. No. 98AP-1371, unreported.

Summary: Appellate court reversed convictions because jury could have found defendant guilty of aiding and abetting murder and felonious assault without making a finding as to an essential element of the offense and evidence existed which would have supported a self-defense instruction.

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- (23) *Mankins v. Paxton* (2001), 142 Ohio App.3d 1; 753 N.E.2d 918.

Summary: Appellate court affirmed in part and reversed in part. Held trial court did not lack subject-matter jurisdiction over plaintiff's claims.

- (24) *Gibson v. Testa* (May 24, 2001), Franklin App. No. 00AP-1303, unreported.

Summary: Appellate court reversed trial court holding trial court erred when it determined the filing of a complaint pursuant to R.C. 5715.13 and 5715.19 constituted notice of protest and notice of intention to sue.

- (25) *State v. Papalevich* (November 13, 2001), Franklin App. No. 01AP-264, unreported.

Summary: Appellate court reversed judgment of conviction. Concluded trial court abused its discretion in allowing witness to testify as state failed to carry its evidentiary burden of establishing competency.

- (26) *State v. Westbrook* (December 4, 2001), Franklin App. No. 00AP-1383, unreported.

Summary: Appellate court reversed conviction. Held testimony as to defendant's prior arrest for loitering for drug trafficking to impeach his credibility was precluded by evidence rules.

- (27) *State v. Norvett* (December 31, 2001), Franklin App. Nos. 01AP-572, 01AP-573, 01AP-574, 01AP-575, 01AP-576, unreported.

Summary: Appellate court affirmed in part and reversed in part. Held trial court failed to make the necessary statutory finding with respect to the imposition of consecutive sentences.

- (28) *HER, Inc. v. Parenteau* (2002), 147 Ohio App.3d 285, 770 N.E.2d 105.

Summary: Appellate court reversed judgment of trial court. Held plaintiff's complaint set forth a derivative claim and could adequately represent the interests of the corporation.

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- (29) *Quesnell v. Bank One Corporation* (April 4, 2002), Franklin App. No. 01AP-792, unreported.

Summary: Appellate court affirmed in part and reversed in part. Concluded trial court erred in concluding plaintiff was not entitled to incentives under the theory of unjust enrichment.

- (30) *State v. Scott* (May 9, 2002), Franklin App. No. 01AP-801, unreported.

Summary: Appellate court concluded trial court erred when it imposed consecutive sentence because it imposed those sentences without making statutory findings either in judgment entry or on the record during sentencing.

- (31) *Covington v. Buckner* (July 23, 2002), Franklin App. No. 01AP-1277, unreported.

Summary: Appellate court affirmed in part and reversed in part. Reversed portion of judgment against former employee's wife for the cash payment. Concluded she was liable only for the amount of the forgiven loan.

- (32) *State v. Simpson* (July 23, 2002), Franklin App. No. 01AP-757, unreported.

Summary: Appellate court affirmed conviction and reversed sentence. Held trial court failed to make required statutory findings to impose maximum and consecutive sentences.

- (33) *State v. Portis* (September 3, 2002), Franklin App. No. 01AP-1458, unreported.

Summary: Appellate court reversed judgment holding trial court erred in not allowing defense counsel to present a detective with a copy of her investigative summary to refresh her recollection as to whether the victim said she had previously dated defendant.

- (34) *DiPietro v. Ginther* (September 12, 2002), Franklin App. No. 01AP-1047, unreported.

Summary: Appellate court reversed judgment holding trial court erred in concluding the arbitration clause in standard printed contract was invalid and that requiring the homebuyers to engage in arbitration was unconscionable.

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- (35) *HER, Inc. v. Parenteau* (2003), 153 Ohio App.3d 704, 795 N.E.2d 720.

Summary: Appellate court reversed judgment of trial court. Held in denying motion to intervene, trial court failed to indicate whether it found the developer was seeking to intervene as of right or permissively.

- (36) *Covington v. HKM Direct Market Communications, Inc.* (November 25, 2003), Franklin App. No. 03AP-52, unreported.

Summary: Appellate court reversed judgment determining trial court erred in ruling all payments made by insolvent insurance company, within one year of the time the company was placed into rehabilitation, were voidable preferences pursuant to statute.

Plaintiff Covington filed a notice of appeal to the Ohio Supreme Court on January 9, 2004. To date, the Ohio Supreme Court has not made a determination whether it will review the case.

- (37) *Welsh v. Cavin* (January 8, 2004), Franklin App. No. 02AP-1328, unreported.

Summary: Appellate court affirmed in part and reversed in part. Held as there was a credibility contest as to the reason the deeds were granted, trial court erred in finding summary judgment was appropriate.

- (c) There were numerous civil and criminal cases in which constitutional issues were raised. Many of these contained no substantive constitutional issues. However, the following two cases contained some degree of constitutional analysis.

- (1) *National Association of Forensic Counselors v. Fleming*, 97CVH03-3468. Appellate court citation, (2001), 143 Ohio App.3d 811; 759 N.E.2d 389 [Please see 15(b)(22)]

- (2) *Northwestern Ohio Building and Construction Trades Council v. Conrad*, 92 Ohio St.3d 282; Franklin App. No. 98AP-1287, unreported.

Summary: Appellate court affirmed in part and reversed in part. Concluded, while summary judgment was proper in part, it was also improper to grant it because the state constitution and statute prohibited the use of state insurance funds for payment of fees for

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medical management services. Ohio Supreme Court reversed appellate court and reinstated judgment of trial court.

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

Not applicable

17. Legal Career:

- (a) Describe chronologically your law practice and experience after graduation from law school:

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

1983 to 1988  
Franklin County Court of Common Pleas  
Bailiff/Law Clerk, the Honorable Tommy L. Thompson  
369 S. High Street  
Columbus, Ohio 43215

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

Not applicable.

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

- (a) 1988 to 1990  
Lane, Alton & Horst, L.L.C.  
Associate  
175 S. Third Street, Suite 700  
Columbus, Ohio 43215

- (b) March, 1990 to December,  
Delligatti, Hollenbaugh, Briscoe & Milless, L.P.A.  
Associate  
175 S. Third Street, Tenth Floor  
Columbus, Ohio 43215



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January, 1991 to February, 1991  
Climaco, Seminatore, Delligatti & Hollenbaugh  
Associate  
175 S. Third Street, Tenth Floor  
Columbus, Ohio 43215

The Delligatti Firm merged with the Climaco Firm in  
January, 1991  
Firms have disbanded  
For information pertaining to these two firms, please  
contact:  
H. Ritchey Hollenbaugh, Esq.  
Carlile, Patchen & Murphy, L.L.P.  
366 E. Broad Street  
Columbus, Ohio 43215  
(614)228-6135

- (c) February, 1991 to May, 1992  
Ohio Department of Commerce  
Chief Legal Counsel  
77 S. High Street, 23<sup>rd</sup> Floor  
Columbus, Ohio 43215
- (d) May, 1992 to March, 1994  
Office of the Governor  
Deputy Chief Legal Counsel  
77 S. High Street, 30<sup>th</sup> Floor  
Columbus, Ohio 43215
- (e) March, 1994 to December 31, 1995  
Office of the Governor  
Chief Legal Counsel  
77 S. High Street, 30<sup>th</sup> Floor  
Columbus, Ohio 43215
- (f) January 1, 1996 to April 30, 2003  
Franklin County Court of Common Pleas  
Judge  
369 S. High Street  
Columbus, Ohio 43215

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(g) May 1, 2003 to present  
Tenth District Court of Appeals  
Judge  
373 S. High Street, 24<sup>th</sup> Floor  
Columbus, Ohio 43215

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

- (a) 1988 to 1990: litigation in the areas of insurance defense, workers' compensation and felony criminal defense.
- (b) March, 1990 to February, 1991: litigation in the area of plaintiff's personal injury, small business representation and defense of employment claims.
- (c) February, 1991 to May, 1992: administrative, policy, supervisory, securities regulations, financial institutions, labor relations and employment.
- (d) May, 1992 to December 31, 1995: administrative, policy, supervisory, legislative, securities regulations, financial institutions, labor relations, employment, real estate, clemency, ethics, human services and corrections oversight.
- (e) 1996 to present: trial and appellate judge.

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

Specialization is recognized in limited areas in Ohio. I did not practice in any of the areas of law subject to specialization as the term is used in Ohio.

As a defense associate, my clients were insured individuals in personal injury and malpractice cases, large and small business owners (ex. Columbus Distributing Co., General Dynamics and Fruehauf Trucking) and criminal defendants.

As an associate in a plaintiff's firm, my clients were individuals in personal injury and employment cases, small business owners

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and criminal defendants.

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

(a) 1988 to 1991: As with many civil practitioners, the time spent in court is more appropriately described as occasional as the majority of work is done in the discovery phase of the case. While in private practice, I appeared in court more frequently for criminal cases than on civil matters.

(b) 1991 to 1995: During my career in the public sector, I testified as a witness in the Dublin Securities prosecution.

(c) 1995 to present: As a trial court judge with over 700 cases constantly on my docket, I regularly presided over civil and criminal trials, criminal pleas and sentencings. As an appellate judge I have participated as a panel member in over 200 cases, authoring roughly one-third of the opinions.

2. What percentage of these appearances was in:

(a) federal courts;

1%. Appearances were limited to pretrials.

(b) state courts of record;

99%. Appearances were before common pleas courts in Franklin County and surrounding counties and municipal courts, on a few occasions, in counties other than Franklin County (ie. Allen, Lancaster, Pike and Licking Counties)

(c) other courts.

Not applicable

3. What percentage of your litigation was:

(a) civil:

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70% of my time in private practice was consumed by civil litigation with workers' compensation defense taking up an additional 10%.

(b) criminal.

20% of my time in private practice was devoted to the criminal defense of primarily indigent defendants.

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

In private practice, the number of trials tried to verdict was fewer than five (5) civil trials, in all of which I served as associate counsel. As a trial judge, I presided over numerous trials (48 jury trials in civil matters, 56 jury trials in criminal matters, 7 non-jury trials civil matters and 7 non-jury trials in criminal matters)

5. What percentage of these trials was:

(a) Jury: 100% (private practice)  
 98% (trial judge)

(ii) Non-jury: Not applicable (private practice)  
 2% (trial judge)

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

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

Private practice: At present, I only recall some of the details in matters with which I was involved while in private practice. With respect to these matters, I was associate counsel.

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- (1) *Columbus Distributing Co.:* I do not recall the case caption or docket number
  - (i) Summary: Represented defendant Columbus Distributing co. in a case arising from an injury to one of its drivers, which occurred at the Old Southern Hotel at Main and High Streets, Columbus, Ohio. The driver pinched and crushed the toes of one of his feet in a freight elevator as it descended into a basement of the building. Plaintiff asserted claims for personal injury and product liability.
  - (ii) Date: late 1988 or early 1989
  - (iii) Participation: Associate counsel
  - (iv) Court/Judge: Franklin County Court of Common Pleas  
The Honorable R. Patrick West
  - (v) Counsel: Jeffrey J. Jurca  
Lead Counsel for Columbus Distributing Co.  
Lane, Alton & Horst, L.L.C.,  
175 S. Third Street, Suite 700  
Columbus, Ohio 43215  
(614)233-4778  
  
James B. Blumenstiel  
Counsel for Plaintiff  
Blumenstiel, Huhn & Adams, L.L.C.  
261 W. Johnstown Road  
Columbus, Ohio 4230  
(614)475-9511
  - (vi) Disposition: Judge West dismissed the case at the end of plaintiff's case. The case was subsequently settled.
- (2) *William Terry v. Sidwell Bros.:* I do not recall the docket number.

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- (i) Summary: Product liability claim involving a mobile drilling unit owned by Sidwell Bros. Coal Co. and manufactured by our client whose name I forget. The drilling unit was used to drill holes to implant explosive charges to aid in strip mining. The drill rig collapsed and crushed the cab of a nearby pickup truck in which plaintiff William Terry was seated. While plaintiff survived, he sustained numerous head injuries. Joseph Gerling and I represented the drill manufacturer.
- (ii) Date: 1988 or 1989
- (iii) Participation: Associate counsel
- (iv) Court/Judge: United State District Court, Southern District of Ohio. I believe it was before the Honorable George C. Smith.
- (v) Counsel: Joseph A. Gerling  
Lead Counsel for the drill manufacturer  
Lane, Alton & Horst, L.L.C.,  
175 S. Third Street, Suite 700  
Columbus, Ohio 43215  
(614)233-4754  
  
Clay P. Graham  
Counsel for Sidwell Bros. Coal Co.  
Graham, McClelland & Ransbottom  
11 N. Fourth Street  
P.O. Box 340  
Zanesville, Ohio 43701  
(740)454-8585  
  
Robert Tracy  
Counsel for Plaintiff William Terry  
Formerly of the Spangenburg firm in  
Cleveland, Ohio  
Unable to locate a current address
- (vi) Disposition: Case was settled after extensive trial preparation completed.

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(3) Client name Deborah Lewis. I do not recall the docket number.

(i) Summary: Personal injury claim. Minor female seriously injured in automobile accident in Shelby, Ohio.

(ii) Date: 1990, approximately

(iii) Participation: Associate Counsel

(iv) Court/Judge: Richland County Court of Common Pleas

(v) Counsel: H. Ritchey Hollenbaugh, Esq.  
Lead Counsel for Plaintiff  
Carlile, Patchen & Murphy, L.L.P.  
366 E. Broad Street  
Columbus, Ohio 43215  
(614)228-6135

I do not recall the other counsel.

(vi) Disposition: Case ultimately settled several years after I left the firm. The work I performed involved preparation of discovery responses and drafting discovery requests. Met with client and her parents in preparation for a settlement conference, which I attended with Mr. Hollenbaugh.

(4) Client name Kelli Tyrrell. I do not recall the docket number.

(i) Summary: Personal injury claim. Young woman suffered traumatic brain injury following automobile accident in which her boyfriend was killed.

(ii) Date: 1990, approximately

(iii) Participation: Associate Counsel

(iv) Court/Judge: Summit County Court of Common Pleas

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- (v) Counsel: H. Ritchey Hollenbaugh, Esq.  
Lead Counsel for Plaintiff  
Carlile, Patchen & Murphy, L.L.P.  
366 E. Broad Street  
Columbus, Ohio 43215  
(614)228-6135

I do not recall the other counsel.

- (vi) Disposition: Case settled after I left the firm. Client improved significantly, completed journalism and law degrees and she is a member of the Bar in Ohio today. I was primarily responsible for discovery preparation. I assisted with continued monitoring of client's injuries. Significant client contact.

- (5) Client was an insured homeowner whose name I do not recall. I do not recall the docket number.

- (i) Summary: Insurance coverage dispute, declaratory judgment action. Insured's home suffered structural damage to large wooden beam which supported most of the weight of the home, which was built into the side of hill.

- (ii) Date: 1988-1989, approximately

- (iii) Participation: Associate Counsel

- (iv) Court/Judge: Common Pleas Court. I do not recall which county.

- (v) Counsel: Jeffrey D. Boyd  
Lead Counsel  
The Boyd Law Firm  
5655 N. High Street, Suite 202  
Worthington, Ohio 43085  
(614)885-4980

I do not recall the rest.



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- (vi) Disposition: Case settled. I conducted discovery depositions. Retained engineering expert and viewed house with expert.
- (6) Client was Clark Forklift. I do not recall docket numbers.
  - (i) Summary: Personal injury and/or wrongful death actions resulting from forklift roll-over accidents.
  - (ii) Date: 1988-1989, approximately
  - (iii) Participation: Associate Counsel
  - (iv) Court/Judge: Cases filed in Common Pleas Court. I do not recall which county.
  - (v) Counsel: William L. Millard  
Lead Counsel  
467 Howland Drive  
Columbus, Ohio 43230  
(614)476-0554  
  
I do not recall the rest.
  - (vi) Disposition: As a rule, these cases settled. My involvement was in the preparation of discovery responses, summarizing depositions and discovery responses.
- (7) Criminal Felony Clients. I do not recall docket numbers.
  - (i) Summary: I was appointed by various judges of the Franklin County Court of Common Pleas to represent indigent criminal defendants. I considered each of these clients' cases to be significant because their liberty was at risk.
  - (ii) Date: 1988-1990, approximately
  - (iii) Participation: Lead Counsel
  - (iv) Court/Judge: Franklin County Court of Common Pleas

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- (v) Counsel: I do not recall any of the prosecutors.
- (vi) Disposition: All of these cases resulted in negotiated resolutions that benefited my clients.
- (8) Dublin Securities. I do not recall the docket number.
  - (i) Summary: While I was Chief Counsel for the Ohio Department of Commerce, the Commissioner of Securities determined to refer for prosecution the principal officers of Dublin Securities (DSI). DSI was involved in the issuance of penny stock deals which were deemed by the Commissioner to violate Ohio Securities law. I facilitated discussions between the Commissioner of Securities and the Commerce Director and, subsequently, between the Ohio Attorney General's office and the Franklin County Prosecutor, which led to the indictments of the principal officers and the closing down of DSI. I was later called to testify as to my involvement.
  - (ii) Date: 1991-1992 was the time-frame for my involvement.
  - (iii) Participation: Chief Counsel for the Ohio Department of Commerce
  - (iv) Court/Judge: Franklin County Court of Common Pleas  
The Honorable William Ammer, by appointment of Chief Justice Thomas Moyer. Following appeal, the Honorable James J. O'Grady appointed to preside over retrial.
  - (v) Counsel: Duke Thomas, Esq.  
Special Counsel  
Vorys, Sater, Semour and Pease, L.L.P.  
52 E. Gay Street, P.O. Box 1008  
Columbus, Ohio 43215  
(614)464-6263

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James E. Phillips, Esq.  
Special Counsel  
Vorys, Sater, Semour and Pease, L.L.P.  
52 E. Gay Street, P.O. Box 1008  
Columbus, Ohio 43215  
(614)464-5610

David F. Axelrod, Esq.  
Special Counsel  
Vorys, Sater, Semour and Pease, L.L.P.  
52 E. Gay Street, P.O. Box 1008  
Columbus, Ohio 43215  
(614)464-8246

(vi) Disposition: DSI shut down and indictments brought against principal officers of DSI.

- (9) As Deputy Chief Counsel in Governor Voinovich's Administration, I assisted Chief Counsel Kurt Tunnell in the oversight of legal matters impacting state administrative agencies. The Lucasville prison riot occurred during this time and demanded a great amount of attention. Numerous questions of law and policy arose as a result of this event which tragically ended with the murder of Corrections Officer Robert Vallandingham, as well as numerous inmates.
- (10) As Chief Counsel in Governor Voinovich's Administration, we had responsibility for legislative analysis of bills enacted by the General Assembly and the preparation of legal analyses of the legislative impact prior to submission for the Governor's signature. Reviewed all clemency petitions, preparing memoranda and briefings to assist the Governor with his decision-making. Provided counsel as requested involving the crisis "du jour".

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

While Chief Legal Counsel to Governor Voinovich, directed research and drafting of state constitutional amendments and implementing statute to remove intermediate appellate review of death penalty sentences. The constitutional amendments and implementing statute passed and became

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effective January 1, 1995. Subsequently, the Ohio Supreme Court ruled the constitutional amendments and implementing statute are constitutional. See *State v. Smith* (1997), 80 Ohio St.3d 89, 684 N.E.2d 668, reconsideration denied 80 Ohio St.3d 1471, 687 N.E.2d 299, certiorari denied 118 S.Ct. 1811. 523 U.S. 1125, 140 L.E.2d 949.

Additionally, as Chief Legal Counsel, all counsel, employed by state administrative agencies trained in Alternative Dispute Resolution. The training was facilitated through cooperation with the Columbus Bar Association, the Ohio Center for Dispute Resolution and practitioners of dispute resolution within the state and local bar.

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## II. FINANCIAL DATA AND CONFLICT OF INTEREST

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

- (a) Ohio Public Employment Retirement Systems  
Payment upon retirement

- (b) Deferred Compensation  
Payment upon retirement

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

To my knowledge, I have not had a conflict of interest regarding financial holdings. Moreover, I do not anticipate any in the future. However, should a conflict develop, I would recuse and divest the financial holding in accordance with the guidelines of the Code of Judicial Conduct. Additionally, only litigation involving funds in which my retirement and deferred compensation accounts are invested are likely to present potential conflicts of interest.

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

No

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

Financial Disclosure Report attached

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

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Net Worth Statement attached

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

I managed the judicial campaign of William L. Millard in 1988 and 1990, in which he was elected and re-elected as a Judge of the Franklin County Court of Common Pleas. Participated as grass roots coordinator in initial election and re-election of S. Michael Miller as Prosecuting Attorney for Franklin County in 1980 and 1984. I have not played a role or held a position in any statewide or national political campaign.

FINANCIAL DISCLOSURE REPORT NOMINATION REPORT		Report Required by the Ethics in Government Act of 1978 (5 U.S.C. App. §§101-111)
1. Person Reporting (Last name, first, middle initial) Michael H. Watson	2. Court or Organization U.S. District Court Southern District of Ohio	3. Date of Report April 6, 2004
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date 4/06/2004 <input checked="" type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period January 1, 2003 - April 1, 2004
7. Chambers or Office Address Joseph P. Kinneary Courthouse 85 Marconi Boulevard Columbus, OH 43215-2833	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer _____ Date _____	
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.		

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

POSITION	NAME OF ORGANIZATION/ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	
1. Trustee	Alvis House
2. President	Worthington Youth Boosters
3.	

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

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
2003 & 2004	Ohio Public Employees Retirement System; pension on retirement
2003 & 2004	Ohio Deferred Compensation; payable upon retirement or separation from state service

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

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1. 2002	Combined salary State of Ohio & Franklin County Adj. Gross	\$ 96,365.00
2. 2003	" " " " " " Adj. Gross	\$ 103,988.00
3. 2004	" " " " " " " Through Apr. 2004	\$ 41,192.00
4. 2002	The Flag Lady, Inc.	\$
5. 2003	" " " " " "	\$

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Watson, Michael H.

Date of Report

April 6, 2004

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

SOURCEDESCRIPTION

NONE (No such reportable reimbursements.)

Exempt

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

SOURCEDESCRIPTIONVALUE

NONE (No such reportable gifts.)

Exempt

\$

\$

\$

\$

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

CREDITORDESCRIPTIONVALUE CODE\*

NONE (No reportable liabilities.)

Huntington National Bank

Credit card

J

MBNA

Line of credit

K

AAA

Credit card

K

USDOE

Student loans

K

Chase

Credit card

J

\* Value Codes: J=\$15,000 or less K=\$15,001-\$50,000 L=\$50,001-\$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000  
 O=\$500,001-\$1,000,000 P1=\$1,000,001-\$5,000,000 P2=\$5,000,001-\$25,000,000  
 P3=\$25,000,001-\$50,000,000 P4=\$50,000,001 or more



## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Watson, Michael H.

Date of Report

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## VII. Page 1 INVESTMENTS and TRUSTS – income, value, transactions (Includes those of spouse and dependent children. See pp. 34-39 of instructions.)

A. Description of Assets (including trust assets)  Place "X" after each asset exempt from prior disclosure.	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	(1)	If not exempt from disclosure			
	Amt. Code1 (A-H)	Type (e.g., div., rent or inc.)	Value Code2 (J-P)	Value Method Code3 (Q-W)	Type (e.g., buy, sell, mover, redemption)	(2) Date: Month- Day	(3) Value Code4 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if provide transaction)
<input type="checkbox"/> NONE (No reportable income, assets).									
<sup>1</sup> OPERS - retirement account		None							
<sup>2</sup> Prospect Bank	A	Interest	J	T					
<sup>3</sup> OH Deferred Comp - pre-tax									
<sup>4</sup> AIM Constellation		None	J	T					
<sup>5</sup> Fidelity Contrafund		None	J	T					
<sup>6</sup> Fidelity Growth Fund		None	J	T					
<sup>7</sup> Vanguard Cap. Opp. Fund		None	J	T					
<sup>8</sup> American Funds - 401K		None	K	T					
<sup>9</sup>									
<sup>10</sup>									
<sup>11</sup>									
<sup>12</sup>									
<sup>13</sup>									
<sup>14</sup>									
<sup>15</sup>									
<sup>16</sup>									
<sup>17</sup>									

1. Income/Gain Codes: (See Col. B1, D4)	A=\$1,000 or less F=\$50,001-\$100,000	B=\$1,001-\$2,500 G=\$100,001-\$1,000,000	C=\$2,501-\$5,000 H=\$1,000,001-\$5,000,000	D=\$5,001-\$15,000 I=\$15,001-\$50,000	E=\$15,001-\$50,000
2. Value Codes: (See Col. C1, D3)	J=\$13,000 or less N=\$250,001-\$500,000 P3=\$25,000,001-\$50,000,000	K=\$13,001-\$30,000 O=\$500,001-\$1,000,000	L=\$30,001-\$100,000 P1=\$1,000,001-\$5,000,000 P4=More than \$5,000,000	M=\$100,001-\$250,000 P2=\$5,000,001-\$25,000,000	
3. Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Watson, Michael H.

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

## X. CERTIFICATION.

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

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

Signature

*Michael H. Watson*

Date

*April 6, 2004*

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

## FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

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

TOTAL P.08

FINANCIAL  
STATEMENT  
NET  
WORTH

## FINANCIAL STATEMENT

## NET WORTH

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

ASSETS			LIABILITIES		
Cash on hand and in banks	5	000 00	Notes payable to banks-secured	38	000 00
U.S. Government securities-add schedule	-0-		Notes payable to banks-unsecured	-0-	
Listed securities-add schedule	-0-		Notes payable to relatives	-0-	
Unlisted securities--add schedule	-0-		Notes payable to others	-0-	
Accounts and notes receivable:	-0-		Accounts and bills due	51	000 00
Due from relatives and friends	-0-		Unpaid income tax	-0-	
Due from others	-0-		Other unpaid income and interest	-0-	
Doubtful	-0-		Real estate mortgages payable-add schedule Extraco Mortgage	199	000 00
Worthington, Ohio Real estate owned-add schedule Personal Residence	246	000 00	Chattel mortgages and other liens payable	-0-	
Real estate mortgages receivable	-0-		Other debts-itemize:		
Autos and other personal property	28	650 00	Sallie Mae - MW	38	000 00
Cash value-life insurance	-0-		USDOE - Spouse for both college		
Other assets itemize: Spouse's 401K	16	700 00	aged sons	36	000 00
Household Items	156	500 00			
OPERS - Cash Value	96	000 00			
OH Deferred Comp. - Cash Value	5	700 00	Total liabilities	362	000 00
Fed. & State Tax Refund - 2003	2	800 00	Net Worth	195	350 00
Total Assets	557	350 00	Total liabilities and net worth	557	350 00
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor	-0-		Are any assets pledged? (Add schedule)	No	
Rental X 2 (2004 & 2005) on leases co- <del>endorsed</del> Co-signed for 2 sons	8	000 00	Are you defendant in any suits or legal actions?	No	
Legal Claims	-0-		Have you ever taken bankruptcy?	No	
Provision for Federal Income Tax	-0-				
Other special debt	-0-				

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### III. GENERAL

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.
  - (a) Columbus Bar Association's Pro Bono Homeless Project. I participated in the counseling of indigent clients at the Homeless Shelter. Approximately 1991 to 1993
  - (b) From 1994 to 1995 I organized teams of attorneys to assist with packaging bulk foods at the Mid-Ohio Food Bank.
  - (c) Former member of Catholic Social Services Board of Trustees. This involved attendance at, and preparation for, monthly meetings and committee work. Approximately 1999 to 2001
  - (d) Member of Children's Hospital Development Board from 1992 to 1998. Its goal was to raise money annually for a particular need at the hospital. Approximately 1992 to 1998
  - (e) Member of Alvis House Board of Trustees. This entails attendance at, and preparation for, monthly meetings. Alvis House operates half-way houses for individuals as they prepare for release into the community. 2001 to present
2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have [sic] done to try and change these policies?  
  
No, never.
3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

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I appeared before the committee charged with recommending candidates for the federal courts to Ohio's Senators DeWine and Voinovich. I was recommended by the committee. The process continues to unfold, but events have transpired to date as follows.

In early October, 2003, Senator DeWine's staff notified interested candidates to submit their application and supporting documentation to his office by October 31, 2003.

The nominating committee, chaired by Tom Wagner, interviewed the candidates on October 31, 2003. I received an interview the next morning with Senator DeWine and his Chief of Staff. Several weeks later, on November 24, 2003, I received the call from Senator Voinovich, on behalf of Senator DeWine and himself, notifying me that I would be recommended to President Bush for nomination to the United States District Court for the Southern District of Ohio.

Subsequently, during the first week of December, 2003, I was contacted to schedule an interview with individuals in the White House Counsel's Office. That meeting occurred at the White House in the office of the Deputy White House Counsel on December 18, 2003.

On January 30, 2004, I received another call informing me that the process was moving forward and that I would be receiving the documents which I completed. On January 31, 2004, I received these documents by courier.

I completed the enclosed documents as accurately as possible. I was interviewed by the FBI and DOJ and nominated by President George W. Bush on April 6, 2004.

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

No

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

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

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

- (a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- (b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- (c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- (d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- (e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The appropriate role of a trial judge is to be an informed, prepared and neutral arbiter of the matters coming before the court. Trial judges should not have policy agendas. Instead, respecting the court's co-equal status with the legislative and executive branches, a trial judge should be guided by precedent and strive to make rulings supported by the law and the evidence.

Finally, a trial judge must be patient, tolerant, willing to listen, slow to speak and slower to anger. Hard work, diligence and integrity should be the hallmark of the judge's character.

Senator DEWINE. Well, Judge, let me start by asking a question about your background, first of all, how you came to be an attorney in the first place. You don't come from a long line of attorneys, but let me ask you how you were raised and describe the environment that you grew up in.

Judge WATSON. Thank you, Mr. Chairman.

My father left his family when we were young. I was raised by my mother and my stepfather. My stepfather managed auto parts stores, and my mother was a middle manager at Riverside Hospital in Columbus. They brought together two families, five kids, and we knew that we would not have the opportunity to go to college unless we saw to it ourselves somehow. Our parents could not afford it.

So the opportunity presented itself for me to enlist in the Air Force and I enlisted in the Air Force approximately 8 months after I graduated from college and went away to basic training, about 13 months after I graduated from high school, at Whetstone High School in Columbus, OH.

I served in the United States Air Force for 3 years and several months. I had the opportunity to go to Germany and spent 2 years in Germany. When I left the Air Force, I had the opportunity to have the GI bill assist me in paying for college. In addition, I joined a program with the Ohio National Guard at that time, known as—I received what was, I suppose, a discharge from the active duty Air Force, and I what they called “palace chased” into the Ohio Air National Guard, where I spent another roughly 6 years.

I ultimately got out of the Air Force and the Air National Guard in 1984. During that period of time, Mr. Chairman, I was married in 1979 to the wife of my youth, who sits behind me, and we had three children. I had my first son, Grant, when I was a junior in college, at Ohio State University. I was working full time during my undergrad years at the Franklin County prosecuting attorney's office, and then when I received my degree from Ohio State, I went to the only law school in town that offered a night program for a young man that was working full time and raising a family. That was Capital University Law School.

Senator DEWINE. What was your job at the prosecutor's office? You said you had a job at the prosecutor's office?

Judge WATSON. Yes. Several things initially, Mr. Chairman. I started on the administrative staff, but eventually developed into the management of law clerks who were doing discovery, providing discovery to criminal defense counsel for the cases that were being prepared. I worked there under the tutelage of Bill Curlis, was hired by now Senior United States District Judge George C. Smith when he was the Franklin County Prosecutor, and I worked for him for a period of time, and then his successor, Michael Miller. That was my tenure at the prosecuting attorney's office.

Senator DEWINE. So you went to Capital University that had a night law school?

Judge WATSON. That is correct. It was a 4-year program. I was fortunate to go to school with a number of second career professionals and other adults who were working their way through law school. I met a number of wonderful people who remain friends to this day.



Senator DEWINE. During that period of time, you continued to work for the prosecutor's office?

Judge WATSON. I worked at the prosecutor's office until I graduated from undergrad. I began working for Judge Thompson as his bailiff and eventually developed into a bailiff/law clerk position for the entirety of my 4 years at Capital.

Senator DEWINE. What impact did this experience have on your ability to be a judge, do you think, both your experience as a bailiff and your experience in going to night law school?

Judge WATSON. Thank you for the opportunity to explain, Mr. Chairman.

I was fortunate enough to meet the lion's share of the practicing bar in Franklin County as a bailiff. I worked for the administrative judge of the court, who was very well regarded, who provided me a phenomenal example of how to be a judge. He was patient. His listened to people. He didn't force people to accept guilty pleas. He had empathy for the folks who appeared before him. He had a work ethic that was one that I chose to emulate. So I had the opportunity to observe, as opposed to reading about the practice of law. I had the opportunity to participate in it, without violating any of the—Well, I had the opportunity to participate and watch other lawyers practice, saw trials conducted, watched experts in their craft performing voir dire. I listened to some fantastic closing arguments. It was a tremendous opportunity and one that other members, other peers, did not enjoy.

Senator DEWINE. After you finished law school, what did you do then?

Judge WATSON. I had the opportunity to go to work for several law firms, and eventually selected the Lane, Alton & Horst firm. Actually, they selected me. Lane, Alton & Horst is primarily an insurance defense firm—it was at that time—although the practice of law has changed, and so, too, has some of their practice.

In any event, I learned how to be a lawyer there. I did the things that a first and second year associate would do. I did not have the opportunity to choose who my clients would be. I simply worked on the cases that the partners assigned to me. I prepared interrogatories; I did deposition summaries; sometimes I conducted depositions; sometimes I interviewed expert witnesses; sometimes I carried partners' suitcases to court; sometimes I sat in the second chair at trial. I learned how to write there, you know, motion drafting and so forth. So that is the type of experience that I had at Lane, Alton & Horst.

Senator DEWINE. What kind of cases were those, Judge?

Judge WATSON. Well, they were primarily personal injury cases. It would be the defense of personal injury cases. But it was the defense of whatever case an insured had. If it was a property dispute of some sort, we dealt with that. I also did some medical negligence defense, because several of the partners focused on medical negligence.

We did some employment law work, where I had the opportunity to participate to some degree in those cases. I also did workers' compensation representation before staff hearing officers and district hearing officers of the Bureau of Workers Compensation. I

also did some felony criminal appointments as they were offered to me by certain members of the Common Pleas Court.

Senator DEWINE. How long then were you with that firm?

Judge WATSON. A year-and-a-half, 15 months, something along those lines, Senator.

Senator DEWINE. After that, where did you go, Judge?

Judge WATSON. I changed sides, so to speak, and went to work for a firm that focused primarily on personal injury representation of plaintiffs.

Senator DEWINE. What firm was that?

Judge WATSON. It would have been Delligatti, Hollenbaugh, Briscoe & Milless at that point.

Senator DEWINE. What did they do?

Judge WATSON. They did primarily personal injury work. They did some small business representation. They did some employment representation.

Senator DEWINE. What was your role there?

Judge WATSON. More of the same, really, in terms of case preparation. I had more client contact there. But primarily it was the working up of a case and trying to get it ready for trial, motion practice and so forth. I also continued with my criminal defense work there as well.

Senator DEWINE. And were you in court then during a part of that period of time?

Judge WATSON. Yes, I had the opportunity to attend—I sat second chair in cases at Lane, Alton and I believe we were prepared to go to trial in a personal injury case in Franklin County that settled. I'm sorry, but the names escape me at this point. But it would have been with Mr. Delligatti and Mr. Hollenbaugh on a particular case.

I was in court regularly when I was handling the criminal cases. I had the opportunity to attend a number of status or pretrial conferences in some of the outlying counties around Franklin County, as well as status conferences in Franklin County.

Senator DEWINE. And where did you go from there, then, Judge? What was your next—

Judge WATSON. In early 1991, I had the opportunity to go to work for the Voinovich administration. I was offered a position working for the Ohio Department of Commerce, as the Chief Counsel, and I held that position until some time in 1992.

Senator DEWINE. What does a chief counsel do?

Judge WATSON. Well, the Chief Legal Counsel had responsibility to the Department Director and dotted line responsibility to the Governor's legal staff for all of the legal issues that arose within out of the regulatory work that took place in Ohio.

Senator DEWINE. Did you give legal advice to people inside that department?

Judge WATSON. I regularly gave legal advice on labor relations matters to the Director. I served as a go between and assisted the Division Chiefs when they had legal issues that they wanted to present to the Director, and I assisted them in the presentation of their issues to the Director.

Senator DEWINE. Within that department, then, you would be basically that department's lawyer?

Judge WATSON. Correct.

Senator DEWINE. You're the chief lawyer of that department?

Judge WATSON. Among a number of lawyers, keeping in mind that the division chiefs, the Commissioner of Securities, was at that time a lawyer, and he employed an enforcement staff. They were lawyers as well, but I was the chief lawyer in the department, yes.

Senator DEWINE. So your work was the work of a lawyer? I mean, you were doing legal work. You weren't just a person who happened to be a lawyer who was in a particular position. You were doing legal work every day, is what you were doing?

Judge WATSON. That is correct. That is correct. I did have administrative responsibilities, but I also had regular legal work that I was involved in.

Senator DEWINE. And your next position was what, then?

Judge WATSON. Judge Lisa Sadler was appointed by Governor Voinovich to the Municipal Court bench, and I succeeded her as the deputy chief legal counsel in the Governor's office in 1992. I held that position until I succeeded Kurt Tunnell as the chief legal counsel to then Governor Voinovich.

Senator DEWINE. Tell us a little bit about those two positions.

Judge WATSON. As the deputy chief counsel, I was responsible primarily to the chief counsel to coordinate information. We had oversight responsibilities in the Governor's office for clemency matters, all legislative matters that were presented to the Governor for his signature. We also served as liaison between each of the cabinet directors and their legal staffs. So whatever the "crisis de jure" would be, we would need to become intimately familiar with the issues so that we could relay those issues cogently to the chief counsel and on to the Governor at that time.

Senator DEWINE. But when you were the chief legal counsel, you were the Governor's, as the term indicates, chief legal counsel?

Judge WATSON. I was, correct. Yes. I succeeded Mr. Tunnell when he went back to Bricker & Eckler, and I became the chief legal counsel. I had others working on my staff who—

Senator DEWINE. Other lawyers?

Judge WATSON. Other lawyers. They assisted me and I was the primary conduit of information to the Governor.

Senator DEWINE. The lawyers for the other departments, you had some coordinating authority in regard to them as well?

Judge WATSON. At the beginning of the Voinovich administration, we asserted a role in the hiring of those individuals and the screening of those individuals, and where expertise existed, we left that expertise in place. They reported through us—they weekly reported to us, and then, of course, if there was a particular issue that rose to the level of the Governor's attention, then they were daily on the phone with us or meeting in our offices, or we were in their offices dealing with those issues.

Senator DEWINE. You became a Common Pleas judge in 1996?

Judge WATSON. Thank you for the opportunity to address that, Senator.

I had the privilege of replacing the judge who I worked for during law school upon his retirement. Judge Tommy Thompson served for 24 years on the Common Pleas bench, and I was fortu-

nate enough to be appointed by now Senator but then Governor Voinovich to replace him, yes.

Senator DEWINE. And you served as Common Pleas judge for how long?

Judge WATSON. Approximately 7 years, 5 months.

Senator DEWINE. Judge, tell us about that experience. In Ohio, the Common Pleas court is the top trial court in the State.

Judge WATSON. That is correct.

Senator DEWINE. And you hear what kind of cases?

Judge WATSON. We hear criminal cases, from garden variety thefts to capital murder cases, and we hear all manner of civil cases, exclusive of—I had no family law jurisdiction, and I had no probate jurisdiction. But there were 16 members on the court. Each of us carried dockets in excess of 700 cases on a constant basis, both civil and criminal. We faced dockets—In a typical criminal week, we would have anywhere between 10 and 16 cases set per day. Our civil dockets typically had five to ten cases set per day. It was the busiest trial court in the State.

What I learned there was—I had had the opportunity to observe Judge Thompson on a daily basis, and so I knew what kind of judge I wanted to be. I wanted to be a fair-minded individual who would listen to litigants, who had empathy for litigants, but who also knew how to move a docket along.

One of the alternative dispute resolution techniques, it is my understanding, that has swept the country, settlement week, started in our court. It then spread to the U.S. District Court in Columbus, and then from there out to the hinterlands, I suppose.

Senator DEWINE. Judge, how do you think that seven-plus years experience would prepare you to serve on the Federal District Court?

Judge WATSON. I believe, Senator, that it would serve me very well. I know how to handle a busy docket. I know how to manage a docket and move it along. I know how to deal with busy lawyers, and I know how to deal with litigants, whose most important case on my docket that day is their case. I think it would serve me well.

The Rules of Civil Procedure in Ohio are not dissimilar to the Federal Rules. The sentencing structure is similar and yet distinct, in that we don't have the type of sentencing matrix that exists at the Federal level, but I don't believe it would cause me any difficulty in following the sentencing guidelines, however.

Senator DEWINE. Judge, last year you were appointed to Ohio's Tenth District Court of Appeals. Has this experience given you a perspective that would help you as a Federal District Court Judge?

Judge WATSON. I believe it has. I have worked with six other wonderful individuals who have served as mentors on that court, and I believe it has given me deep insight into how to be a better trial judge.

Senator DEWINE. Judge, let me ask you about your reversal rate. In your Judiciary Committee questionnaire, you list, I believe, 37 cases on which you have been reversed.

Put this in a little context for us. For example, how many cases do you think you have dealt with on the Common Pleas Court bench? These 37 cases were Common Pleas cases where you've been reversed?

Judge WATSON. That's correct.

Senator DEWINE. What kind of reversal rate is this that you've had?

Judge WATSON. Thank you. First and foremost, I think it would compare very favorably with the other members of the court. Secondly, I believe it is statistically not that significant. If you assume a constant 700 case docket and you assume that you take in approximately 100 new cases each month, while getting rid of, on average, 105, 115 cases a month, you're dealing with 1200 cases a year that are moving through the docket, times seven-and-a-half years. Thirty-seven out of 9600 cases is where I come out on that.

No one really keeps those statistics, but—

Senator DEWINE. So that's just an approximation?

Judge WATSON. It's an approximation, and that's all it is. But that 700 number is constant, and as administrative judge for the last 3 years, I had a three-quarter docket. So everybody else on the court probably had a quarter more cases than I did even. I mean, they're facing dockets at 750 and some of them 800 cases now.

Senator DEWINE. Of course, the numbers you gave us, to keep it in perspective, that would not include all cases that had been appealed. So if you took just the cases that had been appealed, how do you think your statistics come out?

Judge WATSON. Very well. I don't have a number, Senator, but I am very well—

Senator DEWINE. Do you think you're in the average range?

Judge WATSON. I think I'm probably above average, in a good way. That's the best way that I can say that. I thumb through some of the advance sheets—For instance, one of the members of the court—you know, at one point I was looking at five cases a year. If you take the 37 and divide it by seven-and-a-half, I was looking at five cases a year and one individual had three cases reversed in 1 day. So I think I would show favorably in those statistics.

Senator DEWINE. Since you have been on the Court of Appeals, have you had any cases reversed?

Judge WATSON. Not to my knowledge, Senator.

If I might amplify that, there are seven judges on the Tenth District Court of Appeals. We sit approximately 17 times a year. Each time we sit, we sit for 3 days out of the week and we hear approximately 21 cases and, therefore, author a third of those cases. I don't know what that totals up to, but that's a pretty good approximation of what that workload has been like.

Senator DEWINE. When we look at your answers to the reversal questions in the Judiciary Committee questionnaire, some of these case summaries do look very similar. Does this mean you were reversed on the same issues repeatedly? I'm a little confused by that.

Judge WATSON. No, it should not, Senator. Those cases are all factually distinct. In fact, the only thing that would bear any resemblance might be—I think there are four sentencing cases of the 37. That whole sentencing law changed in July of 1996. It changed in July of 1996 and the Tenth District was somewhat lenient until the Supreme Court determined that we were to find case-specific facts to support our sentencing decisions. So then things tended to

clear up in terms of the sentencing issues. But there are only four of those cases, and everything else was factually distinct.

Senator DEWINE. There is another matter, Judge, that I would like to ask you about, and that is your ABA evaluation. Frankly, to my surprise, given what I believe are your excellent qualifications to be a Federal District Court judge, the ABA gave you a substantial majority of qualified, but a minority not qualified rating. This rating is not secret and, frankly, none of my colleagues have told me they are particularly concerned about this rating. But I do want to ask you about it for the record and get this out.

Do you know why the ABA gave you this rating—why a minority gave you this rating is what I should say. Let me state for the record—and I think everyone knows this—that there are 14 voting members on the ABA committee. We don't know how the vote broke down, but at least 10 must have voted qualified for you. We don't know what the rest could have been. It may have only been one who voted not qualified, or it could have been up to four. We don't know.

Judge WATSON. Thank you for the opportunity to address that, Senator.

I don't know what the reason is is the fairest answer. I'm not privy to the committee's vote. I don't wish to speculate on why that might have taken place. I'm as surprised, I suppose, as anyone.

Senator DEWINE. Did they give you any reason?

Judge WATSON. No, there was no reason given at all. I was told to expect the opportunity, if something had come up—I was told that when I had my personal interview. I had a wonderful interview with a very nice gentleman, and I was led to believe that everything was fine and there were no problems.

Senator DEWINE. No issue was raised with you—

Judge WATSON. No issue was raised with me.

Senator DEWINE. —in that exit interview, whatever it's called?

Judge WATSON. Absolutely not.

Senator DEWINE. Now, Judge, you testified that you were an administrative judge—is that the term?

Judge WATSON. Correct.

Senator DEWINE. You were an administrative judge for how long?

Judge WATSON. The last 3 years that I was on the trial court, so it was 2001, 1902 and 1903.

Senator DEWINE. How is that person selected?

Judge WATSON. By a vote of his peers.

Senator DEWINE. What does that person do?

Judge WATSON. You serve as the manager of the court, of the court's business and the court's employees.

Senator DEWINE. So you were selected by the other—how many judges?

Judge WATSON. The other 15 judges.

Senator DEWINE. The other 15 judges.

Judge WATSON. I voted for myself as well.

[Laughter.]

Senator DEWINE. So you were selected by the other judges to be the administrative judge, then?

Judge WATSON. That's correct.

Senator DEWINE. Tell me a little bit about your approach to docket management a little bit more. You talked about this, but I wonder if you could expand on how you see your role with this on the Federal District Court. Because it's a problem with any court, and it certainly is a problem, as you pointed out, in Franklin County Common Pleas Court. But it is a problem at the Federal District Court as well.

Tell us a little bit about your attitude on that, and tell us a little bit about the alternative dispute resolution, too.

Judge WATSON. In the nearly 20 years that I have been around courts and around the law, I have had the opportunity to see a number of techniques, alternative dispute resolution and docket management techniques tested, some successfully, others not so successfully.

Franklin County employed what was known as a "rocket docket", where you got a trial date and all of the attendant hearing dates the day you file your lawsuit, and then everything works towards the trial date. If managed correctly, which means regular contact with the lawyers, you can fairly efficiently move a case through to resolution.

Along the way there are a number of opportunities through mediation, through this settlement week concept, through arbitration, both private and then arbitration with court magistrates and so forth to resolve cases.

As the case nears trial, oftentimes the judge would sit down with counsel and see if there wasn't any last minute ability to settle a case. Many cases have a tendency to settle on the morning of trial on the courthouse steps, as I'm sure you're aware. Judge Thompson was a very effective negotiator, but he did it without twisting people's arms very hard. So I learned how to do it in a manner that left open the opportunity for people to try the case, if that's the route they wanted to continue to pursue.

Senator DEWINE. Judge, we often hear lawyers complain about judges who won't allow lawyers to try their own case. On the other hand, a judge clearly has to keep control of the courtroom.

How do you balance the two?

Judge WATSON. Senator, I think you have identified perhaps a key distinction between conducting a trial at the State level and conducting a trial at the Federal Court. My understanding of the practice in the Southern District is that a number of the judges conduct voir dire for the lawyers, where in the State court the practice is much more left to the lawyers themselves.

Unless I am bound by some rule that I'm currently unfamiliar with, my intention would be to allow the lawyers to choose their own jury, because I think it's a key aspect of the case. I believe that lawyers should be allowed, once they get to trial, they should be allowed, within the bounds of the rules of evidence and the rules of procedure and proper decorum, to present their case without my interference, only ruling on the objections that come before me and properly administering the case.

Senator DEWINE. What about the rest of the trial itself, besides the selection of the jury? What about the general running of the case? How would you describe yourself, as to what kind of judge are you?

Judge WATSON. My tendency as a trial judge has been not to allow questions from witnesses—I'm sorry, is that what I mean? I mean questions of witnesses to a jury. I am willing to be edified on that. I know that it has been tried by a number of my peers and I know there are folks who experiment with those things from time to time.

But in the conduct of the case itself, I have on rare occasions interjected a question when I had a question, but I think the trial judge, in doing so, has to be very careful not to evidence-bias in the question that you ask. You have to be very careful about how you put your question.

Senator DEWINE. Judge, you have been on the Common Pleas Court. You have now been on the Court of Appeals, and you have had the experience of watching trials from a great seat, and that's the seat of a bailiff. You have had all those experiences.

Why do you want to be on the Federal Court?

Judge WATSON. Senator, thank you for the opportunity to answer that question.

I sit here today because this is a highly sought after position in our profession. I view this as the crowning achievement of a career, a capstone of a career, if you will. I have dedicated my life to public service. This is an opportunity that I simply could not ignore. I believe that my skills and my temperament qualify me, that my experience qualifies me for this position. I think that most lawyers, at some point in their career, would say that this is a coveted position. I respect that and that is why I am seeking this position.

Senator DEWINE. Judge, in general, 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?

Judge WATSON. Absolutely, Senator.

Senator DEWINE. Judge, I thank you very much.

Let me just say that the record will remain open for one week for additional statements or questions. We would ask, if members of the Judiciary Committee do submit questions for you, that you respond to these promptly. The record will close at 5:00 p.m., on June 11th.

I do have a written statement for the record to be submitted by Senator Voinovich, who regrets that he could not be here today. That will become a part of the record.

Judge WATSON. Thank you very much, Mr. Chairman. I appreciate all you have done and I thank you for having this hearing today.

Senator DEWINE. If there is no other business to come before the Committee today, the Committee will stand adjourned.

[Whereupon, at 10:50 a.m., the Committee adjourned.]

[Questions and answers and a submission for the record follow.]

[Additional material is being retained in the Committee files.]



QUESTIONS AND ANSWERS

MICHAEL H. WATSON  
6851 McCord Street  
Columbus, OH 43085  
XXXXXXXXXXXX

June 16, 2004

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Mr. Chairman:

Enclosed are the responses I have prepared to the written questions from Senator Patrick J. Leahy. Where appropriate, I have included attachments. All attachments are enclosed with the exception of the May 17, 2004 Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. This document will follow by overnight mail.

Very truly yours,



Michael H. Watson

MHW/ksw

Enclosures

cc: The Honorable Patrick J. Leahy

**Response of Judge Michael H. Watson  
Nominee to the U.S. District Court for the Southern District of Ohio  
to Questions of Senator Patrick J. Leahy  
June 16, 2004**

1. *Judge Watson, I was surprised to see your response to the question about why you want to be a federal judge. So I wanted to give you an opportunity to respond further upon reflection. Why do you want to be a federal judge?*

Senator Leahy, thank you for the opportunity to better explain my desire to be a federal judge. I have enjoyed the opportunity to serve the citizens of Ohio in a number of positions of ever increasing responsibility throughout my legal career. If confirmed, it would be a singular privilege to continue judicial service as a United States District Court Judge. The eight and a half years I have spent as a state trial and appellate judge have given me skills that would greatly assist in a transition to the district court, if given the opportunity by the United States Senate. I feel that the federal trial court presents distinct challenges that will only enhance my legal experience. I have managed a docket in the busiest state trial court in Ohio and served as its Administrative Judge during the last three years of my tenure. The seven and a half years I spent as a trial judge provide me with considerable experience dealing with people and the numerous issues their cases present. If confirmed, I would devote the balance of my career to serving the citizens of the United States and Ohioans.

Responses of Judge Michael H. Watson  
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2. *Why do you think the Senate should entrust you with the power of this position for the rest of your life?*

The position of federal judge is one of great honor and responsibility. If confirmed, I would take this position of trust very seriously. I believe my record on the state court bench demonstrates my commitment to the rule of law. As a judge, I have strived to perform my duties with compassion and fairness and would continue to do so on the federal bench if confirmed.

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3. *You suggested in your testimony that you thought your reversal rate was "above average, in a good way." Please determine, and advise the Committee of, the average number of cases that are appealed from the Franklin County Court of Common Pleas per year (since 1996, if possible) to the Court of Appeals for the Tenth District, and please inform the Committee of the average percentage of reversals by that appellate court on which you now sit. Also, please indicate your reversal rate as a trial court judge.*

Neither the Franklin County Court of Common Pleas nor the Tenth District Court of Appeals of Ohio compile statistical data with respect to reversal rates for either individual judges or for the Franklin County Court of Common Pleas, General Division, as a whole.

Attached is a chart that I prepared (Exhibit A), with the assistance of my staff, in which I endeavored to determine my reversal rate and how it compared to the other judges of the trial court. The process which was undertaken began with a review of my monthly statistics as reported to the Supreme Court of Ohio which entails the number of new cases assigned, reactivated cases<sup>1</sup>, and any cases terminated<sup>2</sup> during the current month. The monthly statistics were figured by the total number of pending cases

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<sup>1</sup> Reactivations included cases where a defendant who absconded but was then apprehended, a bankruptcy which was lifted, and/or a case on an interlocutory appeal which was decided and then remanded for further proceedings in the trial court.

<sup>2</sup> The terminations included anything terminated voluntarily by plaintiff's attorneys, a settlement of a case, a judgment entry following a decision by the court which would result in a final appealable order, bankruptcy filing of a main-named defendant, a removal to another court, a capias (warrant) for a defendant who did not appear for sentencing or trial, a plea bargain resulting in a sentencing for a defendant, and/or a trial resulting in a guilty verdict for which the defendant was sentenced during that month. The acceptance of a plea bargain and/or a verdict did not terminate a case. Only at the time of sentencing did the case result in a termination.

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(using the ending figure from the prior month carried over to the new month's report) and the new figure compiled from the above calculations to result in the pending number of cases at month-end. Over the entire 7 ½ year period of time, my average number of cases terminated per year (1266), was the average then used to compare with the other Judge's monthly statistics for the entire court. I used this average then for comparisons with the rest of the court in determining my reversal rate compared to other judges on the Franklin County Court of Common Pleas bench.

The resulting figures for the reversal rate were compiled by reviewing the release sheets maintained by the Tenth District Court of Appeals beginning in 1999 (which was the first year the sheets indicated who the trial court judge was on each appellate decision). The cases for each judge of the 16-member bench of the Franklin County Court of Common Pleas were tallied according to the following categories: affirmed, reversed and reversed in part. As a result of this work, it was determined that my reversal rate over this documented 5-year period of time as explained above, was the second lowest relative to the entire Franklin County Common Pleas Court bench. My figures are attached in the table reflecting all percentages as a percentage of a whole number. That is, these figures are not to be multiplied by 100. They state the figure

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as a decimal of a whole. While these figures are not 100% infallible, I believe they fairly represent my reversal rate in relation to the rest of my colleagues.

Turning to the number of cases appealed from the Franklin County Court of Common Pleas, the Tenth District Court of Appeals was able to compile the total number of appeals for calendar years 1999, 2000, 2001, 2002<sup>3</sup> and 2003. However, the numbers provided include cases which were subsequently dismissed by the parties or settled. Accordingly, these numbers would not equate to the number of opinions issued by the Tenth District Court of Appeals.

In calculating the percentage of cases for each individual judge in relation to the total number of cases appealed from the Franklin County Court of Common Pleas, we included opinions which were affirmed in part and reversed in part. The total number of cases appealed per year and each individual judge's reversal rate in relation to this number and the court's reversal rate as a whole, are set forth in Exhibit B. Again, the percentages are a percentage of a whole number. That is, these figures

<sup>3</sup> The Tenth District Court of Appeals did not have figures for the second quarter of 2002. We were unable to determine what this number was by looking at the release sheets for two reasons. First, the dates for when the appeal is filed is not on the release sheet. Thus, it could not be determined what appeals were filed during the second quarter of 2002. Second, even if cases filed in the second quarter of 2002 could be determined from the release sheets, it would not provide an accurate number as it would not include appeals which were dismissed by the parties or settled. Accordingly, to establish an estimate for calendar year 2002, we established the average number of the three quarters which were available and used this number for the second quarter of 2002.

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are not to be multiplied by 100. They state the figure as a decimal of a whole. Again, I reiterate, these figures are not 100% infallible.

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*4. It appears that you were reversed when you ruled in favor of civil defendants twice as often as you were reversed when you ruled in favor of civil plaintiffs. In considering your reversals, have you taken any steps to ensure that, despite the fact that you began your career as attorney defending Insurance companies in personal injury cases, you do not act with bias, perhaps unintentionally, in favor of civil defendants and against plaintiffs? What specific assurances can you provide that you will treat civil litigants on both sides equally and fairly if confirmed?*

I can assure you that I treat all litigants in my court fairly and without bias.

My primary interest in any case is to ensure justice is fairly administered for all parties. As such, I address each case as it presents, applying the law to the facts as I have sworn to do. I make decisions without respect to persons as my oath requires, and if confirmed, I would continue to do so. Finally, I would clarify that while in private practice, I represented both plaintiffs and defendants.



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5. *You testified that when you served as the Chief Legal Counsel for the Governor of Ohio, you "asserted a role in the hiring of those individuals [attorney for state agencies] and the screening of those individuals, and where expertise existed, we left that expertise in place." Did you ever consider political affiliation or political beliefs in your role in hiring, retaining, firing, or offering early retirement to state employees? If so, please explain the extent to which you felt party affiliation or political allegiance should play a role in the selection, retention or promotion of civil servants. Were you also involved in the process for judicial appointments? If so, please explain the amount of weight given to political beliefs in your recommendations.*

The Voinovich Administration was into its fourth year when I took the position as Chief Legal Counsel to then Governor George V. Voinovich. When I assumed this role, I was well aware that neither political affiliation nor beliefs were legally appropriate reasons upon which to make any employment decisions pursuant to Ohio and federal law. The Voinovich Administration was committed to the mission of providing the best service with the best people then available. As such, it is true that where legal expertise existed in a given area, we retained that expertise. From my perspective, the issue of political affiliation or beliefs did not enter into the equation. In fact, a number of departmental counsels, who had served the prior administration, were retained. During my tenure in the Governor's office, I was not involved in the judicial appointment process.

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6. *In your testimony and in your questionnaire, you noted that as deputy chief counsel and then chief counsel to the governor, you had oversight responsibilities for clemency matters. Please describe the clemency process as it then existed in Ohio. To what do you attribute the fact that during your tenure giving advice [to] the Governor, the average number of times clemency or mercy was given declined precipitously?*

The clemency review process has not changed markedly since I left the Voynovich Administration. The clemency procedure begins with the filing of a petition for clemency to the Ohio Adult Parole Authority ( OAPA ). The OAPA conducts its own internal review process, votes on the request and sends a package of information including OAPA's recommendation to the Governor's office. One of my Assistant Deputy Legal Counsel would review the file including inmate criminal records and institutional adjustment reports, all material forwarded by OAPA, correspondence, victim impact information, if available, along with any evidence of community support or opposition. My staff and I discussed these matters, then reviewed and discussed them with the Governor, who made the decision whether or not to grant clemency. It was then our job to prepare the appropriate documentation to reflect the Governor's intention with respect to each case.

Then Governor Voynovich was keenly concerned about a high degree of certainty prior to granting clemency. As a general, rule a majority of clemency petitions are denied. The statistics I reviewed and attach for your reference evidence a

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one year decline from 1993 to 1994, but then a jump back up in 1995, my last  
year. I do not recall any specific reason for this one year decline.

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7. *Please provide the Committee with the names of individuals who served as opposing counsel to you on key issues you handled for the state, as your answers to question 18 of the Senate Judiciary Committee Questionnaire are incomplete in this regard.*

As Chief Legal Counsel, neither I, nor my staff represented the Governor in litigation. This was the role of the Ohio Attorney General or Special Counsel in certain designated circumstances. I believe I have answered question 18 to the absolute best of my ability and have previously provided amended responses to this question.

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8. *You cited as one of your significant legal activities your work in Ohio in crafting state constitutional amendments and implementing legislation to remove intermediate appellate jurisdiction over death penalty appeals. Did you have any concerns during your tenure in the Governor's office about innocent people receiving death sentences or the need for adequate funds for counsel in criminal cases? What steps, if any, did you take to address these concerns? As a trial judge how many death penalty cases did you handle and what was the result in each of those cases?*

During my tenure as Chief Legal Counsel I was certainly concerned that no innocent person be executed. In fact, no execution was carried out in Ohio during the Volnovich Administration.

While in the Governor's office, I was involved in the selection of Ohio's current Public Defender. I assisted him in obtaining additional funding for indigent defendants, in the amount of a \$1.2 million additional appropriation from the Ohio General Assembly.

During my tenure on the Franklin County Court of Common Pleas, to the best of my recollection, I handled 10 death penalty cases. Included in this list are the names of all defendants assigned to my docket that were initially indicted by the Franklin County Grand Jury as capital murder cases, along with, the sentence<sup>4</sup> received, and whether the sentence was the result of trial or a plea:

1.	Richard Hayes	12 to 40 years	Plea
2.	Shawn Towns	30 to life	Plea

<sup>4</sup> For the sentence, I have listed the total sentence. As such, it may include the sentence for aggravated murder, or in the event of a plea, the lesser offense, in addition to time for other charges arising from the death of the victim.

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3.	Alonzo Adkins	4 yrs <sup>5</sup>	Plea
4.	Leon Hawkins	50 to life	Trial
5.	Kareem Jackson	Death	Trial
6.	David Braden	Death	Trial
7.	Andrew Lee	Life w/o parole	Trial
8.	Donovan Simpson	78 to life	Trial
9.	Cornelius Jackson	23 to life	Plea
10.	Dean Preston	33 to life	Plea

<sup>5</sup> Alonzo Adkins was 18 years old. He was initially found to be incompetent to stand trial. Eventually, he was restored to competency and pled to involuntary manslaughter. After he served approximately 2 ½ years of his sentence, I granted Mr. Adkins' request for probation and placed him on probation for 5 years.

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9. *As a trial judge your convictions or sentencing decisions in criminal cases were reversed by the appellate court almost a dozen times, and of the more than 60 appellate decisions available electronically that you have handled in the past year, it appears that you rarely rule in favor of criminal defendants in the non-capital appeals over which your new court has jurisdiction. Press accounts indicate that before reversing the conviction of Timothy Howard, who spent 26 years in jail on false charges of murdering a bank security guard in a robbery, you "insistently urged" him to accept a plea to manslaughter and a sentence of time served without informing him that pleading would forfeit his right to recover damages for wrongful imprisonment. What were your actions in this case and why did you take them? What specific assurances can you give that, if you were confirmed, you will be fair to criminal defendants and protect their rights?*

Mr. Howard's April, 2003 appearance was my first chance to inquire of Mr. Howard, in open court, whether he wanted to accept the plea deal then being offered by the assistant prosecutor. I did not urge him to accept the plea, but inquired if he had come to his own decision after weighing all of his options. Mr. Howard had at least two attorneys and Mr. James McCloskey of Centurion Ministries counseling him as to his options. I knew that my decision would likely be appealed by the state, and while I was confident that I was making the appropriate and legally supportable decision, as a practical matter the possibility of reversal on appeal existed, as my decision was precedent setting in the area of second or successive post conviction relief petitions. Therefore, I was concerned that if I were reversed he would have concluded his life in prison. Accordingly, I wanted him to know there was an option available that would allow him to resolve the case and go home that day with

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essentially a sentence of time served for the 26 years he had already spent imprisoned. Moreover, I intended to make sure it was Mr. Howard, and not his advisors, who made this monumental decision, and I wanted the record to reflect Mr. Howard's independent judgment as to his options.

Prior to the hearing to announce my ruling, I had been specifically told by Mr. Howard's counsel that Mr. Howard had no interest in pursuing civil damages in the event his post-conviction was granted. I took this statement at face value and, as a result, this issue did not enter my mind during the discussion of the plea bargain. As Mr. Howard has subsequently filed suit against the State, I can only speculate that he changed his mind.

To clarify, I did not find that Mr. Howard "spent 26 years in jail on false charges of murdering a bank security guard in a robbery." Some may take the conclusory language of my opinion, "...the Court cannot, in good conscience, allow Defendant's verdict to stand when there is clear and convincing evidence that, but for the *Brady* violation, no reasonable fact-finder would have found Defendant guilty in this matter" as declaring Mr. Howard was falsely accused of these charges. However, my decision voided his conviction on these charges, because key evidence was withheld, it did not proclaim his innocence.

Moreover, as stated in response to Question 4, my interest in every



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matter that comes before me is to ensure justice is done for all parties.

This applies with even more gravity when an individual's liberty is at stake.

As you are aware, I represented criminal defendants while in private practice. As a result of my experiences, I had empathy and an open mind for every individual who appeared before me charged with a crime.

If I am fortunate enough to be confirmed, I would continue to ensure defendants are treated fairly and that their rights are protected.

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10. *Is it true that you are currently running for an additional term on the state appellate bench and that you are actively seeking campaign donations for that race? What suggestions, if any, have you made to contributors regarding your candidacy for the federal bench? If you were confirmed, would you promise to withdraw from your campaign for state judicial office? What other actions would you intend to take with respect to state judicial races? What would you do with the political donations you have received? Are the names of contributors to state judicial campaigns in Ohio public? Would you make public the names of those who contributed to your campaign? How would you handle recusal from cases involving those who contributed to your campaign?*

I am currently running to retain the seat to which I was appointed in May, 2003, on the Tenth District Court of Appeals. I am actively seeking campaign donations to fund my race. With respect to my candidacy for the federal bench, I have informed my contributors that I am in the confirmation process. Moreover, I informed them that it is a privilege to serve on the Tenth District and would continue to do so if I am not confirmed and am re-elected. However, if confirmed, as I hope, my contributors are aware I would take my oath as a federal judge, withdraw from my race and resign my current position.

Upon taking the oath as a federal judge, I would have no further involvement with any state judicial race. It would be inappropriate for a federal judge to be involved in partisan politics in any way.

Additionally, in the event I am confirmed, my options with respect to how my campaign funds may be dispersed are limited by law to a very few options. I believe these options are: (1) return donation to donor, (2)

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contribute donations to charity and (3) under very limited circumstances, purchase individual tickets to other political events. Currently, I have not determined which option I would pursue. However, I would comply with applicable election laws regarding the disposition of my campaign funds as well as the Rules of Judicial Conduct (28 U.S.C. §455).

The names of my contributors are public information and must be disclosed under Ohio election laws.

Finally, an unfortunate aspect of an elected judiciary is the necessity of seeking campaign donations from members of the legal community. I do note however, the Code of Judicial Conduct prohibits acceptance of funds from anyone who does business with the court in the form of contractual or other arrangement in which the person, in the current year or any of the previous six calendar years, received as payment aggregate funds or fees in excess of \$250.00. Canon 7(C)(2)(a)(i). Recusal based solely upon a campaign donation is not often necessary. Nevertheless, I approach every case with the awareness of my obligations under the Code. If I believed, or a party believed, my recusal was necessary due to a campaign donation, I would examine the situation under the Code and make an appropriate decision.

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*11. While serving as a judge, have you made financial contributions or otherwise been active in connection with partisan election campaigns? Please explain.*

Over the past eight and a half years, consistent with state ethics rules, I have on limited occasions made personal contributions to certain candidates. Moreover, consistent with the Canons, I have purchased tickets to individual events for certain candidates from my judicial campaign funds.

If confirmed, I understand and agree that I would be prohibited from engaging in any partisan political activity.

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*12. According to press accounts, you have made efforts to try to remove the Honorable Deborah O'Neill. What actions have you taken in this regard and why? Did you request a psychiatric evaluation of Judge O'Neill, without consulting all of your colleagues? Please provide a copy of the report of the Disciplinary Board in connection with this matter. Please provide your correspondence in this matter and any testimony you have given in this case.*

I have enclosed my November, 2003 testimony from the disciplinary hearing involving Judge O'Neill. The testimony sets forth the actions I took, as Administrative Judge, in concert with other members of the Franklin County Court of Common Pleas, pertaining to Judge O'Neill.

Additionally, I have enclosed my July 13, 2001 correspondence to Chief Justice Thomas J. Moyer, along with attachments. Included as an attachment were the minutes of the Franklin County Court of Common Pleas Personnel Committee meeting. One motion, which passed, was the relocation of Judge O'Neill's secretary, whom she shared with Judge David L. Johnson, to another floor. As discussed, the need for this move was due to the untenable discord between Judge O'Neill and the secretary. The second motion, which also passed, authorized me as Administrative Judge to seek the counsel of Chief Justice Moyer with respect to Judge O'Neill. The Chief Justice was whom we turned to as he was the only judicial officer with the authority to take action as he deemed appropriate. This was not action I took based upon my own counsel. While not every member of the Franklin County Court of Common Pleas

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was consulted regarding this action, the members of the Court authorize the members of the Personnel Committee to handle personnel issues. Accordingly, as this was an action agreed upon by the Personnel Committee, it was not an issue which needed to be discussed and agreed upon by the whole court.

In addition to my November, 2003 testimony and July 13, 2001 correspondence, I have enclosed my Affidavit subpoenaed in this matter and the May 17, 2004 Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. I would note that this case is unprecedented in the State of Ohio and the matter remains for final determination by the Supreme Court of Ohio.

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13. *In a supplement to your questionnaire you note that you have given speeches during your campaigns for office but you did not retain any notes of those remarks. Please indicate the dates, location, audiences and topics of those speeches. Also, please provide all press accounts.*

The only recollection I have is with respect to two Continuing Legal Education speeches I gave. The theme, I believe for both, was "A View from the Bench". The focus was on pre-trial practice and procedure in Franklin County, basically a "how to" on maneuvering in the Common Pleas Court. There was no discussion of constitutional law or legal policy. The audience comprised of Columbus Bar Association members seeking C.L.E. credit. I do not recall the exact dates, but believe it was within the last 4 years. There were no press accounts.

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*14. Have you ever been reversed for a due process or abuse of discretion violation? If so, please describe those cases in detail and what steps you took to prevent such errors in other proceedings.*

I have previously provided the committee all cases where I was reversed on appeal. A review of these cases reveal I have been reversed based upon an abuse of discretion. However, it does not reveal, and I do not recall having been reversed for a due process violation. What constitutes an abuse of discretion differs from one judge to the next. Even the words used to describe an abuse of discretion differ in degree. My personal view is that reversals based on an abuse of discretion should be few and far between.



## Exhibit A

Courtroom	1999 (%)	2000 (%)	2001 (%)	2002 (%)	2003 (%)	Total
Bessey - 6A	0.3	0.7	1.02	0.78	1.02	0.76
Miller - 6B	1.02	0.79	0.95	0.95	1.11	0.96
Fals - 6C	0.24	1.2	0.78	0.55	0.47	0.65
Connor - 6D	0.24	0.79	0.95	0.36	0.87	0.64
Sadler - 7A	0.24	0.95	0.63	0.63	0.63	0.62
Watson - 7B	0.47	0.55	0.79	0.55	0.45*	0.54
McGrath - 7C	0.47	0.47	0.71	0.79	0.47	0.58
Cain - 7D	0.24	1.11	1.5	0.39	0.36	0.72
Travis - 8A	0.55	0.79	0.63	0.79	0.95	0.74
Brunner/Bender/ O'Grady - 8B	0.79	1.3	0.39	0.79	0.15	0.68
Pfeiffer - 8C	0.71	1.2	0.39	1.2	0.32	0.73
Crawford - 8D	0.32	0.87	0.55	0.47	0.95	0.63
O'Neill - 9A	0.47	2.13	1.216	1.02	0.39	1.05
Johnson - 9B	0.55	0.39	0.47	1.28	0.79	0.69
Sheward - 9C	0.79	1.66	0.95	1.34	1.26	1.2
Hogan - 9D	0.24	0.36	0.55	0.95	0.39	0.5
*This total was achieved by multiplying .15 by 3 since Judge Watson was on the bench through April of 2003.						

## Exhibit B

	Number of Appeals and Reversal Rate Percentage Per Year				
	1999	2000	2001	2002	2003
	744	743	812	769	686
Courtroom					
Bessey - 6A	0.005	0.012	0.016	0.013	0.019
Miller - 6B	0.017	0.013	0.014	0.016	0.02
Fais - 6C	0.004	0.02	0.012	0.009	0.008
Connor - 6D	0.004	0.013	0.016	0.005	0.016
Sadler - 7A	0.004	0.016	0.01	0.01	0.012
Watson- 7B	0.008	0.009	0.012	0.009	0.006*
McGrath - 7C	0.008	0.008	0.011	0.013	0.009
Cain - 7D	0.004	0.018	0.023	0.007	0.006
Travis - 8A	0.009	0.013	0.01	0.014	0.017
O'Grady/Bender/ Brunner - 8B	0.001	0.022	0.006	0.013	0.004
Pfeiffer - 8C	0.012	0.017	0.006	0.002	0.006
Crawford - 8D	0.005	0.015	0.009	0.008	0.017
O'Neill - 9A	0.008	0.036	0.02	0.017	0.007
Johnson - 9B	0.009	0.007	0.007	0.021	0.015
Sheward - 9C	0.013	0.028	0.015	0.022	0.023
Hogan - 9D	0.004	0.005	0.009	0.017	0.007
Reversal Percentage Entire	11.7	25.6	19.5	21.3	19.1
*This total was achieved by multiplying .002 by 3 since Judge Watson was on the bench through April of 2003.					

## VOINOVICH CLEMENCY STATISTICS

91	618	614	4	28	4.5	9	1.47	17	2.77	2	0.32	586
92	691	649	42	19	2.9	7	1.07	10	1.5	2	0.3	630
93	914	847	67	20	2.36	8	0.94	9	1.06	3	0.35	827
94	1241	1222	19	6	0.49	2	0.16	3	0.25	1	0.08	1216
95	514	510	4	17	3.3	11	2.2	5	0.98	1	0.188	493
96	299	294	5	13	4.42	11	3.7	1	0.34	1	0.38	281
97	282	272	17	8	2.94	7	2.57	1	0.38	0	0	264
98	202	213	0	18	7.98	14	6.57	4	1.87	0	0	198
99	4761	4621	158	129	3.61	69	2.33	50	1.14	10	0.2	4493

TOTAL P.27

STATE OF OHIO :  
 : ss  
 COUNTY OF FRANKLIN :

**AFFIDAVIT OF MICHAEL H. WATSON**

I, Michael H. Watson, having been first duly sworn, deposes and says as follows:

1. On May 16, 1988, I was admitted to the practice of law in the State of Ohio.
2. On December 27, 1995, Governor George V. Voinovich appointed me to the Franklin County Court of Common Pleas to complete the term of retiring Judge Tommy L. Thompson, a mentor and former employer.
3. In November of 1996 I was elected to complete the term to which I had been appointed.
4. In November of 1998 I was elected to a full six (6) year term.
5. I first became aware of allegations of bizarre and unreasonable behavior by Judge Deborah P. O'Neill while serving as Chair of the Personnel Committee of the Court during Judge David Cain's tenure as Administrative Judge.
6. In December of 2000 I was elected by my colleagues to succeed Judge Cain as Administrative Judge in 2001.
7. Subsequently I was re-elected as Administrative Judge for 2002 and 2003.
8. I will resign my position as Administrative Judge on April 30, 2003 to begin, on May 1, 2003, the Tenth District Court of Appeals unexpired term to which I was appointed by Governor Bob Taft.
9. Throughout my term as a Common Pleas Judge and particularly while a member of the Personnel Committee and as Administrative Judge I have had innumerable conversations with individuals, including Court staff, private

lawyers, prosecutors and public defenders, who have in one way or another been subjected to Judge O'Neill's unique behavior.

10. Upon assuming my duties as Administrative Judge, I decided to address Judge O'Neill's behavior, her treatment of her staff, attorneys, jurors and the public.
11. On January 10, 2001 I met with Judge O'Neill and Jennifer Goodman the Court's Director of Purchasing, in Judge O'Neill's office. Several months prior to January 10, 2001, the Court had authorized the purchase of office furniture for each of the sixteen-(16) Judges. The January 10 meeting was necessitated because of Judge O'Neill's responses to Jennifer Goodman and her treatment of administrative staff concerning several issues including the size of her desk, the color of the wood on the desk, the timing of delivery and her perception she was always the last Judge to receive anything and she was tired of this treatment. Judge O'Neill was not the last Judge to receive the new furniture.
12. Judge O'Neill was the only member of the Court with whom I had to meet regarding the proposed new furniture and she was not forced to accept her furniture.
13. Paragraphs 471 through 482 of the Amended Complaint in this disciplinary matter reflect some of what I was made aware of concerning Judge O'Neill and the proposed new office furniture.
14. During the meeting with Judge O'Neill and Jennifer Goodman four different options were discussed.

15. Once the discussion concerning the furniture concluded Ms. Goodman left Judge O'Neill's office and I had a private conversation with Judge O'Neill about her behavior and treatment of Court personnel, attorneys, and the public.
16. I indicated to Judge O'Neill that I was aware of a pattern of troublesome behavior from her and that other members of the Court were concerned as well.
17. We discussed the fact that, not infrequently, she exhibited a pattern of behavior where she would become extremely angry with others for no apparent reason.
18. I told Judge O'Neill that her tirades towards Court employees could create a legal liability for the Court.
19. I reminded her that prior Administrative Judges had ordered Court Reporters and Float Bailiffs not to return to her Courtroom because of her abusive behavior. I explained that the effect of her behavior on some of the employees was supported by documentation from their doctors. I told Judge O'Neill that I was concerned for her. In addition, I told her that if there was some stress in her life that was making it difficult for her to perform her job I was there to help. I would be willing to do whatever needed to be done with her docket to make sure that her cases were covered. However, I felt that it was important she consider taking some time off to seek whatever help she felt she may need.

20. Contrary to my expectations, Judge O'Neill at first appeared receptive to my suggestions, but ultimately stated she did not need to take any time off. Instead she responded that she did not like feeling boxed in and that she was tired of people "fucking" with her. She justified her feelings by relating incidents almost eight (8) years removed, from the 1992 campaign against Judge Cain, contending they were the motivation behind his efforts as Administrative Judge to undermine her.
21. I reminded Judge O'Neill that Judge Cain's view of the events might well be entirely different than hers. She acknowledged this might be true.
22. We discussed several, then recent situations, which had come to my attention concerning her behavior towards Assistant Prosecutor Tim Prichard and another involved her treatment of jurors.
23. Judge O'Neill apologized for her behavior, recognized that she at times lost her cool, and asked for assistance in dealing with individuals who she perceived as challenging her authority.
24. I proposed, rather than getting angry with people in open court, she should get off the bench and come back in her office, close the door and call me to talk about it.
25. Responding to her question regarding handling a lawyer who challenged her authority in Court, I told her when she felt challenged by a particular lawyer in Court, she should summon that lawyer into her chambers to discuss that lawyer's comportment in the Courtroom. Moreover, and as an example of her shrewdness, she asked whether or not this might create an *ex parte* situation.

I indicated that as long as both sides understood that the conversation dealt only with the lawyer's comportment in the Courtroom there would be no *ex parte* issue.

26. I further advised Judge O'Neill that her pattern of calling administrative staff and ordering them to her office with the expectation that they drop everything and respond immediately must cease.
27. I further explained that the Administrative Director was told not to allow any of her personnel to report to Judge O'Neill's chambers alone and that I was to be called to accompany any of the administrative staff so summoned to Judge O'Neill's chambers.
28. Judge O'Neill also relayed problems with her bailiff's attendance. I reminded her that her bailiff was her employee and she would have to address that issue herself through progressive discipline.
29. The conversation with Judge O'Neill lasted approximately 45 minutes and concluded by my reminding her that it was my intention as Administrative Judge to let her know that her belligerent behavior needed to stop and that I was available to assist her in any way necessary to cover her docket or her Courtroom if she felt she needed a period of time to get away. Finally I reminded Judge O'Neill that as Judges we needed to lead by example. The same afternoon following the meeting with Judge O'Neill I dictated a synopsis of our meeting and the discussion that we engaged in.
30. I have read Paragraphs 603 through 616 of Judge O'Neill's Answer to the Amended Complaint in the disciplinary matter. While nothing with regard to



Judge O'Neill surprises me any longer, her categorical denial of the contents of our private conversation on January 10, 2001 is further evidence of the separate reality that she experiences.

31. Between January 10, 2001 and the Personnel Committee Meeting on June 6, 2001, reports of problems concerning Judge O'Neill's treatment of Court personnel and others continued to roll in.
32. By way of example, in late February 2001, while I was on the bench, my balliff, Karen Waldrop told me of a telephone conversation she had just had with Judge O'Neill. I instructed her to write a memorandum concerning what took place.
33. Recognizing as I do that no one truly has a conversation with Judge O'Neill, rather they are talked at or talked down to by her, Ms. Waldrop related that she was trying to explain to Judge O'Neill that I was not able to speak with her because I was on the bench in a hearing with the attorney that Judge O'Neill was looking for. It was clear to me both from the way Ms. Waldrop told me and then later when I read the memorandum, that Judge O'Neill was completely unreasonable and inappropriate, yelling at and then hanging up on Ms. Waldrop.
34. This was precisely the type of unreasonable and irrational behavior that led to our prior conversation on January 10, 2001.

35. On June 6, 2001, the Court Personnel Committee met and discussed Judge O'Neill's continuing abuse of Court personnel. In particular, the escalating problem of Judge O'Neill's abusive treatment of the secretary she hired, whom she shared with Judge David L. Johnson.
36. Prior to the June 6, 2001 meeting, I had been contacted, directly and indirectly, on numerous occasions regarding Judge O'Neill's treatment of this secretary.
37. At that meeting, following discussion, Judge Pfeiffer moved and Judge Connor seconded a motion that would require the secretary to move from just outside Judge O'Neill's office on the ninth floor to an office on the fourth floor. The Personnel Committee voted unanimously to take this action and to authorize the Administrative Director to take this action, so that she may intercede on behalf of the secretary should there be additional problems.
38. This caused no small inconvenience to Judge Johnson.
39. Later in the same Personnel Committee meeting, following a discussion of how the Court should proceed with the persistent problems involving Judge O'Neill's behavior, another motion was made by Judge Connor, seconded by Judge Pfeiffer, asking me as the Administrative Judge to contact Chief Justice Moyer. The purpose in contacting Chief Justice Moyer was to seek his advice and counsel with respect to whether the Administrative Judge was empowered under the Ohio Rules of Superintendence, or any other authority to address the erratic and non-judicious conduct of Judge O'Neill. In the alternative, to ask Chief Justice Moyer to assign a visiting judge to Judge

- O'Neill's docket for a period of time which would enable her to seek the assistance of a mental health professional.
40. On July 13, 2001, I sent a letter to Chief Justice Moyer concerning Judge O'Neill's continuing unreasonable behavior and indicated that a physical and mental evaluation of Judge O'Neill may be warranted. I proposed the assignment of a visiting Judge as an appropriate step to facilitate the evaluation.
  41. Several days after my father-in-law passed on August 28, 2001, I received a telephone call on my cell phone from Chief Justice Moyer in which he indicated essentially that absent a doctor's opinion raising the issue of mental illness regarding Judge O'Neill, he could take no action at that time.
  42. Since June of 2001, incidents involving Judge O'Neill's treatment of Court personnel, attorneys and others have continued to occur.
  43. I can state unequivocally that I have never met a more gifted prevaricator than Judge O'Neill.
  44. Judge O'Neill can be, within the same conversation, at once charming then vindictive, accusatory and paranoid.
  45. If Judge O'Neill were to appear before me as a defendant, based upon my knowledge of her bizarre episodic behavior, I would order a Netcare evaluation, anger management and mental health treatment and supervise her in the community for the maximum period allowed by law.

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46. This affidavit is by no means an exhaustive list of the problems and issues about which I have become aware concerning Judge O'Neill.

FURTHER AFFIANT SAYETH NAUGHT.

Michael H. Watson  
Michael H. Watson, Judge  
Dated: April 25, 2003

Sworn to before me and subscribed in my presence this 25<sup>th</sup> day of April, 2003.

Margaret H. Weather-Blanca  
Notary Public

My commission expires: 6/24/07

SUBMISSION FOR THE RECORD

**Statement of Senator George V. Voinovich  
Before the Senate Judiciary Committee  
June 4, 2004  
Confirmation Hearing for Judge Michael H. Watson**

Mr. Chairman, I take great pride in having the opportunity to introduce, along with my home-state colleague Senator DeWine, someone with whom I worked very closely for many years, Judge Michael H. Watson who has been nominated to the United States District Court for the Southern District of Ohio.

Throughout the time I have known Judge Watson, he has proven himself to be nothing short of a highly effective practitioner of the law. When I was the Governor of Ohio, Michael served as my Chief Legal Counsel. In that capacity, he provided sound and practical direction on legislative, regulatory, clemency and ethical matters that concerned state government.

Michael has been a dedicated member of and servant to his community through serving on numerous committees and associations including being President of the Worthington, Ohio, Youth Boosters. He has also held positions serving in the Office of the prosecuting attorney, as a Bailiff/Law Clerk for the Court of Common Pleas, as an attorney working on insurance, workers' compensation, and criminal defense, Chief Legal Counsel for the Ohio Department of Commerce, and finally Deputy Chief Counsel for the Office of the Governor before becoming my Chief Legal Counsel.

In 1996, I appointed him to the Franklin County Common Pleas Court – the busiest trial court in the State of Ohio – and he has served the court with integrity and fairness. He later also served as one of the Court's Administrative Judges. Since last year, he has further served his country as an Appeals Court Judge for the 10<sup>th</sup> District. As a result of our strong working relationship, I have gained an immense amount of respect for him and he has reinforced my confidence in his abilities.

In closing, Mr. Chairman, I believe that Judge Watson has extraordinary qualifications to serve as a judge for the United States District Court for the Southern District of Ohio and feel tremendously privileged to have this opportunity to express my strong recommendation for his approval. I am certain that he would prove to be a valuable asset and an excellent member of the District Court.

Thank you very much for your time and careful consideration of this fine jurist.



**NOMINATION OF RICHARD A. GRIFFIN, OF  
MICHIGAN, NOMINEE TO BE CIRCUIT  
JUDGE FOR THE SIXTH CIRCUIT; DAVID W.  
MCKEAGUE, OF MICHIGAN, NOMINEE TO BE  
CIRCUIT JUDGE FOR THE SIXTH CIRCUIT;  
AND VIRGINIA MARIA HERNANDEZ COV-  
INGTON, OF FLORIDA, NOMINEE TO BE DIS-  
TRICT JUDGE FOR THE MIDDLE DISTRICT  
OF FLORIDA**

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**WEDNESDAY, JUNE 16, 2004**

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:07 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Cornyn, and Leahy.

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

Chairman HATCH. Today, the Committee will conduct a hearing on the nominations of three outstanding lawyers to be Federal judges. I commend President Bush for nominating each of them and I look forward to their testimony. I welcome the nominees, their family members and guests, and, of course, our distinguished colleagues who will be here, I believe, to testify today, as well as Members of the House who will introduce two of our nominees.

On our agenda today are two nominees for the United States Court of Appeals for the Sixth Circuit: Mr. Richard A. Griffin and Mr. David W. McKeague. In addition, we will consider the nomination of Virginia Maria Hernandez Covington, to be United States District Judge for the Middle District of Florida. We are happy to have you all here today.

I might add that it was over two-and-a-half years ago, on November 8, 2001, that President Bush nominated Judge McKeague for a seat on the Sixth Circuit. Judge Griffin was first nominated to this position by President George W. Bush on June 26, 2002. Both of these nominees have been rated Well Qualified by the American Bar Association.

Let me be frank. I am aware that many people have strong feelings about the status of the Sixth Circuit Court nominees. For

more than 2 years, I have been working with many, including the Senators from Michigan, to bring an acceptable resolution to these issues. I believe the best way to continue at this point and to progress toward a resolution is to move forward with this hearing, report the nominees from the Committee and place them on the executive calendar.

I am mindful that Senators Levin and Stabenow have concerns about the Sixth Circuit nominees. The Michigan Senators' negative blue slips have been and will continue to be accorded substantial weight. Indeed, the timing of this hearing is due, in part, to the views of the Michigan Senators. While negative blue slips are not dispositive under the Committee's Kennedy-Biden-Hatch blue slip policy, they certainly are a significant factor.

Since I first became Chairman of the Committee in 1995, I have followed the same blue slip policy crafted by two former Democratic Chairmen of this Committee, Senator Kennedy and Senator Biden. Here is the Committee's blue slip policy, as explained in a letter by former Chairman Joe Biden to the first President Bush, dated June 6, 1989, quote, "For many years, under both Democratic and Republican chairmanships, the return of a negative blue slip meant that the nomination simply would not be considered. That policy was modified under Senator Kennedy's chairmanship so that the return of a negative blue slip would not preclude consideration of the nomination. A hearing and vote would be held, although the return of a negative blue slip would be given substantial weight," unquote.

Chairman Biden continued to explain the blue slip policy that the Committee would follow under his chairmanship as follows, quote, "The return of a negative blue slip will be a significant factor to be weighed by the Committee in its evaluation of a judicial nominee, but it will not preclude consideration of that nominee unless the administration has not consulted with both home State Senators prior to submitting the nomination to the Senate. If such good-faith consultation has not taken place, the Judiciary Committee will treat the return of a negative blue slip by a home State Senator as dispositive and the nominee will not be considered," unquote.

In the case of Judge McKeague, Judge Griffin and other Michigan nominees, there is a clear record of consultation by the Bush White House with the Michigan Senators. Over 3 years ago, on April 10, 2001, White House Counsel Alberto Gonzales began discussions with the offices of the Michigan Senators regarding the vacancies on the Sixth Circuit and in the Eastern District of Michigan.

I understand that on May 17, 2001, Judge Gonzales provided the names of the individuals being considered for the Michigan vacancies and invited both Senators to provide feedback. The record is clear that over the next year, through subsequent telephone conversations as well as written correspondence, there was extensive consultation and repeated invitations to the Michigan Senators to provide their input into the nomination process.

In fact, I understand the White House offered to consider nominating both of the individuals championed by the Michigan Senators to Federal judgeships. Although President Bush ultimately



did not nominate those individuals, one can only conclude the consultation requirement was meaningfully fulfilled in the cases of Judge McKeague, Judge Griffin and other Michigan nominees.

I will continue to work with my friends and colleagues from Michigan—Senators Levin and Stabenow—the White House, Members of the House of Representatives, Senator Leahy and others on the Committee to reach an acceptable resolution for the vacancies in Michigan and the Sixth Circuit. I view resolution of the Sixth Circuit situation as important as any other judicial nominations matter pending before the Committee. I remain hopeful that we can reach an acceptable outcome.

Toward that end, this morning we welcome to the Committee Richard Allen Griffin, whom President Bush has nominated for a seat on the Sixth Circuit Court of Appeals. Judge Griffin has exceptional qualifications for the Federal appellate bench.

After graduating from the University of Michigan Law School in 1977, Judge Griffin spent 11 years in the private practice of law. In 1985, Judge Griffin founded the firm Read and Griffin, in Traverse City, Michigan. During his private practice, Judge Griffin specialized automobile negligence, premises liability, products liability and employment law. Additionally, he provided pro bono legal services as a volunteer counselor and attorney with the Third Level Crisis Center. In 1988, Judge Griffin was elected to the Michigan Court of Appeals. He was elected to retain his seat in 1996, and again in 2002. We are pleased to have him before us and look forward to hearing from him.

Of course, we note that his father is here with us, the former Senator from Michigan, a man whom I have always had a great deal of respect for, Senator Griffin.

We welcome you here to the Committee today.

I would be remiss if I hadn't mentioned that because Judge Griffin's father was a very distinguished member of the United States Senate.

I know how proud you must be, Senator Griffin, of your son today.

Our second nominee to the Sixth Circuit is David W. McKeague, who presently serves as a Federal district court judge for the Western District of Michigan. This is Judge McKeague's second appearance before this Committee, his first having occurred when he was nominated to his current position more than a decade ago.

In 1992, this Committee voted him to the floor with several other district court nominees en bloc, without any objection, and the full Senate confirmed him to the Federal bench by unanimous consent. Since 1992, he has served with distinction in the Western District of Michigan, and since 1994 has regularly been designated to sit on panels and draft appellate opinions for the Sixth Circuit Court of Appeals.

Judge McKeague graduated from the University of Michigan in 1968 and then attended the University of Michigan Law School. Upon graduation, in 1971, he joined the law firm of Foster, Swift, Collins and Smith, P.C., in Lansing, Michigan. He also served 6 years in the United States Army Reserve.

Since 1998, Judge McKeague has also served as an adjunct professor of law at Michigan State University's Detroit College of Law.

Judge McKeague is a distinguished and well-respected Federal judge who, in the words of one of his current colleagues on the Federal district court, quote, "let's the law and the facts take him where they take him," unquote. He will make an outstanding addition to the Sixth Circuit and I look forward to hearing from him this morning.

I will submit letters of support into the record for all nominees.

Judge Virginia Maria Hernandez Covington is our nominee for the Middle District of Florida. Judge Covington has had a distinguished career on both sides of the docket and is a pioneer of sorts. She became the first Cuban-American woman ever appointed to Florida's appellate courts. She is the highest-ranking Hispanic woman serving in Florida's judiciary, presently serving as a judge on the Second District Court of Appeal.

Prior to her appointment to the bench, Judge Covington served in various legal positions. After graduation from Georgetown University Law School, where she was the editor of the Tax Lawyer Law Review, Judge Covington worked for the Federal Trade Commission as a trial attorney, where she was responsible for ensuring that compliance agreements were enforced.

In 1982, she became an Assistant State Attorney for Hillsborough County, Florida, where she prosecuted traffic and misdemeanor cases. In 1983, Judge Covington became an Assistant United States Attorney for the Middle District of Florida, where she rose to the position of chief of the Asset Forfeiture Division.

In addition to her prosecutorial and managerial duties, Judge Covington has lectured extensively on asset forfeiture, money laundering and complex prosecutions to prosecutors and law enforcement personnel throughout the United States and abroad. Throughout her career, Judge Covington has received more than 70 accolades and commendations for her professional and civic work. She is well deserving of the ABA's unanimous Well Qualified rating.

Again, I am pleased to welcome these distinguished nominees to the Committee and I look forward to hearing her testimony.

We will now turn to the Democrat leader on the Committee, Senator Leahy, before we turn to our witnesses.

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

Senator LEAHY. Well, thank you, Mr. Chairman. I welcome our two Senators from Michigan and the others. It is good to see my former colleague, Senator Griffin. We served together back a long, long time ago, and I remember his calm demeanor, his courtesy, especially to this, the junior-most member of the Senate when I arrived.

I recall that you were as kind and as forthcoming to me as you were to the far more senior members, and I appreciate that. My good friend, the senior Senator at that time, Bob Stafford told me you would be that way, and he was right, as always.

Seeing Senator Levin and Senator Stabenow here, I can't help but mention that the basketball fans in Detroit and throughout Michigan are probably still celebrating that extraordinary triumph of the Pistons last night, the NBA championship. The Pistons' win

was an example of great teamwork. It was hard work. Actually, I can't help but say I wish the White House would work with the same kind of teamwork and we would be a lot further along.

In some ways, these hearings—and I hate to mention this, but having listened to the statement of my good friend from Utah, Senator Hatch, I worry that we are just one more time breaking longstanding precedent and Senate tradition. In the past year-and-a-half, with the Senate and the White House under control of the same political party, we have witnessed rule after rule broken or misinterpreted.

The list is long. Whether it is from the way home State Senators are treated, to the way hearings are scheduled, to the way the Committee questionnaire has been altered, to the way our Committee's historic protection of the minority by Committee Rule IV has been violated—something that the Democrats, when they were in the majority, followed assiduously to protect the rights of the Republicans—in every one of these cases, the Republicans on the Committee have destroyed virtually every custom, and I must say every courtesy that used to help create and enforce cooperation and civility in the confirmation process.

Some are even now beginning to talk openly about ignoring another longstanding practice, one that was followed very carefully, the Strom Thurmond rule. Every time it came up, we were told, out of respect, this is what we all agree to. And now they think that maybe they might not follow the Thurmond rule for the first time in this particular presidential election year.

It has been a strange time, these 3 years, during which Republican staff stole Democratic files off the Judiciary computers during what has been a "by any means necessary" approach. Their approach to the rules and precedents seems to follow a new kind of golden rule; that is that he with the gold rules. That has not been helpful to the process or the Senate or the country.

In the past several weeks, we have begun to see how the administration, at the Department of Defense, at the Department of Justice and at the White House, reinterpreted our laws and our treaties that govern our Nation's policies and practices for the detention and interrogation of prisoners, and how that led to torture and abuse. That has severely undercut and endangered our brave men and women serving in Iraq and around the world.

I can't remember a time when the United States has faced more criticism abroad. As Secretary Ridge stated in his own testimony at our hearing last week, these kinds of abuses have had the effect not of making us safer, but instead they have increased recruiting by anti-American and terrorist organizations.

It is as if those in power believe that they are above our constitutional checks and balances, and they can reinterpret any treaty, any law, rule, custom or practice that they do not like or find inconvenient, today's hearing being an example of that.

Nearly a year ago, the Chairman crossed a line that he had never before crossed when he held a hearing for Henry Saad, a nominee to the U.S. Court of Appeals for the Sixth Circuit. He was opposed by both of his home State Senators. I said at that time I thought it may not only have been the first time this Chairman held a hearing for a nominee without two positive blue slips indi-

cating support from home State Senators, but it may have been the first time any Chairman on any Senate Judiciary Committee, Republican or Democrat, proceeded with a hearing on a judicial nominee over the objection of both home State Senators. It was certainly the only time we could find in the last 50 years. I know it is the only time during my 30 years in the Senate.

Today, having broken a longstanding practice of this Committee founded on a respect for the wishes of a home State Senator, whether in the case of a district or circuit court nominee, we are doing it again, but we are doubling the ante this time because both judicial nominees are opposed by their home State Senators.

The Michigan Senators, highly respected, have come to this Committee. They have stated their very real grievances with the White House and their honest desire—and I know because I have sat in on some of these meetings—to work toward a bipartisan solution to the problem of filling vacancies in the Sixth Circuit.

I think we should respect their views, just as we have respected the views of Republican and Democratic Senators for decades. I have urged the White House to work with them. I have proposed solutions that might work. Even the Republican Governor of their State has said that he thought those solutions were extremely workable. For one thing, they have proposed reasonable solutions, including a bipartisan commission used in many other States, and the White House rejects that.

I mention this because it is telling that another nominee today is the result of a bipartisan commission. Judge Virginia Maria Hernandez Covington, who has been nominated to a Federal district court in Florida, has the full support of both of her home State Senators, both Democrats. I congratulate the Senators from Florida for their efforts to maintain this important mechanism for promoting experienced and consensus candidates to the bench.

The President promised—and I found this a hopeful promise—on the campaign trail to be a uniter, not a divider. That promise apparently stopped after the campaign, because his practice in office with respect to judicial nominees has been often most divisive.

Citing the remarks of a White House official, the Lansing State Journal reported that President Bush is simply not interested in compromise on the existing vacancies in the State of Michigan. It is unfortunate that there is no effort to unite and not divide.

I have talked about this before, but given the continued flaunting of precedent, it bears repeating. When Republicans chaired this Committee and we were considering the nominations of a Democratic President, if there was just one negative blue slip from just one home State Senator, that doomed the nomination and there wasn't even a hearing. This included all nominations, including those to the circuit court.

There is no other way to explain the failure to schedule hearings for such qualified and non-controversial as James Beaty and James Wynn, African-American nominees from North Carolina. There had been a failure to return one blue slip. There was an objection from one Senator, so we didn't have hearings.

What other reason could plausibly be found for what happened to the nominations of Enrique Moreno and Jorge Rangel, both Latino, both Harvard graduates, both highly rated by the ABA? A

Senator from Texas objected, so we didn't having hearings in the Judiciary Committee.

Now, that was the rule during the time of the Clinton administration. Apparently, now that there is a Republican in the White House, the Republicans in the Senate have changed the rule. They used the rule against more than 60 of President Clinton's judicial nominees. They never had a hearing, never had a vote. More than 200 of his executive branch nominees never had a hearing, never had a vote, through the enforcement of rules and precedents which the Republican majority said at that time were sacred. But now they find it is only inconvenient because the White House has changed.

The Republican Senate majority refused for over 4 years to consider President Clinton's well-qualified nominee Helene White to the Sixth Circuit because a Republican Senator from Michigan objected. Judge White has served on the Michigan Court of Appeals with Judge Griffin since 1993. Prior to her successful election to that seat, she served for nearly 10 years as a trial judge, handling a wide range of civil and criminal cases. She was first nominated by President Clinton in January 1997, but the Republican-led Senate refused to act on her nomination. She waited in vain for 1,454 days for a hearing, before President Bush withdrew her nomination.

President Clinton had also nominated Kathleen McCree Lewis. She is the daughter of a former well-respected African-American Solicitor General of the United States and a former Sixth Circuit judge. She was also passed over for a hearing for years. No effort was made to accord her consideration for 18 months. Now, we have a double standard at work.

Under our Constitution, the Senate has an important role in the selection of our judiciary. The brilliant design of our Founders established that the first two branches of Government would work together to equip the third branch to serve as an independent arbiter of justice. That is why the U.S. Senate rejected some of George Washington's judges—the most popular President this country ever had. When there was a huge Democratic majority in the Senate, they rejected the judicial plans of Franklin Roosevelt at the height of his popularity.

As columnist George Will wrote, "A proper constitution distributes power among legislative, executive and judicial institutions so that the will of the majority can be measured, expressed in policy and, for the protection of minorities, somewhat limited."

The structure of our Constitution and our own Senate rules of self-governance are designed to protect minority rights and to encourage consensus. Despite the razor-thin margin of recent elections, the majority party is not acting in a measured way, but in complete disregard for the traditions of bipartisanship that are the hallmark of the Senate. It has acted to ignore precedents and reinterpret longstanding rules to its advantage. This practice of might makes right is wrong.

Thank you, Mr. Chairman. I do look forward very much to Judge Covington. That was followed through in a bipartisan effort to get her nomination here, and I suspect that she will probably get a unanimous vote.

Chairman HATCH. Thank you, Senator. I will put my responses to your comments in the record.

Senator Levin, we will turn to you.

**STATEMENT OF HON. CARL LEVIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN**

Senator LEVIN. Mr. Chairman, thank you for inviting us to testify here today. Thanks to both you and to Senator Leahy for your efforts on this Committee. We know how difficult they are and we all appreciate them.

As we have expressed to you, Mr. Chairman, and expressed to the Committee in a lengthy statement last July 30, and reflected by our negative blue slips on these nominations, we believe that moving forward on these nominations without addressing the existing impasse in a bipartisan manner could deepen partisan differences and make future efforts to resolve this matter more difficult.

The number of Michigan vacancies provides an unusual opportunity for bipartisan compromise. Efforts to forge compromise so far have not been successful. We hope these efforts will continue. The Pistons' victory last night as underdogs only reinforces my optimistic streak. If they can do it, we all can do it.

Chairman HATCH. Let's hope we can.

Senator LEVIN. Two of President Clinton's nominees—Michigan Court of Appeals Judge Helene White and Kathleen McCree Lewis—stood without a hearing before this Committee for more than 4 years, in one case, and one-and-a-half in the other. No questions or concerns were raised about either nominee's qualifications. In the case of Judge White, her nomination went without a hearing longer than any other in the history of the United States Senate.

The Senate's failure to consider these nominations in the first instance was a direct result of Senator Abraham's refusal to return his blue slips on the nominations of Judge White and Ms. Lewis. Senator Abraham's refusal did not relate to either woman's qualifications. Rather, it stemmed from his repeated efforts to persuade the Clinton White House to nominate Jerry Rosen, a district court judge in the Eastern District of Michigan, to the Sixth Circuit. The record shows that this Committee honored Senator Abraham's refusal to return the blue slips. The Clinton administration gave serious consideration to Senator Abraham's recommendation, but ultimately decided to nominate someone else—Kathleen McCree Lewis.

During the years in which Judge White's and Ms. Lewis' nominations were pending, Senator Leahy as Ranking Member of this Committee delivered at least 16 statements on the Senate floor regarding the Sixth Circuit nominations. During the same period, I frequently asked Senator Abraham to return his blue slip and Chairman Hatch to hold Committee hearings for the nominees. Those efforts were futile.

Also troubling was that after Senator Abraham finally returned his blue slips on the two nominations, the two women were still not given hearings. To that point, I had understood that Senator Abraham's decision not to return blue slips on the two nominees prevented them from being granted a Judiciary Committee hearing.

So the day that Senator Abraham returned the blue slips, I wrote Senator Hatch, reminding the Chairman that both slips had now been returned on the two nominations and urging that they be placed on the agenda of the next Judiciary Committee confirmation hearing. That effort and the many that followed were unsuccessful.

Over the next several months, Senator Leahy went to the floor ten times to urge action on the Michigan nominees. More than once, I also raised the issue on the Senate floor. None of our statements prompted the Judiciary Committee to act.

On at least one version of Judge White's and Ms. Lewis' blue slips read the following, quote, "No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominees' home State Senators." That was right on this Committee's blue slip, and during the entire Clinton presidency it is my understanding that not a single judicial nominee, not one, got a Judiciary Committee hearing if there was opposition by one home State Senator, let alone two, as there are here.

So the unreturned blue slips of one Republican Senator precluded Judiciary Committee consideration of two nominees of a Democratic President. Surely, two negative Democratic blue slips should not be ignored by this Committee simply because we have a Republican President making the nominations.

Inconsistencies in the Committee's blue slip policy are deeply troubling, but equally troubling, Mr. Chairman, is that even after the blue slips were returned by Senator Abraham, Judge White and Ms. Lewis were still denied hearings. Why?

Please listen to the testimony of Kent Marcus, of Ohio, about President Clinton's Sixth Circuit nominees. Professor Marcus was nominated by President Clinton to fill an Ohio vacancy on the Sixth Circuit. Both home State Senators indicated their approval of that nomination. Nevertheless, he was not granted a Judiciary Committee hearing. His troubling account of his experience—and it was an account in his testimony before the Senate—sheds added light on this Michigan situation.

Here is what his testimony was before this Committee, quote, "To their credit," Professor Marcus said, "Senator DeWine and his staff, and Senator Hatch's staff and others close to him were straight with me. Over and over again, they told me two things. One, there will be no more confirmation hearings to the Sixth Circuit during the Clinton administration. Two, this has nothing to do with you. Don't take it personally. It doesn't matter who the nominee is, what credentials they may have, or what support they may have."

He went on, "On one occasion, Senator DeWine told me this is bigger than you and it is bigger than me. Senator Kohl, who had kindly agreed to champion my nomination within the Judiciary Committee, encountered a similar brick wall. The fact was a decision had been made to hold the vacancies and see who won the presidential election. With a Bush win, all those seats could go to Bush rather than Clinton nominees," close quote.

Senator Stabenow are not alone in our view that what occurred with respect to Judge White's and Lewis' nominations were fundamentally unfair. Even Judge Gonzales, the current White House

Counsel, acknowledged that it was wrong for the Republican-led Senate to delay action on judicial nominees for partisan reasons, at one point even calling the treatment of some nominees during the Clinton administration, quote, "inexcusable."

Senator Stabenow and I are determined to do what we can to see to it that the tactic used against the two nominees from Michigan does not succeed. But we are also determined to seek a bipartisan solution, and we have proposed a bipartisan commission to recommend nominees to the President. Similar commissions have been used in other States. That commission would not guarantee that the recommendation, much less the nomination of any particular individual would occur, but it has thus far been rejected.

I also want to thank you, Mr. Chairman, because you have made some real efforts to seek a bipartisan solution to this problem. It has not yet succeeded, but again I think it is incumbent on all of us—and I know the Chairman agrees with this—to keep on trying.

Again, with this number of Michigan vacancies, we have an unusual opportunity to find a better path for the consideration of judicial nominees. Finding that path would be of great benefit not just as a solution to this problem, but to set a positive tone for the resolution of other judicial disputes as well.

I again thank you, Mr. Chairman, for inviting us to speak this morning. A much lengthier statement was given by me on July 30 with many more details, and I would refer the Committee to that statement for those details.

Chairman HATCH. We will incorporate that statement in the record.

Senator Stabenow.

**STATEMENT OF HON. DEBBIE STABENOW, A U.S. SENATOR  
FROM THE STATE OF MICHIGAN**

Senator STABENOW. Well, thank you, Mr. Chairman, and I too want to thank you for allowing Senator Levin and I to once again speak before the Committee.

We have had some references to the Pistons and I wanted to say as someone who has watched them very closely and is very excited about the win last evening that they did show us what you can do when you can work together.

Chairman HATCH. Well, they really did. Sorry to interrupt you, but I have been a big fan of Larry Brown for years.

Senator STABENOW. Terrific.

Chairman HATCH. He is one of the great coaches in the game. We have one of the greatest coaches in Utah, in Jerry Sloan. In fact, I think probably the two of them are the two greatest coaches in the game.

That was a truly remarkable win. I felt badly for my dear friend, Karl Malone. You guys were really nasty to him, is all I can say, in not getting his ring finally, because he has been the greatest power forward who ever lived. But I congratulate Detroit. What a team. Did they play well together? Like you say, it was pure teamwork.

You know, if we could do that around here, if we just had a little teamwork around here—

Senator STABENOW. I agree.



Chairman HATCH. —I think we could be champions, too.

Senator LEVIN. Even when the odds are against us.

Chairman HATCH. Even when the odds are against us.

Senator STABENOW. It shows what we can do when we work together, no question about it.

Mr. Chairman, once again I completely agree with Senator Levin's testimony, and I want to thank Senator Levin for his leadership in trying to bring fairness in the nomination process for the Sixth Circuit Court of Appeals. I personally deeply regret that after many hours of meetings and discussions—and I thank the Chairman for all of your efforts—there is not yet a solution or a willingness from the administration to work with us to create a solution, which I believe that there is and I believe that people of good faith can find a solution.

Mr. Chairman, I still believe the best way to end the impasse is to have a bipartisan compromise. I fear that without a fair compromise, this struggle between the two branches of Government will continue for some time. As you know, Senator Levin and I have proposed to settle this conflict by appointing a bipartisan commission to make recommendations to the White House on judicial nominations, similar to the commission that is up and working just across the lake in Wisconsin. Unfortunately, the White House has rejected this proposal, despite having agreed to similar commissions in other States with other Senators.

I went into detail at the July 30, 2003, Committee hearing about how this type of commission could break this impasse. I won't repeat my earlier testimony, but I simply would ask that my statement from the July hearing be included in today's record.

Chairman HATCH. Without objection, we will put it in the record.

Senator STABENOW. Mr. Chairman, I want to thank you again for allowing us to testify. I really do believe that if we continue to work together in good faith, we can find an acceptable bipartisan compromise, and I am hopeful that the Chairman will continue to pursue that course.

Thank you.

Chairman HATCH. Well, thank you, Senator. I appreciate that. As you know, I have tried to resolve this. I tried to resolve it before, and the problem before was that Senator Abraham said there was zero consultation. And under those circumstances, it was very difficult to break through.

I want to personally express my regard for both of you in trying to work with me to resolve it. We just haven't been able to find the right combination to do it, but I will keep working on it because these are well-qualified people and should have the right to confirmation. I promise I will do my very best.

Senator LEVIN. Thank you so much.

Chairman HATCH. Thank you so much.

I don't know which one of you two is more senior. Well, I have got to go to Senator Nelson first, and then I will go to Representative Camp and then Representative Rogers. I thought maybe I would just continue with Michigan, but we will let you go, Senator Nelson, and then you can leave.

Senator NELSON. I don't mind waiting, Mr. Chairman, if you want to continue with—

Chairman HATCH. No. We will go with you and then we will finish with them.

**PRESENTATION OF VIRGINIA MARIA HERNANDEZ COVINGTON, NOMINEE TO BE DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF FLORIDA, BY HON. BILL NELSON, A U.S. SENATOR FROM THE STATE OF FLORIDA**

Senator NELSON. Well, thank you, Mr. Chairman. I am here on behalf of a nominee for judge that is an American success story, for Judge Covington's family left Cuba in 1953, not speaking a word of English, and it is a story, as you would expect, to be nominated to this high court.

She comes with extraordinary recommendations that are bipartisan in nature. She has a master's in business administration, a law degree from Georgetown, and then she worked as a trial attorney for the Federal Trade Commission and as an Assistant State Attorney back in our State of Florida. For 12 of those 20 years, she was at the U.S. Attorney's office, so an enormous amount of Federal experience there. In addition to Judge Covington's experience as a prosecutor, she has lectured extensively; numerous honors.

I would like to introduce her two children who have accompanied Judge Covington, Laura and Stephen. Where are they?

Thank you for being here.

Chairman HATCH. We are happy to have you young folks with us.

Senator NELSON. So I could keep going on in. I know Judge Covington. She is from Tampa. She is close friends with many of my close friends there. She has Senator Graham's—both of our unqualified support.

Chairman HATCH. Well, thank you so much.

Judge Covington, that is high praise. We have a lot of respect for Nelson, and we appreciate you taking time from what we know is a busy schedule to be here today and to give this testimony. It is very favorable and helpful here.

Senator NELSON. Thank you, Mr. Chairman.

Chairman HATCH. We will turn to Representative Camp, and then we will go to Representative Rogers.

**PRESENTATION OF RICHARD A. GRIFFIN, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT, BY HON. DAVE CAMP, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN**

Representative CAMP. Thank you very much, Mr. Chairman.

Senator Bob Griffin and ladies and gentlemen, it is an honor to introduce circuit court nominee Judge Richard Allen Griffin. Judge Griffin is a life-long resident of Traverse City, Michigan, which is in my 4th Congressional district. I have known Rick and his family for a number of years and I am pleased to recommend him to the Committee.

Judge Griffin is already an experienced court of appeals judge. He is currently serving his 16th year on the Michigan Court of Appeals. In support of his nomination for the Sixth Circuit, Judge Griffin has received the very highest recommendation of the American Bar Association of Well Qualified.

In addition to the ABA, his supporters are many and from both sides of the aisle. They include President Gerald R. Ford, who wrote the following to the Chairman of this Committee. "I write to strongly support the nomination of Richard Allen Griffin to the United States Court of Appeals for the Sixth Circuit. He is a highly qualified nominee and I can say with conviction that Judge Griffin is a person of highest-quality character. As the record shows, he has been a very excellent judge with unquestioned integrity."

Also, the Chief Justice of the Michigan Supreme Court, Maura Corrigan, who served with Judge Griffin for 7 years on the court of appeals, has said, "Judge Griffin is intellectually gifted. He is a spirited questioner who cuts to the chase. Judge Griffin brings a depth of practical experience and a grasp of real-life problems to the decision of cases. His thinking assists his colleagues in their deliberations. Richard Allen Griffin is a man of integrity and probity who is fully capable of discharging the duty of protecting our Constitution and laws. He is deserving of the public trust. I have every confidence that he will serve our country with honor and distinction."

Finally, the former Democrat mayor of the city of Detroit and former court of appeals judge Roman Gribbs has written the following in support of Rick. "I have known Judge Griffin for many years and have worked with him as a colleague on the Michigan Court of Appeals for 14 years. Working together on hundreds of opinions has given me the opportunity to observe and know Rick very well. He is in many respects a judge's judge—integrity personified, intelligent, hard-working, fair, sensitive with level temperament and good judge, plus the uncanny ability to decide and write in a clear and understandable manner that resolves complex and obscure issues. He is a dedicated public servant."

Senator as a Congressman, as a citizen and as a lawyer, I cannot urge more strongly the immediate confirmation of Judge Richard Griffin to the Sixth Circuit. The Federal Court of Appeals for the Sixth Circuit is in desperate need of additional judges. Twenty-five percent of the seats on the bench are currently vacant. The Sixth Circuit is the slowest circuit in the Nation in deciding cases. Justice delayed is justice denied is now the rule, not the exception for the Sixth Circuit.

Judge Griffin is an exceptional, well-qualified individual who is ready, willing and able to serve all the people as judge of the Sixth Circuit. Judge Griffin's nomination has already been pending for 2 years. Without further delay, I urge this Committee to act promptly to confirm this well-qualified nominee.

Mr. Chairman, I want to thank you for your leadership on this and many other issues. Thank you for the time today.

Chairman HATCH. Well, thank you, Representative Camp. We appreciate you taking time to come over here. Your praise of the judge is very meaningful here today and I appreciate your appearance.

Representative CAMP. Thank you.

Chairman HATCH. Representative Rogers, we will turn to you.

**PRESENTATION OF DAVID W. MCKEAGUE, NOMINEE TO BE  
CIRCUIT JUDGE FOR THE SIXTH CIRCUIT, BY HON. MIKE  
ROGERS, A REPRESENTATIVE IN CONGRESS FROM THE  
STATE OF MICHIGAN**

Representative ROGERS. Thank you, Mr. Chairman.

Chairman HATCH. If you need to leave, feel free.

Representative ROGERS. Before I begin—

Chairman HATCH. Maybe I could just say one thing before you do leave. There is a lot of misunderstanding about this situation. You know, the one rule we have on this Committee—and everybody in Michigan needs to know this—is that the President, whoever that President may be, has to consult with both home State Senators.

In the case of the two Democrat nominees, there was absolutely zero consultation, and they had made an agreement with Senator Abraham and they just completely blew it away and didn't pay any attention at all. There was no choice in what happened there. It was, some thought, an arrogant approach toward the judiciary, and I, as Chairman, had no choice.

Now, some think that the withholding of blue slips by two Senators from the home State in the case of a circuit court of appeals judge, or in this case four of them, should automatically end the matter. Well, it doesn't because Presidents reserve their right to demand that circuit court of appeals judges be voted upon, regardless of withholding of blue slips.

We have had two Democrats set the rules on this Committee—Senators Kennedy and Biden—that those negative blue slips should be given great consideration and heavy weight, but they are not dispositive in and of themselves; that the nominees do deserve to be heard and have an opportunity for a vote up and down. Now, suddenly, the approach here has become, in the eyes of some, a breach of the rules. Well, it isn't a breach of the rules.

I don't know what else to do, other than to proceed and hopefully work with everybody to try and resolve this matter. I am going to work with the two Senators from Michigan to see if I can resolve it, and they have expressed a desire here to work with me to resolve it. If I can, I certainly am going to do that, and resolve it so that they can be happy as well.

But we shouldn't hold up people who are well-qualified by the American Bar Association, the gold standard that the Democrats have set, and that is what these people are who are nominated, and certainly the two here today, Judges Griffin and McKeague.

In fact, Judge Covington, I will tell you I don't see any reason for you to have to sit here any further, because I am not going to ask you any questions. I know your background, I know you are qualified. Senator Leahy has basically said that he will support you and that you are qualified, and I believe every member of this Committee will support you.

So if you would like, you can relax, take it easy and leave, if you want to. Otherwise, you can stay and listen to this. But, frankly, I don't see any reason to ask you any questions because I understand your background and I am very proud of you and proud of your background. This may take a little bit of time here today and I just want you to know that we are very proud of you and we will

support your nomination and try to get you through before the end of this year, although that is going to be difficult, I have got to tell you, with the way things are breaking down right now. But I will do my best.

I am sorry to interrupt you, Representative Rogers. We will turn to you.

Representative ROGERS. Thank you, Mr. Chairman. It has been a privilege to work with you during this process. I want to just say I am proud of you and I hope America is proud of you. You recognize that clinging to the past serves no purpose to the lives of the people today, and I appreciate that.

I have watched you look under every rock for a solution and I have watched you reject the bitterness of partisan negotiation to seek consensus, and I want to applaud you for that. Thank you very much, sir, for digging your heels in and working so hard to find that solution.

Chairman HATCH. Thanks for your kindness.

Representative ROGERS. It is my distinct privilege and honor today, Mr. Chairman, to introduce David McKeague to this distinguished panel. David is not only a constituent of Michigan's 8th Congressional District, he is a good friend and a widely respected member of Michigan's legal community and a distinguished jurist over the last decade with experience on the Federal bench.

At this time, Mr. Chairman, I would ask David to introduce himself to you, if I may.

Chairman HATCH. Sure, and your family, as well, if you wish.

**STATEMENT OF DAVID W. MCKEAGUE, NOMINEE TO BE  
CIRCUIT JUDGE FOR THE SIXTH CIRCUIT**

Judge MCKEAGUE. Thank you, Representative.

Unfortunately, my family was unable to be here. They are all working.

Chairman HATCH. Well, that is fine, or any friends or anybody else.

Judge MCKEAGUE. I am very pleased to introduce Ted Lidds, who you may know as head of the Defender Services Division.

Chairman HATCH. We are happy to have you here, Ted.

Judge MCKEAGUE. I have been privileged to be on that Committee now for 4 years and work closely with Ted to provide assistance to those who can't afford a lawyer.

[The biographical information of Judge McKeague follows.]

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
315 W. ALLEGAN  
LANSING, MICHIGAN 48933

DAVID W. McKEAGUE  
DISTRICT JUDGE

1-517-377-1563  
FAX: 377-1706

January 9, 2003

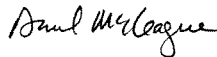
Honorable Orrin G. Hatch  
Chairman, Senate Judiciary Committee  
104 Hart Office Bldg.  
Washington, D.C. 20510

Dear Senator Hatch:

Enclosed please find my Senate Judiciary Committee Questionnaire in connection with my nomination to the United States Court of Appeals for the Sixth Circuit by President Bush on January 7, 2003.

If additional information is needed, please do not hesitate to contact me.

Sincerely,



David W. McKeague

pir/  
Enclosure

cc: Honorable Patrick Leahy

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

David William McKeague

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

Residence

East Lansing, Michigan

Office

315 W. Allegan Street  
Lansing, Michigan 48933

3. Date and place of birth.

November 5, 1946  
Pittsburgh, Pennsylvania

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

Married

Wife's Maiden Name: Nancy Lynne Palmer

Occupation: Senior Vice President of Administration

Employer: Michigan Chamber of Commerce

600 South Walnut

Lansing, Michigan 48933

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

University of Michigan, Ann Arbor, Michigan

September 1964 through April 1968

Bachelor of Business Administration granted April 27, 1968.

University of Michigan Law School, Ann Arbor, Michigan

June 1968 through August 1971

Juris Doctor granted August 17, 1971

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.
  - a. I was appointed to the United States District Court for the Western District of Michigan on February 28, 1992.
  - b. I joined the law firm of Foster, Swift, Collins & Smith, P.C. in 1970 as a summer associate. I became a full-time associate in 1971 and was elected a shareholder and director in 1976. I was elected Vice President and member of the three-person Executive Committee that manages the day-to-day operation of the firm from 1979 to 1983. I served as Chairman of the Government and Commerce Department from 1983 to 1990. I was elected Secretary/Treasurer and member of the Executive Committee in 1990 to my appointment to the United States District Court on February 28, 1992.
  - c. I was a partner in S. Washington Investment Co., a Michigan co-partnership, from 1979 to 1992. The purpose of this partnership is to own the building at 313 South Washington Square, Lansing, Michigan, that houses the law firm of Foster, Swift, Collins & Smith. I was the partner principally responsible for the operation of this partnership from its inception to the time I resigned from the law firm.
  - d. I have been a limited partner in Stonehedge Limited Partnership since 1990. This partnership owns an apartment complex in East Lansing, Michigan. I am not involved in the management of this partnership.
  - e. I was general counsel and a member of the executive committee and Board of Directors of Impression 5 Science Museum, Lansing, Michigan. The purpose of the Museum is to provide "hands-on" education in science for children. I was elected in 1985 and I resigned in 1992.
  - f. I was a member of the Board of Governors of the Country Club of Lansing, Lansing, Michigan. The Country Club is a golf and social club. I was appointed to fill a vacancy on the Board of Governors in 1988. I was



elected to the Board and elected an officer in 1989. My term of office on the Board of Governors expired in 1992 and my term of office as an officer expired in December 1991. I was re-elected to the Board of Governors in 1995. My term ended in December 2001.

g, I was general counsel and a member of the State Central Committee of the Michigan Republican Party. I was a member of the Central Committee since 1985. I was elected an officer in April 1989, and re-elected for a second two-year term in April 1991. I resigned in 1992. I provided legal advice to the Party and represented the Party before administrative agencies and in courts of record.

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

Yes.  
 March 1969 to March 1975  
 United States Army Reserve  
 Specialist 7  
 Serial No. XXXXXXXXXXXX  
 Selective Service No. XXXXXXXXXXXX  
 Honorable Discharge

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

Boss of the Year, Lansing Legal Secretaries Association,  
 1977  
 Who's Who in American Law - 1990 - present  
 The Best Lawyers in America - 1991-1992  
 Who's Who in America - 1994 - present

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

Judicial Conference of the United States  
 Member, Defender Services Committee, 2000-present;  
 Chairman, Federal Defender Budget Subcommittee, 2002-present

Federal Judicial Center  
Chairperson, District Judge Education Committee, 1998-present

Federal Bar Association, 1988-present  
Regional Director, Western Michigan Chapter, 1990-1992

American Bar Association, 1971-1993

District of Columbia Bar Association, 1989-present

State Bar of Michigan, 1971-present  
Member, Oil & Gas Committee, 1985-1992  
Chairperson, Oil & Gas Committee, 1988-1989  
Member, U.S. Courts Committee, 1999-present

Ingham County Bar Association, 1971-1998  
Founding Member, Commercial Mediation Panel Steering Committee, 1988-1992  
Mediator, 1988-1992

Judicial Selection Committee for the Western District of Michigan, 1986

Republican National Lawyers Association, 1987-1992

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

I do not belong to any organizations that are active in lobbying before public bodies.

I currently belong to the following other organizations:

Civic

Corporation for Supportive Housing Advisory Board 2002-present  
Wharton Center for the Performing Arts Advisory Council 1996-2002

Professional

American Inns of Court 1999-present  
Catholic Lawyers Guild 1992-present  
Federalist Society for Law and Public Policy Studies 1988-present

Social

Country Club of Lansing 1978-present  
Michigan Athletic Club 2001-present

Educational

University of Michigan Alumni Club 1971-present -

Homeowners

Glencairn Neighborhood Association 1996-present

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

Michigan Supreme Court  
December 8, 1971

United States District Court, Western District of Michigan  
January 28, 1972

United States District Court, Eastern District of Michigan  
July 6, 1978

United States Court of Appeals, Sixth Circuit  
March 24, 1988

District of Columbia Court of Appeals  
November 17, 1989

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

*Differentiated Case Management Can Help Make ADR More Than an "Intermediate Irritating Event,"* Federal Judicial Center, Directions. Issue No. 7 (1994) (see attachment 1)

Guide to Judicial Management of Cases in ADR, Advisory  
Committee Member, Federal Judicial Center. Fall 2001.

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

My health is excellent. My last physical examination was December 12, 2002.

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

I was appointed to the United States District Court for the Western District of Michigan on February 28, 1992. The United States District Court is a court of limited jurisdiction as set forth in the Constitution and laws of the United States.

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

1) Significant Opinions

Kemp v. Medtronic, Inc., 231 F.3d 216 (6th Cir. 2000)  
(Opinion written while sitting by designation on Sixth Circuit.)

Wilson v. City of Kalamazoo, 127 F.Supp.2d 855 (W.D. Mich. 2000)

Daugherty v. Vanguard Charter School Academy, 116 F.Supp.2d 897 (W.D. Mich. 2000)

In re Jackson National Life Ins. Co. Premium Litigation,  
209 F.R.D. 134 (W.D. Mich. 2002)  
156 F.Supp. 2d 846 (W.D. Mich. 2001)  
107 F.Supp.2d 841 (W.D. Mich. 2000)  
183 F.R.D. 217 (W.D. Mich. 1998)

Doe v. Kelley, 961 F.Supp. 1105 (W.D. Mich. 1997) -

Southwell v. Southern Poverty Law Center, 949 F.Supp. 1303  
(W.D. Mich. 1996)

Federal Trade Commission v. Butterworth Health Corp.,  
946 F.Supp. 1285 (W.D. Mich. 1996), aff'd, 121 F.3d 708  
(6th Cir. 1997)

Mauro v. Borgess Medical Center, 886 F.Supp. 1349  
(W.D. Mich. 1995), aff'd, 137 F.3d 398 (6th Cir. 1998),  
cert. denied, 525 U.S. 815 (1998)

Upjohn Co. v. Aetna Casualty and Surety Co., 850 F.Supp.  
1342 (W.D. Mich. 1993)

Kelley v. Tiscornia, 810 F.Supp. 901 (W.D. Mich. 1993)

## 2) Appellate Reversals & Criticisms

### A. Civil Cases

Mill's Pride, Inc. v. Continental Insurance Co., 300 F.3d  
701 (6th Cir. 2002)

This case presented the claim of an insured to enforce its insurer's duty to provide defense and indemnification coverage in connection with trademark infringement and unfair competition claims brought against the insured. The insurance policy included no choice of law provision. After evaluating relevant factors under governing law, the law of Michigan, where the underlying wrongs occurred, was held to govern. The Sixth Circuit reversed, holding that Ohio, where the insurance contract was entered into, had a more significant relationship to the transaction and that Ohio law should be applied.

In re Desilets, 291 F.3d 925 (6th Cir. 2002)

An attorney who had been admitted to the bar of the State of Texas and the bar of the U.S. District Court for

the Western District of Michigan, who had been denied admission to the State Bar of Michigan, and who practiced law out of an office in Michigan almost exclusively in the U.S. Bankruptcy Court, was held not to be an "attorney authorized under applicable law to practice law" under the Bankruptcy Code. The Sixth Circuit reversed in a 2-1 decision, holding that state law excluding the attorney from the practice of law in Michigan, must give way to federal law, which authorized him to practice in the bankruptcy court.

Bradford Co. v. Jefferson Smurfit Corp., No. 00-1511, 00-1546 (Fed. Cir. Oct. 30, 2001) (Attachment 2)

After a lengthy jury trial in a patent infringement case, the district court refused to consider the merits of an issue raised in Bradford's renewed motion for judgment as a matter of law, because it challenged an inconsistency in the jury verdict, an objection Bradford waived by failing to assert it before the jury was dismissed. The Federal Circuit remanded the issue for consideration on the merits, concluding that Bradford's motion not only challenged an inconsistency in the verdict, but also challenged the sufficiency of the evidence to support it.

Adams v. City of Battle Creek, 250 F.3d 980 (6th Cir. 2001) (Attachment 3)

Summary judgment was awarded to defendant city upon the finding that police department's temporary monitoring of an officer's department pager, based on suspicions that he was leaking confidential information to drug traffickers, was not violative of the Electronic Communications Privacy Act ("ECPA") or the Fourth Amendment. See 1999 WL 425885. The Sixth Circuit (2-1) reversed the ruling on plaintiff's ECPA claim, holding that the subject monitoring did not come within the business use exception to ECPA liability because plaintiff had not been given notice of the monitoring.

Turner v. Bolden, 2001 WL 493415 (6th Cir. April 30, 2001) (Attachment 4)

In this prisoner civil rights action, the Sixth Circuit affirmed summary judgment for defendants in some respects, but reversed with respect to plaintiff's First Amendment and Equal Protection claims for the right, as a Hare Krishna follower, to have his vegetarian diet specially prepared by a Hare Krishna follower and served on separate dishes. Genuine issues of material fact were held to preclude summary judgment on these claims.

Rutlin v. Prime Succession, Inc., 220 F.3d 737  
(6th Cir. 2000)

In action for overtime and "on call" compensation under Fair Labor Standards Act by funeral director and undertaker, partial summary judgment was awarded to each party. See 29 F.Supp. 2d 794. In short, plaintiff was found not to be entitled to overtime compensation in all of five different periods of employment. The Sixth Circuit affirmed as to four of the periods of employment, but reversed as to one, concluding that plaintiff was entitled to limited "on-call" compensation during one period.

Timber-Lee Evangelical Free Church Christian Center v. Baraga County Road Commission, 205 F.3d 11342 (Table), 2000 WL 191849 (6th Cir.); 145 F.3d 1333 (Table), 1998 WL 228044 (6th Cir.) (Attachments 5 and 6, respectively)

Following bench trial, Baraga County was held to have acquired a public roadway pursuant to Michigan's highway-by-user statute, by virtue of public use and maintenance of the roadway in a reasonably passable condition for a period in excess of ten consecutive years. The Sixth Circuit reversed, (1) holding that the county's maintenance of the road had not been continuous for one ten-year period, and (2) construing "reasonably passable" in such a way as to render that element of highway-by-use unsatisfied during a second ten-year period.

Keweenaw Bay Indian Community v. United States, 136 F.3d 469  
(6th Cir. 1998)

Plaintiff Indian tribe had been granted summary judgment based on the finding that gaming conducted on Indian lands pursuant to a compact with the State of Michigan, with the approval of the Secretary of Interior, was not subject to further approval of the Secretary and the Governor under the Indian Gaming Regulatory Act (IGRA). See 940 F.Supp. 1139. The Sixth Circuit reversed, holding IGRA requirements were applicable and had to be met before commencement of gaming. (The IGRA requirements have since been satisfied and the case dismissed.)

Musco Corp. v. Qualite, Inc., 106 F.3d 427 (Table),  
1997 WL 16031 (Fed. Cir. (Mich.)) (Attachment 7)

Judgment of patent-infringement reversed by the Federal Circuit upon holding that the subject patent's specification did not sufficiently describe the invention so as to enable one of ordinary skill in the art to practice the invention.

Sheets v. Moore, 97 F.3d 164 (6th Cir. 1996)

In prisoner civil rights action, Sixth Circuit reversed judgment for plaintiff, holding that prison official's rejection of catalog mailed to plaintiff was action taken pursuant to neutral regulation rationally related to legitimate penological interests and did not violate his First Amendment rights.

Strong v. Teletronics Pacing Systems, Inc., 78 F.3d 256 (6th Cir. 1996)

Action for negligent manufacture of pacemaker was removed to federal court based on "complete preemption" doctrine under the Medical Device Amendments to the Food, Drug and Cosmetic Act. Plaintiff's motion to remand was denied. See 891 F.Supp. 401. The Sixth Circuit reversed, holding that "complete preemption" was not applicable and that remand should have been granted so that state court could consider federal preemption defense.

Harrow Products, Inc. v. Liberty Mutual Ins. Co., 64 F.3d 1015 (6th Cir. 1995)

The Sixth Circuit affirmed in part and reversed in part a summary judgment ruling dealing with various issues of insurance companies' duties of defense and indemnification in connection with insured manufacturer's liability for groundwater contamination. See 833 F.Supp. 1239. The reversal was limited to the question whether a PRP (potentially responsible person) letter from an administrative agency constituted a "suit" under Michigan law triggering an insurer's duty to defend. Although the summary judgment ruling followed then-controlling Sixth Circuit precedent in holding that a PRP letter was not a "suit," the Michigan Supreme Court subsequently clarified Michigan law, dictating a different result on appeal.

Perkins v. LeCureux, 58 F.3d 214 (6th Cir. 1995)

Petition of a state prisoner for writ of habeas corpus was granted, ordering resentencing because of evidence (post-sentencing testimony of the sentencing judge) that racial bias played a role in the original sentence. The Sixth Circuit reversed, holding petitioner had failed to show he was actually (as opposed to possibly) prejudiced by any racial bias and that evidence of the sentencing judge's statements was not admissible.



Hardin v. Fox, 51 F.3d 272 (Table), 1995 WL 118990 (6th Cir. (Mich.)) (Attachment 8)

In a prisoner civil rights action, summary judgment was awarded to defendant corrections officials on plaintiff's due process and retaliation claims. The Sixth Circuit affirmed in part and reversed in part, finding that questions of fact remained and precluded summary judgment on one due process claim and one retaliation claim.

Detroit Edison Co. v. NABCO, Inc., 35 F.3d 236 (6th Cir. 1994)

In this opinion, the Sixth Circuit rejected the "compromise" approach employed in Citizens Ins. Co. v. Proctor & Schwartz, 802 F.Supp. 133 (W.D. Mich. 1992), aff'd on other grounds, 15 F.3d 558 (6th Cir. 1994), where Michigan's economic loss doctrine was construed as permitting recovery in tort for damage to property other than the defective product itself where the damage resulted from an unforeseeable calamitous event.

#### B. Criminal Cases

United States v. Hibbler, 159 F.3d 233 (6th Cir. 1998)

In reviewing application of the Sentencing Guidelines, the Sixth Circuit vacated a sentence imposed, holding (1) that for purposes of U.S.S.G. § 3D1.2, a child depicted in a pornographic image is an "identifiable victim," even though not personally identified, rendering the child - not society at large - the primary victim; and (2) that a sentence may be enhanced under U.S.S.G. § 2G2.2(b)(2) for distribution of pornographic material even though the distribution was not undertaken for pecuniary gain. (Effective November 1, 2002, U.S.S.G. § 2G2.2(b)(2) was amended to expressly provide for sentence enhancement in the event both of distribution for pecuniary gain and distribution for receipt of any other thing of value.)

United States v. Oleson, 44 F.3d 381 (6th Cir. 1995)

The Sixth Circuit affirmed a challenged conviction and sentence in all respects but one, setting aside a money laundering conviction based on the holding that defendant's investment of \$100,000 in drug trafficking proceeds to facilitate other drug dealing did not constitute the requisite "financial transaction." The Sixth Circuit's Oleson ruling on this point was subsequently overruled in United States v. Reed, 77 F.3d 139 (6th Cir. 1996) (en banc).

United States v. Dalecke, 29 F.3d 1044 (6th Cir. 1994)

The Sixth Circuit vacated a sentence imposed, holding that downward departure based on the totality of the circumstances was improper where all the factors considered by the sentencing court were taken into account by the Sentencing Guidelines. The Sixth Circuit's ruling on this point was subsequently rejected by the United States Supreme Court in Koon v. United States, 518 U.S. 81 (1996).

### 3) Significant Rulings on Constitutional Issues

Kemp v. Medtronic, Inc., 231 F.3d 216 (6th Cir. 2000)

Horn by Parks v. Madison County Fiscal Court, 22 F.3d 653 (6th Cir. 1994)

(Opinion written while sitting by designation on Sixth Circuit).

Wilson v. City of Kalamazoo, 127 F.Supp.2d 855 (W.D. Mich. 2000)

Johnson v. City of Kalamazoo, 124 F.Supp.2d 1099 (W.D. Mich. 2000)

Daugherty v. Vanguard Charter School Academy, 116 F.Supp.2d 897 (W.D. Mich. 2000)

United States v. Spears, 89 F.Supp.2d 891 (W.D. Mich. 2000)

Doe v. Kelley, 961 F.Supp. 1105 (W.D. Mich. 1997)

Southwell v. Southern Poverty Law Center, 949 F.Supp. 1303 (W.D. Mich. 1996)

Waste Management of Michigan v. Ingham County, 941 F.Supp. 656 (W.D. Mich. 1996)

Coker on Behalf of Coker v. Henry, 813 F.Supp. 567 (W.D. Mich. 1993), aff'd, 25 F.3d 1047 (6th Cir. 1994).

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

I have never held nor sought elective public office.

17. Legal Career:

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

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

None

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

Not applicable.

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

1971-1992  
Foster, Swift, Collins & Smith, PC  
313 South Washington Square  
Lansing, Michigan 48933

Positions:

Summer Clerk, 1970; Associate, 1971-1976;  
Shareholder and Director, 1976-1992; Vice  
President, 1979-1983; Chairman, Government and  
Commerce Department, 1983-1990; Secretary/  
Treasurer and member of Executive  
Committee, 1990-1992

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

During the first five years of my practice (1971-1975), I was primarily involved in the formation of bank holding companies, the merger of banks, and the establishment of branch banks. These projects involved the Comptroller of the Currency, the Federal Reserve Board, the Michigan Financial Institutions Bureau, and the Securities and Exchange Commission. I was also responsible for a substantial amount of general commercial litigation. During the next five years of my practice (1976-1980), the character of my banking practice changed and I was primarily involved in loan documentation and workouts. During this period, I also represented banks regularly in state court and bankruptcy court. I also began to represent utilities, both before the Michigan Public Service Commission and in appeals to Ingham County Circuit Court. During the next eleven years (1981-1992), I became extensively involved in contested case proceedings before the Michigan Public Service Commission and the Supervisor of Wells of the Michigan Department of Natural Resources on behalf of utilities and oil and gas producers and processors. I also regularly appeared in cases involving political issues. I also continued to represent banks and became principally responsible for all litigation involving the largest bank located in Lansing.

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

Typical banking clients included:

First of America Bank-Central, Lansing, Michigan  
 Empire National Bank of Traverse City, Michigan  
 City Bank, Lansing, Michigan  
 Republic Bank, Williamston, Michigan  
 Michigan Financial Corporation, Marquette, Michigan  
 First Manistique Corporation, Manistique, Michigan  
 IBT Bancorp, Mt. Pleasant, Michigan

Typical utility clients included:

The Detroit Edison Company, Detroit, Michigan  
 Telephone Association of Michigan, Lansing, Michigan  
 Michigan Exchange Carriers Association (all independent telephone companies in Michigan), Lansing, Michigan  
 ALLTEL Michigan, Inc., Stockbridge, Michigan  
 Barry County Telephone Company, Delton, Michigan  
 Ogden Telephone Company, Ogden, Michigan  
 Deerfield Farmers' Telephone Company, Deerfield, Michigan  
 Pigeon Telephone Company, Pigeon, Michigan

Typical oil and gas clients included:

Shell Oil Company, Houston, Texas  
 Western Gas Processor, Ltd., Denver, Colorado  
 Wolverine Gas & Oil Company, Inc., Grand Rapids, Michigan  
 Grace Petroleum Corporation, Oklahoma City, Oklahoma  
 Michigan Oil & Gas Association, Lansing, Michigan

The areas in which I have specialized include banking, securities, utilities, oil and gas, and commercial litigation.

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

I appeared in court frequently during the first five (5) years of my practice (1971-1975). For the next five (5) years (1976-1981), I appeared occasionally in court. During the next eleven (11) years (1981-1992), I appeared frequently before regulatory boards and commissions and occasionally in court.

2. What percentage of these appearances was in:  
 (a) federal courts;

During the first ten (10) years of my practice (1971-1981), very few of my appearances were in federal courts. During the last ten (10) years (1981-1991), approximately 10%-20% of my court appearances were in federal court.

(b) state courts of record;

During the first ten (10) years of my practice (1971-1981), almost all of my appearances were in state courts. During the last ten (10) years (1981-1991), approximately 80%-90% of my court appearances were in state courts.

(c) other courts.

I appeared extensively in contested case hearings before state administrative agencies in the last eleven (11) years of my practice (1981-1992).

3. What percentage of your litigation was:

(a) civil;

100%

(b) criminal.

None

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

I tried approximately forty (40) cases to judgment in state and federal courts of record. I was sole or chief counsel in each case. I also tried approximately fifty (50) cases to judgment in contested case proceedings before state administrative agencies. These contested cases were conducted pursuant to the Michigan Administrative Procedures Act, which requires the agency to follow the Michigan Rules of Court and

the Michigan Rules of Evidence. I was sole counsel in the vast majority of these cases and chief counsel in the remainder.

5. What percentage of these trials was:

(a) jury;

None

(b) non-jury.

100%

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

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

Kaleva-Norman-Dickson School District No. 6, Counties of Manistee, Lake and Mason, Michigan v. Kaleva-Norman-Dickson Teachers' Association & Joy Urka, (Manistee County, Michigan, Circuit Court Docket No. 1482), 52 Mich App 433, 393 Mich 583 (1975)

Party Represented: Joy Urka, Defendant

Judge: Manistee County Circuit Court, Hon. Charles A. Wickens  
Michigan Court of Appeals, Judges R.B. Burns, Allen and O'Hara  
Michigan Supreme Court, Justices T.G. Kavanagh, T.M. Kavanagh, Swainson, Williams, Coleman, Fitzgerald and Levin

Trial Date: January 9, 1973

Co-Counsel: James A. White  
White, Przybylowicz, Schneider & Baird, P.C.  
2300 Jolly Oak Road

Okemos, Michigan 48864  
(517) 349-7744

Counsel for Plaintiff: Daniel D. Hesslin  
Gockerman, Wilson, Saylor &  
Hesslin, P.C.  
414 Water Street  
Manistee, Michigan 49660  
(616) 723-3322

This case involved the right of a probationary teacher to submit the non-renewal of her contract to arbitration under a collective bargaining agreement. This was a case of first impression in Michigan. My participation in this case included the preparation of the pleadings and briefs in the Circuit Court, Court of Appeals and Supreme Court, and all appearances before the Circuit Court and the Court of Appeals. The case was argued in the Supreme Court by my co-counsel, a partner at that time in Foster, Swift, Collins & Smith, P.C. This case established that a probationary teacher is entitled to submit the non-renewal of her contract to arbitration, notwithstanding a "management rights" clause in the agreement. This case is regularly cited by attorneys in cases involving the arbitration of grievances under collective bargaining agreements.

Anderson, et al v. Richard Austin, Secretary of State of the State of Michigan, et al (Oakland County, Michigan, Circuit Court Docket No. 84-277044-CZ) 419 Mich 142, 313 (1984)

Parties Represented: Harold R. Anderson, Carol D.  
Balzarini, Jon M. Gaskell, Bernard R.  
Brown, Jr. and Kenneth U. Navarre,  
Plaintiffs

Judge: Oakland County Circuit Court, Hon. George H.  
LaPlata, Jr.  
Michigan Court of Appeals: bypassed by Supreme  
Court  
Michigan Supreme Court, Justices Williams,  
Kavanagh, Ryan, Brickley, Cavanagh and Boyle

Trial Date: May 31, 1984

Co-Counsel: Theodore W. Swift, deceased

Counsel for Defendants: Gordon R. Wyllie  
4851 Haddington Dr.  
Bloomfield Hills, MI 48304  
(248) 644-0935



Counsel for Intervening  
Defendants:

Gary P. Gordon  
Assistant Attorney General  
600 Law Building  
Lansing, Michigan 48913  
(517) 373-6434

This case involved the constitutionality of the enactment of 1983 PA 256 under Article 4, section 24 of the Michigan Constitution of 1963. My participation in this case included the preparation of the pleadings and briefs in the Circuit Court, Court of Appeals and Supreme Court. The argument of the case before the Circuit Court and the Supreme Court were shared with my partner, Theodore W. Swift (the Supreme Court ordered that the case bypass the Court of Appeals). This case established that the Legislature may not amend a vehicle bill in a manner which changes its original purpose under the "change of purpose" clause of the Constitution. This case is frequently cited by legislators and staff in connection with the constitutional requirements for legislation. Although the case was decided solely on constitutional grounds, its practical effect was to set aside a reapportionment plan adopted by the Legislature which would have controlled the election of Michigan Senators and Representatives in 1984 through 1990.

Northern Michigan Exploration Company, et al v. Michigan Public Service Commission, 153 Mich App 635 (1986) (Michigan Public Service Commission Case No. U-970 (Cleon 22), Ingham County, Michigan, Circuit Court Docket Nos. 82-30061-AA, 82-30077-AA, 82-30085-AA, Michigan Court of Appeals No. 78273)

Party Represented: Shell Oil Company, Intervening Defendant  
Judge: Ingham County Circuit Court, Hon. Robert Holmes  
Bell (presently a United States District Judge in Grand Rapids, Michigan)  
Michigan Court of Appeals, Judges MacKenzie, Hood, Mies

Trial Date: April 26, 1984

Counsel for Plaintiff: William H. Stephens III  
(Co-Counsel for Northern Michigan Exploration Company)  
1021 Main Street No 2800  
Houston, TX 77002-6606  
(713) 230-7225

William B. Wagner  
 (Co-Counsel for Northern Michigan  
 Exploration Company)  
 Fulbright & Jaworski  
 1301 McKinney  
 Houston, Texas 77001  
 (713) 651-5151

George F. Gronewold  
 (Counsel for Reef Petroleum Company  
 and Empire National Bank of  
 Traverse City)  
 53 Harbour View  
 P.O. Box 147  
 Linwood, MI 48634-0147  
 (517) 895-8505

Counsel for Defendant: Don L. Keskey  
 R. Philip Brown  
 Assistant Attorneys General  
 Lansing, Michigan 48913

Counsel for Intervening  
 Defendants Miller  
 Brothers, et al Byron P. Gallagher (retired)  
 Lynch, Gallagher, Lynch & Martineau  
 555 N. Main  
 Mt. Pleasant, Michigan 48858  
 (517) 773-9961

This case involved a significant challenge to the right of the Michigan Public Service commission to prorate the production of natural gas in Michigan. My participation in this case included the preparation of exceptions to the Proposal for Decision, all pleadings in the Circuit Court and Court of Appeals, and all appearances before the Circuit Court and Court of Appeals. This case established that the Public Service Commission has jurisdiction to prorate production under 1929 PA 9, even when production does not exceed demand, and that the 90-10 net pay method used by the Commission is not a rule which must be promulgated under the Administrative Procedures Act. This case also upheld the Commission's practice of cumulative balancing, retroactivity and transfer of under production.

Walter B. Campbell, et al v. Shell Oil Company, (Otsego County, Michigan, Circuit Court Docket No. 82 1981 CK(P))

Party Represented: Shell Oil Company, Defendant  
Judge: Otsego County Circuit Court, Hon.  
William A. Porter

Trial Date: November 22, 1988  
Co-Counsel: Webb A. Smith  
Scott A. Storey  
Foster, Swift, Collins & Smith, P.C.  
313 S. Washington Square  
Lansing, Michigan 48933  
(517) 371-8157; (517) 371-8159  
Counsel for Plaintiffs: John J. Lynch  
Lynch, Gallagher, Lynch & Martineau  
555 N. Main  
Mt. Pleasant, Michigan 48858  
(517) 773-9961

This case involved the extent of the implied duties owed by a lessee to its lessor under an oil and gas lease. I was retained to substitute for another firm that filed the answer in this case. My participation included substantial discovery, preparation of all pleadings following the answer, all appearances in Circuit Court, and negotiation of a settlement. Plaintiffs in this action sought to impose many duties on a lessee under an oil and gas lease not previously recognized in Michigan. The case was settled following cross motions for summary disposition and the release of a proposed Opinion by the Circuit Court for review and comment by the parties. This case was extremely significant to Shell Oil Company and required the exhaustive analysis of many aspects of the relationship of a lessor-lessee in Michigan that had largely gone unnoticed in the oil and gas industry. The holding of this case would have been extremely significant if the case had not settled.

Sonitrol of Flint, Inc. & Sonitrol of Flint Limited Partnership v. Sonitrol Corporation, (United States District Court for the Western District of Michigan, Docket No. G86 266; Ingham County Circuit Court No. 85-54709-NO)

Party Represented: Sonitrol of Flint, Inc. and Sonitrol of Flint Limited Partnership, Plaintiffs  
Judge: United States District Court of the Western District of Michigan, Hon. Benjamin F. Gibson and Hon. Robert Holmes Bell

Trial Date: April 23, 1986, February 9, 19, 1987, September 10, 1987, May 10, 1988, June 1, 1988

Co-Counsel: Michael D. Sanders  
Mark H. Canady  
Foster, Swift, Collins & Smith, P.C.  
313 South Washington Square  
Lansing, Michigan 48933  
(517) 371-8100

James E. Lozier  
Dickinson, Wright PLLC  
215 S. Washington Square, Suite 200  
Lansing, Michigan 48933  
(517) 487-4775 ext 605

Counsel for Defendant: Ronald R. Pentecost  
Fraser Trebilcock Davis & Foster  
10<sup>th</sup> Floor, Michigan National Tower  
Lansing, Michigan 48933  
(517) 377-0859

Harvey Cohen  
Scott Caulkins  
Cohen, Gettings, Alper & Dunham  
1400 North Uhle Street  
Arlington, Virginia 22216  
(703) 525-2260

This case involved a breach of contract action filed in state court which was removed to Federal District Court and a cross complaint to terminate a franchise. My participation included preparation or review of all pleadings and all appearances in Federal Court. Although the case was settled before trial, it involved very contentious discovery disputes. These disputes included the mental health of a witness, attorney-client privilege, motions for disqualification of counsel, trade secrets and enforcement of a settlement agreement. This case was significant to me because of the myriad of complex procedural issues under the Federal Rules of Civil Procedure.

Vernon J. Ehlers, et al v. Michigan Republican State Central Committee (Kent County, Michigan, Circuit Court Docket No. 87-56036-CZ; Affirmed, Michigan Court of Appeals Nos. 105399 & 105690; Leave Denied 429 Mich 895 (1988))

Party Represented: Congressman Vernon J. Ehlers, et al,  
Plaintiffs

Judges: Kent County circuit Court, Hon. George V. Boucher  
and Hon. Roman J. Snow

Michigan Court of Appeals, Judges Wahls, Walsh & Sullivan  
Michigan Supreme Court, Justices Riley, Levin, Brickley, M.F. Cavanagh, Boyle, Archer and Griffin

Trial Date: December 4, 1987; January 8, 1988

Co-Counsel: Hon. Kurtis T. Wilder  
Michigan Court of Appeals  
1001 Woodward #900  
Detroit, Michigan 48226-1970  
(313) 256-9285

Stephen C. Bransdorfer  
Bransdorfer & Bransdorfer, P.C.  
125 Ottawa Ave., NW #305  
Grand Rapids, Michigan 49503  
(616) 458-4004

Attorneys for Defendant: Donald L. Reisig  
Director of Litigation  
Legal Aid of Central Michigan  
300 N. Washington Square #311  
Lansing, Michigan 48933  
(517) 485-5418 ext. 240

Co-Counsel for Defendant: Albert B. Addis  
Kitch, Drutchas, Wagner, DeNardis & Valitutti  
10 S. Main St. #307  
Mt. Clements, Michigan 48043-7903  
(810) 463-9770  
Michael G. GagLeard  
Ishbia & GagLeard, P.C.  
251 Merrill St.  
Birmingham, Michigan 48009  
(248) 647-8590

This case arose out of the Presidential primary contest between George Bush, Jack Kemp and Pat Robertson. In an attempt to gain a strategical advantage, supporters of Kemp and Robertson gained control of the Michigan Republican State Central Committee and attempted to change the rules for the selection of delegates to county and district conventions shortly before these conventions in 1987. These rule changes would have had the effect of excluding most of the publicly elected officials in Michigan from participation in the election of national convention delegates. This rule change was enjoined by the Circuit Court following which an attempt was made to change other

rules to similarly gain an advantage. The Circuit Court promptly amended its original judgment and enjoined the new changes. The original judgment and the amended judgment were then affirmed by the Court of Appeals and the Supreme Court. My participation included preparation or review of all pleadings and all appearances in Circuit Court (no argument took place in either the Court of Appeals or the Supreme Court).

In the matter of the application of Shell Western E&P Inc. for proration of natural gas production from the Manistee 24 Pool in Manistee County, Michigan Public Service Commission Case No. U-970 (Manistee 24)

Party Represented: Shell Western E&P Inc., Applicant  
Judge: Hon. Alfred A. Sullivan, Administrative Law Judge  
(deceased)

Trial Date: July 21, 1986 to June 2, 1987

Attorneys for

Respondents: Jack D. Sage  
(Counsel for Tenneco Oil Company and  
Packaging Corporation of America)  
Varnum, Riddering, Schmidt & Howlett  
P.O. Box 352  
Grand Rapids, Michigan 49501-0352  
(616) 336-6000

Terrence V. Lynam  
(Counsel for Petrotech, Inc.)  
Lynam & Associates  
Location unknown

Philip Rosewarne  
(Counsel for Michigan Public Service  
Commission Staff)  
2258 Pinegrove  
Ann Arbor, Michigan 48103  
(734) 741-8979  
Peter J. Zirnhelt  
(Counsel for Arthur Schwaiger, et al)  
Peter J. Zirnhelt, P.C.  
400 E. Eight Street  
Traverse City, Michigan 49685-1067  
(616) 946-8630

This case involved the proration of gas from one of the largest fields in Michigan. Each percentage point in the field was worth approximately \$1,000,000 to the parties. The hearing in this case lasted 54 days over a one-year

period, and involved a detailed examination of every aspect of subsurface geology. My participation in this case included the preparation of all pleadings and all appearances before the Michigan Public Service Commission. In addition to resolving the dispute in this case, the Commission's Order in this case also clarified the language in two earlier orders which had resulted in general uncertainty in proration cases for over ten years.

George Heitmanis, et al v. Richard Austin, United States District Court for the Eastern District of Michigan, Docket No. 87-CV-74465-DT; United States Court of Appeals for the Sixth Circuit, No. 88-1214

Party Represented: Congressman Vernon J. Ehlers, et al,  
Intervening Defendants

Judge: Hon. George E. Woods, District Judge  
Hon. Albert J. Engel, Nathaniel R. Jones and  
Ralph B. Guy, Jr., Circuit Judges

Trial Date: January 12, 1988

Co-Counsel: Hon. Kurtis T. Wilder  
Michigan Court of Appeals  
1001 Woodward #900  
Detroit, Michigan 48226-1970  
(313) 256-9285

Counsel for Plaintiffs: James F. Schoener  
1712 Glenhouse Dr. #315  
Sarasota, FL 34231-6763  
(941) 966-6920

Hon. Sean F. Cox  
Third Circuit Court  
1441 St. Antoine #604  
Detroit, Michigan 48226  
(313) 224-6889

Counsel for Defendant: Gary P. Gordon  
Assistant Attorney General  
600 Law Building  
Lansing, Michigan 48913  
(517) 373-6434

Counsel for Intervening  
Plaintiff: Albert B. Addis  
Kitch, Drutchas, Wagner, DeNardis  
& Valitutti  
10 S. Main St. #307  
Mt. Clements, Michigan 48043-7903  
(810) 463-9770

This case involved a constitutional challenge to several sections of the Michigan Election Law. Supporters of Jack Kemp and Pat Robertson, after failing to obtain the relief they wanted in State Court, turned to Federal Court and claimed that their First Amendment rights of freedom of association were violated by Michigan statutes which gave certain rights to Party nominees and Party legislators in connection with the election of national convention delegates. My participation included drafting all pleadings and all appearances in Federal Court. The Court granted motions to dismiss based on abstention, lack of state action and justiciability. This decision permitted the 1988 Republican State Convention to proceed to select delegates to the 1988 Republican National Convention. Subsequent to this decision the United States Supreme Court affirmed a decision striking down state laws in California that restricted the operation of both political parties. Relying on this decision, the Sixth Circuit subsequently reversed the decision of Judge Woods and found the statutes in question to be unconstitutional. We did not participate in the proceedings before the Sixth Circuit. We participated again before the District Court in connection with a request for an award of attorney fees under the Civil Rights Act.

Olive Wheeler as Trustee of the Estate of Donald S. Wheeler v. United States of America, United States District Court, Western District of Michigan, Southern Division, Docket No. 5:89-CV-97; 770 F.Supp 1205; affirmed 967 F.2d 222

Party Represented: Olive Wheeler, Plaintiff  
 Judge: United States District Court  
 Hon. Benjamin F. Gibson  
 Trial Date: Summary Judgment granted August 12, 1991  
 Co-Counsel: Frank A. Fleischmann  
 Brookover, Fleischmann & Carr, P.C.  
 1005 Abbott Road  
 East Lansing, Michigan 48823  
 (517)336-4300  
 Counsel for Defendant: W. Francesca Ferguson  
 Assistant United States Attorney  
 399 Federal Building  
 Grand Rapids, Michigan 49503  
 (616) 456-2404

This was an action under the Federal Quiet Title Act to determine the ownership of an island in Arbutus Lake. The plaintiff claimed she acquired title in 1921 from the owner of the upland lot. The Federal Government claimed that the island was never included in a government patent and that



the government could not have intended to convey title to the island because the island was not included in either of the early government surveys of Michigan. My participation in this case included drafting all pleadings in earlier proceedings before the Bureau of Land Management and in Federal Court. This case was extremely important because there are some 12,000 islands in the Midwest similarly situated.

Shell Western E&P Inc. v. Department of Natural Resources and Terra Energy, Ltd; Terra Energy, Ltd. v. David F. Hales, et al, Ingham County, Michigan, Circuit Court Docket Nos. 90-65518-AV & 90-65688-AA; Michigan Department of Natural Resources Cause No. (A) 7-4-89

Party Represented: Shell Western E&P, Inc., Plaintiff  
Judge: Ingham County Circuit Court, Hon. William E. Collette

Trial Date: January 28, 1991

Co-Counsel: Scott A. Storey  
Foster, Swift, Collins & Smith, P.C.  
313 South Washington Square  
Lansing, Michigan 48933  
(517) 371-8159

Counsel for Defendants: J. Andrew Domagalski (deceased)  
Jeffrey D. VanLeuwen  
Attorneys for Terra Energy  
8992 East D Avenue  
Richland, Michigan 49083-0366  
(616) 629-9791

James E. Riley  
Assistant Attorney General  
P.O. Box 30028  
Lansing, Michigan 48909  
(517) 373-7540

This case involved the appeal of a decision of the Supervisor of Wells permitting production from a well located closer to the unit line of its lease than is permitted by applicable rules. This was the first of eight very similar cases heard by the Supervisor of Wells. My participation involved the drafting or review of all pleadings and all appearances before the administrative agency and Circuit Court. These cases had the potential of significantly changing the rules for the exploration and production of oil and gas in Michigan. The cases were subsequently settled on appeal after I became a district judge.

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

In addition to the ten significant cases described in paragraph 18 which were selected to show a broad variety of litigation, I had substantial experience in representing amicus curiae before the Court of Appeals and Michigan Supreme Court in very significant cases. Examples include:

Catherine Shavers, et al v. Attorney General of the State of Michigan, et al, 402 Mich 554 (1978); 65 Mich App 355 (1975)

This case involved the constitutionality of the property damage provisions of Michigan's No-Fault Insurance Act. I represented the American Mutual Insurance Alliance.

O'Donnell v. State Farm Mutual Automobile Insurance Company, 404 Mich 524 (1979)

This case involved the constitutionality of the coordination of benefits provisions of the Michigan No-Fault Insurance Act. I represented the American Mutual Insurance Alliance.

Patricia Placek & Joseph R. Placek v. City of Sterling Heights & Richard Milton Ernst, 405 Mich 638 (1979)

This case involved the question of whether the defense of contributory negligence should be replaced with comparative negligence. I represented the American Insurance Association, Alliance of American Insurers and National Association of Independent Insurers.

Union Carbide Corporation and Consumers Power Company v. Michigan Public Service Commission, 431 Mich 135 (1988)

This case involved the scope of the Commission's power to inject itself in management decisions of a public utility. I represented the Michigan Oil and Gas Association.

Zolton Ferency v. Richard Austin, Secretary of State  
(Michigan Supreme Court No. 92109; Michigan Court of Appeals  
No. 129240; Ingham County Circuit Court No. 89-64700-AA)

This case involved the constitutionality of Michigan's new Presidential Primary Act. I represented the Michigan State Republican Party.

In addition, I was involved in very significant appeals of decisions by the Michigan Public Service Commission by the Detroit Edison Company. These cases included:

The Detroit Edison Company v. Michigan Public Service Commission, 127 Mich App 499 (1983); lv den 419 Mich 867 (1984), after supplemental proceedings, 155 Mich App 461 (1986); lv den 428 Mich 228 (1987)

This case involved the claim of numerous errors by the Commission in granting a rate increase in the amount of \$62,425,000. We were successful in obtaining injunctive relief that allowed the Company to increase its rates by \$13 million in 1976. Although this relief was ultimately reversed by the Supreme Court, the Company credits this case with convincing Wall Street that there was hope for the financial recovery of the Company.

Attorney General v. Michigan Public Service Commission & The Detroit Edison Company, 416 Mich 510; 82 Mich App 59 (1982)

This case involved changes ordered by the Commission in Detroit Edison's fuel cost adjustment clause. We were successful in obtaining injunctive relief that allowed the Company to increase its rates by \$23 million in 1976. This relief was subsequently reversed by the Court of Appeals whose decision was affirmed by the Supreme Court on a 4-4 vote.

Attorney General v. Michigan Public Service Commission & The Detroit Edison Company, 412 Mich 385 (1982)

This case involved the right of the Commission to determine the need for new power plants in cases involving the issuance of securities under the Utilities Securities Act. The decision of the Supreme Court in this case allowed the Company to sell the securities necessary to complete the Enrico Fermi nuclear power plant.

20. Criminal History: State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.

No.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

None

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

I do not anticipate any potential conflicts of interest. I will follow the Code of Judicial Conduct at all times and disclose any facts to the parties that may create an appearance of a conflict.

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

I have served as an adjunct professor at Michigan State University/Detroit College of Law since 1998. I teach Federal Jurisdiction, and I anticipate continuing to do so as long as my schedule permits and the Chief Judge of the Sixth Circuit permits.

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

See Financial Disclosure Report (Attachment 9).

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

See attached Financial Net Worth Statement and attachment thereto.

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

I served on the following political committees:

Ingham County Republican Committee, 1979-1989  
Sixth District Republican Committee, 1981-1987  
Michigan Republican State Committee, 1985-1992

I was identified in a public way with the following candidates:

President Ronald Reagan - Sixth District Chairman for the Reagan/Bush Victory 1984 Committee  
President George Bush - State Co-Chairman for the Bush/Quayle Victory 1988 Committee and National Steering Committee of Lawyers for Bush  
Governor John Engler - Member of Engler Exploratory Committee and Chairman of Lawyers for Engler  
Jim Dunn - I was publicly identified with the Dunn for Congress Committee in 1986 in my capacity as Sixth District Chairman

I actively participated in numerous state and local political campaigns by providing financial support, strategic input and legal representation prior to my appointment to the District Court.

## III. GENERAL (PUBLIC)

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

The Legal Aid of Central Michigan maintains a list of attorneys available for pro bono service and their specialities. I volunteered to participate in this program from approximately 1983, when the list was first established to the time of my appointment to the District Court.

In 1980, I proposed a policy which requires that all members of Foster, Swift, Collins & Smith be required to contribute time to the community. This commitment could be satisfied by volunteering time to civic, religious, bar or political groups. For the last 12-15 years that I was in private practice, I was extensively involved in civic organizations and political organizations. I was an officer and director of Junior Achievement, which provides business education to high school students, and a director of Camp Highfields, a private facility that provides housing and counseling to disadvantaged and troubled youth. I was also an officer, director, general counsel and a member of the executive committee of Impression 5 Science Museum, a "hands-on" museum for youth, which includes a special project to encourage minority interest in science. I also provided legal services at reduced rates to other civic organizations. An example is the Boys and Girls Club of Lansing in connection with the issuance of bonds for a new building. I estimate that I contributed from 400 to 1,000 hours/year to these activities while in private practice.

Following my appointment to the Federal Court in 1992, I have been very active in judicial administration and education. I established the Voluntary Facilitative Mediation program for the Western District of Michigan in 1996, and continue to manage this program for the Court. This program has successfully settled 70% of all cases using this program since its inception. Attorneys who are certified by the Court as Facilitative Mediators must agree

to handle at least one case per year on a pro bono basis to assist pro se parties and financially disadvantaged parties in resolving their claims. This program lead to my appointment by the Michigan Supreme Court to an Alternative Dispute Resolution Task Force in 1999. The task force recommended, and the Michigan Supreme Court approved amendments to the Michigan Court Rules which now provide for facilitative mediation in all Michigan trial courts. This program was awarded the Council's Award for Distinguished Public Service by the Alternative Dispute Resolution Section of the State Bar of Michigan in September, 2001

I was also responsible for establishing a case management committee for the Western District of Michigan and continue to manage this program for the Court. This committee has lead to the standardization of the case management forms used by all of the active and senior judges in the Western District, which has greatly simplified the practice of law in this district for both attorneys and their clients.

I also organized the Electronic Case Filing Task Force for the Western and Eastern District Courts, which resulted in electronic case filing becoming available in the Western District on October 1, 2001, and is intended to facilitate a standardized approach to electronic cases filed in the Western and Eastern Districts.

I have been a frequent lecturer at Federal Judicial Center programs, including schools for newly appointed federal district judges, and I have been a frequent judge of moot court and appellate advocacy programs at Michigan State University, Detroit College of Law, Ava Maria School of Law, and Thomas M. Cooley School of Law.

I was a founding Master and the first President of the American Inns of Court chapter at Michigan State University, Detroit College of Law in 1999. My term as President ended in 2001. I continue as an active Master of the Inn of Court.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any



organization which discriminates -- through either formal membership requirements or the practical implementation of

membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I joined The Automobile Club, Lansing, Michigan, a luncheon club, on May 9, 1986. I subsequently learned that the club had no racial minorities or women as members at that time. I resigned on April 21, 1988, after discussing these issues with the members that sponsored my membership and concluding that it was not likely that its membership practices would change in the near future.

I am also a member of the County Club of Lansing. A controversy developed in approximately 1990 over the access of women to a grill and restricted tee times. The Country Club of Lansing reaffirmed that it had no rules or policies restricting the use of any of the Club's dining facilities, and changed its rules with respect to tee times to limit the use of the golf course during certain times to members only. I strongly supported these actions as a member of the Executive Committee and Board of Governors. The Club has men and women members and does not discriminate in its membership practices on the basis of race, sex, religion or national origin.

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

Yes. The Governor and the Republican members of Michigan's Congressional Delegation appointed a Qualification Review Committee to assist the Governor and Congressional Delegation in recommending candidates for the Sixth Circuit Court of Appeals to the President. I expressed an interest in this appointment to the Governor and members of the Congressional Delegation. I was requested to complete a questionnaire on character, fitness and merit. I was interviewed by the Committee on February 4, 2001. I understood I was rated exceptionally well qualified by the Committee and my name was one of four names submitted to the

Governor and the Republican Congressional Delegation. I understood my name was then submitted by the Governor and the Republican Congressional Delegation to the President. I was interviewed by the White House Office of Legal Counsel on February 14, 2001. On May 22, 2001 I was advised that the President had referred my name to the Department of Justice for further consideration.

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

No

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

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

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

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Federal courts are courts of limited jurisdiction. Exercise of that jurisdiction requires an understanding of the constitutional values of separation of powers and federalism, as well as an appreciation of the proper role of the judiciary in interpreting the constitutional and statutory law of the land. In exercising their "judicial power" under Article III of the Constitution, federal courts must invariably give deference to the decisions of the legislative and executive branches of the federal government, and to the authority of the states. The legislative branch has the constitutional authority to enact laws, which should be interpreted in a manner consistent with their plain language and congressional intent. The executive branch has the right to administer these laws in its reasonable discretion without undue interference by the courts.

In carrying out its responsibility to "say what the law is" (in the words of Chief Justice John Marshall), the principal obligation of the federal judge must always be to attempt to the best of his ability to discern and give meaning to the language of constitutions and statutes. This requires a conscientious effort on the part of the judge to understand what the words of the law meant to its framers, while according a strong sense of respect for federal and state legal precedents. Although reasonable judges will often disagree on how best to interpret a particular provision of law, this process nevertheless is essential to ensuring the "rule of law" rather than the "rule of men". It is never proper for a judge to substitute his own personal values for the text of the law, or to impose upon the law his own sense of how the law ought to read.

Only by this sense of deference to the representative institutions of government can the federal judge remain true to the enormous trust reposed in him by "we the people".

## FINANCIAL STATEMENT AS OF DECEMBER 31, 2002

## NET WORTH

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

ASSETS			LIABILITIES		
Cash on hand and in banks	5	000	Notes payable to banks-secured		0
U.S. Government securities-add schedule		0	Notes payable to banks-unsecured		686
Listed securities-add schedule		0	Notes payable to relatives		0
Unlisted securities--add schedule	26	400	Notes payable to others		0
Accounts and notes receivable:		0	Accounts and bills due		0
Due from relatives and friends		0	Unpaid income tax		0
Due from others		0	Other unpaid income and interest		0
Doubtful		0	Real estate mortgages payable-add schedule	631	200
Real estate owned-add schedule	731	000	Chattel mortgages and other liens payable		0
Real estate mortgages receivable		0	Other debts-itemize:		
Autos	80	000	1999 4Winns boat	16	731
Cash value-life insurance	21	062	car leases	80	000
Other assets itemize:			student loans		0
1999 4Winns boat	25	000			
Retirement Accounts	590	888			
Art and personal property	75	000	Total liabilities	728	617
			Net Worth	825	733
Total Assets	1 554	350	Total liabilities and net worth	1 554	350
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor		0	Are any assets pledged? (Add schedule)		yes
On leases or contracts		0	Are you defendant in any suits or legal actions?		no
Legal Claims		0	Have you ever taken bankruptcy?		no
Provision for Federal Income Tax		0			
Other special debt		0			

FINANCIAL STATEMENT SCHEDULE  
DECEMBER 31, 2002

Assets

Unlisted Securities		
Stonehedge Limited Partnership		26,400
Real Estate Owned		
Property 1, East Lansing, MI	470,000	
Property 2, Grand Haven, MI	<u>261,000</u>	731,000
Retirement Accounts		
Commonwealth Financial Network-David	410,093	
IRA - David	1,133	
Michigan Chamber of Commerce Pension		
Plan - Nancy	179,213	
IRA - Nancy	<u>449</u>	590,888

Liabilities

Notes Payable to Banks - unsecured		
Citizens -		686
Real Estate Mortgages payable		
Property 1, East Lansing, MI	300,700	
Property 1, East Lansing, MI	151,500	
Property 2, Grand Haven, MI	<u>179,000</u>	631,200

Attachment 9

AO-10 Rev. 1/2001			<b>FINANCIAL DISCLOSURE REPORT</b> <b>NOMINEE REPORT</b>		<i>Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App., §§101-111)</i>
<b>1. Person Reporting</b> (Last name, first, middle initial) McKeague, David W.		<b>2. Court or Organization</b> United States Court of Appeals for the Sixth Circuit		<b>3. Date of Report</b> January 9, 2003	
<b>4. Title</b> (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) Circuit Judge (nominee)		<b>5. Report Type</b> (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date <u>01/9/03</u> <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final		<b>6. Reporting Period</b> 1/1/01 to 12/31/02	
<b>7. Chambers or Office Address</b> United States District Court 315 West Allegan Lansing, MI 48933		<b>8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.</b> Reviewing Officer _____ Date _____			
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.					

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

	<u>POSITION</u>	<u>NAME OF ORGANIZATION/ENTITY</u>
<input checked="" type="checkbox"/>	NONE (No reportable positions.)	
1		
2		
3		

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

	<u>DATE</u>	<u>PARTIES AND TERMS</u>
<input checked="" type="checkbox"/>	NONE (No reportable agreements.)	
1		
2		
3		

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

	<u>DATE</u>	<u>SOURCE AND TYPE</u>	<u>GROSS INCOME</u> (yours, not spouse's)
<input type="checkbox"/>	NONE (No reportable non-investment income.)		
1	2001	Michigan State University/Detroit College of Law (approved teaching)	\$ 7,000
2	2002	Michigan State University/Detroit College of Law (approved teaching)	\$ 11,700
3	2001-2002	Michigan Chamber of Commerce - wages	\$
4	2001-2002	Accident Fund of Michigan - director fees	\$
5			\$

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting McKeague, David W.	Date of Report January 9, 2003
--	-----------------------------------

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

	<u>SOURCE</u>	<u>DESCRIPTION</u>
<input type="checkbox"/>	NONE (No such reportable reimbursements.)	
1	Exempt	
2		
3		
4		
5		
6		
7		

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

	<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
<input type="checkbox"/>	NONE (No such reportable gifts.)		
1	Exempt		\$
2			\$
3			\$
4			\$

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

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE*</u>
<input type="checkbox"/>	NONE (No reportable liabilities.)		
1	U.S. Department of Education	student loans	J
2	Sallie Mae Servicing Corp.	student loans	J
3			
4			
5			
6			

\*Value Codes: J=\$15,000 or less    K=\$15,001-\$50,000    L=\$50,001-\$100,000    M=\$100,001-\$250,000    N=\$250,001-\$500,000  
 O=\$500,001-\$1,000,000    P1=\$1,000,001-\$5,000,000    P2=\$5,000,001-\$25,000,000  
 P3=\$25,000,001-\$50,000,000    P4=\$50,000,001 or more

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting McKeague, David W.	Date of Report January 9, 2003
--	-----------------------------------

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

A. Description of Assets (including trust assets)  <i>Place "X" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period <b>Exempt</b>				
	(1)	(2)	(1)	(2)	If not exempt from disclosure				
	Amt. Code 1 (A-H)	Type (e.g., div., rent or int.) (I-P)	Value Code2 (J-P)	Value Method Code3 (Q-W)	Type (e.g., buy, sell, merger, redemption)	(2) Date: Month- Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> <b>NONE</b> (No reportable income, assets,					<b>Exempt</b>				
1 Stonehedge Limited Partnership (Limited Partnership Int.)	A	Dividend	K	W					
2 Mich. Chamber of Commerce Emp. Money Pur. Pen. Plan	A	Div./Int.	M	T					
3 Rental Cottage, Grand Haven, MI	C	Rent	N	Q					
4 Prime Fund - Capitol	A	Dividend							
5 Fidelity Advisor High Yield Fund	A	Dividend							
6 T. Rowe Price International Bond	A	Dividend							
7 Stein Roe Income Trust	B	Dividend							
8 Scudder-Dreman High Return Fund		None							
9 Mutual Series Qualified Income Fund		None							
10 Putnam New Opportunities Fund		None							
11 Liberty Newport Tiger-A		None							
12 Franklin Small Cap Growth A		None							
13 Putnam International Growth-A		None							
14 Cohen & Steers Realty Shares		None							
15 Eclipse Small Cap Value		None							
16 Invesco Financial Services		None							
17 White Oak Growth Stock		None							

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



## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

McKeague, David W.

Date of Report

January 9, 2003

**VII. Page 2 INVESTMENTS and TRUSTS -- income, value, transactions** *(Includes those of spouse and dependent children. See pp. 34-37 of Instructions.)*

A. Description of Assets (including trust assets)  <i>Place "(X)" after each asset exempt from prior disclosure.</i>	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period <b>Exempt</b>				
	(1)	(2)	(1)	(2)	(1)	If not exempt from disclosure			
	Amt. Code1 (A-H)	Type (e.g., div., rent or int.)	Value Code2 (J-P)	Value Method Code (Q-W)	Type (e.g., buy, sell, merger, redemption)	(2) Date: Month- Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> <b>NONE</b> (No reportable income, assets, or transactions)					<b>Exempt</b>				
18 Vanguard Long Term Corp.	A	Dividend							
19 Invesco Technology Fund		None							
20 American AAdvant Intl. Eq. Inst.	A	Dividend	K	T					
21 Artisan International Fund	A	Dividend	K	T					
22 DFA U.S. Small Cap Value	D	Dividend	L	T					
23 MSIF Trust Mid Cap		None		T					
24 Nations International Value Prim. A	A	Dividend	K	T					
25 PIMCo High Yield Fund	B	Dividend	K	T					
26 PIMCo Low Duration Fund	A	Dividend	K	T					
27 PIMCo Real Return Fund	B	Dividend	K	T					
28 PIMCo Total Return Fund	C	Dividend	L	T					
29 T. Rowe Price Mid Cap Growth Fund		None	K	T					
30 Vanguard 500 Index Fund	B	Dividend	M	T					
31 Schwab Money Market Fund	A	Dividend	J	T					
32									
33									
34									
35									

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

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting	Date of Report
McKeague, David W.	January 9, 2003

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

1. Fidelity Cash Reserves (Part VII, line 4, 2001 Annual and Nominee Reports) changed its name to Prime Fund - Capitol (Part VII, line 4, 2002 Annual and Nominee Reports).
2. The liabilities listed in Part VI were fully repaid prior to December 31, 2002.

**IX. CERTIFICATION.**

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

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

Signature

*David W. McKeague*

Date

*January 9, 2003*

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

**FILING INSTRUCTIONS:**

Mail signed original and 3 additional copies to:

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

06/10/04 THU 16:28 FAX  
06/10/04 THU 16:28 FAX

0002  
06/10/04 THU 16:28 FAX

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
315 W. ALLEGAN  
LANSING, MICHIGAN 48933

DAVID W. McKEAGUE  
DISTRICT JUDGE

1-419-377-1248  
FAX: 377-1708

June 10, 2004

Honorable Orrin G. Hatch  
Chairman, Senate Judiciary Committee  
104 Hart Office Bldg.  
Washington, D.C. 20510

Re: Senate Judiciary Committee Questionnaire of David W. McKeague

Dear Senator Hatch:

Enclosed please find an addendum to my Senate Judiciary Committee Questionnaire which supplements the answers to questions 9, 10, and 13 of Part I. Also, enclosed is the supplemental list of my speeches, panel presentations and seminars since August of 2003.

If additional information is needed, please do not hesitate to contact me.

Sincerely,

  
David W. McKeague

pjr/  
Enclosure

cc: Honorable Patrick Leahy

06/10/04 THU 16:26 FAX  
06/10/2004 THU 14:19 FAX

0003

#### I. BIOGRAPHICAL INFORMATION (PUBLIC)

9. **Bar Associations:**

Federal Judicial Center:

Member, District Judge Education Committee, 1997-2003

Chairperson, District Judge Education Committee, 1998-2003

10. **Other Memberships:**

Civic:

Ele'S Place, A Healing Center for Grieving Children -

Children's Grief Support Group - Volunteer Facilitator 2004 - present

13. **Health:**

Excellent. My last physical examination was January 28, 2004.

06/10/04 THU 16:26 FAX  
08/10/2004 THU 14:19 FAX

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00000000

**SPEECHES, PANEL PRESENTATIONS  
AND SEMINARS**

WHAT	WHERE	WHEN
Berrien County Bar Association & St. Joseph Rotary Club Law Day - <b>Speaker</b>	St. Joseph, MI	05/04
MSU College of Law Advocacy Competition - <b>Judge</b>	East Lansing, MI	04/04
Electronic Evidence Presentation to MSU College of Law Trial Advocacy Class - <b>Speaker</b>	Lansing, MI	03/04
FBA/Federal Court Technology Seminar - <b>Speaker</b>	Grand Rapids, MI	02/04
Electronic Evidence Presentation to MSU College of Law Trial Advocacy Class - <b>Speaker</b>	Lansing, MI	02/04
Hillman Advocacy Program - <b>Speaker</b> Trial Advocacy Techniques	Grand Rapids, MI	01/04
Ave Maria Law School Mott Court Competition - <b>Judge</b>	Ann Arbor, MI	11/03
MSU College of Law Moot Court Competition - <b>Judge</b>	East Lansing, MI	11/03
Northern Michigan Advocacy Skills Workshop - <b>Speaker</b> "The Electronic Courtroom"	Marquette, MI	09/03

Chairman HATCH. We are happy to have both of you here.

Representative ROGERS. Mr. Chairman, I would be remiss if I did not thank and applaud you for your principled decision to continue hearings for President Bush's nominees from Michigan to the Sixth Circuit Federal Court of Appeals. This hearing is evidence of progress toward filling vacancies that have been deemed judicial emergencies by the Administrative Office of United States Courts.

An independent Federal judiciary is the hallmark of America's tripartite system of Government. A judiciary free of partisan political wrangling stands as a counter-weight to the political passions of the Congress and the executive branch.

Appearing before the Committee today is a nominee to the Federal appellate bench who embodies the temperament, compassion and intelligence implicit in Article III's creation of an independent judiciary. Judge David McKeague is a distinguished Federal district court judge with over a decade of experience on the bench.

In 1992, Judge McKeague was unanimously confirmed by the United States Senate to serve on the U.S. District Court for the Western District of Michigan. Additionally, the American Bar Association has rated Judge McKeague Well Qualified to sit on the Sixth Circuit.

Prior to his service on the bench, Judge McKeague practiced law first as an associate and later as a partner with the respected Lansing, Michigan, law firm of Foster, Swift, Collins and Smith. He had a diverse practice, handling a variety of matters involving financial transactions, mergers, regulations of public utilities, commercial litigation and bankruptcy. David earned both his undergraduate and law degrees from the University of Michigan.

Before offering my opinion, however, Mr. Chairman, on why Judge McKeague is an ideal nominee for the Federal appellate bench, I believe it is best to hear from those in Michigan's legal community who have observed or worked with David during his time in the Federal district court. Here are what a number of David's colleagues have said regarding his fitness for the Sixth Circuit.

I quote, "Judge David McKeague possesses the character, intellect, experience and judicial demeanor to serve with distinction on the Sixth Circuit." I quote again, "Although we had very different political beliefs and associations, the law was always Dave's guide and he studied it carefully and interpreted it fairly," unquote.

I quote again, Mr. Chairman, "Despite the fact that Judge McKeague and I do not share party affiliation, he will bring experience and boundless wisdom to the United States Court of Appeals."

It must be noted that the preceding testimonials are all from prominent Democrats in Michigan's legal community. In addition, here is what one Detroit news columnist said regarding Judge McKeague's nomination, and I quote again, "David McKeague is an uncontroversial and respected district judge from western Michigan. He deserves a prompt hearing and, if approved by the Judiciary Committee, an up-or-down vote in the Senate."

Well, cognizant of the significant restraints Federal judges face on non-judicial activities, David has given much back to his profession, Mr. Chairman, and the legal community. He has been at the

forefront in mentoring tomorrow's legal leaders, while training and educating his peers.

In mentoring and developing the legal minds of tomorrow's leaders, David is a longtime adjunct professor at the Michigan State University School of Law. Additionally, David is a founding master and president of the American Inns of Court at the Michigan State University School of Law.

Leaders within the Federal judiciary have also recognized Judge McKeague's intellect and leadership abilities. United States Supreme Court Judge Rehnquist has appointed Judge McKeague to two positions of prominence. He currently serves on the Defender Services Committee, which is responsible for ensuring adequate representation to all persons accused in Federal court of having committed a crime. He is the Chairman of the budget Subcommittee of this important committee. He also just completed 6 years of service on the District Judge Education Committee of the Federal Judicial Center, the last five of which he served as chairman.

Judge McKeague has proven an excellent steward of the court's resources, as he has led his district to a national reputation for innovation in technology and as leader in modernization of dispute resolution. As Chairman of the Automation Committee of the Western District of Michigan, Judge McKeague instituted a pilot civil electronic filing program which allows attorneys in civil cases in the district to file case documents electronically. It is the first such program in Michigan and only the seventh nationwide.

David also serves as Chairman of the Alternative Dispute Resolution Committee of the Western District of Michigan, where he is recognized as a leader in reforming the system, encouraging parties to settle disputes short of trial. The cost of litigation and trial can be immense, as you know, Mr. Chairman, both economically and psychologically for the involved parties.

In terms of both tax dollars and case backlog, settling a case before trial can improve the administration of justice in the Federal district court system. Through a facilitative mediation program advocated by Judge McKeague, countless parties in the Western District have been able to resolve their disputes before reaching trial. In fact, facilitative mediation has resulted in the settlement of over two-thirds of the cases referred, resulting in a savings of approximately \$25 million for the Western District of Michigan since 1996—no small accomplishment, as you know, Senator. In fact, the Bar Association of Michigan has begun instituting facilitative mediation in the Michigan courts, following suit.

Mr. Chairman, in addition to filling a declared judicial emergency in the Sixth Circuit, it is clear that Judge McKeague is a highly respected and eminently qualified jurist who would be an excellent addition to the Federal appellate bench.

Again, I applaud your decision to continue hearings for Michigan's nominees to the Sixth Circuit, and steadfastly urge without delay the swift confirmation of Judge David W. McKeague to the U.S. Court of Appeals for the Sixth Circuit.

One personal anecdote, Senator. In the busy lives of Representatives and elected officials and our distinguished jurists, I happened to attend an event with Mr. McKeague where he swore in new citi-

zens to this country. I watched his compassion and his general caring as he individually welcomed each new citizen to America, took the time to talk to their families and take photos and welcome them in a way that I think will have a lasting impact on each and every one of those citizens. That certainly spoke to the character and heart of someone who is a great, fair jurist.

I again applaud all of your efforts and will look forward to the opportunity of working with you further as you determine to find a consensus solution to this problem. Thank you, Mr. Chairman.

Chairman HATCH. Well, thank you. I have appreciated both of you Congress people, and, in fact, your whole Republican Congressional delegation who have tried to work with us to achieve a compromise. We may still be able to do that. I hope so. Both Senators from Michigan have indicated that they would still like me to try and work one out. I will try my best. I just you will support whatever I can get done, if I can get it done. From my experience with you, I think you will, if I can do this.

So I just want to thank you both for being here. It means a lot to me that you would take time to come over from your respective positions on Capitol Hill. Both of your testimonies have been great. These are two individuals who have the highest ratings from the American Bar Association, as, of course, does Judge Covington. I am just grateful you would take the time. So thanks so much.

If I could have the two nominees take their seats, I am going to swear you in. In fact, let's swear you in also, Judge Covington. Why don't you raise your hand, too? I don't plan on asking you any questions, but we will swear you in so that you have that privilege.

Do all three of you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Judge McKEAGUE. I do.

Judge GRIFFIN. I do.

Judge COVINGTON. I do.

Chairman HATCH. Thank you.

As stated, I am not going to ask Judge Covington any questions. I have tremendous respect for you, for what you have come through, for how you have made such a success out of your life, for the work that you have done on the bench. I am going to support you with everything I have got, so just know that. I know you very well and know your background very well, and I know that you are very well-qualified, as the American Bar Association has said as well.

Judge McKeague, you did introduce your friend, and I would like you to introduce your wife and anybody else you would care to, including your father, Judge Griffin.

#### **STATEMENT OF RICHARD A. GRIFFIN, NOMINEE TO BE CIRCUIT JUDGE FOR THE SIXTH CIRCUIT**

Judge GRIFFIN. Thank you, Chairman Hatch. I would like to introduce my wife, Chris.

Chairman HATCH. Chris, we are glad to have you here, finally. And your father?

Judge GRIFFIN. And my father, Senator Griffin.

Chairman HATCH. We are honored to have you here, Bob.



He is one of the reasons I went on the Labor Committee when I got here, because he is the author of the Landrum-Griffin bill, one of the most important and significant pieces of legislation in the history of this country, and has kept us safe and secure in many ways ever since. So we just want to acknowledge the greatness of your father.

[The biographical information of Judge Griffin follows.]

QUESTIONNAIRE FOR NOMINEES BEFORE THE COMMITTEE ON THE JUDICIARY,  
UNITED STATES SENATE

1. **Name:** Full name (include any former names used).  
  
**Richard Allen Griffin**
2. **Position:** State the position for which you have been nominated.  
  
**Judge, United States Court of Appeals, Sixth Circuit**
3. **Address:** List current office address and telephone number. If state of residence differs from your place of employment, please list the state where you currently reside.  
  
**Ste. 3310, 10850 Traverse Hwy., Traverse City, Michigan 49684**  
**Phone: (231) 929-3190**
4. **Birthplace:** State date and place of birth.  
  
**April 15, 1952; Traverse City, Michigan**
5. **Marital Status:** (include maiden name of wife, or husband=s name). List spouse=s occupation, employer=s name and business address(es). Please also indicate the number of dependent children.  
  
**Married – wife, Nan Christine (Kephart) Griffin. Homemaker.**  
**Two dependent children.**
6. **Education:** List in reverse chronological order, listing most recent first, each college, law school, and any other institutions of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.  
  
**1977 - J.D. University of Michigan Law School (1974-1977);**  
**1973 - B.A. Western Michigan University Honors College, magna cum laude,**  
**(1970-1973)**
7. **Employment Record:** List in reverse chronological order, listing most recent first, all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation

from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

**1/89-present, Judge, Court of Appeals, State of Michigan**  
**Ste. 3310, 10850 Traverse Hwy., Traverse City, MI 49684**  
**Paid position**

**4/1985-12/1988, Partner, Read & Griffin**  
**415 Munson Ave., Ste. 110, Traverse City, MI 49686**  
**Paid position**

**8/1981-4/1985, Partner, Coulter, Cunningham, Davison & Read**  
**413 S. Union St., Traverse City, MI 49684**  
**Paid position**

**8/1977-8/1981, Associate, Williams, Coulter, Cunningham, Davison & Read**  
**413 S. Union St., Traverse City, MI 49684**  
**Paid position**

**1987-present, President, Grand Traverse Zoological Society, (Clinch Park Zoo)**  
**non-paid position**

**1991, Chairman, Grand Traverse County Yellow Ribbon Committee - Desert Storm**  
**non-paid position**

**1987-1988, Chairman, Long Lake Township Building Authority**  
**non-paid position**

**2002 and 1985, President, Pinewood Point Property Owners Association**  
**non-paid position**

8. **Military Service:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number and type of discharge received.

**None**

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

**Honors award in political science, Western Michigan University**

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

**State Bar of Michigan; Grand Traverse-Leelanau-Antrim Bar Association; The Florida Bar; American Judicature Society; Michigan Judges Association; American Bar Association; Federal Judicial Selection Committee, Western District of Michigan; and 2002-present, Chairman, Quality Review Committee, Michigan Court of Appeals**

11. **Bar and Court Admission:** List each state and court in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

**1977 State Bar of Michigan; 1978 The Florida Bar; 1980 United States District Court for the Eastern District Michigan; 1979 United States District Court for the Western District Michigan; and 1980 United States Court of Appeals for the Sixth Circuit**

12. **Memberships:** List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, charitable, or other organizations since graduation from college, other than those listed in response to Questions 10 or 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion - either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

**1997-present, Chief Judge, Michigan YMCA Youth in Government Mock Trial Program  
1987-present, President, Grand Traverse Zoological Society, Inc. (Clinch Park Zoo)  
1991, Chairman, Grand Traverse County Yellow Ribbon Committee - Desert Storm  
1987-1988, Chairman, Long Lake Township Building Authority  
1995-1996, Coach, Silver Lake Elementary girls' basketball team  
1985-1987, Ambassador, National Cherry Festival**

**None of the above organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion**

13. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other material you have written or edited, including material published on the Internet. Please supply four (4) copies of all published material to the Committee, unless the Committee has advised you that a copy has been obtained from another source. Also,

please supply four (4) copies of all speeches delivered by you, in written or videotaped form over the past ten years, including the date and place where they were delivered, and readily available press reports about the speech.

**None other than YMCA Youth in Government Mock Trial cases (enclosed) I have delivered several speeches; none are in written or videotape form.**

14. **Congressional Testimony**: List any occasion when you have testified before a committee or subcommittee of the Congress, including the name of the committee or subcommittee, the date of the testimony and a brief description of the substance of the testimony. In addition, please supply four (4) copies of any written statement submitted as testimony and the transcript of the testimony, if in your possession.

**None**

15. **Health**: Describe the present state of your health and provide the date of your last physical examination.

**Excellent. Last physical examination March 15, 2001**

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

- (1) a short summary and citations for the ten (10) most significant opinions you have written;
- (2) a short summary and citations for all rulings of yours that were reversed or significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court; and
- (3) a short summary of and citations for all significant opinions on federal or state constitutional issues, together with the citation for appellate court rulings on such opinions.

If any of the opinions or rulings listed were in state court or were not officially reported, please provide copies of the opinions.

**Answer #1: Ten most significant opinions written by Judge Griffin:**

***Evans & Luptak, PLC v Lizza*, 251 Mich App 187; 650 NW2d 364 (2002)**

Attorney fee splitting contracts that violate the Rules of Professional Conduct contravene public policy and are unenforceable. Plaintiffs, who are attorneys representing an estate, referred a wrongful death claim against their own client to defendants pursuant to an alleged referral contract in which defendants agreed to pay plaintiffs a one-third

contingent fee of all recoveries obtained against plaintiffs' client. Under these circumstances, a clear conflict of interest existed and "it would be absurd if an attorney were allowed to enforce an unethical fee agreement through court action even though the attorney potentially is subject to professional discipline for entering into the agreement."

*Attorney General v MI Public Service Comm*, 243 Mich App 487; 625 NW2d 16 (2000)

The Court of Appeals, on its own motion, raised the issue whether the Attorney General's participation in the case through various assistant attorneys general as both party litigant and counsel for the PSC gave rise to a conflict of interest.

The Court of Appeals held that the Attorney General may not in the same proceeding be both a litigant adverse to a state agency and counsel for the state agency unless the Attorney General reasonably believes that such representation will not adversely affect the relationship with the state agency and the state agency consents after consultation.

*Doyle v Hutzel Hosp*, 241 Mich App 206; 615 NW2d 759 (2000)

Plaintiff's new theory of liability is not barred by the statute of limitations because it arose out of the previously pleaded transactional setting. The general transactional setting for the original complaint was the postoperative infection following the surgery. The amended complaint alters the theories explaining why the infection developed and caused injury. It did not change the transactional setting for the personal injury claim arising out of the postoperative infection.

*Kern v Blethen-Coloni*, 240 Mich App 333; 612 NW2d 838 (2000)

In this accident involving an automobile and a pedestrian, Michigan's no-fault automobile injury threshold is defined and applied. The Court holds that plaintiff's femur fracture is a serious impairment of body function as a matter of law. A remand for a new trial on damages, only, is ordered.

*Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich App 134; 610 NW2d 272 (2000)

The term "occurrence" in a commercial liability insurance policy is defined. The duty to defend is specified. The defendant's policy covers property damage if it is caused by an occurrence. The policy defines "occurrence" to mean an accident. An occurrence transpires with respect to an insured's defective workmanship if damage extends not only to the insured's product but also to the property of another. Here, an occurrence transpired so as to trigger coverage under the defendant's policy because the plaintiffs'

erroneous schematic and faulty instructions regarding the mobile home's basement foundation resulted in damage to its product, the mobile home, as well as to the property in the basement.

*People v Hoffman*, 225 Mich App 103; 570 NW2d 146 (1997), lv den 459 Mich 857; 583 NW2d 901 (1998)

Defendant argued that the trial court abused its discretion in admitting testimony from two women whom defendant had allegedly assaulted and battered and to whom he had expressed his general hatred toward women. The Court holds that "other-acts evidence" tending to establish that defendant hated women was properly admitted at trial for the purpose of proving defendant's motive for his brutal and depraved actions.

*Feaster v Portage Public Schools*, 210 Mich App 643, 656-661; 543 NW2d 242 (1995) (Griffin, J., dissenting), rev'd (dissent adopted) 451 Mich 351; 547 NW2d 328 (1996).

A fourteen-year-old boy, living with his uncle was unlawfully denied enrollment by defendant school district. The residence rules promulgated by defendant, which require a guardianship, violate state law.

The residency rules promulgated by defendant limit enrollment and thereby reduce costs. These rules also violate state law. Students like Deonte Carpenter are denied their right to a free public education by the enforcement of residence rules that are more restrictive than allowed by state law. The School Code, which is to be liberally construed consistent with the public policy of fostering and encouraging free public education, is seriously undermined by defendant's restrictive residency rules.

*People v Hubbard*, 209 Mich App 234; 530 NW2d 130 (1995), lv den 450 Mich 965; 548 NW2d 634 (1996)

Drug dealer "profile" evidence is not admissible as substantive evidence of guilt. The probative value of drug dealer profile evidence is outweighed substantially by the danger of unfair prejudice. Because the prosecution used the drug dealer profile evidence as substantive evidence of the defendant's guilt, it is unnecessary to consider whether such evidence can be used for more limited purposes when accompanied by proper cautionary instructions to the jury. The trial court abused its discretion in admitting the drug dealer profile evidence, and that error cannot be said to be harmless in light of the fact that the question of the defendant's guilt was closely drawn because there was no direct evidence linking the defendant to either the cocaine or the weapon.

*Farrell v Ford Motor Co*, 199 Mich App 81; 501 NW2d 567 (1993), lv den 445 Mich 863; 519 NW2d 158 (1994)

The choice of law rule in conflict of law cases is established. Where a tort action in a Michigan court presents a conflict of laws, the court must analyze the interests of each jurisdiction in having its law govern the case. In this case, the State of North Carolina has a substantial economic interest in extending to Ford and other manufacturers who do business in North Carolina the benefit of its statute of repose as protection from open-ended products liability claims. North Carolina's interest outweighs Michigan's interest. Michigan merely serves as the forum state and the site of Ford's headquarters. Michigan has no interest in affording greater rights of tort recovery to a North Carolina resident than those afforded by North Carolina for this North Carolina accident.

*Rinvelt v Rinvelt*, 190 Mich App 372; 475 NW2d 478 (1991)

Prenuptial agreements are valid so long as certain conditions of fairness are met. Agreements governing the division of property in the event of a divorce are enforceable if legally procured and ostensibly fair in result; an agreement must not have been obtained through fraud, duress or mistake, or misrepresentation or nondisclosure of material facts, and must not have been unconscionable when executed; in addition, the facts and circumstances must not have changed since the agreement was executed that would make its enforcement unfair and unreasonable. The party challenging enforcement of an agreement governing the division of property in the event of a divorce bears the burden of proof and persuasion.

**Answer #2: Reversals**

*In re Lapeer Co Clerk*, 242 Mich App 497; 619 NW2d 45 (2000), rev'd 465 Mich 559; 640 NW2d 567 (2002)

Court of Appeals held: A local administrative rule violated Michigan law. The Court of Appeals issued a writ of superintending control to remedy the statutory violation.

The Michigan Supreme Court held:

If an action for superintending control is the proper means for the county clerk to challenge the validity of the circuit court's administrative order, only the Supreme Court has jurisdiction to entertain such an action. Further, the circuit court's plan for the family division was adopted pursuant to Administrative Order No. 1997-1, which directed that circuit courts prepare implementation plans and submit them to the State Court Administrative Office for approval. In these circumstances, the circuit court's challenged practices were intertwined with Supreme Court supervisory control over the court system,



making it particularly inappropriate for the Court of Appeals to intervene to review the circuit court's plan.

*People v Rice*, 231 Mich App 126; 585 NW2d 331 (1998), rev'd 459 Mich 899; 589 NW2d 280 (1998)

Court of Appeals held the trial court erred in failing to follow the stringent state law precedent for waiver of the right of self-representation. However, were it permitted, the court would have affirmed and held that a request for self-representation must be made in a timely manner, otherwise a defendant relinquishes the unconditional right to represent himself.

The Michigan Supreme Court held:

The record does not establish that defendant made an unequivocal request to represent himself that was knowing, intelligent, and voluntary, nor did the illiterate defendant's brief mention of the subject suggest that self-representation would not be disruptive or unduly burdensome.

*In re Osborne*, 230 Mich App 712; 584 NW2d 649 (1998), vacated 459 Mich 360; 589 NW2d 763 (1999), (On Remand) 237 Mich App 597; 603 NW2d 824 (1999), lv den 461 Mich 931; 605 NW2d 320 (1999)

Court of Appeals held: In a termination of parental rights case, plain error requiring reversal occurred because respondent's former attorney switched sides to prosecute his former client.

The Michigan Supreme Court held:

It may well be that Attorney Wistrom would have been disqualified if this matter had been timely raised in 1996, but it is 1996 no longer. Timing does matter. A request that must be honored if made at the outset of a hearing need not, in every instance, be honored if made ten months later. And a problem that has obvious solution if timely noticed may have quite a different remedy, or no remedy at all, if noticed at a later stage of the proceedings.

Rules of automatic reversal are disfavored, and we are not prepared to sweep away the 1996 and 1997 proceedings in the absence of demonstrated harm.

*Crego v Coleman*, 226 Mich App 815; 573 NW2d 291 (1997), followed 232 Mich App 284; 591 NW2d 277 (1998), rev'd 463 Mich 248; 615 NW2d 218 (2000)

Court of Appeals held: A Michigan statute treating illegitimate children differently for purposes of child support is unconstitutional as violating equal protection.

The Michigan Supreme Court held:

It is not unreasonable to conclude that the statute has not created a classification on the basis of illegitimacy, but rather has created a classification on the basis of whether paternity had been legally determined. This is a classification that distinguishes between categories of illegitimate children, not between the categories of illegitimate and legitimate children. Under this interpretation, the statute should be upheld as long as it is rationally related to a permissible legislative objective.

*People v Graves*, 224 Mich App 676; 569 NW2d 911 (1997), rev'd 458 Mich 476; 581 NW2d 229 (1998)

At the request of the Court of Appeals, the Supreme Court overrules prior precedent that had required automatic reversal based on the mere possibility of a compromise verdict.

The Michigan Supreme Court held (agreeing with the Court of Appeals):

Where the jury has sense enough to acquit the defendant of an unwarranted murder charge and convict him of manslaughter, the jury, by its verdict showed its ability to discriminate and to correctly apply the facts to the law as given it by the court. Speculating whether the jury compromised, or whether the unwarranted charge affected such compromise gives the jury far less credit than it deserves.

*People v Sabin*, 223 Mich App 530; 566 NW2d 677 (1997), remanded 459 Mich 924; 589 NW2d 779 (1998), (On Remand) 236 Mich App 1; 600 NW2d 98 (1999), rev'd 463 Mich 43; 614 NW2d 888 (2000), (On Second Remand) 242 Mich App 656; 620 NW2d 19 (2000)

Court of Appeals held: Defendant was denied a fair trial by the admission of prejudicial and irrelevant other acts evidence.

The Michigan Supreme Court held:

The trial court did not abuse its discretion in admitting evidence that defendant sexually assaulted his stepdaughter and that an agency order existed prohibiting him from having contact with children under the age of seventeen.

*Arnold v GMC (On Remand)*, 220 Mich App 494; 560 NW2d 59 (1996), rev'd 456 Mich 682; 575 NW2d 540 (1998)

Court of Appeals held: Prior, not current employer, liable for worker's compensation benefits.

The Michigan Supreme Court held:

Under the circumstances of this case, the statute contemplates that the original employer is to pay benefits computed using wages at the time of the original injury.

*In re Return of Forfeited Goods*, 208 Mich App 689; 528 NW2d 852 (1995), rev'd 452 Mich 659; 550 NW2d 782 (1996)

Court of Appeals held: The prosecutor's agreement to return noncontraband property was binding and enforceable.

The Michigan Supreme Court held:

The alleged agreement by the prosecutor to return the seized items is of no significance because the court lacked subject-matter jurisdiction to review and set aside the forfeiture.

*People v Grove*, 208 Mich App 574; 528 NW2d 796 (1995), rev'd 455 Mich 439; 566 NW2d 547 (1997).

The Court of Appeals held: Trial court erred in refusing to accept defendant's guilty plea. By operation of the court rule, the trial court may not refuse to accept a guilty plea based solely on disagreement with the wisdom of the plea, of the charge, or of the plea bargain, unless the bargain is conditioned on the court's agreement to some provision, such as sentence disposition.

The Michigan Supreme Court held:

The court had the authority to exercise its discretion in rejecting defendant's guilty plea. The trial court's rejection of the plea agreement was not an abuse of discretion.

**Wohlert Special Product v MESC**, 202 Mich App 419; 509 NW2d 825 (1993); rev'd in part 447 Mich 1022; 527 NW2d 514 (1994)

The Court of Appeals held: A labor dispute was a substantial contributing cause to plaintiffs' unemployment.

The Michigan Supreme Court held:

In part IV of its opinion, the Court of Appeals made findings of fact on the availability of positions for claimants throughout the strike. Findings of fact should normally be made in the first instance by the administrative body, rather than the appellate court. In all other respect leave to appeal is denied.

**Gibson v Bronson Methodist Hosp**, 197 Mich App 67; 495 NW2d 162 (1992), rev'd 445 Mich 331; 517 NW2d 736 (1994)

The Court of Appeals held: MCR 2.314(B)(2) specifically provides that a party who asserts that medical information is subject to a privilege may not introduce thereafter any evidence of the patient's physical condition. That provision is applicable where the physician-patient privilege is asserted at a deposition and, because it specifically addresses the question of the assertion of a medical privilege, controls rather than MCR 2.302(B)(1)(b), which deals generally with the assertion of a privilege. Accordingly, the trial court properly concluded that the assertion of the physician-patient privilege at the depositions barred the introduction at trial of any evidence of the child's physical condition.

The Michigan Supreme Court held:

The sanction provided in MCR 2.314(B)(2), precluding the introduction of evidence of a party's physical condition after the party has asserted that such information is subject to the physician-patient privilege, does not apply where the privilege is asserted at a deposition.

Because the Supreme Court was persuaded that the sanction set forth in MCR 2.314(B)(2) should be made applicable where the physician-patient privilege is asserted at a deposition, effective September 1, 1994, amended MCR 2.302, 2.306, and 2.314(B)(2) to make the sanction applicable to assertions of the privilege at a deposition and in other specified areas of discovery.

**People v Faucett**, 193 Mich App 499; 484 NW2d 670 (1992), rev'd 442 Mich 153; 499 NW2d 764 (1993). Cf. *Florida v JL*, 529 US 266; 120 S Ct 1375; 146 L Ed 2d 254 (2000)

Court of Appeals held: Evidence properly suppressed pursuant to the Fourth Amendment

because the anonymous tip did not contain the necessary range of details regarding the defendant's present and future actions to demonstrate that the informant had a special familiarity with defendant's affairs.

The Michigan Supreme Court held:

We conclude that the tipster's information carried with it sufficient indicia of reliability under the totality of the circumstances to support a finding that the officer had a reasonable suspicion to make the investigative stop. We read the record as indicating that the tipster identified defendant, knew that at the time of the call defendant was on the road, specified the route to be traveled, and described the pickup truck with substantial accuracy.

***Profit v Citizens Ins Co***, 187 Mich App 55; 466 NW2d 354 (1991), rev'd 444 Mich 281; 506 NW2d 514 (1993)

Court of Appeals held: Defendant automobile insurance company may not set off plaintiff's social security disability payments from plaintiff's no-fault automobile work-loss benefits.

The Michigan Supreme Court held:

Although plaintiff purchased a policy of no-fault insurance that was not coordinated for work loss benefits, and paid a somewhat higher premium than if the policy had been so coordinated, social security disability benefits, because they are benefits provided or required to be provided under the laws of the federal government shall be subtracted from work loss benefits otherwise payable for an automobile injury.

***People v Smith***, 190 Mich App 352; 475 NW2d 875 (1991), rev'd in part 439 Mich 954; 480 NW2d 908 (1992)

Court of Appeals held: Defendant's conviction is reversed because defendant's silence was used against him in violation of the Fifth Amendment. The prosecutor's failure to defend the appeal may be treated as a confession of error.

The Michigan Supreme Court held:

A party who seeks to raise an issue on appeal but who fails to brief it may properly be considered to have abandoned the issue. *Mitcham v Detroit*, 355 Mich 182, 203 (1959). However, the failure of an appellee to file a responsive brief may not properly be considered to be a confession of substantive error. In all other respects leave to appeal is denied.

*Lorencz v Ford Motor Co*, 187 Mich App 63; 466 NW2d 346 (1991), rev'd 439 Mich 370; 483 NW2d 844 (1992)

The Court of Appeals held: In an action based on tort, the county or counties in which all or part of a plaintiff's injuries or damages occurred is first in priority when determining proper venue.

The Michigan Supreme Court held: Venue is proper where part or all of a cause of action arises, not merely the situs of an injury; that a cause of action may arise in more than one place, making venue proper in more than one jurisdiction.

Note: Venue statute was revised by the Legislature to conform to Court of Appeals' decision. See MCL 600.1629.

**Overruled:**

*McKeighan v Grass Lake Twp Supervisor*, 234 Mich App 194; 593 NW2d 605 (1999), overruled *Tolksdorf v Griffith*, 464 Mich 1; 626 NW2d 163 (2001)

Court of Appeals held: the private roads act of 1881 does not violate the Michigan Constitution of 1963.

The Michigan Supreme Court held: The private roads act arose from language at art 18, § 14 of the Michigan Constitution of 1850. A similar provision is found in the Michigan Constitution of 1908, art 13, §§ 1 and 3. However, the current Michigan constitution eliminated the express reference to private roads. The key issue is whether the act [private road act of 1881] provides for an unconstitutional taking under art 10, § 2 of the Michigan Constitution of 1963. We hold that it does because the act authorizes a taking and the taking primarily benefits a private rather than public purpose.

*People v Troncoso*, 187 Mich App 567; 468 NW2d 287 (1991), overruled *People v Hill*, 192 Mich App 102; 480 NW2d 913 (1991), followed *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995)

Court of Appeals held: The Legislature sought to moderate previously rigid and uncompromising drug laws by allowing departures from presumptive minimum terms for "substantial and compelling reasons." A prior panel's determination that substantial and

compelling reasons are limited to “objective and verifiable,” “pre-arrest conduct,” is a judicial invention not supported by the words of the statute or its legislative history.

The Michigan Supreme Court held:

In imposing a sentence under MCL 333.7401(4) for substantial and compelling reasons below the statutory minimum, only objective factors capable of verification may be applied, i.e., those actions or occurrences that are external to the minds of the judge, the defendant, and others involved in making the decision, capable of being confirmed. Both prearrest and postarrest factors may be used.

**Answer #3: Significant opinions on federal or state constitutional issues written by Judge Griffin**

*People v Carter*, 250 Mich App 510; \_\_\_ NW2d \_\_\_ (2002)

A warrantless search of defendant’s burned automobile held not to violate the Fourth Amendment or the Michigan Constitution (art 1, § 11) because of the automobile warrant exception. The well-established automobile exception does not rise or fall depending on the peculiarities of the automobile to be searched. On the contrary, the exception was established because of the mobility of automobiles in general. *Carroll v United States*, 267 US 132, 153; 45 S Ct 280; 69 L Ed 543 (a ship, motor boat, wagon, or automobile is inherently different from a dwelling house); *Michigan v Thomas*, 458 US 259, 261; 102 S Ct 3079; 73 L Ed 2d 750 (1982) (the exception does not depend on the likelihood in each particular case that the car would have been driven away). Numerous evidentiary hearings would be required were the automobile exception based on fact rather than law. Further, evidence seized by many reasonable searches would be suppressed if it were later discovered that at the time of the search the vehicle had a dead battery, flat tire, or some other mechanical problem that hindered its self-mobility.

In addition, the lower courts failed to recognize or apply the second basis for the automobile exception, which is the reduced expectation of privacy regarding automobiles.

*People v Van Tubbergen*, 249 Mich App 354; 642 NW2d 368 (2002)

Sheriff’s appointment of public safety officers of a religiously affiliated college as deputy sheriffs held not to violate the establishment of religion clauses of the United States or Michigan Constitutions. U S Const, Am I; Const 1963, art 1 § 4.

It is clear that the sheriff’s appointment of deputies has an underlying purpose that is secular in nature. There was no claim that the college’s public safety officers used their position as deputy sheriffs to proselytize on behalf of their employer or to infringe the religious liberties of others; accordingly, there was no showing that the appointment of the officers as deputy sheriffs had the primary effect of advancing or inhibiting religion. The trial court found, and the record supports, that there is nothing in the nature of the

appointment of the college's public safety officers as deputy sheriffs that would create a relationship between the sheriff and the college that would cause an excessive entanglement of church and state.

*Vargas v Hong Jin Corp*, 247 Mich App 278; 636 NW2d 291 (2001)

Out-of-state manufacturer that did not advertise or solicit business in Michigan did not have sufficient minimum contacts required by the Due Process Clause to subject defendant to personal jurisdiction.

The plaintiff failed to show that defendant had minimum contacts with Michigan sufficient to establish personal jurisdiction. The hope and expectation of defendant that its product would be marketed throughout the nation, including Michigan, is not sufficient to establish a prima facie case of personal jurisdiction. Even if defendant had a distribution agreement in and of itself, does not establish that defendant purposefully availed itself of the privilege of conducting activities in Michigan. The evidence does not show that defendant purposefully directed its product into Michigan.

*In re Ayres*, 239 Mich App 8; 608 NW2d 132 (1999)

The registration of juvenile sex offenders is not cruel or unusual punishment. The Sex Offenders Registration Act, which requires a juvenile who has been adjudicated responsible for certain criminal sexual conduct offenses to register as a sex offender but restricts access to information about the registered juvenile to law enforcement agencies with jurisdiction over the juveniles' postal zip code area, neither punishes the juvenile nor offends a basic premise of the juvenile justice system—that a reformed adult should not have to carry the burden of a continuing stigma for youthful offenses. The confidential collection and maintenance of juvenile sex offender registration data by law enforcement authorities serves the important remedial function of aiding law enforcement investigation of sex offenses, which have high recidivism rates, and is not punitive in form and effect as to render it cruel or unusual punishment that is prohibited by Const 1963, art 1, § 16.

*Cole v General Motors Corp*, 236 Mich App 452; 600 NW2d 421 (1999)

"Reverse discrimination" claim by Caucasian male barred by EEOC conciliation agreement with defendant. The training at issue was offered in a good-faith attempt to comply with the conciliation agreement and in reliance on an Equal Employment Opportunity Commission opinion letter that qualified as an EEOC opinion.



*Adams Outdoor Advertising, Inc v City of Holland*, 234 Mich App 681; 600 NW2d 339 (1999), aff'd 463 Mich 675; 625 NW2d 377 (2001)

City's sign ordinance banning new billboards is a valid exercise of legislative power. A zoning ordinance is clothed with every presumption of validity and the burden is on the party challenging the ordinance. The court erred in placing the burden on the defendant to justify the validity of its ordinance and erred in concluding that the defendant's aesthetic concerns and other interests sought to be advanced by the sign ordinance were not reasonable governmental interests. The plaintiff did not sustain its burden of proving exclusionary zoning. The demonstrated need that must be shown relates to the public need of the residents of the community, not merely to the plaintiff's private economic self-interest.

*Norris v State Farm Fire & Casualty Co*, 229 Mich App 231; 581 NW2d 746 (1998)

Plaintiff established a genuine issue of material fact by direct evidence regarding whether she was unlawfully discriminated against because of her handicap. Traditional burdens of proof apply and burden-shifting approach of *McDonnell Douglas Corp v Green*, 411 US 792 (1973), is not applicable where a plaintiff alleging unlawful employment discrimination based on the plaintiff's handicap presents direct evidence of unlawful discrimination by the employer.

*People v Hanna*, 223 Mich App 466; 567 NW2d 12 (1997), aff'd 459 Mich 1005; 595 NW2d 827 (1999), cert den 528 US 1131; 120 S Ct 970; 145 L Ed 2d 840 (2000)

Claims of excessive force under the Fourth Amendment are analyzed under an "objectively reasonable" standard. In this case of suspected drunk driving, the police did not violate defendant's Fourth Amendment rights by briefly restraining him with a pain compliance device in order to execute a warrant for a blood sample.

*People v Wybrecht*, 222 Mich App 160; 564 NW2d 903 (1997), lv den 456 Mich 949; 576 NW2d 169 (1998)

Sentence review is a function of the appellate courts, not the trial court. A trial court may correct an invalid sentence but may not modify a valid sentence after it has been imposed except as provided by law. Absent a tangible legal or procedural error that makes a sentence invalid, the trial court cannot alter a sentence that the defendant has begun to serve. Only appellate courts are authorized to invalidate sentences for lack of proportionality.

*Terzano v Wayne Co*, 216 Mich App 522; 549 NW2d 606 (1996)

An employee who reports third-party violations of law or suspected violations of law is protected by the Whistleblowers Protection Act. An employee who reports a violation of law or suspected violation of law by a third party is protected by the Whistleblowers' Protection Act when the employee acts within the scope of employment and the reported violation or suspected violation affects the business of the employer.

*City of Lansing v Hartsuff*, 213 Mich App 338; 539 NW2d 781 (1995)

A city ordinance that prohibits disturbing the public peace and quiet by a loud or boisterous conduct is not unconstitutionally vague. The language of the ordinance provides fair notice of the conduct prohibited and does not encourage arbitrary and discriminatory enforcement. An ordinary person exercising common sense can sufficiently understand the term loud or boisterous, especially when the term is modified by the phrase "disturb the public peace and quiet."

*Young v Young*, 211 Mich App 446; 536 NW2d 254 (1995)

The Federal Wiretapping Act does not contain an interspousal exception. State courts have concurrent jurisdiction with federal courts to adjudicate civil claims arising out of violation of the federal wiretapping act. Interspousal wiretapping is included within the scope of the prohibitions and remedies of the federal wiretapping act; a judicially created interspousal-immunity exception would thwart the clear intent of Congress to prohibit eavesdropping in domestic relations cases. The good-faith belief that it is lawful to eavesdrop on conversations made by others on one's own telephone is not a defense to a civil action brought pursuant to the act.

*Porth v Roman Catholic Diocese of Kalamazoo*, 209 Mich App 630; 532 NW2d 195 (1995)

The Religious Freedom Restoration Act bars application of Michigan's Civil Rights Act to the hiring of teachers in Catholic schools. (Constitutionality of act not raised or decided.) Although the Michigan Civil Rights Act applies to church-operated schools, under the facts of this case the Religious Freedom Restoration Act of 1993 is controlling. Pursuant to the federal act, government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. Application of a strict scrutiny test in this case mandates the conclusion that the state does not possess a compelling interest in prohibiting religious discrimination in the employment of teachers in church-operated schools.

*People v Perry*, 201 Mich App 347, 353-359; 505 NW2d 909 (1993) (Griffin, J., concurring), lv den 445 Mich 926; 521 NW2d 7 (1994). Cf. *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357; 118 S Ct 2014; 141 L Ed 2d 344 (1998)

Under the totality of circumstances, the exclusionary rule is inapplicable to probation revocation proceedings. “In my view, the applicability of the exclusionary rule should not hinge solely on the narrow question whether the police had actual knowledge or reason to know that the target of their illegal search and seizure was a probationer. Rather, I would examine the totality of the circumstances surrounding the Fourth Amendment violation and apply the exclusionary rule to the probation revocation proceedings only in those cases where (1) the exclusion of the evidence would substantially further the deterrent purpose of the exclusionary rule, and (2) the need for deterrence outweighs the harm to the probation system.”

*Marketos v American Employers Ins Co*, 185 Mich App 179; 460 NW2d 272 (1990)

Nonconfidential materials are not privileged under Michigan’s shield law or the First Amendment. The obligation of all persons to give evidence necessary for the proper administration of justice is a fundamental civic duty applicable to both criminal and civil cases. The civil rules of discovery grant trial courts broad discretion to issue protective orders to prevent potential abuses.

*People v Eaton*, 184 Mich App 649; 459 NW2d 86 (1990), aff’d 439 Mich 919; 479 NW2d 639 (1992)

Defendant’s constitutional and statutory rights to a speedy trial were relinquished by operation of his unconditional pleas of guilty. An unconditional plea of guilty relinquishes all personal jurisdiction defects, including the constitutional and statutory guarantees to a speedy trial.

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

- (1) List chronologically any public offices you have held, federal, state or local, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or nominations for appointed office for which were not confirmed by a state or federal legislative body.

**1994 – Candidate for Michigan Supreme Court (unsuccessful)**

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

**1986 - Chairman, Robert Griffin for Supreme Court  
Head of committee for father's successful Supreme Court campaign**

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

- (1) Describe chronologically your law practice and legal experience after graduation from law school including:

- (1) whether you served as clerk to a judge, and if so, the name for the judge, the court and dates of the period you were a clerk;

**1975-1977, Law Clerk for Hon. Ross W. Campbell,  
Washtenaw Circuit Court**

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

**No**

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

**1977-1981 - Associate, Williams Coulter, Cunningham, Davison & Read  
413 S. Union St., Traverse City, MI 49684**

**1981-1985 - Partner, Coulter, Cunningham, Davison & Read  
413 S. Union St., Traverse City, MI 49684**

**1985-1989 - Partner, Read & Griffin,  
415 Munson Ave., Ste. 110, Traverse City, MI 49686**

- (2) (1) Describe the general character of your law practice and indicate by date if and when its character has changed over the years.

**1977-1989 - Trial practice. I litigated cases involving automobile negligence, premises liability, products liability, employment law, civil rights, breach of contract, commercial litigation, and probate disputes.**

- (1) Describe your typical former clients, and mention the areas, if any, in which you have specialized.

**I specialized in automobile negligence, premises liability, products liability, and employment law. My typical clients were AAA, State Farm, and Farm Bureau Insurance Company, and injured plaintiffs. My law firms engaged in both plaintiff and defense personal injury litigation.**

- (3) (1) Describe whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe each such variance, providing dates.

**Frequently**

- (2) Indicate the percentage of these appearances in

- (1) federal courts; 10%  
 (2) state courts of record; 90%  
 (3) other courts.

- (3) Indicate the percentage of these appearances in:

- (1) civil proceedings; 95%  
 (2) criminal proceedings. 5%

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

**Fifty-two cases tried to verdict or judgment; sole counsel on all cases**

- (5) Indicate the percentage of these trials that were decided by a jury.

**Ninety percent**

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

**None**

- (5) Describe legal services that you have provided to disadvantaged persons or on a *pro bono* basis, and list specific examples of such service and the amount of time devoted to each.

**Volunteer counselor and attorney, Third Level Crisis Center, Grand Traverse-Leelanau-Antrim Bar Association (divorce, landlord/tenant, breach of contract). Chief Judge, Michigan YMCA Youth-In-Government Mock Trial Program (three ABA national championships); Instructor, Peoples' Law School, Michigan Trial Lawyers Association ("The Courts and How They Function"; Basic Constitutional Law)**

19. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, and for each provide the date of representation, the name of the court, the name of the judge or judges before whom the case was litigated and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties. In addition, please provide the following:

- (1) the citations, if the cases were reported, and the docket number and date if unreported;
- (2) a detailed summary of the substance of each case outlining briefly the factual and legal issues involved;
- (3) the party or parties whom you represented; and
- (4) describe in detail the nature of your participation in the litigation and the final disposition of the case.

- 1. Defended Crawford County in a 1983 action arising out of actions taken by defendant during a factory labor dispute.**

**UAW v Crawford Co Sheriff's Dep't  
1978-1980**

**Federal District Court Eastern District Michigan (Bay City);**

**Honorable Stewart Newblatt and U.S. Sixth Circuit Court of Appeals.**

**Counsel for plaintiff, Alan Reuther, 1757 N. Street N.W., Washington, D.C. 20036; (202) 828-8540; Counsel for codefendant, Richard Ford, 326 State St., Traverse City, MI 49684; (231) 946-2700**

2. Defended cherry packer in alleged breach of contract litigation. Complex UCC legal issues and factual contract issues were litigated. Settlement achieved at jury selection.  
Felix Braun & Co v Elk Rapids Packing Company  
1979-1981  
Federal District Court Western District Michigan (Grand Rapids);  
Honorable Benjamin Gibson  
Counsel for plaintiff, Thomas Koernke, 55 Campau NW #500,  
Grand Rapids, MI 49503; (616) 235-2300
3. Represented plaintiffs injured in an automobile accident. Jury verdict for plaintiff.  
Lobodinski v Baesch  
1980-1982  
Grand Traverse Circuit Court; Honorable Charles M. Forester  
Counsel for defendant, Ronald Sondee, 310 W. Front St., Ste. 300,  
Traverse City, MI 49684; (231) 947-0400
4. Represented plaintiff injured in an automobile accident. Jury verdict for plaintiff.  
Francis Hundley v Cudworth  
1979-1981 (verdict 3/81)  
Kalkaska Circuit Court; Honorable Francis L. Walsh (by assignment)  
Defense counsel, Richard Scholl (deceased)
5. Represented defendant foam insulation manufacturer in a products liability action. Jury verdict for defendant. Peterman v Scientific Applications.  
1982-1984 (verdict 10/84)  
Grand Traverse Circuit Court; Honorable Charles M. Forster  
Counsel for plaintiffs, Phillip Clancey, 3347 S. Airport Rd., Traverse City, MI 49684; (231) 946-9620
6. Vallance v Brewbaker, 161 Mich App 642; 411 NW2d 808 (1987)  
Michigan Court of Appeals affirms a grant of summary judgment in favor of defendant on plaintiff's claim for abuse of process.  
July 20, 1987, Michigan Court of Appeals  
Counsel for plaintiff, Jerry L. Sumpter (current address unknown)
7. Pioneer State Mut Ins Co v State Farm Mut Auto Ins Co, 110 Mich App 617; 313 NW2d 170 (1981)  
Michigan Court of Appeals affirms summary judgment in favor defendant holding a "cherry shaker," a motorized, self-propelled four-wheeled device used to harvest cherries, is a "vehicle" for the purposes of the no-fault automobile insurance act and is excluded from coverage for property protection insurance benefits unless the damage to such vehicle is incurred while it is parked in a manner

so as not to cause unreasonable risk of the damage.  
 October 21, 1981, Michigan Court of Appeals  
 Counsel for plaintiff, Menmuir, Zimmerman, Rollert & Kuhn (R. Edward Kuhn),  
 412 S. Union St., Traverse City, MI 49684; (231) 947-7900

8. Defense of sex harassment claim. Verdict for defendant.  
 Lutz v Prange Co.  
 1982-1985 (verdict 4/85)  
 Grand Traverse Circuit Court; Honorable William R. Brown  
 Counsel for plaintiff, George Bearup, 202 E. State St., Traverse City, MI 49684;  
 (231) 929-4878
9. Defense of age/sex discrimination claim. Verdict for defendant  
 Mead v TV 29/8  
 1980-1982 (verdict 8/82)  
 Grand Traverse Circuit Court; Honorable William R. Brown  
 Counsel for plaintiff, George Bearup, 202 E. State St., Traverse City, MI 49684.
10. Defense of fraudulent claim for life insurance benefits. Verdict for defendant.  
 Hanson v League Life Ins. Co.  
 1983-1985 (verdict May 1985)  
 Manistee District Court; Honorable Brent Danielson  
 Counsel for plaintiff, Don Jennings, Manistee, MI
20. **Criminal History:** State whether you have ever been convicted of a crime, within ten years of your nomination, other than a minor traffic violation, that is reflected in a record available to the public, and if so, provide the relevant dates of arrest, charge and disposition and describe the particulars of the offense.  
  
 None
21. **Party to Civil or Administrative Proceedings:** State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil or administrative proceeding, within ten years of your nomination, that is reflected in a record available to the public. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest. Do not list any proceedings in which you were a guardian *ad litem*, stakeholder, or material witness.  
  
 Small Claims Court. 1997 - dismissed - Northway v Griffin, Leelanau District Court (Dispute over daughter's orthodontic overcharges.)
22. **Potential Conflict of Interest:** Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.



Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

**None anticipated. I will abide by the Code of Judicial Conduct and will regularly check for conflicts of interest**

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

**No**

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

**See Financial Disclosure Report**

25. **Statement of Net Worth:** Complete and attach the financial net worth statement in detail. Add schedules as called for.

**See attached net worth statement**

26. **Selection Process:** Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?

- (1) If so, did it recommend your nomination?

**Yes, I was recommended for nomination by a joint Michigan gubernatorial/congressional qualifications review committee.**

- (2) Describe your experience in the judicial selection process, including the circumstances leading to your nomination and the interviews in which you participated.

**I wrote letters seeking consideration for nomination to the U. S. Court of Appeals Sixth Circuit.**

**The chair of the Qualifications Review Committee - Sixth Circuit, contacted my office and forwarded to me an applicant questionnaire. I e-mailed to the**

committee my completed applicant questionnaire. I was interviewed by the committee for approximately an hour.

I later was advised that I had been recommended by the committee for nomination to the Sixth Circuit. I traveled to Washington, and was interviewed by the White House Counsel's Office.

Subsequently, I was advised that before a final decision would be made on my nomination many forms such as the SF86 Questionnaire, tax check waiver, fingerprint cards, FBI consent, and physical examination must be completed and returned.

I was nominated by President George W. Bush on June 26, 2002.

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

No

**RICHARD ALLEN GRIFFIN  
FINANCIAL STATEMENT  
NET WORTH**

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

ASSETS			LIABILITIES		
Cash on hand and in banks		4, 800	Notes payable to banks-secured		0
U.S. Government securities-add schedule		0	Notes payable to banks-unsecured		0
Listed securities-add schedule		0	Notes payable to relatives		0
Unlisted securitiesBadd schedule		0	Notes payable to others		0
Accounts and notes receivable:		0	Accounts and bills due		365
Due from relatives and friends		0	Unpaid income tax		0
Due from others		0	Other unpaid income and interest		0
Doubtful		0	Real estate mortgages payable-add schedule - <b>Residence</b>	92,	500
Real estate owned-add schedule <b>Residence</b> <b>50% Grenellefe Condo</b>	170, 000 30, 000		Chattel mortgages and other liens payable	3,	400
Real estate mortgages receivable		0	Other debts-itemize:		0
Autos and other personal property	100, 000				
Cash value-life insurance		0			
Other assets itemize:		0			
			Total liabilities	96,	265
			Net Worth	208,	535
Total Assets	304,	800	Total liabilities and net worth	304,	800
CONTINGENT LIABILITIES		0	GENERAL INFORMATION		
As endorser, comaker or guarantor		0	Are any assets pledged? (Add schedule) <b>No.</b>		
On leases or contracts		0	Are you defendant in any suits or legal actions? <b>No.</b>		
Legal Claims		0	Have you ever taken bankruptcy? <b>No.</b>		
Provision for Federal Income Tax		0			
Other special debt		0			

AO-10 Rev. 1/2001		<b>FINANCIAL DISCLOSURE REPORT FOR NOMINEES</b>		Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App., §§101-111)
<b>1. Person Reporting (Last name, first, middle initial)</b> Griffin, Richard A.		<b>2. Court or Organization</b> US Court of Appeals Sixth Circuit		<b>3. Date of Report</b> 1-6-03
<b>4. Title</b> (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) Circuit Judge (nominee)		<b>5. Report Type (check appropriate type)</b> <input checked="" type="checkbox"/> Nomination, Date <u>1-7-03</u> <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final		<b>6. Reporting Period</b> 1/1/2001 to 12/31/2002
<b>7. Chambers or Office Address</b> Ste 3310 10850 Traverse Hwy. Traverse City, MI 49684		<b>8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.</b> Reviewing Officer _____ Date _____		
<b>IMPORTANT NOTES:</b> The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.				

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

POSITION	NAME OF ORGANIZATION/ENTITY
<input type="checkbox"/> NONE (No reportable positions.)	Grand Traverse Zoological Society, Inc.
1 President (uncompensated)	(nonprofit 501(c)(3) dedicated to improve the Clinch Park Zoo, Traverse City, MI
2	
3	

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

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements.)	
1 Pension Plan	Michigan Judges Retirement System, Defined Benefit 234 PA 1992
2	
3	

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

DATE	SOURCE AND TYPE	GROSS INCOME
<input type="checkbox"/> NONE (No reportable non-investment income.)		
1 2001	State of Michigan, salary	\$141,720.88
2 2002	State of Michigan, salary	\$151,441.00
3		\$
4		\$
5		\$

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Richard A. Griffin	

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

	SOURCE	DESCRIPTION
1	<input type="checkbox"/> NONE (No such reportable reimbursements.)	
2	Exempt	
3		
4		
5		
6		
7		

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

	SOURCE	DESCRIPTION	VALUE
1	<input type="checkbox"/> NONE (No such reportable gifts.)		
2	Exempt		\$
3			\$
4			\$

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

	CREDITOR	DESCRIPTION	VALUE CODE*
1	<input checked="" type="checkbox"/> NONE (No reportable liabilities.)		
2			
3			
4			
5			
6			

Due Codes: J=\$15,000 or less Q=\$50,001-\$100,000 P=\$100,001-\$250,000 R=\$250,001-\$500,000 S=\$500,001-\$1,000,000 T=\$1,000,001-\$5,000,000 U=\$5,000,001-\$25,000,000 V=\$25,000,001-\$50,000,000 W=\$50,000,001 or more	K=\$15,001-\$50,000 L=\$50,001-\$100,000 M=\$100,001-\$250,000 N=\$250,001-\$500,000 O=\$500,001-\$1,000,000 P=\$1,000,001-\$5,000,000 Q=\$5,000,001-\$25,000,000 R=\$25,000,001-\$50,000,000 S=\$50,000,001 or more
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<b>FINANCIAL DISCLOSURE REPORT</b>	Name of Person Reporting Richard A. Griffin	Date of Report
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**VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions** (Includes those of spouse and dependent children. See pp. 34-37 of Instructions.)

A Description of Assets (including trust assets)  <i>Place "X" after each name except from prior disclosure</i>	B Income during reporting period		C Gross value at end of reporting period		D Transactions during reporting period				
	(1) Type (e.g., dividend, rent or interest)	(2) Amount (See Col. B1)	(3) Value (See Col. C1)	(4) Value (See Col. C2)	(1) Type (e.g., buy, sell, merger, redemption)	(2) Date Month Day	(3) Value (See Col. D3)	(4) Code (See Col. D4)	(5) If not exempt from disclosure (See Col. D5)
<input type="checkbox"/> NONE (No reportable income, assets)									
1 Huntington Nat'l Bank	B	Int	J	T	Exempt				
2									
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									

Income/Gain Codes: A=\$1,000 or less (See Col. B1, D8)	B=\$1,001-\$1,500 C=\$1,501-\$1,999,999 D=\$2,000-\$2,499,999 E=\$2,500-\$2,999,999 F=\$3,000-\$3,499,999 G=\$3,500-\$3,999,999 H=\$4,000-\$4,499,999 I=\$4,500-\$4,999,999 J=\$5,000-\$5,499,999 K=\$5,500-\$5,999,999 L=\$6,000-\$6,499,999 M=\$6,500-\$6,999,999 N=\$7,000-\$7,499,999 O=\$7,500-\$7,999,999 P=\$8,000-\$8,499,999 Q=\$8,500-\$8,999,999 R=\$9,000-\$9,499,999 S=\$9,500-\$9,999,999 T=\$10,000-\$10,499,999 U=\$10,500-\$10,999,999 V=\$11,000-\$11,499,999 W=\$11,500-\$11,999,999 X=\$12,000-\$12,499,999 Y=\$12,500-\$12,999,999 Z=\$13,000-\$13,499,999 AA=\$13,500-\$13,999,999 AB=\$14,000-\$14,499,999 AC=\$14,500-\$14,999,999 AD=\$15,000-\$15,499,999 AE=\$15,500-\$15,999,999 AF=\$16,000-\$16,499,999 AG=\$16,500-\$16,999,999 AH=\$17,000-\$17,499,999 AI=\$17,500-\$17,999,999 AJ=\$18,000-\$18,499,999 AK=\$18,500-\$18,999,999 AL=\$19,000-\$19,499,999 AM=\$19,500-\$19,999,999 AN=\$20,000-\$20,499,999 AO=\$20,500-\$20,999,999 AP=\$21,000-\$21,499,999 AQ=\$21,500-\$21,999,999 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## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting

Richard A. Griffin

Date of Report

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

## X. CERTIFICATION.

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

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

Signature



Date

1/6/2003

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

## FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

RECEIVED THE JUDGE FOR  
JANUARY 2004 FOR REPLY

002



STATE OF MICHIGAN  
COURT OF APPEALS

RICHARD ALLEN GRIFFIN  
JUDGE

June 10, 2004

GRANDVIEW PLAZA  
SUITE 3010  
TRAVERSE CITY, MI 49884  
TELEPHONE (231) 929-3190  
Fax (231) 929-3103

VIA FACSIMILE AND  
OVERNIGHT EXPRESS

Hon. Orrin G. Hatch  
Chairman  
Committee on the Judiciary  
US Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Senator Hatch:

Enclosed is my Second Addendum to No. 16(2) of the Questionnaire for Nominees  
Before the Committee on the Judiciary, United States Senate.

I look forward to seeing you on June 16, 2004, for the Judiciary Committee hearing.

Sincerely,

Richard Allen Griffin

RAG/cmd  
Enclosure



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**SECOND ADDENDUM TO NO. 16(2)**  
**QUESTIONNAIRE FOR NOMINEES BEFORE THE COMMITTEE ON THE**  
**JUDICIARY - UNITED STATES SENATE**

16. Citations: If you are or have been a judge, provide:

(2) a short summary and citations for all rulings of yours that were reversed or significantly criticized on appeal, together with a short summary of and citations for the opinions of the reviewing court;

**Answer #2: Reversals**

*People v McKenzie*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2003 (Docket Nos. 237202 and 237815), rev'd in part 469 Mich 1035; 679 NW2d 69 (2004).

The Court of Appeals held: defendant's conviction for felony-firearm was reversed on the basis that, at the time the search warrant was executed at defendant's residence in Michigan, defendant was in Arizona and, therefore, physically incapable of possessing the firearm during the commission of a felony.

The Michigan Supreme Court held: "It is irrelevant whether defendant possessed a firearm at the time of arrest or at the time of the police raid. All that is required is that defendant possessed a firearm at the time he committed a felony. The prosecution presented sufficient evidence that defendant possessed the firearms at the time he possessed the marijuana with the intent to distribute. Therefore, the convictions for felony-firearms were proper."

*People v McCoy*, unpublished opinion per curiam of the Court of Appeals, issued August 21, 2003 (Docket No. 234042), rev'd in part 469 Mich 984; 672 NW2d 853 (2004).

The Court of Appeals held: defendant's conviction for first-degree murder was reversed and the matter remanded for a new trial on the grounds that the trial court's non-standard jury instruction failed to adequately define and distinguish premeditation and deliberation.

The Supreme Court held: the non-standard jury instruction given to the jury, over defense counsel's objection, did not constitute error requiring reversal: "We are not persuaded that the jury instructions were erroneous and, in any event, any error, on review of all the evidence, was harmless beyond a reasonable doubt."

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*Pervovic v Brown*, unpublished opinion per curiam of the Court of Appeals, issued November 15, 2002 (Docket No. 235699), rev'd 469 Mich 936; 670 NW2d 670 (2003).

The Court of Appeals held: in this automobile negligence case, because there was a genuine issue of material fact whether defendant was negligent, the trial court erred in granting summary disposition in favor of defendant. While plaintiff may have been comparatively negligent, on this record, defendant may also have been negligent, and, therefore, the trial court erred in denying plaintiff his right to a jury trial.

The Michigan Supreme Court held: "We reverse the November 15, 2002 judgment of the Court of Appeals and reinstate the summary disposition entered by the Macomb Circuit Court. Having found that defendant's negligence cannot be determined on the record, the Court of Appeals clearly erred when it reversed the Macomb Circuit Court's decision to grant defendant's motion for summary disposition . . ."

*St Paul Fire & Marine Ins Co and Handicappers Information Counsel/Patient Equipment Locker, Inc v Mich Mutual Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued January 1, 2003 (Docket No. 231269), rev'd 469 Mich 899; 668 NW2d 903 (2003).

The Court of Appeals held: the trial court did not err when it determined that defendant's insurance policy covered a city bus while it was being operated by an employee of Handicappers Information Counsel, who was transporting elderly and handicapped individuals to a festival. "It is well settled that if the allegations of the underlying suit arguably fall within the coverage of the policy, the insurer has a duty to defend its insured." "The record does not contain any evidence to refute St. Paul's assertion that the HIC/PEL employee who caused the accident drove the bus 'in connection with' HIC/PEL's business. Therefore, the trial court did not err when it granted plaintiff's motion for summary disposition."

The Michigan Supreme Court held: "Summary disposition for the plaintiff on the duty to indemnify is not proper where the evidentiary record is not fully developed or where there is a genuine issue of material fact. (citations omitted) In this case, the Gratiot Circuit Court granted to the plaintiff summary disposition on the duty to indemnify based on the allegations of the underlying complaint. On remand, the Court of Appeals should consider whether the Gratiot Circuit Court's decision was based on adequate evidence under MCR 2.116(G)(3)."

*Corporate Flight, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals issued November 22, 2002 (Docket No. 233602), rev'd 469 Mich 852; 666 NW2d 665 (2003).

The Court of Appeals held: petitioner's request for redetermination of the assessment of use tax is rejected on the basis that the Michigan Tax Tribunal's ruling that petitioner did not meet the requirements for holding a plane for resale was supported by competent, material, and substantial evidence.

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The Michigan Supreme Court held: "We reverse the judgment of the Court of Appeals, and remand to the Michigan Tax Tribunal for reconsideration in light of MCL 205.94(1), which exempts from the Use Tax Act property that is 'purchased for resale.' The Michigan Tax Tribunal is directed on remand to determine whether petitioner purchased the property for resale, or whether the use of the property and any other circumstances in the case demonstrate that the property was actually purchased for another purpose."

*Soupal v Shady View, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2003 (Docket No. 231443), rev'd 469 Mich 458; 672 NW2d 171 (2003).

The Court of Appeals held that defendant's dock is not a commercial marina and, therefore, does not violate the township zoning ordinance which prohibits commercial activity within the area of single family residences.

The Supreme Court held: "The association's communal use of the [dock] property violates the zoning ordinance." "Even assuming that the Court of Appeals correctly ruled that defendant's marina is not commercial, the marina nevertheless is a violation of the zoning ordinance because of the prohibition in Article IV, Section 4.1 of the use of land 'for any purpose other than the types and uses permitted in the respective [single family residence] districts.'"

*Cain v Dep't of Corrections*, unpublished order per curiam of the Court of Appeals, entered December 1, 1994 (Docket No. 179432) (text of order quoted at 451 Mich 470, 508-509; rev'd 451 Mich 470; 548 NW2d 210 (1996)).

The Court of Appeals held:

"The record reveals that the trial judge has become personally enmeshed in the prosecution of this claim. At a time when the trial judge considered the Governor of the State of Michigan and defendant Department of Corrections to be a single entity, the judge personally filed a grievance with the Attorney Grievance Commission against the Governor based upon the Governor's criticisms of the trial judge's rulings. Thereafter, the trial judge advised plaintiff's counsel how to most effectively proceed with a motion to hold the Governor in contempt of court.

"Under the circumstances of this case, this Court concludes that the trial judge has abandoned his essential role as a neutral and detached judicial officer.

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"The lower court abused its discretion in denying the motion to disqualify Judge James R. Giddings. The record clearly demonstrates actual bias on the part of the trial judge thereby mandating disqualification. MCR 2.003.

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"Further, the procedural due process guarantees of the Michigan and the United States Constitutions require disqualification under these circumstances. *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975); *Clemens v Bruce*, 122 Mich App 35; 329 NW2d 522 (1982).

The Michigan Supreme Court held: "This Court disagrees with the Court of Appeals decision that the department succeeded in showing that Judge Giddings has demonstrated actual bias or prejudice against it."

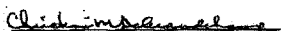
"Furthermore, . . . the fact of the matter is that the Governor of this state is not a party to this action, nor was he ever a party to this action. . . . this Court finds that Judge Giddings was hesitant to include the Governor within the scope of the media contacts order, but did so because the Governor, at that time, was purporting to speak with authority on the subject . . ."

#### AFFIDAVIT

I, Richard Allen Griffin, being duly sworn, hereby state that I have read the foregoing Second Addendum to No. 16(2) Questionnaire for Nominees Before the Committee on the Judiciary - United States Senate, and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

  
Richard Allen Griffin

Subscribed and sworn to before  
me this 10<sup>th</sup> day of June, 2004.

  
Christine M. DeGrandchamp, Notary  
Public, Grand Traverse County, MI  
My commission expires: 6/28/05

CHRISTINE M. DEGRANDCHAMP  
Notary Public, Grand Traverse County, MI  
My Commission Expires Jun. 28, 2005

Chairman HATCH. Judge Covington, I would appreciate it if you would introduce your family, as well.

**STATEMENT OF VIRGINIA MARIA HERNANDEZ COVINGTON,  
NOMINEE TO BE DISTRICT JUDGE FOR THE MIDDLE DIS-  
TRICT OF FLORIDA**

Judge COVINGTON. Thank you very much, Senator. I have my two children with me—my son, Stephen, who is going into his senior year at Jesuit High School in Tampa, Florida, and my daughter, Laura, who is going into her sophomore year at Florida State University. And I have an older son who has just begun law school at Stetson. My husband, Doug, is at home with my mother, who was too ill to travel.

Chairman HATCH. Well, we are grateful to have your kids with you, and wish your mom well. And we are very proud of you.

Judge COVINGTON. Thank you very much. I appreciate that.  
[The biographical information of Judge Covington follows.]

## I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Name: Virginia Maria Hernandez Covington
2. Address: List current place of residence and office address(es).  
  
Residence - Tampa, Florida  
  
Office - Second District Court of Appeal at Stetson University College of Law,  
1700 N. Tampa Street, Suite 300, Tampa, Florida 33602
3. Date and place of birth. July 12, 1955, Tampa, Florida
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).  
  
Douglas Malcolm Bagge  
Assistant General Counsel  
Teco Energy, Inc.  
P.O. Box 111  
Tampa, Florida 33601-0111
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.  
  

Georgetown University Law Center	August 1977-May 1980	J.D.
University of Tampa	June 1976-August 1977	M.B.A
University of Tampa	August 1973-December 1976	B.S., <u>cum laude</u>
Rollins College	June 1973-August 1973	Summer in Spain Program
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

September 2001 - present	Judge Second District Court of Appeal
January 1989 - September 2001	Assistant United States Attorney Chief, Asset Forfeiture Section Criminal Division United States Attorney's Office Middle District of Florida
March 1983 - December 1988	Assistant United States Attorney Civil Division United States Attorney's Office Middle District of Florida
February 1982 - March 1983	Assistant State Attorney Thirteenth Judicial Circuit
August 1980 - December 1981	Trial Attorney Federal Trade Commission
January - August 1979	Law Clerk Tucker, Flyer, Sanger, Reider and Lewis
June - August 1978	Law Clerk Department of Defense The Army Office of the Judge Advocate General
July 1976 - August 1977	Student Assistant University of Tampa
1985-2003	University of Tampa, Board of Counselors, Executive Board
1986-1988	University of Tampa MBA Alumni Club, Board of Directors
1994-2001	Old Dominion S.A. of Panama, Board of Directors (served in official capacity as Assistant United States Attorney after corporate assets were forfeited)
1994-1997	Catholic Charities, Board of Directors

1994-2000	Tampa Hispanic Heritage, Inc., Board of Directors
1995-1997	Hispanic Needs and Services Council, Board of Directors
1997-1998	University of Tampa, Board of Trustees
2002-present	Georgetown University Law Center, National Alumni Board

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

None

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

Tampa's Hispanic Woman of the Year, 2003  
 Outstanding Alumnus Award, University of Tampa MBA program, 2003  
 Alumni Achievement Award, University of Tampa, 2003  
 Hispanic Women Making a Difference Award; honored as one of ten Latin women whose work has enriched Hillsborough County, 2002  
 Recipient of "Lo mejor de lo nuestro" (The best that we have) Award, Club 15, 2002  
 Recognition by Catholic Charities of the Diocese of St. Petersburg for services rendered to the San Jose Mission, 2002  
 Recipient of the Raymond E. Fernandez Award presented by the Hillsborough County Sheriff's Hispanic Advisory Council in recognition of outstanding contributions to the Hispanic community, 1999  
 Special Award from the Hillsborough Association for Women Lawyers in recognition of outstanding service provided from 1986-95  
 University of Tampa, Board of Counselors; Counselor of the Year, 1994-95, 1988-89, and 1987-88  
 Special Recognition from Catholic Charities of the Diocese of St. Petersburg for services rendered as Chairperson of the Diocesan Cuban Immigration Commission, 1994



Work-related honors and awards:

More than 70 written commendations received for work performed as an Assistant United States Attorney, 1983-2001  
 Selected Special Emphasis Program Manager for Hispanic Issues, United States Attorney's Office, 1995-2001  
 Served as Chair of the Attorney Hiring Committee, Middle District of Florida, 1988-90, 1995-2001  
 Special Recognition received from the former Attorney General, Republic of Venezuela; the National Prosecutor, Republic of Chile; the Government of Bolivia; the National Police of Mexico and the Federal Police of Argentina for assistance in trial advocacy, legal management issues, and/or development of forfeiture programs, 1994-2000  
 Equal Employment Opportunity Award, presented by the Tampa Bay Federal EEO Committee, 1999  
 Special Act Award, Department of Justice, 1999  
 Employee Volunteer Service Award, 1995-98  
 Director's Award for Superior Performance in Asset Forfeiture, Executive Office for United States Attorneys, 1996  
 Special Appreciation Award for Outstanding Law Enforcement Contribution to the Department of Justice Asset Forfeiture Program, presented by the Executive Office for Asset Forfeiture, 1993  
 Special Commendation Award for Outstanding Service to the Department of Justice, Executive Office for United States Attorneys, 1990  
 Nominated by the Middle District of Florida for the Younger Federal Lawyers Award, 1990  
 Nominated by the Middle District of Florida for the Presidential Letter of Commendation, 1990  
 Special Achievement Award, Department of Justice, 1989, 1988  
 Awarded an AV rating by Martindale-Hubbell

Academic Honors:

Phi Eta Sigma Freshman Honor Society, University of Tampa  
 Society of Athena Freshman Honor Society, University of Tampa  
 Omicron Delta Epsilon Economics Honor Society, University of Tampa  
 Omicron Delta Kappa Leadership Honor Society, University of Tampa  
 Alpha Chi Honor Society, University of Tampa  
 Recipient of numerous book scholarships from Alpha Chi Omega Sorority  
 Recipient of the Mary Emma Griffin Marshall Scholarship Award for law school studies  
 Awarded Outstanding Member of Alpha Chi Omega Sorority, State of Florida, 1977  
 Elected to numerous student government and leadership positions at the University of Tampa  
 Varsity Letter Winner, University of Tampa Women's Crew, 1976  
 Who's Who in American Universities and Colleges, 1977

Awarded the "Outstanding Female Graduate Award, Class of 1976-77,"  
University of Tampa  
Graduated cum laude with a 3.73 GPA from the University of Tampa  
Graduated with a 3.7 GPA from the M.B.A. program, University of Tampa  
Elected to The Tax Lawyer law review at Georgetown University Law Center;  
Staff Member 1978-79; Editor 1979-80; Case comment, Japan Line Ltd. v. County of Los Angeles, 33 TAX LAW. 497 (1980)

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

American Bar Association  
American Inns of Court, Justice William Glenn Terrell Inn, Barrister, 1988-92  
American Inns of Court, Herbert G. Goldburg Criminal Law Inn, Master. Elected to the Executive Committee-Clerk, 2001; Secretary/Treasurer, 2002; President-elect, 2003; President 2004  
Appellate Court Rules Committee, Florida Bar, 2002-present  
Catholic Lawyers Guild  
Cuban American Bar Association  
Federal Bar Association; Member, National Council, 1995-96  
Florida Association for Women Lawyers  
The Florida Bar  
Hillsborough Association for Women Lawyers; Board Member, 1986, 1989-90, 1993-95; Treasurer, 1987-89  
Hillsborough County Bar Association; Chair, Government Law Section, 1994-96  
Hispanic Bar Association of Central Florida; Keynote Speaker, Installation Dinner, March 2003  
Hispanic National Bar Association; Speaker, Annual Conference, 1997  
Hispanic Professional Women's Association  
Lakeland Bar Association  
National Hispanic Prosecutors Association; President-Region I, 1998-99

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

Alpha Chi Omega Sorority  
Club 15, a social organization whose members perform charitable work primarily in the Hispanic community  
Christ the King Catholic Church  
Georgetown Alumni Club of Tampa Bay, President, 1992-97  
Georgetown University Law Center National Alumni Board  
Georgetown University Alumni Admissions Program

Jesuit High School Foundation/Advancement Council  
University of Tampa, Board of Counselors; Chairman-Elect, 1996-97; Chairman,  
1997-98

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

Supreme Court, State of Florida, 1980  
United States District Court, Middle District of Florida, 1983  
United States Court of Appeals, Eleventh Circuit, 1983

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

While a third year law student at Georgetown University Law Center, I authored a comment on Japan Line, Ltd. v. County of Los Angeles, 33 TAX LAW. 497 (1980).

In 1990, I, along several others, authored a pamphlet concerning the interlocutory sale of property seized for forfeiture. The pamphlet was distributed nationwide to other Assistant United States Attorneys. Copies of the original and revised pamphlets are attached and marked as Exhibit 1.

From 1994 - 96, I served as Chair of the Government Law Section of the Hillsborough County Bar Association. One of my responsibilities was to either write or have one of the members write an article to be published in the organization's magazine. I authored the articles called "Double Jeopardy Litigation and Civil Forfeiture Cases," "We are a Diverse Group," "Double Jeopardy and Civil Forfeitures," and "Farewell." "You are a Government Lawyer" was written by Assistant U.S. Attorney Terry A. Zitek, although his name does not appear as the author. Copies of these articles are attached and marked as Exhibit 2. Several other individuals also wrote articles for publication that appeared in the Government Lawyer Section. I have not included those articles because I neither authored the articles, nor edited them. The individual authors are specifically identified as the authors. I have also included an interview that appeared in the December 2001 edition because it is written in question and answer format. I provided the answers to the questions that were submitted.

Since 1989, I have been asked to lecture both throughout the United States and abroad in the field of asset forfeiture, money laundering, and trial practices. I have given lectures on those or related subjects at the following conferences:

2/13/89	Asset Forfeiture for Supervisors, Department of Justice
3/19/89	Asset Forfeiture for Supervisors, Department of Justice
4/5/89	Asset Forfeiture Attorney Training Conference, Department of Justice
4/16/89	Asset Forfeiture for Supervisors, Department of Justice
4/26/89	Federal Bureau of Investigation Training Seminar
5/18/89	Asset Forfeiture Attorney Conference, Department of Justice
6/22/89	Asset Forfeiture Support Staff Training Conference, Department of Justice
7/26/89	Florida Department of Law Enforcement Conference
8/4/89	Asset Forfeiture Support Staff Training Conference, Department of Justice
9/20/89	Real Property Forfeitures, sponsored by the Orange County Bar Association
9/22/89	Prosecutions/Asset Forfeiture for Local Law Enforcement
9/28/89	Money Laundering Conference, Department of Justice
11/16/89	Organized Crime Drug Enforcement Task Force National Conference
7/25/90	Institutional Fraud Conference, Department of Justice
8/29/90	Asset Forfeiture Attorney Training Conference, Department of Justice
12/5/90	Advanced Asset Forfeiture Attorney Training Conference, Department of Justice
1/10/91	Asset Forfeiture Training Conference, Department of Justice
7/23/91	Organized Crime Drug Enforcement Training Conference
9/18/91	Advanced Asset Forfeiture Conference, Department of Justice
9/24/91	Law Enforcement Coordinating Committee Conference
9/25/91	Law Enforcement Coordinating Committee Conference
9/26/91	Law Enforcement Coordinating Committee Conference
10/10/91	United States and Canada Proceeds of Crime Conference
11/5/91	Trial Advocacy Institute
3/18/92	Civil Financial Institution Reform, Recovery, and Enforcement Act Conference
4/29/92	Secret Service's Training Class
6/24/92	Money Laundering Conference
6/29/92	Hillsborough County Association of Criminal Defense Attorneys
8/25/92	Law Enforcement Coordinating Committee Conference
8/26/92	Law Enforcement Coordinating Committee Conference
8/27/92	Law Enforcement Coordinating Committee Conference
10/6/92	United States/United Kingdom Asset Forfeiture Conference

1/21/93	Organized Crime, Narcotics Trafficking, and Financial Investigations Joint Program
1/25/93	Secret Service Training Conference
2/17/93	Money Laundering Seminar, Department of Justice
3/10/93	Law Enforcement Coordinating Committee Seminar
5/21/93	Federal Practice Seminar
6/4/93	Florida Association of Criminal Defense Lawyers
10/19/93	Money Laundering Seminar, Department of Justice
12/15/93	Federal Bureau of Investigation Money Laundering Conference
2/8/94	Advanced Asset Forfeiture Seminar, Department of Justice
3/94	Technical Assistance/presentations to the Bolivian Government in the fields of asset forfeiture and money laundering
4/26/94	Secret Service Training Conference
7/26/94	Advanced Money Laundering Conference, Department of Justice
10/17/94	Asset Forfeiture Conference, Department of Justice
10/27/94	Complex Prosecutions, Department of Justice
2/14/95	In-house Criminal Training Program, United States Attorney's Office, Tulsa, Oklahoma
2/17/95	Complex Prosecutions, Department of Justice
3/17/95	Pacific Rim Asset Forfeiture Conference
4/4/95	Advanced Money Laundering Seminar, Department of Justice
6/17/95	Criminal Federal Practice Seminar, Department of Justice
12/10/95	Fundamentals of Asset Forfeiture, Department of Justice
2/96	Technical Assistance/presentations to the Bolivian Government in the fields of asset forfeiture and money laundering
4/17/96	Forfeiture Law in Florida, The Florida Bar
4/18/96	Forfeiture Law in Florida, The Florida Bar
5/15/96	Asset Forfeiture for Criminal Prosecutions, Department of Justice
7/12/96	Advanced Asset Forfeiture, Department of Justice
9/10/96	Advanced Dangerous Drugs Law Enforcement School
10/5/96	In-house Criminal Training Program, United States Attorney's Office, Philadelphia, PA
2/5/97	Charging and Trying Criminal Cases, Department of Justice
4/22/97	Prosecuting Non-Drug Cases, Department of Treasury Seminar
4/24/97	Prosecuting Drug Cases, Drug Enforcement Administration Seminar
6/25/97	Advanced Asset Forfeiture Training Seminar, United States Food and Drug Administration, Office of Criminal Investigations
6/27/97	Training Seminar, Treasury Department, Executive Office for Asset Forfeiture
7/15/97	Training Conference, Drug Enforcement Administration
9/22/97	Asset Forfeiture/Money Laundering Seminar, Federal Bureau of Investigation, Colombia
10/16/97	Training Seminar, Treasury Department, Executive Office for Asset Forfeiture

11/5/97	Training Seminar, Treasury Department, Executive Office for Asset Forfeiture
11/13/97	Asset Forfeiture Law and Procedures, The Florida Bar
12/3/97	Training Seminar, Treasury Department, Executive Office for Asset Forfeiture
1/13/98	Training School, Drug Enforcement Administration
1/27/98	Training Seminar, Treasury Department, Executive Office for Asset Forfeiture
2/9/98	Training School, Drug Enforcement Administration
2/98	Asset Forfeiture/Money Laundering Conference, Department of Justice, Latvia
3/98	Trial Advocacy Presentations, Department of Justice, Venezuela
3/3/98	Training Seminar, Treasury Department, Executive Office for Asset Forfeiture
4/4/98	Asset Management Conference, Treasury Department, Executive Office for Asset Forfeiture, United States Marshals Service
4/30/98	Asset Forfeiture/Financial Investigations Seminar, United States Customs Service
6/3/98	Law Enforcement Coordinating Committee Conference
6/17/98	Asset Forfeiture Seminar, United States Attorney's Office, South Dakota
7/98	Trial Advocacy Presentations, Department of Justice, Venezuela
9/4/98	Russian Organized Crime Trainer Exchange Seminar, United States Department of State, Bureau for International Narcotics and Law Enforcement Affairs
9/98	FBI Money Laundering/Asset Forfeiture Seminar in Argentina
11/3/98	Asset Forfeiture Seminar, California District Attorney's Office
12/8/98	Asset Forfeiture Seminar, United States Customs Service
2/99	FBI Major Case Management Conference in Argentina
3/5/99	Inter American Institute for Legal Studies Program on International Drug Traffic and Money Laundering
4/12/99	Dual Level Asset Forfeiture Seminar, Department of Justice
4/99	Trial Advocacy Presentations, Department of Justice, Venezuela
7/15/99	Middle District of Florida Training Conference
7/26/99	Training Seminar, Treasury Department, Executive Office for Asset Forfeiture
8/3/99	Training School, Drug Enforcement Administration
8/5/99	Central America Regional Financial Crimes & Money Laundering Seminar, Federal Bureau of Investigation, Mexico
9/4/99	Training Seminar, Treasury Department, Executive Office for Asset Forfeiture
10/5/99	Administrative Lead Evaluator Training, Department of Justice
1/27/00	Special Agent-in-Charge/Assistant Special Agent-in-Charge, Asset Forfeiture Conference, United States Department of Agriculture
2/24/00	Health Care Fraud Conference, Department of Justice

3/14/00	Training Conference, Drug Enforcement Administration
4/17/00	Training Conference, Drug Enforcement Administration
6/16/00	Asset Forfeiture Trends and Equitable Sharing, Organized Crime Drug Enforcement Task Force
7/00	Trial Advocacy Presentations, Department of Justice, Venezuela
7/17/00	Office of Overseas Prosecutorial Development, Assistance and Training
8/27/00	Civil Asset Forfeiture Reform Act, Department of Justice
10/27/00	Criminal Advocacy Course, Department of Justice/Office of Prosecutorial Development, Assistance and Training
11/00	Trial Advocacy Conference, Chile
11/13/00	Organization of American States, Asset Forfeiture Conference, Colombia
11/28/00	Eleventh Circuit Asset Forfeiture Component Seminar
3/11/01	Drug Enforcement Administration Training Academy
5/7/01	Training Conference, Drug Enforcement Administration
7/9/01	Training Conference, Drug Enforcement Administration
8/01	Trial Advocacy Conference, Department of Justice, Honduras
12/01	FBI Asset Forfeiture/Money Laundering Conference, Costa Rica
2/02	Appellate practice seminar presented to the St. Petersburg Bar Association
4/02	Appellate practice panel presented to the West Pasco Bar Association
6/02	The Academy of Florida Trial Lawyers Women's Caucus, presentation on "How to Succeed in Your Legal Career"
9/02	Appellate Practice Seminar, Hillsborough /County Bar Association
10/02	Conflicts in Representation, Federal Bar Association/ABA Criminal Law Section/ Stetson University College of Law Seminar
7/02	Reflections from the Bench, Department of Treasury
10/02	Trial Advocacy Conference, Department of Justice, Chile
3/03	Appellate issues concerning ineffective assistance of counsel, the Orange/Osceola Public Defender's Office
4/03	Criminal Law Overview, Ecuadorian judges, Federal Judicial Center
4/03	Appellate practice seminar presented to the St. Petersburg Bar Association
6/03	Reversible Error and Appellate Motions Practice, Manatee and Sarasota Florida Association for Women Lawyers
7/03	Trial Advocacy Conference, Department of Justice, Colombia
10/03	Trial Advocacy Conference, Department of Justice, Chile
10/03	Presentation on the History of the Second District Court of Appeal given to the Lakeland Bar Association
10/03	Preservation of Error Seminar, The Florida Bar
2/04	Appellate practice seminar presented to the St. Petersburg Bar Association

5/04 Presentation scheduled to be given on "Melbourne, and other jury issues" for the Florida College of Advanced Judicial Studies

Other presentations:

12/96 Commencement Speaker, University of Tampa's Graduation Ceremony  
 9/00 Hillsborough County Sheriffs Hispanic Advisory Council's Awards Dinner. Presentation covered the role of Hispanics in law enforcement and Hispanics in the community  
 10/01 Orange County Bar Association, Hispanic Heritage Celebration Luncheon Presentation  
 1/02 Speech presented at Investiture Ceremony  
 1/02 Pierce Middle School, Student Appreciation Dinner. Presentation was focused on encouraging students, in this largely Hispanic school, to perform well on their upcoming Florida Comprehensive Assessment Test  
 3/03 Installation Dinner, Hispanic Bar Association of Central Florida, Keynote speaker  
 9/03 Hispanic Man and Woman of the Year Gala, speech given upon being presented with Hispanic Woman of the Year Award

During the past twelve years, I have been asked to speak to various community organizations. In approximately 1997, I spoke to a local Rotary Club on the work of the United States Attorney's Office. In 2002, I spoke to a local Kiwanis Club on the appellate process. From 1995 to 2003, I spoke at schools during Law Week, the Great American Teach-in, or at the special request of teachers. These presentations normally dealt with topics such as becoming a lawyer, going to law school, or the law in general. I have given numerous presentations at Stetson Law School from 1994 to the present. During this time period, I have presented lectures to trial advocacy classes, appellate advocacy classes, and to the Stetson Hispanic Bar Association. Stetson administrators have asked me to appear at conferences, and I have provided advice and guidance to students on subjects such as how to get a job. In the past several years, I have volunteered to judge several moot court presentations at Stetson. Finally, in 1996, during my tenure as President of Tampa Hispanic Heritage, I spoke frequently to community groups, to schools, and on radio and television shows concerning Hispanic Heritage celebrations.

Copies of those speeches that were written out are attached as Exhibit 3. Copies of available outlines distributed to participants at conferences are attached as Exhibit 4.

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



Excellent. March 31, 2004.

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

I was appointed by Governor Jeb Bush to the Second District Court of Appeal and I began my service on September 25, 2001. In 2002, I was retained by the electorate to a six-year term which expires in January 2009.

The Second District Court of Appeal, which covers a 14 county area from Lakeland to Naples, is one of five judicial appellate districts in Florida. Appeals from circuit court decisions in civil and criminal cases and from state administrative decisions are heard by the district courts of appeal. Generally speaking, the courts of appeal review final and certain non-final orders from the circuit courts. In addition, the district courts may issue extraordinary writs such as the writ of mandamus and common law certiorari. In the majority of cases, the district courts of appeal are the courts of final appellate jurisdiction. In a limited number of proceedings, such as judgments imposing the death penalty, appeals are filed directly with the Florida Supreme Court and bypass the courts of appeal.

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

- (1) Tomalo v. Kingsley Displays, Inc., 862 So. 2d 899 (Fla. 2d DCA 2003)

State v. Veilleux, 859 So. 2d 1224 (Fla. 2d DCA 2003)

Checkers Drive-In Restaurants, Inc. v. Tampa Checkmate Food Services, Inc., 858 So. 2d 1080 (Fla. 2d DCA 2003)

Bowen v. State, 28 Fla. L. Weekly D2144 (Fla. 2d DCA Sep. 10, 2003)

Varro v. Federated Mut. Ins. Co., 854 So. 2d 726 (Fla. 2d DCA 2003)

Harper v. Harper, 848 So. 2d 1179 (Fla. 2d DCA 2003)

Daeda v. State, 841 So. 2d 632 (Fla. 2d DCA 2003)

Jost v. Lakeland Regional Medical Ctr., Inc., 844 So. 2d 656 (Fla. 2d DCA 2003)

Mortellite v. American Tower, L.P., 819 So. 2d 928 (Fla. 2d DCA 2002)

Kin Yong Lung Industrial Co., Ltd. v. Temple, 816 So. 2d 663 (Fla. 2d DCA 2002)

- (2) Only one of my cases has been disapproved of by the Florida Supreme Court. In Vanderbilt Inn on the Gulf v. Pfenninger, 27 Fla. L. Weekly D356, 2002 WL 459252 (Fla. 2d DCA Feb. 8, 2002), I authored an opinion reversing the decision of the trial court to grant a new trial. The trial court had granted Pfenninger's motion because one juror failed to disclose his past involvement in litigation. Our reversal was based on the notion that Pfenninger failed to meet the requisite due diligence requirements. Soon after our opinion was issued, the Florida Supreme Court rendered its decision in Roberts v. Tejada, 814 So. 2d 334 (Fla. 2002). In Tejada, the Florida Supreme Court specifically disapproved of our holding in Vanderbilt. Under the new standards set forth in Tejada, we issued a revised opinion affirming the decision of the trial court. Vanderbilt Inn on the Gulf v. Pfenninger, 834 So. 2d 202 (Fla. 2d DCA 2002).

None of my opinions have been reversed or criticized by the Florida Supreme Court. However, review has been granted as to one of my opinions, Jost v. Lakeland Regional Medical Center, Inc., 844 So. 2d 656 (Fla. 2d DCA 2003). To date, an opinion has not been issued by the Florida Supreme Court.

However, I was on the panel in McBride v. State, 816 So. 2d 656 (Fla. 2d DCA 2002). That opinion, authored by another judge, was disapproved of by the Florida Supreme Court in Cardenas v. State, 2004 WL 351171, 29 Fla. L. Weekly S90 (Fla. 2d DCA Feb. 26, 2004).

- (3) State v. Villieux, 859 So. 2d 1224 (Fla. 2d DCA 2003)  
State v. Martinez, 2003 WL 21946474, 28 Fla. L. Weekly (Fla. 2d DCA Aug. 15, 2003)
16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I have only held a judicial office or sought to hold a judicial office.

17. Legal Career:
- a. Describe chronologically your law practice and experience after graduation from law school including:

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

No

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

No

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

September 2001 - present

Judge  
Second District Court of Appeal  
1005 E. Memorial Boulevard  
Lakeland, Florida 33801

From January 2004 - present,  
located at

1700 N. Tampa Street, Suite 300  
Tampa, Florida 33602

January 1989 - September 2001

Assistant United States Attorney  
Chief, Asset Forfeiture Section  
Criminal Division  
United States Attorney's Office  
Middle District of Florida  
400 N. Tampa Street, Suite 3200  
Tampa, Florida 33602

March 1983 - December 1988

Assistant United States Attorney  
Civil Division  
United States Attorney's Office  
Middle District of Florida  
400 N. Tampa Street, Suite 3200  
Tampa, Florida 33602

February 1982 - March 1983

Assistant State Attorney  
Thirteenth Judicial Circuit  
800 E. Kennedy Boulevard  
Tampa, Florida 33602

August 1980 - December 1981

Trial Attorney  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

January 1989 - September 2001

As Chief of the Asset Forfeiture Section for the Middle District of Florida, my practice consisted of supervising attorneys and support staff in a section primarily responsible for forfeiting assets illegally acquired or illegally utilized. I was involved in the development of hundreds of cases in conjunction with representatives of virtually all federal law enforcement agencies. In addition to my forfeiture responsibilities, I carried a caseload of typical criminal matters, including drug, money laundering, and fraud prosecutions. Thus, I had extensive involvement in all aspects of criminal and civil litigation, including preparation of search and seizure warrants, grand jury presentations, trials, indictments, arraignments, plea agreements, sentencing, and motions practice.

Along with my managerial and prosecutorial responsibilities, I lectured extensively, both in the United States and abroad, in the fields of asset forfeiture, money laundering, complex prosecutions, trial advocacy, and management practices. I was one of a few Assistant United States Attorneys nationwide selected to serve as a Team Leader, Evaluation and Review Section, Department of Justice. In this capacity, I was responsible for conducting evaluations of other districts. As the Hiring Coordinator for the District, I was responsible for hiring Assistant United States Attorneys. Finally, I coordinated many special projects for various United States Attorneys and was tasked with assisting other districts that needed particular guidance with serious personnel and management issues.

Clients—Although as a prosecutor I did not have clients per se, the federal law enforcement agencies were considered our clients. In addition, I worked extensively with victims of crimes, particularly those hoping to obtain restitution.

March 1983 - December 1988

As an Assistant United States Attorney assigned to the Civil Division, I represented the United States in numerous types of trials and proceedings. I handled medical malpractice actions, personal injury cases, discrimination lawsuits, and a large variety of other matters. Client agencies, such as the Veterans Administration and the

United States Postal Service, sought my services when a claim could not be settled administratively and a lawsuit had been filed in federal court. In addition, I wrote numerous appellate briefs and orally argued approximately 15 cases before the Eleventh Circuit Court of Appeals.

Clients--While in the Civil Division, my client was always the United States. Typically this meant that an employee or agent of the United States had been accused of a negligent act or that a federal agency had been accused of engaging in a discriminatory practice. I dealt on a regular basis with individuals who considered these charges as personal actions against them, even though the named defendant was the United States.

February 1982 - March 1983

During my tenure as an Assistant State Attorney for Hillsborough County, I prosecuted traffic and misdemeanor cases in Hillsborough County Court.

Clients--Typically I worked with representatives of the Tampa Police Department or the Hillsborough County Sheriff's Office who had referred cases for prosecution. I also had significant interaction with victims and witnesses.

August 1980 - December 1981

While employed by the Federal Trade Commission, my duties included bringing civil actions in federal court against entities who previously had signed compliance agreements with the agency.

Clients--My client was the Federal Trade Commission, which was acting on behalf of consumers in the United States.

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

I appeared in court as an attorney for either the State of Florida or the United States, its agencies or employees, on a regular basis from February 1982 until September 2001. After becoming a supervisory Assistant United States Attorney in January 1989, my actual time in court decreased. As a supervisor, I handled a reduced caseload, but spent the majority of my time assisting other attorneys in the office with their cases. In my last three or four years at the United States Attorney's Office, I was assigned additional administrative responsibilities that caused me to spend less time in the courtroom. However, I remained very involved with all aspects of litigation, not only as to my own cases, but as to cases assigned to other lawyers in the office.

2. What percentage of these appearances was in:

- (a) federal courts;  
90%
- (b) state courts of record;  
10%
- (c) other courts.

## 3. What percentage of your litigation was:

- (a) civil;  
50%
- (b) criminal.  
50%

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

I have tried more than 110 cases in federal and state court. In almost all of those cases, I was the sole or lead counsel. In addition, in a supervisory capacity, I assisted numerous other attorneys with their cases.

## 5. What percentage of these trials was:

- (a) jury;
- (b) non-jury.

About 10 percent of my trials have been jury trials and 90 percent were non-jury.

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

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

(1) Jerry D. Haxton v. Donald T. Regan, et al., Case No. 80-1163-Civ-T-H

The plaintiff, a former group supervisor of the Internal Revenue Service, alleged violations of the Age Discrimination in Employment Act and Title VII when he was demoted from his position. When I joined the United States Attorney's Office I took over

complete responsibility for defense of this action. In preparing for trial, I took dozens of depositions and prepared numerous legal pleadings. Another Assistant United States Attorney sat with me during trial, but I handled every witness and made all arguments to the court.

This case was significant because the plaintiff attempted to have the court certify this matter as a class action lawsuit against the United States. I succeeded in defeating the class action certification. At trial the plaintiff called numerous witnesses in an attempt to show a pattern of discrimination at the Internal Revenue Service. I was able to establish that the plaintiff was removed from his position for cause, not because of any type of discrimination. After trial, the court found in favor of the United States on all charges.

- (a) August 1983
  - (b) United States District Court, Middle District of Florida  
The Honorable William Terrell Hodges
  - (c) Co-counsel, former Assistant United States Attorney Lee William Atkinson  
P.O. Box 5124  
Clearwater, Florida 33758  
(727) 799-2882
- Opposing counsel, Frank E. Hamilton, III, Esquire  
2620 W. Kennedy Blvd.  
Tampa, Florida 33609  
(813) 879-9842

- (2) Earnest H. Waters and Doris G. Waters, his wife v. United States,  
Case No. 82-785-Civ-T-H

This medical malpractice action, seeking significant damages, was brought pursuant to the Federal Tort Claims Act. The plaintiff had undergone an angiogram at the Haley VA Hospital in Tampa. During the procedure, particles were displaced causing the plaintiff to suffer paralysis and other debilitating conditions. Upon joining the office, I took over complete responsibility for defense of the lawsuit. I hired expert witnesses, handled all discovery, and tried the case by myself.

This case was difficult to try because the issues concerning the proximate cause of the plaintiff's injuries were complex. The case became a battle of experts in an effort to establish the proximate cause of the plaintiff's injuries. The case was significant in that damages would have been sizeable if the government had not prevailed. After trial, judgment was entered for the United States.

- (a) August 1984
- (b) United States District Court, Middle District of Florida  
The Honorable Elizabeth A. Kovachevich
- (c) Opposing Counsel, Richard A. Nielsen, Esquire  
now The Honorable Richard A. Nielsen

Judge, Thirteenth Judicial Circuit  
801 E. Twiggs Street, Suite 437  
Tampa, Florida 33602  
(813) 272-5819

Richard J. Salem, Esquire  
101 E. Kennedy Blvd., Suite 3200  
Tampa, Florida 33602  
(813) 224-9000

(3) Alfred T. Bowers v. Veterans Administration, Case No. 81-247-Civ-T-H

The plaintiff alleged that the Veterans Administration engaged in a systematic practice of racial discrimination. He contended that he was a victim of that practice and filed a Title VII lawsuit against the VA. Although another attorney had originally been assigned to the case, I became the sole attorney on the case in March 1983. I handled all discovery and tried the case by myself.

The case was significant because of the nature of the plaintiff's allegations against the VA. At trial I presented evidence to establish that the reason the plaintiff had not been promoted was because of poor work performance, not because of his race. I also presented statistical summaries to establish that the VA did not have a pattern of racial discrimination. After trial the court ruled that the VA had not discriminated against the plaintiff.

- (a) November 1984
- (b) United States District Court, Middle District of Florida  
The Honorable William Terrell Hodges
- (c) Opposing counsel, Morris W. Milton, Esquire  
(Mr. Milton is now deceased.)

(4) Lori Martin v. United States, Case No. 82-1363-Civ-T-H

This was a medical malpractice action brought pursuant to the Federal Tort Claims Act. The plaintiff alleged that physicians at MacDill Air Force Base Hospital failed to diagnose that she was undergoing a torsion of the right ovary. As a result, she lost her right ovary. Her lawsuit sought compensation for damages. In March 1983 I took over sole responsibility for defense of the lawsuit, and I hired expert witnesses, handled all discovery, and tried the case.

I was able to utilize an expert witness who testified that the plaintiff would have lost her right ovary regardless of the actions of her physicians. Originally, the plaintiff had requested hundreds of thousands of dollars in damages. However, the judgment against the United States was in the amount of \$2000, awarded for the pain and suffering the incorrect diagnosis caused the plaintiff. This case was significant because the damages sought were substantial.



- (a) November 1984
- (b) United States District Court, Middle District of Florida  
The Honorable William Terrell Hodges
- (c) Opposing counsel, Steve Didio, Esquire  
4028 Holcombe Bridge Road, Suite 100  
Norcross, Georgia 30092 (This is Mr. Didio's last known address. He is no longer listed as a member of The Florida Bar. He is not listed in Martindale-Hubbell.)

(5) R. James Wallace v. United States, Case No. 84-259-Civ-T-17

In this lawsuit, brought under the Federal Tort Claims Act, the plaintiff alleged that the Equal Employment Opportunity Commission had been negligent in the manner that his case had been handled. As a result, he claimed that he had lost the opportunity to file charges against his employer for discrimination and sued the United States for substantial damages. Although agency lawyers assisted with preparing reports, I was the only lawyer at the United States Attorney's Office assigned to the case. I handled all of the discovery as well as the trial.

Because of the nature of the allegations made against the EEOC, it was important to the agency that this case be won. In defending the lawsuit I focused on whether the negligence was the proximate cause of the plaintiff's damages. I called an expert in discrimination law to testify that despite the plaintiff's charges of discrimination, he would not have been able to prevail in a discrimination action. The court found in favor of the government.

- (a) July 1985
- (b) United States District Court, Middle District of Florida  
The Honorable Elizabeth A. Kovachevich
- (c) Opposing counsel, Charles R. Wilson, Esquire  
now The Honorable Charles R. Wilson  
Judge, Eleventh Circuit Court of Appeals  
United States Courthouse  
801 N. Florida Avenue  
Tampa, Florida 33602  
(813) 301-5650

(6) Emma Simmons, as Personal Representative of the Estate of Carl A. Simmons, deceased, etc. v. United States, Case No. 85-1586-Civ-T-15

The decedent had presented at the VA Hospital complaining of chest pains. Unfortunately, he was not immediately treated and died of a myocardial infarction while seated in the waiting room. His estate filed a lawsuit pursuant to the Federal Tort Claims Act. I was the only lawyer assigned to the defense of the case and handled all aspects of the case including the trial.

This case was significant because of the amount of damages sought, more than five million dollars, and because of the fact that the government had been negligent in its treatment of the plaintiff. At trial, I admitted liability and focused strictly on the damages. Because of the testimony elicited from the government's expert, as well as the cross-examination of the plaintiff's expert, the damages were very close to what the government had offered--\$285,000.

- (a) May 1987
- (b) United States District Court, Middle District of Florida  
The Honorable William J. Castagna
- (c) Opposing counsel, John W. Andrews, Esquire  
3220 Henderson Blvd.  
Tampa, Florida 33609  
(813) 877-1867

(7) Bobbie A. Bautista-Johnson v. United States, Case No. 84-1384-Civ-T-17

The plaintiff developed a severe infection, as well as suffering facial disfigurement, after having had a tooth extracted at a government dental clinic. She filed a negligence action pursuant to the Federal Tort Claims Act seeking several million dollars. As the only lawyer assigned to the case I handled all aspects of the litigation including trial.

The government dentist testified that she had given the patient a prescription for antibiotics, but had neglected to write it down in her chart. However, the plaintiff alleged that no prescription had been given. The plaintiff's expert admitted in cross-examination that if antibiotics had been prescribed, the standard of care would have been met. In contrast, the defense expert testified that the standard of care was met regardless of whether antibiotics were prescribed. The case was significant in light of the amount of damages sought and because effective cross-examinations of both the plaintiff and her expert were essential to the government's case. After trial, judgment was entered in favor of the government.

- (a) June 1987
- (b) United States District Court, Middle District of Florida  
The Honorable Elizabeth A. Kovachevich
- (c) Opposing counsel, Anthony W. Cunningham, Esquire  
601 Bayshore Boulevard, Suite 750  
Tampa, Florida 33606-0333  
(813) 228-0505

(8) United States v. Hercules Washington and Joan Sampson, Case No. 89-316-Cr-T-15C

An undercover operation was commenced in order to develop evidence against the alleged ring leader of a Manatee County cocaine trafficking operation. As a result of the operative, indictments charging narcotics violations were returned against the two defendants. Mr. Washington pleaded guilty and testified against Ms. Sampson in trial. The jury found Ms. Sampson guilty of both counts. The case was significant because this prosecution brought an end to this particular drug ring.

Assistant United States Attorney Roberta Bahnsen was initially assigned to this case. After the matter was indicted, it was transferred to me. I was the sole attorney assigned to the case, although former Assistant United States Attorney Karla R. Spaulding was the second chair at trial.

- (a) March 1990
- (b) United States District Court, Middle District of Florida  
The Honorable William J. Castagna
- (c) Co-counsel, Assistant United States Attorney Karla R. Spaulding  
now The Honorable Karla R. Spaulding  
United States Magistrate Judge  
Middle District of Florida  
80 N. Hughey Avenue, Fifth Floor  
Orlando, Florida 32801  
(407) 835-4320

Opposing Counsel, Michael R.N. McDonnell, Esquire  
1165 8th Street, South  
Naples, Florida 34102  
(239) 434-7711

Frank T. Johnson, Esquire  
2402 E. Martin Luther King, Jr., Blvd.  
Tampa, Florida 33610  
(813) 231-4300 (This is Mr. Johnson's last known address and phone number. He is no longer listed as a member of The Florida Bar. He is not listed in Martindale-Hubbell.)

- (9) United States v. Richard O'Connor and Frank Carmine Gamba, Case No. 90-98-Cr-T-10(B)

In a reverse sting operation, an undercover agent from the Drug Enforcement Administration negotiated the sale of 4400 pounds of marijuana to the defendants. Both defendants were indicted and charged with narcotics violations. Mr. Gamba pleaded "straight up" to the indictment and would not testify against Mr. O'Connor.

Although the facts of the case were simple, Mr. O'Connor argued that he had been entrapped by law enforcement. Thus, various legal issues had to be addressed and argued to the court's satisfaction. In addition, this case was important to law enforcement because these defendants were believed to be an important link in the

drug connection between Tampa and other areas. Although I handled the case from the time of the indictment, Terry A. Zitek, former Chief of the Criminal Division, was my second chair during trial. After trial, Mr. O'Connor was convicted on all charges.

- (a) March 1991
- (b) United States District Court, Middle District of Florida  
The Honorable Howard B. Turrentine, Visiting Judge,  
Southern District of California
- (c) Co-counsel, Terry A. Zitek, Chief, Criminal Division  
United States Attorney's Office  
Middle District of Florida  
400 N. Tampa Street, Suite 3200  
Tampa, Florida 33602  
(813) 274-6336

Opposing Counsel, Richard P. Condon, Esquire  
214 Bullard Parkway  
Temple Terrace, Florida 33617  
(813) 985-3467 (This is Mr. Condon's last known address and phone number. He is no longer listed as a member of The Florida Bar. He is not listed in Martindale-Hubbell.)

Thomas F. Granahan, II, Esquire  
1906 N. Tampa Street  
Tampa, Florida 33602  
(813) 228-1084

Anthony Martinez  
Assistant Federal Public Defender  
Eastern District of Tennessee  
707 Georgia Avenue, Suite 203  
Chattanooga, Tennessee 37402  
(423) 756-4349

- (10) United States v. William Dee Young, Sonny James Mikell, Samuel Lee Langston and Gus Jackson, Case No. 94-133-Cr-T-21(C)

The defendants were believed to be the leaders of the largest crack cocaine ring in Sarasota County. They were indicted for violations of the drug trafficking laws and brought to trial.

The case was complicated by the fact that without having obtained a search warrant, law enforcement officers had entered the apartment where it was believed that cocaine was being "cooked" into crack. The evidence seized at the apartment was essential to the government's case. A motion to suppress the evidence was filed and a hearing held. Based on the arguments made, the court did not suppress the evidence

and the case proceeded to trial. Trial also was difficult because law enforcement officers were not able to identify all of the defendants as being in the apartment when the crack was being cooked. Three of the four defendants were convicted and two defendants were sentenced to life in prison, with no possibility of parole.

There were complicated sentencing issues with respect to Mr. Mikell, primarily related to his criminal history. He was given a life sentence, as requested by the government, but he appealed to the Eleventh Circuit. Although the convictions were affirmed, the sentence as to Mr. Mikell was vacated and the case remanded for resentencing. Subsequently, Mr. Mikell was sentenced again to life imprisonment. The appellate decision is reported as United States v. Mikell, 102 F.3d 470 (11th Cir. 1996).

I was the only lawyer assigned to the case, although Assistant United States Attorney Samuel Armstrong helped with some of the sentencing hearings and issues concerning Mr. Mikell. Former Assistant United States Attorney Edward Page was second chair at trial. Although I handled all aspects of the indictment and the trial, I did not handle the appeal.

- (a) September 1994
- (b) United States District Court, Middle District of Florida  
The Honorable Ralph W. Nimmons, Jr.
- (c) Co-counsel, Assistant United States Attorney, Samuel D. Armstrong  
P.O. Box 3107  
Orlando, Florida 32802  
(407) 648-7500

Edward J. Page, Esquire  
P.O. Box 3239  
Tampa, Florida 33601  
(813) 223-7000

Opposing Counsel, S. Craig Alldredge  
Former Assistant Federal Public Defender  
Public Defender's Office  
14250 49th Street North  
Clearwater, Florida 33762  
(727) 464-6540

Terry C. Christian, Esquire  
620 E. Twiggs Street, Suite 203  
Tampa, Florida 33602  
(813) 228-7743

Matthew P. Farmer, Esquire  
708 E. Jackson Street  
Tampa, Florida 33602  
(813) 228-0095

Douglas M. DeVlaming, Esquire  
 1101 Turner Street  
 Clearwater, Florida 33756  
 (727) 461-0525

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)
- (1) United States v. Certain Funds in Switzerland, United Kingdom, Hong Kong, Isle of Man, Luxembourg, Austria, et al., United States District Court, Middle District of Florida, Consolidated Case No. 92-1282-Civ-J-10.

The most significant legal proceeding that I worked on involved about 25 related civil forfeiture cases filed against the assets of Jose Gonzalo Rodriguez Gacha. Gacha, who had been indicted in the Middle District of Florida and was eventually killed in a gun battle with Colombian authorities, hid more than \$90 million in overseas bank accounts. These moneys represented the proceeds of illegal narcotics transactions. At that time, there was no long-arm statute specifically providing for venue in the United States when the moneys were located outside the United States. (Legislation has since been passed specifically providing for in rem jurisdiction and venue under these circumstances.) Funds were located in Switzerland, the United Kingdom, Austria, Hong Kong, and Luxembourg, as well as other countries.

After personally negotiating with the Swiss government, I was able to secure the return of approximately \$13 million to the United States for a civil forfeiture action. Many challenges were faced as the case was actively litigated, but the United States was successful in obtaining an order of forfeiture against the funds.

Representatives of the other governments were unable to agree to release the money to the United States for a variety of reasons. Hence, the government was required to convince the district court that venue did lie in the Middle District of Florida. We ultimately succeeded in those arguments. Regarding the funds in the United Kingdom, I (together with a lawyer from British Customs) argued to the British court that our judgment should be domesticated in the United Kingdom. In this case of first impression, the court in London allowed the funds to be seized from Gacha's accounts. Eventually, the funds were repatriated to the United States.

We similarly succeeded with the lawsuits filed against the funds in Hong Kong, Luxembourg, and Austria. Gacha's heirs and relatives very aggressively contested all of the actions. All of the cases were decided by the filing of dispositive motions. In March 1995, a settlement was reached with Gacha's heirs in which they agreed not to pursue further appeals. This continues to be considered one of the most significant forfeiture cases ever litigated by the United States.

I worked with two other lawyers on this matter, former Assistant United States Attorney Paul I. Perez (currently the United States Attorney for the Middle District of

Florida) and Assistant United States Attorney Edward B. Gaines. Both of these Assistant United States Attorneys worked under my supervision in these proceedings. I received a Director's Award in 1996 for my work on this case.

- (2) United States v. Tison, 780 F.2d 1969 (11th Cir. 1986).

This case, believed to be the first brought under the Victim Witness Protection Act, 18 U.S.C. § 1514, sought to enjoin the defendants and their counsel from bringing a state civil action for slander. The lawsuit was against a prospective government witness to be utilized in a federal criminal trial. My involvement included writing all of the pleadings, at both the trial and appellate levels, and making many of the arguments. We succeeded in our arguments at both levels. The Eleventh Circuit issued an opinion finding that the threatened lawsuit amounted to harassment, thus warranting the issuance of the injunction.

- (3) United States v. \$15,020,489.20 in U.S. Currency, United States District Court, Middle District of Florida, Case No. 90-44-Civ-T-10(C).

In January 1990, in what was at the time the largest bank forfeiture, the Bank of Credit and Commerce International Overseas Ltd. and the Bank of Credit and Commerce International S.A. agreed to forfeit over \$15 million to the federal government in connection with the banks' guilty pleas on international money laundering charges. I not only prosecuted that civil forfeiture matter but was also responsible for litigating more than 50 related forfeiture cases involving bank accounts and real estate located throughout the country and worth many millions of dollars. None of the cases were tried; nevertheless, they were very actively litigated via the filing of numerous pleadings.

- (4) United States v. Grand Shores West, et al., United States District Court, Middle District of Florida, Case No. 84-100-Civ-T-15(A).

When filed in January 1984 this civil forfeiture action involved one of the single highest valued assets nationwide ever sought for forfeiture. For a number of reasons, this case also proved to be one of the most complicated on record. The in rem defendant was that percentage of partnership interest in the Grand Shores West Limited Partnership, the owner of a time-share condominium project, which was purchased by a St. Petersburg attorney with drug proceeds. The lawyer had attempted to hide the illegal assets by laundering his drug profits through Swiss bank accounts and then transferring the funds to his escrow account for the purchase of the condominium project. After nearly four years of litigation, the court granted the government's motion for partial summary judgment. This enabled the United States to obtain a payment of \$1.75 million in settlement of the lawsuit. Settlement was pursued because it allowed the government to recoup the drug proceeds invested while not penalizing the investments of hundreds of innocent time-share owners. I was assigned to this case

less than one month after the complaint was filed and solely handled it through disposition.

- (5) United States v. Real Property, 1990 WL 305291 (M.D. Fla. Feb. 12, 1990).

This civil forfeiture action marked one of the first times that the then newly-enacted money laundering statute was utilized to seek the forfeiture of real property used to facilitate money laundering activities. When the complaint was filed, there were no other reported cases holding that 18 U.S.C. § 981(a)(1)(A) could be used to forfeit property used to facilitate the laundering process. Consequently, I had to rely on the plain meaning of the language of the statute, as well as the legislative history, to convince the court that Congress intended that the forfeiture of these properties be permitted. The opinion rendered by the court is one of the first decisions ruling that a business used to launder the proceeds of illegal activities was subject to forfeiture. As a result, that opinion was utilized by numerous other prosecutors nationwide. Since that time, many other decisions have been handed down throughout the United States following the rationale expressed by the Middle District of Florida. The United States eventually succeeded in this action and the government realized approximately \$500,000 from the forfeiture.

- (6) Sonia Crum v. Housing Authority, 841 F.2d 376 (11th Cir. 1988).

This lawsuit began as a claim by the plaintiffs against the local housing authority that public housing had been inappropriately denied to them. The federal defendant was joined because it had failed to promulgate regulations as required by statute. After the suit was filed, however, the federal defendant did issue the necessary regulations. I filed a motion for summary judgment arguing that the case was moot. The court granted the motion for summary judgment and found that the claims of all members of the class were moot. The plaintiffs appealed the matter to the Eleventh Circuit. The Eleventh Circuit affirmed the judgment on appeal. I was the lead attorney on the matter working with the assistance of agency counsel.

- (7) Karnack Educational Trust v. Bowen, 821 F.2d 1517 (11th Cir. 1987).

This case is significant because the Eleventh Circuit held that the suspension of Medicare payments during an investigation was constitutionally valid. The matter began when a clinic and its physicians sued the federal defendant because of the government's decision to suspend Medicare reimbursements pending an administrative hearing. Finding that it lacked subject matter jurisdiction, the district court dismissed the matter. Although the Eleventh Circuit upheld the dismissal, it did so on the basis that the plaintiffs' claim failed to state a cause of action. The Eleventh Circuit concluded that because both parties had argued the substantiality as well as the merits of the plaintiffs' claims, it could affirm the decision of the trial court on the merits. I was the lead attorney on this case, having worked with the assistance of attorneys from the Department of Health and Human Services.



(8) Management of Asset Forfeiture Section

In December 1988, I was appointed to head up the newly organized Asset Forfeiture Section for the Middle District of Florida. The late Robert W. Genzman, who had just been appointed United States Attorney, promoted me to this position. At the age of 33, I became the first female attorney supervisor for the Middle District of Florida. It was my challenge to organize a new section and to create a program that would enable the District to utilize the tools that Congress gave the Department of Justice in its prosecution efforts.

Ultimately, I developed a model program based on the concept that asset forfeiture should go hand in hand with criminal prosecutions. Until that time, almost all forfeitures nationwide were handled as civil forfeitures, apart from the criminal actions. When I became Chief of the Section, I changed that policy. I required communication between those lawyers prosecuting the criminal cases and those prosecuting the forfeiture cases. I instituted a method of forfeiting assets in the District via the criminal forfeiture laws, with civil forfeiture to be used only as a last resort. This was a novel concept, and one that was not accepted overnight. The Middle District of Florida soon became one of the top districts in the country with respect to the number and value of assets forfeited. The model plan that I developed was adopted by the Department of Justice and recommended to other districts. I served as a consultant to other districts and advised them as to how they should reorganize their forfeiture programs.

In the mid to late 1990s, court decisions brought asset forfeiture to a standstill in many United States Attorney's Offices. Because of the way that the forfeiture program had been managed, those court decisions and subsequent legislative reforms had virtually no impact on forfeitures in the Middle District of Florida. Almost without exception, the forfeiture cases brought under my supervision were successful and passed every level of scrutiny.

(9) Instructions on American Legal System

From January 1989 until September 2001, I lectured to prosecutors, the law enforcement community and, on occasion, the criminal defense bar, on asset forfeiture, money laundering, complex prosecutions, trial advocacy, and management practices. I was asked on numerous occasions to travel to Latin America to assist our Latin American colleagues with trial advocacy and other specialized subjects. I spent a significant amount of time working with the Bolivian Government and helped to establish their asset forfeiture program. The bulk of my time in Latin America, though, was spent in assisting prosecutors and law enforcement personnel adjust to changes in their respective Codes of Justice. Until fairly recently, most Latin American countries utilized the inquisitorial system of justice. In the past few years, most have changed to the adversarial system. Because Latin American lawyers were unfamiliar with concepts such as examination of witnesses or introduction of evidence, I worked with them and taught them how these types of matters should be handled.

As a judge I have continued working on Latin American projects, although to a lesser extent. Now my focus has been directed towards assisting judges. I have

worked with Colombian judges, both in Bogota and Cartagena, on the concept of how to preside over trials. Because of my language skills, I have been asked to participate in programs sponsored by the Federal Judicial Center's Office of Interjudicial Affairs. Specifically, I have lectured to Ecuadorian judges on criminal law and detailed the role of the participants in oral trials. I am continuing my work on international programs with Stetson University College of Law and the Federal Judicial Center to the extent that my other responsibilities permit.

## II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

United States Government Thrift Savings Plan—My thrift savings plan is worth approximately \$80,000. Deposits to the funds were withdrawn from my salary on a regular basis and invested in stocks, bonds, and government securities. I will be able to draw from the fund at my retirement.

United States Government Retirement Plan—Undetermined present value. Due to my 20-year employment with the federal government, I am entitled to receive a deferred annuity at age 62. The annuity will be approximately 36% of the average of my "high three years" salary with the federal government. That figure would be approximately \$40,000 per annum, adjusted for inflation.

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

The Code of Judicial Conduct governs the actions of judges under these circumstances. In particular, Canon 3(E)(1) provides that a judge should disqualify himself or herself if the judge or the judge's family has an economic interest in the subject matter or a party in the proceeding. Economic interest is defined by the Code of Judicial Conduct as ownership of more than a *de minimis* legal or equitable interest. In addition, I have recused myself from cases involving Florida Power Corporation, where my husband was previously employed, and cases involving TECO Energy, Inc., where my husband is currently employed. Because I spent over 18 years employed as an Assistant U.S. Attorney, there may be some cases in which I would need to recuse myself. For instance, I would recuse myself from any case that I had any involvement with as well as those cases in which someone that I supervised may have worked on.

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

No

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

See attached Financial Disclosure Report.

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

See attached Net Worth Statement.

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

No

## FINANCIAL STATEMENT

## NET WORTH

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

ASSETS		LIABILITIES	
Cash on hand and in banks	35,000	Notes payable to banks-secured	41,000
U.S. Government securities-add schedule		Notes payable to banks-unsecured	
Listed securities-add schedule	5,000	Notes payable to relatives	
Unlisted securities--add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid income and interest	
Doubtful		Real estate mortgages payable-add schedule	80,000
Real estate owned-add schedule	550,000	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts-itemize:	
Autos and other personal property	160,000		
Cash value-life insurance	1,000		
Other assets itemize:			
Thrift/Savings Plan	85,000		
Retirement Plans	undetermined		
401K	160,000	Total liabilities	121,000
		Net Worth	875,000
Total Assets	996,000	Total liabilities and net worth	996,000
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	None	Are any assets pledged? (Add schedule)	No
On leases or contracts	None	Are you defendant in any suits or legal actions?	No
Legal Claims	None	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	withheld from pay		
Other special debt	None		

**Schedule**

**Securities**--My husband has a 401K plan at TECO Energy, his employer. The value is approximately \$160,000. In addition, he has a number of stock options for TECO stock. The options have an undetermined value.

**Securities**--My children own stock in Walt Disney, Intel Corporation, Microsoft, AT&T as well as an account with Putnam Mutual Funds. The total value of these assets is about \$5000.

**Real Estate**--My husband and I own our residence which is worth approximately \$550,000. There is a mortgage with a balance of about \$80,000, held by Wells Fargo.

<b>AO-10</b> Rev. 1/2002		<b>FINANCIAL DISCLOSURE REPORT</b> Calendar Year 2003		Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)
1. Person Reporting (Last name, First name, Middle initial) Covington, Virginia M		2. Court or Organization District Court-Middle Florida		3. Date of Report 4/22/2004
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge Nominee		5. Report Type (check appropriate type) <input checked="" type="radio"/> Nomination, Date 4/20/2004 <input type="radio"/> Initial <input type="radio"/> Annual <input type="radio"/> Final		6. Reporting Period 1/1/2003 to 3/31/2004
7. Chambers or Office Address 1700 North Tampa Street Suite 300 Tampa, Florida 33602		8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer _____ Date _____		
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.				

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

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

POSITION	NAME OF ORGANIZATION/ENTITY
1. Board Member.	Georgetown University Law Center National Alumni Board
2.	

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

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

DATE	PARTIES AND TERMS
1.	

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

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

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1. 2004	Teco Energy, Inc.	
2. 2003	Teco Energy, Inc.	
3. 2002	Teco Energy, Inc.	

## FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Covington, Virginia M	4/22/2004

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

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

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
4.	2004	State of Florida	\$35,947.32
5.	2003	State of Florida	\$140,665.26
6.	2002	State of Florida	\$139,365.69



**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting Covington, Virginia M	Date of Report 4/22/2004
---	-----------------------------

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

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

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

	<u>SOURCE</u>	<u>DESCRIPTION</u>
I. Exempt		

**V. GIFTS.** (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)☐ **NONE** - (No such reportable gifts.)

	<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
I. Exempt			

**VI. LIABILITIES.** (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)☒ **NONE** - (No reportable liabilities.)

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE</u>
I.			

## FINANCIAL DISCLOSURE REPORT

Page 1 of 1

Name of Person Reporting  
Covington, Virginia MDate of Report  
4/22/2004

## II. INVESTMENTS and TRUSTS — income, value, transactions (includes those of the spouse and dependent children. See pp. 34-37 of filing instructions.)

A. Description of Assets (including trust assets)  Place "X" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period:				
	(1)	(2)	(1)	(2)	(1)	If not exempt from disclosure			
	Amount Code 1 (A-H)	Type (e.g., div., rent, or int.)	Value Code 2 (J-P)	Value Method Code 3 (Q-W)	Type (e.g., buy, sell, transfer, redemption)	(2) Date: Month Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
<input checked="" type="checkbox"/> NONE (No reportable income, assets, or transactions)									
1. Merrill Lynch Investment Account	A	Interest				Exem	Ex	Ex	
2. Solomon Smith Barney IRA	A	Interest				Exem	Ex	Ex	
3. Bank of America Accounts	A	Interest	K	T		Exem	Ex	Ex	
4. Prudential Whole Life	No		J	T		Exem	Ex	Ex	
5. Walt Disney Common Stock	A	Dividend	J	T		Exem	Ex	Ex	
6. Intel Corporation Common Stock	A	Dividend	J	T		Exem	Ex	Ex	
7. Microsoft Common Stock	A	Dividend	J	T		Exem	Ex	Ex	
8. AT&T Common Stock	A	Dividend	J	T		Exem	Ex	Ex	
9. Putnam Mutual Funds	A	Capital Gain	J	T		Exem	Ex	Ex	
10. Florida Progress Savings Plan	A	Interest	J	T		Exem	Ex	Ex	
11. Robert Baird Money Market Fund	A	Interest	K	T		Exem	Ex	Ex	
12. TECO Savings Plan	B	Interest	K	T		Exem	Ex	Ex	
13. TECO Pension Plan		None				Exem	Ex	Ex	

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Covington, Virginia M	4/22/2004

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Covington, Virginia M	4/22/2004

IX. CERTIFICATION.

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

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

Signature *Virginia M. Henry Craig* Date *April 22, 2004*

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

## III. GENERAL (PUBLIC)

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

As a past member of the Hispanic Needs and Services Council (El Consejo de Necesidades y Servicios para Hispanos), I was called upon on numerous occasions to provide pro bono legal services to Hispanics. Because Spanish was the primary language spoken in my home as I was growing up, the Hispanic Needs and Services Council turned to me for help on many occasions. Some of the specific cases I worked on include the potential filing of a lawsuit against a particular organization for alleged disparate treatment of a non-English-speaking Hispanic and assisting a non-English-speaking Hispanic with attempting to obtain the return of funds her employer inappropriately retained. I devoted in excess of fifty hours to these projects.

I served as Chairperson of the Diocesan Cuban Immigration Commission. The primary function of this organization was to draft a plan of action for the Catholic Diocese of St. Petersburg outlining its role in the resettlement of Cuban refugees in the Tampa Bay area. I was asked to be Chairperson of this Commission because the Diocese wanted someone at the helm who was both bilingual and bicultural, that is, someone who could understand the needs of Cuban refugees, yet be cognizant of the issues they might face in adjusting to life in the United States. In this role, one of the many items I was responsible for included addressing the legal needs of these new immigrants. I was able to obtain a commitment for pro bono legal services for many Cuban refugees upon their arrival in the Tampa Bay area. In total, I spent about twenty hours working on this assignment.

While at Georgetown University Law Center, I served as treasurer and founding member of La Alianza de Derecho, an organization for Hispanic students. Although our club was primarily social, we were involved in providing assistance to indigent Hispanics who had legal problems. For me this involved translating documents and providing advice concerning simple legal problems, such as debtors' rights. As an Assistant State Attorney, I was called upon many times to translate for Hispanic victims/witnesses who could not speak English. Likewise, I provided such services, although to a lesser degree, at the United States Attorney's Office. I estimate that I spent about ten hours on these projects.

From 1994 through January 2000 I served on the Board of Directors of Tampa Hispanic Heritage, Inc. The organization, which is non-profit and totally composed of volunteers, was established in order to promote awareness of Tampa's rich Hispanic Heritage. During the year that I was president, I spoke on Spanish radio stations and

appeared on Spanish-language TV shows promoting Hispanic Heritage. I also spoke to school groups and community groups—very often in Spanish—concerning Hispanic Heritage. I volunteered well in excess of 300 hours to this organization.

As a member of Catholic Charities, I had the opportunity to participate in many philanthropic activities. The one cause that meant the most to me was the development of the San Jose Mission in Dover, Florida. The Mission was designed to provide job and language skills to primarily female migrant workers from Mexico as well as day care for their children. As a member of the Board of Directors of Catholic Charities, I worked closely on the development of this very worthwhile project. In total, I spent approximately forty hours on these assignments.

In addition to the activities detailed above, I have delivered presentations to schools, community groups, and other organizations. Some of the presentations include:

Keynote Speaker, Pierce Middle School, Student Appreciation Dinner, 2002  
 Keynote Speaker, Orange County Bar Association, Hispanic Heritage Celebration Luncheon, October 2001  
 Keynote speaker, Hillsborough County Sheriff's Hispanic Advisory Council's Awards, 2000  
 Commencement speaker, University of Tampa's Graduation Ceremony, December 1996  
 Stetson Law School-Speaker at various Hispanic Bar Association activities and distinguished guest lecturer for numerous classes  
 Participant, Great American Teach-In, multiple years

In total, I spent about twenty-five hours on these various projects.

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

No

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

Yes, the Middle District of Florida has a Judicial Nominating Commission. I was interviewed and recommended by the Judicial Nomination Commission. I began the process of being considered for the position by submitting a detailed application. The Committee reviewed my application, as well as the applications of the other candidates, and selected ten individuals to be interviewed. Out of those ten, six were selected to be interviewed by White House personnel. In addition, we were asked to meet with Senator Bill Nelson and a representative from Senator Bob Graham's office. Both before and after those interviews were conducted, contacts were made with numerous individuals who know me in the community. Based on the information obtained from those contacts, the interviews, and the application package, I was selected to be considered for the nomination.

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

No, not directly. However, a member of the Judicial Nominating Commission asked me if being Catholic influenced my views on the death penalty. I answered that my role as a judge was to follow the law regardless of whatever personal views I might have.

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

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

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

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

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

My view is that the role of the judge is to follow the law. A judge should not usurp the functions of the legislature, nor the executive branch. Rather, the role of the judiciary is to interpret and follow the law, not to create it.

Chairman HATCH. Now, let me just say this. I don't know of anybody who has any objections to any of the three of you on this Committee. I don't know anybody who has a substantive objection. All three of you are rated Well Qualified by the American Bar Association, the highest rating that the Bar Association gives. All three of you are people of immense experience.

Judge Covington we have covered. The two of you are both judges who are highly respected in the State of Michigan. It is almost a crime that this has been held up this long. Again, I will mention that the reason that the two Democrat judges were held up was clearly a matter of failure to consult with the existing Senator, and he felt, and I felt, they breached an agreement—that is, the then-White House breached an agreement with Senator Abraham that should not have been breached. And they certainly should have consulted.

Now, there has been plenty of consultation with both Michigan Senators, and so that is not an issue here. As you will notice, they did not raise that as an issue. I have not heard one ounce of comment from either Michigan Senator against either of you. And, frankly, I think it is pathetic that we are at this position where we are having such a difficult time getting both of you and Judge Saad confirmed.

We are going to proceed with Judge Saad's nomination this week in Judiciary, and hopefully we will pass him out of Judiciary on Thursday, tomorrow. I will move as rapidly ahead as I can with your two nominations. In fact, I expect all three of you to be on the Judiciary Committee docket next Thursday, not tomorrow, but next Thursday. It is too early to do it for tomorrow. Hopefully, we will have votes out of the Committee at that particular time.

You will probably be put over for a week, which is standard practice—it is not standard practice, but it has become common practice since this administration has taken over and it was used by Republicans at times in the past. So you will be put on next week's agenda, and undoubtedly you will be put over another week after that. But then we should vote on you.

Now, that gives me a couple of weeks to see what I can do to resolve this impasse, and hopefully I can do that. If not, we intend to report you from Committee and bring you up on the floor. I don't see how anybody really can vote against either of you. But without resolving the impasse, I think we would find probably further filibusters.

Now, that is one thing that hasn't been mentioned. I listened carefully to Senator Leahy's comments, but never in the history of the Judiciary Committee, in the history of this country or in the history of the Senate have we had substantive filibusters on the floor against Federal judges—never, not once.

We have had people who wanted to do that in the Clinton administration and in prior administrations, but I personally stopped that with the few who did. And to their credit, my colleagues on the Republican side said we are not going to filibuster anybody, certainly not Federal judges, because Article II, Section 2, of the Constitution basically calls for a vote up and down under the Advise and Consent Clause.



The Founding Fathers knew what a super-majority vote was because just a line or two above the Advise and Consent Clause was the requisite two-thirds vote for the ratification of treaties. So it was quite apparent that advise and consent means a vote up and down.

Now, I know both of you well. I know both of your reputations. I have studied and read a lot about you. I don't see any reason to even ask you any questions today, and I don't think anybody on the other side has wanted to either. I don't think anybody doubts your qualifications, and it would be an absolute crime if you are not confirmed. But I will do my very best to get you confirmed and I will do my very best to work with the two Michigan Senators and hopefully break through this impasse that has occurred.

I know it is a long way here and that you would probably love to answer a lot of questions, but what I am going to do is hold the record open for one week so anybody can send you written questions who might have any questions of you both. And I would suggest to you that you get those answers in as quickly as possible, if you do get written questions. It is very important that you get those answers back immediately because I don't want anything to stand in the way of our best attempts to get you both confirmed.

I know that both of you would serve beautifully and well on the Sixth Circuit Court of Appeals, which is in dire need of judges. It is 25-percent lacking in judges right now, so it is critical that you get you through and I am going to do the best I can to do that.

So I will keep the record open for one week, until 5:00 p.m. on June 23, for additional statements or questions by members of the Committee. I may have some written questions myself, but I doubt it because I am very personally aware of both of you.

Judge Covington, we are proud of you, as well.

With that, we are going to recess until further notice.

[Whereupon, at 11:08 a.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

1700 N. Tampa Street  
Suite 300  
Tampa, Florida 33602  
June 22, 2004

The Honorable Orrin G. Hatch  
Chairman  
Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

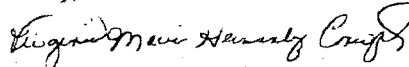
Re: Virginia Maria Hernandez Covington - Written Questions

Dear Senator Hatch:

Per your request, enclosed please find responses to your written questions. Please let me know if you have any further questions in this regard.

Thank you for your consideration in this matter.

Sincerely,



Virginia Maria Hernandez Covington

cc: The Honorable Patrick J. Leahy  
Ranking Member

Questions for Judge Virginia Maria Hernandez Covington from Senator Orrin Hatch

1. **Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?**

Courts should begin with the premise that a statute is constitutional and give deference to Congressional findings. It is only when a statute clearly violates the Constitution under the tests set forth in Supreme Court precedent that a court should declare that statute to be unconstitutional.

2. **In general, 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?**

Yes, I am fully committed to following the precedents of higher courts faithfully and giving them full force and effect, even if I personally disagree with such precedents.

3. **What would you do 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 rely on your own best judgment of the merits?**

If I believed that the Supreme Court or the Court of Appeals had seriously erred in rendering a decision, I would nevertheless apply that decision. I would cite to that decision as precedent and follow it.

4. **There may be times when you will be faced with cases of first impression. If there were no controlling precedent dispositively concluding an issue with which you were presented in your circuit, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

If faced with an issue where there was no controlling precedent, I would turn to decisions of courts of other jurisdictions to see how they had handled the same issue. I would also look at how the courts in my own jurisdiction had handled similar types of issues. In deciding a case of first impression, I would apply a practical and reasoned approach. If I were trying to determine what the words in a statute meant, I would look at the plain meaning of the words as utilized. Some of the tools that I might use include treatises, dictionaries, and legislative history. I would attempt in good faith to discern the meaning of the law.

5. **As you know, the federal courts are facing increasing caseloads. If**

**confirmed, how do you intend to manage your caseload, including regulating the pace and conduct of litigation?**

If I am fortunate enough to be confirmed, I would manage my caseload in much the same way as I currently do—by being committed to a strong work ethic. I would rule on dispositive motions as expeditiously as possible. Where appropriate, I would encourage the use of magistrate judges and alternative dispute resolution techniques, such as arbitration and mediation, to determine which cases are appropriate for settlement. In addition, I would schedule status conferences and hearings as necessary to ensure that cases and issues are efficiently addressed. As a judge, I recognize that it is important not only that justice be served, but also that it be served in a timely fashion.

6. **Given your background and prior experience, please comment on the role and significance of judicial temperament, and indicate what elements of judicial temperament you consider to be the most important?**

The judge sets the tone of the courtroom; thus it is of utmost importance that a judge have the appropriate judicial demeanor. Integrity as well as humility and honor are such traits. A judge must be professional, respectful, and courteous. Both lawyers and litigants come to the courtroom with a certain amount of anxiety and uncertainty. By being polite, punctual, and decisive a judge can put others in the courtroom at ease. Finally, a judge should never forget that he or she is a public servant and that judicial power is to be exercised with the dignity that the office demands.

06/22/04 TUE 16:25 FAX

002



STATE OF MICHIGAN  
COURT OF APPEALS

RICHARD ALLEN GRIFFIN  
Justice

June 22, 2004

GRANDVIEW PLAZA  
SUITE 2310  
TRAVERSE CITY, MI 49664  
TELEPHONE (231) 929-3100  
FAX (231) 929-9103

VIA FACSIMILE AND  
OVERNIGHT EXPRESS

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Senator Hatch:

Attached are my answers to the written questions submitted by the Chairman in connection with my pending judicial nomination to the U.S. Court of Appeals for the Sixth Circuit.

Thank you for the opportunity to respond to your questions.

Sincerely,

Richard Allen Griffin

RAG/cmd  
Attachment

cc: The Honorable Patrick J. Leahy  
Ranking Member (w/attachment)

06/22/04 TUE 16:25 FAX

003

June 22, 2004

**RESPONSES OF JUDGE RICHARD ALLEN GRIFFIN  
TO WRITTEN QUESTIONS FROM SENATOR HATCH**

1. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

All statutes enacted by Congress are presumed to be constitutional and the burden is on the party challenging the constitutionality of the statute. In view of the constitutionally mandated separation of powers, the judicial branch of government should not impose its policy or philosophical decisions on another branch of government. Rather, the policy, philosophical decisions, and fact finding of Congress must be respected and implemented, unless clearly unconstitutional.

2. In general, 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?

Yes. Supreme Court precedents are binding on all lower federal courts. As a lower court appellate judge, I am duty bound to faithfully follow and give full force and effect to all Supreme Court precedents whether I agree or disagree with the decision. I would continue to apply such precedent if confirmed to the Sixth Circuit.

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

In the event I seriously disagreed with a Supreme Court decision, I would nevertheless faithfully follow its precedent. The case would be decided based on precedent, not my personal opinion.

4. Under what circumstances, if any, do you believe an appellate court judge should overturn precedent within his or her own circuit?

**An appellate judge should vote to convene an en banc panel and overturn precedent within his circuit only when the prior precedent is fundamentally flawed and involves an issue of exceptional public importance.**

5. Given your background and prior experience, please comment on the role and significance of judicial temperament, and indicate what elements of judicial temperament you consider to be the most important?

**A proper judicial temperament is very important because the judge sets the standard for civility in his courtroom. A judge should treat all litigants, lawyers, witnesses, and jurors with respect and courtesy. A judge must be patient in listening and carefully considering all matters.**

6. Your ability to constructively interact with your fellow judges on the Sixth Circuit will be an important element of your work. Could you comment about the role and significance of collegiality, and please indicate how you plan to contribute to it once you join the federal bench?

**Improving the collegial atmosphere on any court is important. Treating all colleagues with courtesy in opinions, with respectful dissents, and without personal attacks, helps foster collegiality. It contributes directly to efficiency in docket management by allowing cases to move more smoothly and expeditiously.**

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
318 W. ALLEGAN  
LANSING, MICHIGAN 48203

DAVID W. McKEAGUE  
DISTRICT JUDGE

1-517-377-1563  
FAX: 377-1700

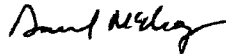
July 1, 2004

The Honorable Orrin G. Hatch  
Chairman, Senate Judiciary Committee  
104 Hart Office Bldg.  
Washington, D.C. 20510

Dear Mr Chairman:

Attached are my responses to written follow-up questions from Senators Leahy, Kennedy,  
and Durbin.

Sincerely,



David W. McKeague

pjr/  
Enclosure

cc: The Honorable Patrick Leahy,  
Ranking Member



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003

**RESPONSES FROM DAVID W. McKEAGUE TO WRITTEN QUESTIONS FROM  
SENATOR PATRICK LEAHY**

1. In 1995, you issued a temporary restraining order, preventing the broadcast of radio advertisements connected to a labor dispute in New York that were scheduled to run on Michigan radio stations. This would seem like a serious First Amendment issue, presenting the problem of prior restraint of the union defendant's rights to free speech.

- a) Can you understand why that ruling would give defenders of the First Amendment pause?
- b) Could you explain your rationale in granting the TRO?

I was assigned a motion for a temporary restraining order due to the absence of the assigned judge in a defamation case brought by Mercy Health Services ("Mercy") against 1199 Health and Human Services Employees Union ("the Union"). I conducted a 2 hour 35 minute hearing. I was requested to enjoin radio advertisements that were running on radio stations in three areas where Mercy operated hospitals. The advertisements concerned a labor dispute in Port Jervis, New York. The radio advertisements falsely implied that Mercy had caused employees to walk out of Michigan hospitals in large numbers and replaced them with inexperienced workers, to the detriment of the quality of health care provided. The record showed that Mercy had no role in the Port Jervis dispute, that the Union did not represent employees at any hospital owned or operated by Mercy in Michigan or elsewhere, and that the Mercy hospitals in Michigan had no history of or pending labor disputes. The record also showed that the misleading statements in the ads were made by the Union with actual malice. I carefully considered the right of the Union under the First Amendment to engage in commercial speech:

The Court is not oblivious to the fact that the restraining order impinges upon defendant's First Amendment right to engage in commercial speech. The First Amendment, however, does not protect false and defamatory speech uttered with "actual malice" and the Court's order is carefully tailored to restrict no more. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

I then enjoined the radio ads (and subsequently enjoined very similar TV ads) but denied the broader relief requested. A motion for a stay pending appeal was denied by the Sixth Circuit. The assigned judge subsequently granted a preliminary injunction, consistent with the TRO, further enjoining the ads.

2. I know you have been in the District Court bench for quite a while, but when I look at your record I see a number of cases on questions of environmental law where you have ruled for the polluter or the big business interests seeking to exploit the environment.

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In *Northwoods Wilderness Recovery v. United States Forest Serv.*, 323 F.3d 405 (6th Cir. 2003) your decision to allow a Forest Service logging and clear-cutting project was reversed by the 6<sup>th</sup> Circuit because they had not adhered to the strict environmental analysis required. In *Help Alert Western Ky. Inc. v. Tenn. Valley Authority*, 1999 U.S. App. LEXIS 23759 (6th Cir. 1999) you joined an opinion that permitted the Tennessee Valley Authority (TVA) to broadly interpret a clause of the National Environmental Policy Act in a way that would allow the TVA to conduct large-scale timber harvesting operations without performing site-specific environmental assessments. In *Kelley ex rel. Mich. Natural Resources Comm'n v. Tiscornia*, 810 F. Supp. 901 (W.D. Mich. 1993), you dismissed a suit brought by the Michigan Natural Resources Commission against the Manufacturer's National Bank of Detroit, finding that the bank was not liable for the costs of environmental cleanup at sites owned by a "troubled borrower." In *Miron v. Menominee County*, 795 F. Supp. 840 (W.D. Mich. 1992), you rejected the efforts of a citizen who lived close to a landfill to require the Federal Aviation Administration to enjoin landfill cleanup efforts until an environmental impact statement regarding the efforts could be prepared. The citizen contended that if the statement were prepared, the inadequacies of a state-sponsored cleanup would be revealed and appropriate corrective measures would be undertaken to minimize further environmental contamination and wetlands destruction. And finally, in *Pape v. U.S. Army Corps of Engineers*, 1998 U.S. Dist. LEXIS 9253 (W.D. Mich.), you ignored relevant facts in order to prevent citizen enforcement of environmental protections.

- a) What can you say to plaintiffs in environmental cases who might come before you about your ability to rule fairly in these kinds of cases?
- b) Can you explain why this sort of pattern of ruling against environmental interests should not trouble such litigants?

I do not have preconceived notions as to how any case should be resolved. Plaintiffs in environmental cases, like all parties, receive reasoned and impartial rulings based on the merits of their claims, as the governing law is applied to the particular facts. I have consistently sought to uphold the law without regard to the identity of the plaintiff or defendant.

*Northwoods Wilderness Recovery v. United States Forest Service*, 323 F.3d 405 (6th Cir. 2003), involved a provision in a forest management plan that exempted sugar maples from allowable sale limitations. I had ruled that the Forest Service, in resolving an ambiguity in the forest management plan and approving proposed logging in a 1,000-acre area, had not acted arbitrarily and capriciously. The Sixth Circuit held that the Forest Service had acted arbitrarily and capriciously in permitting additional logging which would exceed the allowable sale limitation, notwithstanding the sugar maple exemption, because the Forest Service's construction *could* lead to unlimited harvesting of sugar maples, an eventuality that would require an environmental impact statement prior to approval. In *Help Alert Western Kentucky Inc. v. Tennessee Valley*

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*Authority*, 1999 U.S. App. LEXIS 23759 (6th Cir. 1999), I was a member of a Sixth Circuit panel that held the district court had not abused its discretion in denying a preliminary injunction of proposed logging. The district court had found that the TVA was not arbitrary and capricious in its interpretation of a forest management plan. Both of these cases called into question the amount of deference due an administrative agency in applying its expertise to interpretation of a forest management plan. *Kelly ex rel. Michigan National Resources Comm'n v. Tiscornia*, 810 F.Supp. 901 (W.D. Mich. 1993), involved the question whether a bank was an "operator" of a facility at which hazardous substances had been discharged, based on the terms of a loan agreement. My analysis, holding that the bank was not liable as an operator, was subsequently upheld by the Sixth Circuit at 1996 U.S. App. LEXIS 33616. *Miron v. Menominee County*, 795 F.Supp. 840 (W.D. Mich. 1992), involved a decision to use a sand cap rather than a clay cap to seal a landfill. I held the agency was not arbitrary and capricious in its determination that a "major action," which would have triggered an environmental impact statute, was not involved. *Pape v. U.S. Army Corps of Engineers*, 1998 U.S. Dist. LEXIS 9253 (W.D. Mich.), required me to determine whether the plaintiff met the standing requirements established in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). I considered all of the facts in the complaint as well as an affidavit setting forth additional facts said to provide the basis for a proposed amended complaint. The decision dismissing the complaint for lack of standing was affirmed by the Sixth Circuit. In all of these cases, I gave careful attention to the facts and the law, as I would continue to do if I am confirmed to sit on the Sixth Circuit.

3. After the 2000 election was held, but before the outcome was finally decided by the Supreme Court of the United States, you participated in a forum at the Detroit College of Law about the effect of the election on the future of the courts. In your talk you outlined the health status of the current sitting justices, what you considered to be the likelihood that each would retire, and the possible impact of those retirements on important lines of cases. You handed out charts detailing these topics.

- a) Do you think it is becoming or appropriate for a federal district court judge to hand out charts describing the health problems from which sitting justices have suffered or still suffer?
- b) Is it necessary to list the cancers which certain justices have been treated for and speculate on how long they might live?
- c) Do you think there was a more respectful way for to begin the discussion about the future of the Court?

Potential vacancies on the United States Supreme Court are a source of great interest to law students at Michigan State University School of Law, where I have been an adjunct professor since 1998. They are also the source of frequent speculation in the press. In my presentation, I noted that very few justices retire for non-health related reasons. I utilized only public

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information about the four oldest justices. I did not offer any prognostication about their health or likelihood of retirement, which would not be appropriate for a federal district judge. I do not believe I was disrespectful of any justice and I did not use any information that is not readily available.

**4. Your discussion of the possible impact on the Court would make it seem that you agree with those who argue that political ideology matters in the selection of federal judges. You are a lifelong Republican, former party activist, and a current member of the Federalist Society. What political ideology do you think you were chosen by President Bush to further?**

I have no way of knowing what factors were used by President Bush in making my nomination to the Sixth Circuit Court of Appeals. My principal obligation is to attempt to the best of my ability to discern and give meaning to the language of constitutions and statutes, and to accord a strong sense of respect for federal and state legal precedents. I have always approached my duties as a judicial officer with utmost respect for the law and for the litigants in front of me. My approach is consistent from case to case and does not vary according to the identity of the plaintiff or defendant. I pledged to uphold the law and will continue to do so.

**5. In 1994 you denied the United States Department of Justice the right to inspect Michigan prisons, a right they asserted under the Civil Rights of Institutionalized Persons Act. Designed to allow the Department an opportunity to investigate and prosecute constitutional violations in prisons, juvenile and mental health facilities, Congress passed CRIPA as a key component in assuring that those confined to state-run institutions are treated humanely.**

**You ruled that Justice could not inspect the facility, although that is what it routinely does before filing a claim under the statute.**

- a) Can you explain how the Department could be expected to prosecute violations of the law if their access to the institutions under investigation without the access you denied?
- b) If states could deny consent to the Department's access to its institutions, Congress's desire to stop violations of the constitution would be thwarted, wouldn't it?

*United States v. State of Michigan*, 886 F.Supp. 890 (W.D. Mich. 1994), was a declaratory judgment action in which the Department of Justice sought a preliminary injunction granting access to two women's prisons in Michigan and requiring the State to provide extensive material prior to access, over the objections of the State of Michigan. The Department of Justice

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requested access to these prisons in order to determine whether to file an action under the Civil Rights of Institutionalized Persons Act ("CRIPA"). This statute gives the Attorney General standing to file an action to protect the rights of incarcerated persons. I carefully examined the text of the statute. The Department of Justice conceded there was no express right of access granted by the statute but claimed the right of access was implied. I found that there simply was no language in the statute which implied such a right before an action under the statute was commenced. I also examined the legislative history of the statute, and found no support for the DOJ's position in the 56 pages of legislative history. The motion for preliminary injunction was denied. Two weeks later the DOJ and the State agreed upon a final order to permit an appeal. No appeal was ultimately filed.

States may of course choose to cooperate in an investigation by the Department of Justice, a result that is clearly contemplated by the statute, but not necessarily required. Even if states do not choose to cooperate in the investigation, as I explained in my opinion, the legislative history of CRIPA identifies various sources that would still allow the Attorney General to obtain information with respect to the institutions.

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**RESPONSES FROM DAVID W. McKEAGUE TO WRITTEN QUESTIONS FROM  
SENATOR EDWARD M. KENNEDY**

The federal courts have an important role in protecting civil rights. Because the Supreme Court reviews only a limited number of cases each year, the courts of appeals often have the final word in interpreting laws enacted to protect civil rights.

In *United States v. Michigan Prisoners' Rights*, you denied a motion by the United States Department of Justice that would have allowed the Department to investigate allegations of sexual abuse in the Michigan prisons. In that case, there had been widespread complaints that prison guards were abusing female prisoners in Michigan state prisons, including allegations of rape. When the Justice Department sought to investigate these allegations to determine whether the prison had violated the Civil Rights of Institutionalized Persons Act (CRIPA), the prison refused to cooperate with the federal investigation. You denied a motion for the Justice Department to investigate the misconduct, holding that the Act didn't give the Department authority to investigate.

1. How can you justify the decision that Department lacked authority to investigate under CRIPA, considering that the Department must gather sufficient facts to satisfy Rule 11 standards before filing a case under the Act?

*United States v. State of Michigan*, 886 F.Supp. 890 (W.D. Mich. 1994), was a declaratory judgment action in which the Department of Justice sought a preliminary injunction granting access to two women's prisons in Michigan and requiring the State to provide extensive material prior to access, over the objections of the State of Michigan. The Department of Justice requested access to these prisons in order to determine whether to file an action under the Civil Rights of Institutionalized Persons Act ("CRIPA"). This statute gives the Attorney General standing to file an action to protect the rights of incarcerated persons. I carefully examined the text of the statute. The Department of Justice conceded there was no express right of access granted by the statute but claimed the right of access was implied. I found that there simply was no language in the statute which implied such a right before an action under the statute was commenced. I also examined the legislative history of the statute, and found no support for the DOJ's position in the 56 pages of legislative history. The motion for preliminary injunction was denied. Two weeks later the DOJ and the State agreed upon a final order to permit an appeal. No appeal was ultimately filed.

2. How can the Department ever bring a suit under CRIPA against a recalcitrant actor, if it cannot first investigate, considering that in cases against prisons, all of the witnesses are in the prison's control? Doesn't your interpretation undermine the purpose of the Act by making it impossible for the Department to enforce it?

My decision did not hold that the Department of Justice could not investigate complaints of abuse, which was not the issue before me. My decision held only that the Act did not provide the

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broad unlimited access to prisons sought by the Attorney General over the objection of the State. States may of course choose to cooperate in an investigation by the Department of Justice, a result that is clearly contemplated by the statute, but not necessarily required. Even if states do not choose to cooperate in the investigation, as I explained in my opinion, the legislative history of CRIPA identifies various sources that would still allow the Attorney General to obtain information with respect to the institutions.

**3. Doesn't your interpretation give those who violate the law an incentive to refuse to comply with Justice Department investigations**

I cannot speculate about the motives of a state in such a situation.

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**RESPONSES FROM DAVID W. McKEAGUE TO WRITTEN QUESTIONS FROM  
SENATOR RICHARD DURBIN**

1. The *Almanac of Federal Judiciary* contains anonymous comments about federal judges from practicing attorneys. The attorneys in your district say that you are very smart and highly efficient. But many express concerns about your judicial temperament. For example, some of the comments about you in the most recent *Almanac of Federal Judiciary* are as follows: "His temperament is prickly." "He is very hard on lawyers." "He intimidates lawyers." "He can lose his temper on occasion." "He is unfairly critical of lawyers who appear before him." "He has a big brain. He has a big ego. He uses both of them."

- A. Judge McKeague, what is your response to these statements about your judicial temperament?
- B. Do you in fact lose your temper on occasion? If so, please provide examples of instances in which you have lost your temper.

The *Almanac of Federal Judiciary* does a service for lawyers by seeking and publishing the evaluation of judges from lawyers. I consider my overall evaluation by lawyers who appear before me to be fair. I grant oral argument in all cases, and I read all of the pleadings rather than relying on bench memos to prepare for a hearing. As a result, I engage in active questioning of the lawyers. I expect them to be prepared and to answer my questions. Lawyers who are prepared indicate they enjoy the chance to discuss the facts and legal issues in detail. Lawyers who are not prepared or choose not to respond to questions are less satisfied. I do not recall losing my temper on occasion, but I do make it clear to attorneys who are late or unprepared that they need to improve their preparation prior to their next appearance. I try not to embarrass any unprepared lawyer in front of his or her client.

2. In the 1994 case *United States v. Michigan*, you ruled against the U.S. Department of Justice in a case alleging that sexual abuse was taking place against inmates at Michigan state prisons. Your ruling in this case barred the Justice Department from conducting an investigation. Yet subsequent investigations of Michigan prisons brought to light the existence of severe sexual abuse, including rape, impregnation, and forced abortions. Fortunately, a district court judge in the Eastern District of Michigan allowed litigation against the Michigan prisons to go forward, and much of the abuse was stopped.

- A. The organization Alliance for Justice has issued a report opposing your nomination and indicating that a Justice Department attorney who worked on the Michigan case stated that you made derogatory remarks about women. Did you make any derogatory remarks about women during the pendency of this case? If so, what was the nature of the remarks?



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- B. The Alliance for Justice report also indicates that you made comments suggesting that sex taking place between female inmates and male guards was consensual. Did you in fact make that statement? If so, was it your belief that all sexual contacts taking place between female inmates and male guards were consensual?**

*United States v. State of Michigan*, 886 F.Supp. 890 (W.D. Mich. 1994), was a declaratory judgment action in which the Department of Justice sought a preliminary injunction granting access to two women's prisons in Michigan and requiring the State to provide extensive material prior to access, over the objections of the State of Michigan. The Department of Justice requested access to these prisons in order to determine whether to file an action under the Civil Rights of Institutionalized Persons Act ("CRIPA"). This statute gives the Attorney General standing to file an action to protect the rights of incarcerated persons. I carefully examined the text of the statute. The Department of Justice conceded there was no express right of access granted by the statute but claimed the right of access was implied. I found that there simply was no language in the statute which implied such a right before an action under the statute was commenced. I also examined the legislative history of the statute, and found no support for the DOJ's position in the 56 pages of legislative history. The motion for preliminary injunction was denied. Two weeks later the DOJ and the State agreed upon a final order to permit an appeal. No appeal was ultimately filed.

The Alliance for Justice Report you refer to in your question cites *Num v. Michigan Department of Corrections*, 1997 U.S. Dist. LEXIS 22970 (E.D. Mich.) as a case allowing litigation against the Michigan prisons to go forward. *Num* was an action brought by prisoners, 18 months after my decision, under § 1983 of the Civil Rights Act, not under CRIPA. The decision cited in the Alliance for Justice Report involved the denial of a motion to dismiss filed by the State of Michigan. It is important to note that I was never asked to address the merits of any allegations of abuse. My involvement was limited to a hearing on the request for a preliminary injunction under CRIPA, a written decision and a Rule 16 scheduling conference to determine how the Department of Justice wanted to proceed in light of the denial of the preliminary injunction. I have reviewed the transcript of the hearing, and consulted my case manager who was present at the Rule 16 scheduling conference. I made no derogatory remarks about women during the pendency of this case or at any other time, and I made no comments suggesting that sex allegedly taking place between female inmates and male guards was consensual.

3. In the case *Northwood Wilderness Recovery v. U.S. Forest Service*, you granted the Forest Service's motion for summary judgment, allowing that agency to pursue a project called "Rolling Thunder." This project would have allowed widescale logging and clear cutting of sugar maple trees to take place in Michigan's Upper Peninsula. The 6th Circuit unanimously reversed your decision and held that approval of Rolling Thunder without a statutorily required Environmental Impact Statement was "arbitrary and capricious."

- A. Do you stand by your ruling in this case, or would you concede that you made a mistake?**

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The controversy in the *Northwoods* case stemmed from facially conflicting terms in the governing Forest Plan. Applying standard rules of construction, and holding that specific language controlled over general language, I determined that the Forest Service's approval of proposed logging (in an area of less than 1,000 acres; not widespread clear-cutting in the U.P.) was not arbitrary and capricious. In reversing, the Sixth Circuit did not find fault with my application of the rules of construction, but, taking a broader view of the potential effects of the Forest Service's approach, held that it could be subject to abuse, and was therefore arbitrary and capricious. I certainly accept the appellate court's exercise of its prerogative to take a broader view of potential consequences and policy considerations.

- B. This is not the only case in which you have ruled against environmental interests. In *Help Alert Western Kentucky v. Tennessee Valley Authority*, you allowed the harvesting of over 2000 acres of land. And in *Pape v. United States Army Corps of Engineers* you denied standing to an environmental plaintiff who challenged the Army Corps' mishandling of hazardous waste. Are there any instances in which you ruled against the government or private industry in an environmental case?

In all cases, I have consistently sought to uphold the law without regard to the identity of the plaintiff or defendant. An example of a ruling benefitting environmental interests recently occurred in *Sierra Club v. Walnuta Dale Farms, Inc.*, W.D. Mich. No. 4:00-CV-193, an action in which the United States Environmental Protection Agency eventually joined. In enforcement of the Clean Water Act, the Sierra Club and the EPA sought monetary penalties and injunctive relief against a large dairy farm operation for discharging manure and other pollutants into neighboring waters. Although the owners of the farm initially insisted on representing themselves and resisted all judicial process, I persuaded them to retain counsel and oversaw negotiations that culminated in a consent judgment, which I approved on March 10, 2004. Pursuant to the judgment, defendant Walnuta Dale Farms is to comply with the Clean Water Act, has undertaken remedial actions, and is obligated to pay penalties of \$100,000, a result with which I understand the Sierra Club and EPA to be well-satisfied.

4. Judge McKeague, the Alliance for Justice report states that "McKeague exhibits a clear preference for granting summary judgment and has been reversed by the Sixth Circuit in several cases for abuse of discretion." The report lists several cases in which you ruled for the defendant and were overturned by the Sixth Circuit. Are there any instances in which you ruled on behalf of a plaintiff at the summary judgment level and were overturned by the Sixth Circuit?

I ruled in favor of the plaintiff and was reversed by the Sixth Circuit in the following four cases: *Keweenaw Bay Indian Community v. United States*, 136 F.3d 469 (6th Cir. 1998); *Sheets v. Moore*, 97 F.3d 164 (6th Cir. 1996); *Perkins v. LeCureux*, 58 F.3d 214 (6th Cir. 1995); and *McLaughlin v. Holt Public Schools Board of Education*, 320 F.3d 663 (6th Cir. 2003).

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5. Judge McKeague, you delivered a speech on November 16, 2000 at Michigan State University entitled "What's Next? The Impact of the Election on the Future of Our Courts." During your presentation, you circulated several handouts that appear to contain your views about the Supreme Court Justices' health problems and judicial philosophies.

- A. One of the handouts contains what you refer to as a "scorecard" – can you please explain what your scorecard reflects? What do the percentages mean in the right-hand column? For example, why does President Ford score a 0%, the first President Bush 50%, and Presidents Clinton and Reagan 100%?
- B. In another handout, you describe four Justices of the Supreme Court as "liberal." Some legal commentators have suggested that since the retirements of Justices Marshall, Brennan, and Blackmun, there have been no liberal members on the Supreme Court, only moderates and conservatives. Please explain the basis of your belief that Justices Souter, Breyer, Ginsburg, and Stevens are "liberal."

I was asked to speak about the impact of the 2000 presidential election on the future of the courts at a panel discussion for law students sponsored by the Michigan State University School of Law, where I have been an adjunct professor since 1998. I utilized information widely available in the press about the four older justices, whose judicial philosophies and possible retirements are the subject of widespread speculation in the press. One of the handouts compared the political philosophy of each president during the last thirty years with how the press categorizes the justices they appointed. If the president was considered liberal and the justice he appointed was considered liberal, that appointment would receive 100%. If the president was considered liberal and the justice was considered conservative, that appointment would receive 0%. The evaluations were then averaged. My description of the justices was based solely on what appears regularly in the press.

6. During the 2000 presidential campaign, President Bush pledged that he would appoint "strict constructionists" to the federal judiciary, in the mold of Supreme Court Justices Clarence Thomas and Antonin Scalia.

- A. How would you describe your own judicial philosophy, and how do you believe it is different from or similar to Justices Scalia and Thomas?
- B. Do you believe that the Supreme Court's most important decisions in the last century – *Brown v. Board of Education*, *Miranda v. Arizona*, *Roe v. Wade* – are consistent with strict constructionism? Why or why not?

While I would not attempt to characterize the judicial philosophy of any Supreme Court justice, I am able to explain the philosophy I have adhered to as a federal district court judge. As a district judge and as a judge of the Sixth Circuit Court of Appeals, if confirmed, I understand it to be my

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obligation not to make law based on my personal or political convictions, but to apply the law enacted by Congress under the Constitution as interpreted by the Supreme Court. *Brown v. Board of Education*, *Miranda v. Arizona*, and *Roe v. Wade* certainly represent three very important Supreme Court decisions of the last century. It is not proper for me to speculate as to whether these Supreme Court decisions might be characterized as consistent with "strict constructionism." Each decision represents the judgment of at least a majority of the justices of the Supreme Court, that body entrusted with final authority to interpret the Constitution as the supreme law of the land.

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PETER A. SMIT	MARK E. ALLARD	THOMAS G. KRYKA, P.C.	MARK E. HULL	MARY E. MACLEOD	JOHN F. DEWITT
MARSHALL A. LARSON	THOMAS E. BAGLE	ALFRED L. SCHUBERT, JR.	JOHN M. WALLACE	AARON LEAL	R. STUART HOFFUS
G. MARK McALEERNAK, JR.	DAVID A. RILEY	PAUL J. TYLER	JEFFREY C. GORDON		J. TERRY MOGAN
THOMAS L. LOCKHART		JON M. BYLSKA	CHRISTOPHER M. BROWN		K. EDWARD FAIR
					CARL E. VAN BEEK

October 17, 2003

VIA FAX (202) 228-1698

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chairman Hatch:

The purpose of this correspondence is to voice my strong support for approval of the nomination of the Hon. David W. McKeague to the United States Court of Appeals for the Sixth Circuit. I currently serve as chairman of the Trial Department of the Michigan law firm of Varnum, Riddering, Schmidt & Howlett LLP. Over the past many years, I have had the privilege of appearing before Judge McKeague on a number of matters. In my experience, he is exceptionally intelligent and always prepared. He has earned his reputation of demanding that attorneys who appear before him are civil and prepared. He is a pleasure to practice before and has always treated me with respect. Most importantly, he has always been fair.



The Honorable Orrin G. Hatch  
 October 17, 2003  
 Page 2

I would like to share with you one particular experience that I believe is indicative of Judge McKeague's qualifications. As part of our training program at this firm, I accompanied a first year associate by the name of Cindy Rogowski to a Rule 16 Conference before Judge McKeague. This was my associate's first appearance in Federal Court. Judge McKeague treated my associate with the utmost respect and throughout the Rule 16 Conference mentored her in a positive way that was very educational. At the conclusion of the Rule 16 Conference, my associate shared with me how good Judge McKeague made her feel about appearing before him and how much she learned from him as a consequence of that experience.

At my request, Judge McKeague has also taken time from his schedule to address the attorneys at my firm as part of a practice group meeting to help educate them regarding practicing in the United States District Court for the Western District of Michigan. The time he has invested, especially with our younger lawyers, has been most appreciated. Finally, I would note that Judge McKeague has been instrumental in establishing one of the most effective facilitative mediation programs in the country. His dedication in establishing a system that has enabled litigants to amicably resolve their disputes in a businesslike fashion attests to his concern for our judicial system.

As a former law clerk to the Hon. Anthony J. Celebrezze and a trial lawyer practicing in the Western District for almost 20 years, I believe that I have some insight as to the qualifications that make judges exceptional. I can think of no more qualified and deserving candidate for the position of United States Circuit Court Judge for the Sixth Circuit than the Honorable David W. McKeague. Please feel free to contact me should you be in need of further information.

Respectfully submitted,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP

Stephen P. Afendoulis  
 Chairman, Trial Department

SA/db

c: The Honorable Patrick J. Leahy  
 Ranking Member, Committee on the Judiciary  
 United States Senate  
 152 Dirksen Senate Office Building  
 Washington, D.C. 20510  
 Fax: 202-224-9516

Office of Legal Policy  
 Fax: 202-514-5715



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JOHN W. ALLEN  
BOARD CERTIFIED CIVIL TRIAL ADVOCATE  
ADMITTED IN ILLINOIS, INDIANA, MICHIGAN, MINNESOTA, WISCONSIN AND FLORIDA

DIRECT DIAL [REDACTED]  
MOBILE [REDACTED]  
E-MAIL: jwallen@varnumlaw.com

October 14, 2003

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

Re: **Honorable David W. McKeague, United States District Judge;  
Support of Nomination to the Sixth Circuit, United States Court of Appeals.**

Dear Chairman Hatch:

This letter supports the nomination and immediate hearing for confirmation of the Honorable David W. McKeague, United States District Court Judge, for appointment to the United States Sixth Circuit Court of Appeals.

I have practiced law in Michigan and in the Sixth Circuit for over thirty years and have known David McKeague all of that time. He is a person of unquestioned honor and integrity. By his example, all the rest of us may set our compasses, in both our professional and personal lives.

Judge McKeague is a task master to those who appear before him, demanding both the quality and quantity of legal work which match the high standards of practice necessary in our courts of justice. Before him, all persons – no matter their backgrounds, age, gender, ethnicity, race or other personal characteristics – are treated with equal dignity and fairness.

He is also a leader and a pioneer. Due only to his own personal perseverance, his courtroom is among the most technologically advanced in the nation. As a result, another courtroom in the Western District of Michigan (in Grand Rapids) is now being similarly equipped, and will allow litigants, jurors and members of the public to participate in and observe all proceedings much more easily and effectively.

Judge McKeague has also been an innovator for alternative dispute resolution, facilitative mediation and other methods of finding solutions to litigants' problems, without the higher costs.



The Honorable Orrin G. Hatch  
October 14, 2003  
Page 2

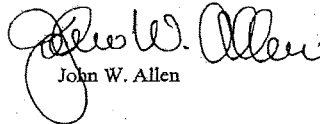
of both time and money usually inflicted in conventional federal court litigation. Judge McKeague's efforts have saved litigants and taxpayers millions of dollars, and he will take that same creativity to the Court of Appeals.

Most importantly, Judge McKeague's judgments are sound, impartial and prompt. He has consistently demonstrated that he is a hard worker, and a very productive member of the federal judiciary. The United States Court of Appeals for the Sixth Circuit needs judges like David McKeague.

I urge you and your colleagues to support his nomination, prompt hearing, a full vote by the Senate, and the confirmation of his appointment, as rapidly as possible.

God Bless America,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP



John W. Allen

JWA/djb  
cc: Hatch Nomination Staff (via facsimile 202/228-1698)  
Honorable Patrick J. Leahy  
Leahy Nomination Staff (via facsimile 202/224-9516  
Office of Legal Policy (via facsimile 202/514-5715)



**WARNER NORCROSS & JUDD LLP**

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JEFFREY O. BIRKHOLO

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October 15, 2003

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

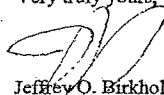
The Honorable Patrick J. Leahy  
Ranking Member, Committee on the Judiciary  
United States Senate  
152 Dirksen Senate Office Building  
Washington, DC 20510

Re: **The Honorable David W. McKeague**

Gentlemen:

I have practiced law in the Western District of Michigan for 26 years and am admitted to practice in the federal district courts for the Western and Eastern Districts of Michigan as well as the Sixth Circuit and Seventh Circuit Courts of Appeals. I write to express my support for the nomination of the Honorable David W. McKeague, District Court Judge for the Western District of Michigan, to the Sixth Circuit Court of Appeals.

Very truly yours,



Jeffrey O. Birkhold

JOB/sra

924641

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MERITAS LAW FIRMS WORLDWIDE

October 15, 2003

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chairman Hatch:

This letter is written in support of the nomination of the Honorable David W. McKeague to the United States Court of Appeals for the Sixth Circuit.

I have been a practicing lawyer in the Federal and State Courts for 34 years. In 1977, President Jimmy Carter appointed me United States Attorney for the Western District of Michigan, and I served as United States Attorney until April 1981. Since Judge McKeague's appointment to the Federal District Bench, I have appeared before him numerous times representing both civil litigants and criminal defendants. We have also been involved together in professional organizations.

One of those professional organizations is the American Inns of Court. As you know, the American Inns of Court is a national organization of lawyers formed with the urging of the late Chief Justice Warren Burger. The mission of the Inns is to promote professionalism and civility amongst lawyers, and to develop their skills to adequately represent their clients in a competent, professional and ethical manner. Judge McKeague was a strong supporter of the formation of the Grand Rapids, Michigan Chapter of the American Inns and a founder of the Detroit College of Law, at Michigan State University Chapter. This is noteworthy because it evidences his willingness to be a mentor, teacher, counselor and advisor to new lawyers. He has spent an immeasurable amount of time to insure that new lawyers be given every opportunity to develop as successful professionals with an understanding of their role as an advocate for their client but yet maintain the high values of civility and excellence.

When I have appeared before Judge McKeague in Court, I have always found him to be extremely well prepared, professional and courteous in his dealings with the lawyers and their clients. I believe his reputation is that of a "lawyer's Judge". Not only is he bright, but always prepared on the matter before him. It is true that if you appear before him you better know your case because he does. Judge McKeague will understand the facts and know the law.

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C.

The Honorable Orrin G. Hatch

October 15, 2003

Page 2

He is also not afraid to decide a case. His opinions are well written and reasoned. Judge McKeague demands are never unfair but he will insist that lawyers who appear before him act in a professional, civil and competent manner. Those of us who have dedicated our life to the practice in State and Federal Courts relish these qualities in a judge.

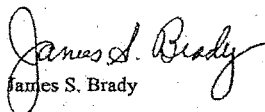
Judge McKeague would make an outstanding appellate judge. He would bring to the United States Court of Appeals for the Sixth Circuit the experience of a successful practitioner and trial judge. A judge that knows the law, the demands of the trial bench, the competence and professionalism required of the lawyers appearing before him and a passion for justice. In my opinion, Judge McKeague has all the necessary components to be a successful appellate judge. Therefore, I respectfully request that the Committee on the Judiciary recommend his confirmation as a Judge on the United States Court of Appeals for the Sixth Circuit to the United States Senate.

Thank you very much for considering my letter.

Sincerely,

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C.

By

  
James S. Brady

JSB/jlp

cc: The Honorable Patrick J. Leahy  
Office of Legal Policy



UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
U. S. COURTHOUSE  
231 WEST LAFAYETTE BLVD.  
DETROIT, MICHIGAN 48226

CHAMBERS OF  
PAUL D. BORMAN  
UNITED STATES DISTRICT JUDGE

December 11, 2001

313 234-5120

Hon. Carl Levin  
United States Senate  
The Capitol  
Washington, DC 20005

Dear Carl:

I write to support the nomination of my friend U.S. District Judge David McKeague to the U.S. Court of Appeals for the Sixth Circuit.

I have known Judge McKeague for seven years and I can vouch for his intelligence, hard work, and commitment to equal protection under law.

David is now a member of the Judicial Conference's Defender Services Committee. He has been a champion for increased funding for Federal Defender programs, and for raising the hourly rates paid to Criminal Justice Act attorneys. In fact, David's Committee has been instrumental in working with Congress in raising the CJA hourly rate to \$90 per hour - a significant increase.

In addition, David serves as Chair of the Federal Judicial Center's District Judge Education Committee. In this capacity, David works with FJC staff to develop continuing education programs for Federal District Judges. Having just returned from one of these programs last week, I can vouch for the excellent content of the programs, and the high regard for David's input from FJC Director Fern Smith and Director of Judicial Education John Cooke.

Finally, during my annual visit to Cincinnati to sit with the Sixth Circuit, I have had the opportunity to hear appeals from Judge McKeague's courtroom. The transcripts reveal a judge who treats parties fairly, tries an excellent case, and in criminal sentencing matters, acts with both his mind and his heart.

All in all, I think David McKeague would be an excellent addition to the Sixth Circuit bench.

Sincerely,

Paul D. Borman  
United States District Judge



STATE OF MICHIGAN  
COURT OF APPEALS

November 24, 2003

STEPHEN L. BORRELLO  
JUDGE

305 WEST OAKLAND STREET  
P.O. BOX 30666  
LANSING, MICHIGAN 48206-7366  
TELEPHONE: (313) 373-1033  
FAX: (313) 373-1020

The Honorable Carl Levin  
United States Senate  
269 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable Debbie Stabenow  
United States Senate  
702 Hart Senate Office Building  
Washington, D.C. 20510

Dear Carl and Debbie,

You have both asked my opinion regarding President Bush's nominees to the Federal Court. On all previous occasions I informed you that Judge Richard Griffin was, in all aspects, highly qualified to sit on the Sixth Circuit. Because I note that there has been no progress on Judge Griffin's nomination, I feel compelled to offer my thoughts, yet again, on the reasons for Judge Griffin's appointment.

As your former Chair of the Judicial Selection Committee, it was my job to search for and to recommend the most qualified candidates to the Federal Bench. During my tenure as chair of the committee, we rated applicants on the basis of competence, temperament, integrity, fairness, experience, and ability. No candidate who was rated less than outstanding in any of these categories had their name presented to you for nomination. After working with Judge Griffin, I would rate him as outstanding in all criteria we set forth. In addition, as a former labor litigator, it is my strong opinion that if my clients were to appear before Judge Griffin, they would be given a fair hearing. Perhaps it is overly simplistic on my part to assert that is all I ever asked of a Judge, but I suspect most attorneys and litigants would agree with that assertion.

I do not desire to lose Judge Griffin as a colleague because I have learned much from him and will continue to ask his advice on cases. I also do not pretend to understand the politics of the judicial nomination process, except to the extent that sometimes politics need make way for doing the right thing. Placing Judge Griffin on the Sixth Circuit is the right thing to do.

Sincerely,

Stephen L. Borrello  
Judge, Michigan Court of Appeals



STATE OF MICHIGAN  
COURT OF APPEALS

STEPHEN L. BORRILLO  
JUDGE

Friday, June 11, 2004

925 WEST OLYMPIA STREET  
P.O. BOX 30035  
LANSING, MICHIGAN 48206-7035  
TELEPHONE: (313) 373-1000  
FAX: (313) 378-1000

Senator Orrin Hatch  
Chair, Senate Judiciary Committee  
United States Senate  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Sent via facsimile to (202) 224-9102

Dear Chairman Hatch and members of the Senate Judiciary Committee:

Re: Appointment of Judge Richard Griffin to the United States Court of Appeals, Sixth Circuit.

I write to you and the honorable members of this committee of my own volition, to state my strong and unequivocal support for the nomination of my colleague, Judge Richard Griffin to the Sixth Circuit Court of Appeals.

By way of introduction, I was appointed one year ago by Governor Jennifer Granholm to sit on the Michigan Court of Appeals. Prior to that, I was engaged in the private practice of law, as counsel to this great State's various construction trade organizations, and served as my county's and Congressman James Barcia's democratic chairs. While in private practice, I was asked by Senator Carl Levin to co-chair his Judicial Selection Committee with Jennifer Granholm and Melvin Hollowell. It was a most difficult yet rewarding task to interview a wide array of highly qualified candidates and then select those who were most qualified. I believe that my involvement with that process gave me insight into accurately gauging the qualifications of persons to hold a lifetime appointment on the bench. As an attorney I always believed that judges were the pinnacle of my chosen profession.

Prior to my appointment to the bench, I did not know Judge Griffin except through the words of my predecessor and my father, both of whom sat with Judge Griffin. Both had kind words and praise for his ability as a jurist as well as for his very pleasant demeanor. Following my appointment to the bench I too had an opportunity to sit with Judge Griffin, and immediately discovered that Judge Griffin possesses a rare trait amongst my colleagues: an intrinsic sense of justice. His innate fairness is combined with a rigorous work ethic and a thorough grasp of legal issues. Judge Griffin is one of the finest jurists in this State. While we may differ on a particular legal issue, I find that our differences are rooted in honest disagreements about the application of legal standards to a particular set of facts, rather than a difference of judicial or political philosophy. Judge Griffin does not belong to that class of jurists, on either the right or the left,

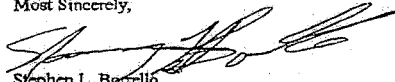
that seek in every case to impose their political will rather than the rule of law. Rather, he is more in line with former Chief Justice Warren, who asked in all cases a most poignant if not simple question about the result of the application of law to the facts: "Is this conclusion fair?"

As an appellate judge, Richard Griffin is a model of how to use quiet diplomacy to make his opinion heard. He brings to the discussion a quiet intellectual debate, which centers upon a myriad of complex legal theories coupled with a devout dedication to the duty of ensuring justice in every case. He has the ability to quietly persuade others while adhering to his overriding principle to uphold the rule of law, making him the consummate appellate judge.

As one who argued many cases in federal and state courts, all I ever asked of a judge is that they be fair and provide my client the opportunity to have their legal grievances adjudicated in accord with the principles of law and fairness. Judge Griffin is such a judge.

In closing, I wish to stress that for selfish reasons, I do not want to lose Judge Griffin as a colleague. He has been of great assistance to me, and I have come to rely upon his legal judgment in seeking for his counsel on numerous occasions. Yet I know that he desires to assume the position he has been nominated to hold, and to that position, I cannot think of a finer person to serve.

Most Sincerely,



Stephen L. Borrelli  
Judge, Michigan Court of Appeals

Co: Members of the Committee

BARRIS, SOTT, DENN & DRIKER, P.L.L.C.

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E-MAIL: lcohan@bodd.com

December 6, 2001

The Honorable Carl Levin  
United States Senate  
459 Russell Office Building  
Washington, D.C. 20510

Dear Carl:

I write to express my unqualified support for the confirmation of Judge David W. McKeague to be a judge of the Sixth Circuit Court of Appeals.

I have known Dave McKeague for over 20 years. During the decade from the late 1970s to the late 1980s, while I was Senior Vice President and General Counsel of Detroit Edison, I engaged the firm of Foster, Collins & Swift, with which Dave McKeague was associated, to assist us in many major and complex legal matters.

In every respect, Dave McKeague's work was outstanding. He was creative, knowledgeable, tenacious and energetic. Furthermore, I found him to be a model of civility, always courteous and respectful toward adversaries as well as the Bench.

Although we had very different political beliefs and associations, he was neither a ideologue nor a zealot. The law was always his guide and he studied it carefully and interpreted it fairly.

I believe Dave McKeague will make a fine appellate judge and I hope you will find yourself able to support his nomination.

Best personal wishes.

Cordially,



Leon S. Cohan

LSCnz  
216278.02





MICHIGAN SUPREME COURT

MAURA D. CORRIGAN  
CHIEF JUSTICE

July 5, 2002

CADILLAC PLACE  
3034 WEST GRAND BOULEVARD  
SUITE 9-300  
DETROIT, MI 48202-6034  
313-972-9238

Senator Carl Levin  
269 Russell Senate Office Building  
Washington, D.C. 20510-2202

Dear Senator Levin:

I write to support President Bush's nomination of Richard Allen Griffin to the United States Court of Appeals for the Sixth Circuit. He should be promptly confirmed to alleviate the current judicial emergency in the Sixth Circuit.

I have known Judge Griffin since 1992, when I first joined the Michigan Court of Appeals. I was fortunate to hear cases on panels with Judge Griffin on many occasions during my seven years as a Court of Appeals judge. Judge Griffin is intellectually gifted. He is a spirited questioner who "cuts to the chase." He is consistently well-prepared for oral argument and offers incisive views on the assigned cases to his colleagues. He is current in all his own writing assignments and promptly circulates his votes on his colleagues' opinions. He acquired excellent work habits from private practice that he applies to the business of appellate judging.

Judge Griffin brings a depth of practical experience and a grasp of real life problems to the decision of cases. His thinking assists his colleagues in their deliberations.

Richard Allen Griffin is a man of integrity and probity who is fully capable of discharging the duty of protecting our Constitution and laws. He is deserving of the public trust as he has already proven himself worthy of that trust during his years of service to the State of Michigan. I have every confidence that he will serve our country with honor and distinction.

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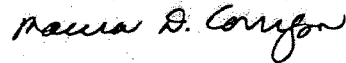
Senator Levin

-2-

July 5, 2002

I would be pleased to answer your questions.

Sincerely,

A handwritten signature in cursive script that reads "Maura D. Corrigan".

Maura D. Corrigan  
Chief Justice

/jc

cc: Judge Richard Allen Griffin

WARNER NORCROSS & JUDD LLP

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J. A. CRAGWALL, JR.  
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October 15, 2003

BY FACSIMILE TRANSMISSION

Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Mr. Chairman:

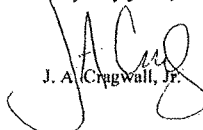
I write to urge the prompt confirmation of the nomination of the Honorable David W. McKeague to the bench of the United States Court of Appeals for the Sixth Circuit.

I have appeared before Judge McKeague in numerous matters, both civil and criminal. I have found him in every instance to be in complete command of the law and the facts, fully prepared to move promptly to the heart of the controversy. He does his homework, and it shows.

I have learned in 25 years of trial practice that some judges have predictable biases or tendencies, at least in certain matters. I have not observed any such biases or tendencies in Judge McKeague's case, and I believe my assessment is shared by my experienced colleagues in the bar. The only thing that is predictable about Judge McKeague is that his decisions will be well-reasoned and well-supported. I have not always agreed with his rulings, but I have always found them to be soundly based.

Those of us who practice before the federal courts in Michigan have been gravely disappointed by the delay in Judge McKeague's confirmation. I do not believe there could be a better-qualified candidate for the bench than Judge McKeague. The Senate would do that court and the citizens of this country a great service by moving forward with his prompt confirmation.

Very truly yours,

  
J. A. Cragwall, Jr.

/rk

cc: Honorable Patrick J. Leahy  
Office of Legal Policy



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of mid-Michigan  
by providing  
quality,  
compassionate,  
cost-effective  
health care.

December 11, 2001

The Honorable Debbie Stabenow  
United States Senator  
280 E. Saginaw  
East Lansing, MI 48823

Dear Senator Stabenow:

It is my understanding that Judge David McKeague has been nominated for the U.S. Sixth Circuit Court of Appeals for the United States. I have known Judge McKeague for the past 16 years, first as an attorney with the Foster Swift Collins and Smith law firm, and later as a federal judge in the Western District of Michigan. I have always found Judge McKeague to be an honest, fair, forthright person who is a bright, intelligent man that has an impeccable legal and judicial record. I would recommend him highly without any concerns. He has made numerous difficult decisions in a fair and equitable manner, including the difficult healthcare anti-trust decision involving the Grand Rapids hospitals.

I hope that his appointment is not delayed because of political issues that go beyond doing what is right for our state and nation. I hope that you will take the lead in resolving this matter on a timely basis so that Judge McKeague can serve the people of our country in this important role. Please let me know if I can provide any additional information.

Thank you again for all you do for the people of Michigan. Best wishes for a joyous and peaceful holiday.

Sincerely,

Joseph F. Damore  
President and CEO  
Sparrow Health System

www.sparrow.org

1215 E Michigan  
PO Box 30480  
Lansing, MI 48909-7980

517.483.2700

**ANTHONY A. DEREZINSKI**

1345 Glendaloch Circle  
Ann Arbor, Michigan 48104  
Phone: XXXXXXXXXXXXX  
FAX: (734) 741-0115

December 10, 2001

The Honorable Carl Levin  
269 Russell Senate Office Building  
Washington, D.C. 20510-2202

**BY FAX**

Dear Carl:

I am watching the Senate's action on judicial appointments with great interest, both as one immersed in the political process for the last number of years, but also as an attorney with experience before the Federal District Courts in Michigan and before the Sixth Circuit Court of Appeals. I hope that an agreement is reached that will satisfy both parties as to their respective nominees, particularly those from Michigan.

And as the process works out, I would like to add my strong recommendation on behalf of Judge David W. McKeague of Lansing. I have known Judge McKeague for many years, starting when we were both in private practice in Western Michigan. We were both active in the University of Michigan Law School alumni activities as well, and also taught courses at the same time at the Thomas M. Cooley Law School in Lansing. In fact, I was teaching full time as a Visiting Professor at Cooley when he was sworn in as a Federal District Judge in the Law School's auditorium, and added my congratulations to those of his friends and supporters on that very special day. One of the major speakers at the event was Congressman Bob Carr who was very praiseworthy of him, while blithely noting, as I would, some differences of opinion, policy and party to the contrary notwithstanding.

Frankly, I have a high opinion Judge McKeague. He was a very good lawyer in private practice, has proven himself to be a very good judge on the Federal District bench, and has support from the legal community and its members having allegiances to both parties, or none. He would be a very good addition to the Court of Appeals, and I hope he will be among the nominees that will be approved. Thanks much for your consideration, and I look forward to seeing you in February.

Sincerely,



Anthony A. Derezinski

BOYDEN, TIMMONS,  
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ATTORNEYS AT LAW

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FAX: 616/459-0137  
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JOEL M. BOYDEN  
(1937-1999)  
ROBERT C. TIMMONS  
FREDERICK D. DILLEY  
TROY W. HANEY  
STEPHEN J. DE HAAN  
OF COUNSEL

December 10, 2001

Senator Carl Levin  
459 Russell Senate Office Building  
Washington, DC 20510-2202

Re: *Appointment of the Honorable David W. McKeague to the Sixth  
Circuit Court of Appeals*

Dear Senator Levin:

I write to support the nomination of Judge David W. McKeague to the United States Court of Appeals, Sixth Circuit.

My very favorable opinion of Judge McKeague is based upon my own experiences in his Court in both criminal and civil matters and upon information and impressions shared with me by other lawyers in my capacity as a past president of the Federal Bar Association for the Western District of Michigan and immediate past president of the Grand Rapids Bar Association. I have also served on committees with Judge McKeague on the subject of alternative dispute resolution and in regard to the Court's annual Hillman Advocacy Program.

I feel as though I have had as much exposure to and information about Judge McKeague as any judge that I have practiced before in my 25 years as a lawyer. In his time on the bench, Judge McKeague has developed a solid reputation as a hard working trial judge of superior intellectual capacity who is both decisive and sensitive in regard to the matters that come before him.

He has championed the cause of collaboration between bench and bar in our district. On many occasions I know it is he who has urged his colleagues on the bench to collaborate with lawyers in implementing innovation and change. This has been most evident in the area of alternative dispute resolution where it is Judge McKeague who has been the Court's leader in developing one of the most successful facilitative mediation programs in the country. His diligent participation in the

December 10, 2001

Page 2

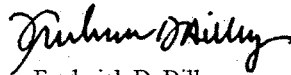
facilitative mediation programs in the country. His diligent participation in the formation of this program and his hands-on follow-up is in large part responsible for the success of this program.

He is even-handed and fair. It is not thought that his own personal, political or social philosophies influence the judicial decisions that he is called upon to make. While not necessarily agreeing with his decisions in every case, I think lawyers are left with the honest belief that Judge McKeague tries his best to do the right thing and makes every effort to follow the law.

He is extremely well prepared and is an aggressive manager of cases. By his example, he has challenged the lawyers in our district to better serve their clients and has raised the level of practice in his Court - all to the benefit of users of the Court, our profession and the Judiciary as a whole.

I heartily endorse Judge McKeague's nomination to the Sixth Circuit Court of Appeals. If I can provide any additional input, please don't hesitate to contact me.

Very truly yours,

  
Frederick D. Dilley

FDD/jrp

BT  
DH  
ATTORNEYS AT LAW

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OF COUNSEL:  
STEPHEN J. DE HAAN  
PAUL E. JENSEN

October 17, 2003

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

*Re: United States District Judge David W. McKeague  
Nomination to the Sixth Circuit Court of Appeals*

Dear Chairman Hatch:

I write to enthusiastically support the nomination of the Honorable David W. McKeague for appointment to the Sixth Circuit Court of Appeals. His appointment will bring an outstanding jurist to this appellate bench.

I have known Judge McKeague since 1971. I have followed his career carefully and I think I speak with some knowledge about his capabilities as a person, a lawyer and a judge. I am a recent former president of the Federal Bar Association for the Western District of Michigan; a recent former president of the Grand Rapids Bar Association; a past chair of the Environmental Law Section Council of the State Bar of Michigan; a former vice-chair person of the Civil Justice Advisory Committee for the Western District of Michigan and I have served on numerous other committees in the federal court for the Western District of Michigan, many of which Judge McKeague has been an integral part of.

I have handled several criminal and civil matters in his Court and have tried one criminal case to a conclusion (which included two trips to the Sixth Circuit Court of Appeals).



The Honorable Orrin G. Hatch  
 October 17, 2003  
 Page 2

I can say without hesitation that the lawyers in the Western District of Michigan regard Judge McKeague as a thoughtful decision-maker; a dynamic thinker; a passionate seeker of justice; and a judge who, while demanding of the lawyers who appear before him, demands no less of himself.

He is always thoroughly prepared for hearings and trials; he is efficient in his use of the court's resources and the time of the lawyers and parties; and he is respectful of the resources that the parties and their lawyers bring to his courtroom.

Judge McKeague would bring a wealth of experience to the appellate bench. Not only has he had a distinguished career as a trial judge here in the Western District of Michigan, but he had over 20 years of legal experience as a private practitioner representing a variety of clients in a prestigious Lansing law firm with which I am very familiar. These experiences give him a perspective that would be extremely valuable on the appellate bench of the Sixth Circuit.

In addition to this acquired legal and judicial wisdom, Judge McKeague brings a keen legal mind and a passionate pursuit of justice to the decisions that he makes. What could be better qualifications for someone to be an appellate judge in the Sixth Circuit Court of Appeals?

Furthermore, Judge McKeague is an independent thinker who is thoughtful in his decision-making and dynamic in his ability to consider and evaluate new and novel approaches to legal problems. In a novel anti-trust matter in which I was local counsel, I observed his engagement in the difficult and demanding intellectual issues presented to him by two outstanding lawyers representing the respective parties. His was an astonishing display of scholarship, engagement, didactic questioning of the lawyers during a dispositive motion hearing on the matter and eventually a decision with which both counsel were completely satisfied. . . and it settled the case. It is this kind of judicial involvement that I think makes Judge McKeague an outstanding choice for the appellate bench.

BT  
 DH  
ATTORNEY AT LAW

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The Honorable Orrin G. Hatch  
October 17, 2003  
Page 3

I am not aware of another trial judge who would be better suited for service in the Sixth Circuit Court of Appeals. His appointment would be one of which everyone could be very proud and by which we would all be well served.

Very truly yours,

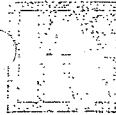
  
Frederick D. Dilley

FDD/mp

cc: The Honorable Patrick J. Leahy  
Office of Legal Policy (*via facsimile 202-514-5715*)

BT  
DHI  
ATTORNEYS AT LAW

TOTAL P.84



**Karoub Associates**  
LEGISLATIVE CONSULTANTS  
GOVERNMENT AFFAIRS

JAMES H. KAROUB (1929-1994)

JAMES A. CRAWFORD  
JAMES P. CURRAN  
GREGORY EATON  
SCOTT D. FAUSTYN  
JOSEPH A. GARCIA  
MICHAEL W. RANVILLE  
JIM A. RHEAD  
JOHN K. SCHICK  
SHELLEY M. STAHL

COUNSEL TO THE FIRM  
MURRAY E. BROWN  
DONALD F. WALL

December 14, 2001

Honorable Debbie Stabenow  
Member, United States Senate  
702 Hart Senate Office Building  
Washington, D.C. 20510

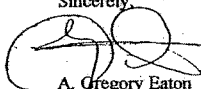
Dear Senator Stabenow,

I am writing with the hope that you will look favorably on the Presidential appointment of Judge David W. McKeague to the United States Sixth District Circuit Court of Appeals.

I've known David McKeague for close to 25 years. As an individual and a sitting member of the bench, his dedication and judicial qualifications are outstanding. During his tenure as U.S. District Court Judge, he has gained an even greater appreciation for honest, hardworking and well-qualified judges at the federal level.

Senator, I know there are political considerations of long-standing surrounding the McKeague appointment. I hope the time is near when important judicial appointments will be examined solely on ability. Please count me with the many who are proud to stand with David McKeague. I highly recommend Judge David W. McKeague as a person of integrity, and urge you to give him expeditious consideration for his pending appointment by President Bush.

Sincerely,

  
A. Gregory Eaton

**WARNER NORCROSS & JUDD LLP**

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wfulkerson@wnj.com

October 15, 2003

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

**Re: Nomination of The Honorable David McKeague for the Sixth Circuit Court of Appeals**

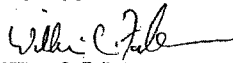
Dear Chairman Hatch:

I have known Judge McKeague for over 20 years, both in his capacity as an attorney in private practice and as a United States District Judge. When I first met Judge McKeague I was serving as an administrative law judge for the then Michigan Department of Natural Resources. Judge McKeague appeared before me on a regular basis. Judge McKeague was appointed to the bench about the same time I returned to the private practice of law in the Western district. While my practice seldom involves federal litigation, I am well aware of Judge McKeague's judicial performance through his opinions and the experience of the members of my law firm who regularly appear before him. Judge McKeague's reputation is one of a hardworking judge. He is always well-prepared and a student of the law. Persons who appear before Judge McKeague can depend on him being fully prepared and having an understanding of the issues involved in the proceeding. Judge McKeague is also demanding and expects those who appear before him to have attained a similar level of preparation.

I believe Judge McKeague would be an excellent Court of Appeals judge. His understanding of the law, his willingness to engage the issues and perform the necessary work to master those issues are important characteristics for an appellate judge.

I offer my unconditional recommendation for Judge McKeague's elevation to the Court of Appeals. The people of the Sixth Circuit would be well served to have him join the bench. If you or your staff have any questions concerning Judge McKeague, please feel free to contact me.

Very truly yours,

  
William C. Fulkerson

ka  
c The Honorable Patrick J. Leahy  
Office of Legal Policy



GERALD R. FORD

August 13, 2002

Dear Senator Leahy:

I write to strongly support the nomination of Richard Allen Griffin to the United States Court of Appeal for the Sixth Circuit. He is a highly qualified nominee by President Bush for this important federal judicial post. His approval by the Senate will alleviate the current judicial emergency in the 6<sup>th</sup> Circuit.

I have literally known Judge Griffin from his birth inasmuch as I have known his parents, Marge and Bob Griffin, when Congressman Bob Griffin was first elected to the US House in 1956. I was in the House at that time.

I carefully followed his career in the House, in the Senate, and in the Michigan Judicial system. My wife and I had a close social relationship for many years with Judge Griffin's parents. We had numerous opportunities to observe first hand Judge Griffin as he matured.

With those very personal observations I can say with conviction that Judge Griffin is a person of highest quality character. As the record shows, he has been a very excellent Judge with unquestioned integrity.

I am greatly impressed that judicial colleagues of Judge Griffin on the Michigan Court of Appeals wholeheartedly endorse his nomination for the Sixth Circuit of Appeals.

I repeat my endorsement of Judge Richard A. Griffin for the Sixth Circuit Court of Appeals and strongly hope you can assist in his confirmation.

Sincerely,

The Honorable Patrick Leahy  
United States Senate  
433 Russell Senate Office Building  
Washington, D.C. 20510

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C.

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October 16, 2003

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to recommend the confirmation of U.S. District Judge David W. McKeague for a judgeship on the United States Court of Appeals for the Sixth Circuit.

By way of background, I am a member of the law firm of Miller, Johnson, Snell & Cummiskey, P.L.C., a 100-person general corporate firm located in Grand Rapids. I have been practicing law since 1980. I graduated from the University of Michigan *magna cum laude* in 1977 and from Harvard Law School *cum laude* in 1980. I am currently chair of our litigation department, and am president-elect of the Federal Bar Association. I am a civil litigator and have appeared before Judge McKeague on many occasions.

Judge McKeague is one of the brightest and hardest working judges before whom I have appeared. He has a keen, analytical mind, and has a special ability to cut through to the essence of the case. He is intellectually demanding and has little tolerance for lazy or sloppy thinking.

Judge McKeague has been active in the Hillman Advocacy Program, one of the leading programs in the country for training young lawyers in trial advocacy. He has been an active proponent of facilitative mediation. He has also been a leader in the use of technology in the courtroom.

Based on my extensive experience practicing for Judge McKeague, I think he would make an outstanding appellate judge.

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C.

The Honorable Orrin G. Hatch

October 16, 2003

Page 2

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Feel free to contact me if you have any further questions.

Very truly yours,

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C.

By

David J. Gass



DJG:jr

Enclosures

cc: The Honorable Patrick J. Leahy  
Office of Legal Policy

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WRIGHT** PLLC

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http://www.dickinsonwright.com

RICHARD A. GLASER  
RGlaser@dickinsonwright.com  
(616) 236-1043

October 15, 2003

*Via Facsimile*

Office of Legal Policy  
Fax No. 202.514.5715

Re: *Honorable David W. McKeague*

Dear Senator Leahy:

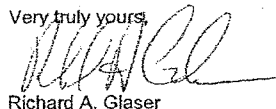
My purpose in writing is to support the nomination of U.S. District Judge David McKeague to the Sixth Circuit Court of Appeals.

Judge McKeague represents the highest standards of judicial qualification. He is gifted with, and uses wisely, a vigorous intellect. In my experience, his integrity is beyond reproach as he maintains an unbiased and even-handed treatment of litigants and counsel.

Judge McKeague's deep respect and vigilance for our system of justice extends beyond the schedule and confines of his courtroom. For example, he has spearheaded and ably guided the voluntary facilitative mediation program for the U.S. District Court for the Western District of Michigan, in which I have participated as a mediator since its inception. The success of this program in terms of rate of settlements, conservation of resources, and satisfaction of the litigants has been widely recognized. Likewise, Judge McKeague gives generously of his time to programs to promote the training of young attorneys and their able representation of clients.

Without reservation, I support and encourage approval of Judge McKeague's nomination.

Very truly yours,



Richard A. Glaser

RAG/mlr  
GRAPIDS 99592-100 141740-03

Counselors At Law

DETROIT BLOOMFIELD HILLS LANSING GRAND RAPIDS ANN ARBOR  
WASHINGTON, D.C.



BOB GRAHAM  
FLORIDA

**United States Senate**  
WASHINGTON, DC 20510-0903

COMMITTEES:  
FINANCE  
ENVIRONMENT AND  
PUBLIC WORKS  
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ENERGY AND NATURAL  
RESOURCES

**United States Senator Bob Graham  
Introduction of Virginia Hernandez Covington to the Senate  
Judiciary Committee**

**June 16, 2004**

Mr. Chairman, thank you for scheduling this important hearing and for the Committee's attention to the needs of the Middle District of Florida, one of the largest and busiest judicial districts in the country. It is my pleasure to introduce the Honorable Virginia Maria Hernandez Covington, who currently serves as a Judge in the state of Florida's Second District Court of Appeal. Judge Covington is joined by her daughter Laura, 19, and her son Stephen, 17. I am certain that they are both very proud of their mother today.

Mr. Chairman, Judge Covington's qualifications make her an excellent candidate for service on the Federal Bench. Prior to her appointment as a Judge for the Second District Court of Appeal, Judge Covington spent 19 years as an Assistant United States Attorney in both the civil and criminal divisions. While working at the United States Attorney's Office, Judge Covington developed a national reputation as an expert in the field of forfeiture. She was asked by the federal government on many occasions to assist Central and South American law enforcement in trial advocacy, legal management issues and development of forfeiture programs.

Currently, Judge Covington is a member of the American Bar Association, the Lakeland Bar Association, the Cuban American Bar Association, and the Florida Association for Women Lawyers. Additionally, she serves as President of the American Inns of Court, Herbert G. Goldberg Criminal Law Inn and as a member of the Appellate Court Rules Committee of the Florida Bar.

As a prosecutor for nearly 20 years and a Second District Court of Appeal Judge for the past two and a half years, Judge Covington's work ethic and dedication has gained her the respect of her colleagues and the legal community of Tampa.

Mr. Chairman, I would like to thank you again for scheduling this hearing. I am confident that you will agree that Judge Covington possesses the qualities needed to effectively serve on the Federal Bench.



**Roman S. Gibbs**

Retired Judge  
Michigan Court of Appeals

Phone: [REDACTED]  
Fax: 248-344-9405  
e-mail: Romansgibbs@aol.com

August 16, 2002

42188 Waterwheel Ct. N.  
Northville, Michigan  
48167-2526

Senator Carl Levin  
269 Russell Senate Office Building  
Washington, D. C. 20510-2202

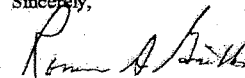
Dear Senator Levin:

I write to support the President's nomination of Richard A. Griffin to the United States Court of Appeals for the Sixth Circuit. I have known Judge Griffin for many years and have worked with him as a colleague on the Michigan Court of Appeals for 14 years.

Working together on hundreds of opinions has given me the opportunity to observe and know Rick very well. He is in many respects a "judge's judge:" integrity personified, intelligent, hardworking, fair, sensitive with level temperament and good judgment plus the uncanny ability to decide and write in a clear and understandable manner that resolves complex and obscure issues. He is a dedicated public servant.

It has been a pleasure and honor to work with Judge Griffin these many years. I know he will serve with honor and distinction as a Judge of the United States Court of Appeals. I hope you agree and consent to his nomination.

Sincerely,

  
Roman S. Gibbs

rsg:ljy

cc: Judge Richard A. Griffin

*P.S. He is a good guy Carl!*

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PETER L. GUSTAFSON  
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October 17, 2003

*Via Facsimile*

The Hon. Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Bldg.  
Washington, DC 20510

Re: **Hon. David W. McKeague**

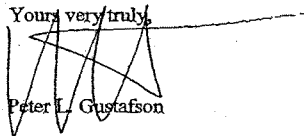
Dear Chairman Hatch:

I am writing to support the nomination of U.S. District Judge David W. McKeague for the Sixth Circuit Court of Appeals.

Judge McKeague has been an outstanding jurist in the Western District of Michigan, and has provided distinguished service to the bench and bar. As a civil trial attorney practicing in his court, I have found him to be bright, organized, and judicious. He has the right mix of collegiality and professionalism, and runs a smooth and efficient courtroom that appropriately keeps practitioners on their toes, thus improving the quality of justice dispensed.

Please give Judge McKeague favorable consideration as a nominee for the Court of Appeals.

Yours very truly,

  
Peter L. Gustafson

vb

924571



News Release  
**JUDICIARY COMMITTEE**

*United States Senate • Senator Orrin Hatch, Chairman*

June 16, 2004

Contact: Margarita Tapia, 202/224-5225

**Statement of Chairman Orrin G. Hatch  
Before the United States Senate Committee on the Judiciary  
Hearing on the Nominations of**

**RICHARD A. GRIFFIN  
TO BE U.S. CIRCUIT JUDGE FOR THE SIXTH CIRCUIT**

**DAVID W. MCKEAGUE  
TO BE U.S. CIRCUIT JUDGE FOR THE SIXTH CIRCUIT, AND**

**VIRGINIA MARIA HERNANDEZ COVINGTON  
TO BE U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF FLORIDA**

Today the Committee will conduct a hearing on the nominations of three outstanding lawyers to be federal judges. I commend President Bush for nominating each of them, and I look forward to their testimony. I welcome the nominees, their family and guests, our distinguished colleagues who are here to testify today, as well as members of the House who will introduce two of our nominees.

On our agenda today are two nominees for the United States Court of Appeals for the Sixth Circuit – Mr. Richard A. Griffin and Mr. David W. McKeague.

In addition, we will consider the nomination of Virginia Maria Hernandez Covington to be United States District Judge for the Middle District of Florida.

I might add that it was over two and one half years ago, on November 8, 2001, that President Bush nominated Judge McKeague for a seat on the Sixth Circuit. Judge Griffin was first nominated to this position by President George W. Bush on June 26, 2002.

Both of these nominees have been rated Well Qualified by the American Bar Association.

Let me be frank: I am aware that many people have strong feelings about the status of the 6th Circuit nominees. For more than two years I have been working with many, including the Senators from Michigan, to bring an acceptable resolution to these issues.

I believe the best way to continue to progress toward a resolution is to move forward with this hearing, report the nominees from the Committee, and place them on the Executive Calendar.

I am mindful that Senators Levin and Stabenow have concerns about the 6th Circuit nominees.

The Michigan senators' negative blue slips have been and will continue to be accorded substantial weight. Indeed, the timing of this hearing is due in part to the views of the Michigan senators'. While negative blue slips are not dispositive under the Committee's Kennedy-Biden-Hatch blue slip policy, they are certainly a significant factor.

Since I first became chairman of this Committee in 1995, I have followed the same blue slip policy crafted by two former Democratic chairmen of this Committee, Senator Kennedy and Senator Biden. Here's the Committee's blue slip policy as explained in a letter by former Chairman Joe Biden to the first President Bush dated June 6, 1989:

"For many years – under both Democratic and Republican chairmanships – the return of a negative blue slip meant that the nomination simply would not be considered. That policy was modified under Senator Kennedy's chairmanship, so that the return of a negative blue slip would not preclude consideration of the nomination. A hearing and vote would be held, although the return of a negative blue slip would be given substantial weight."

Chairman Biden continued to explain the blue slip policy that the Committee would follow under his chairmanship as follows: "The return of a negative blue slip will be a significant factor to be weighed by the committee in its evaluation of a judicial nominee, but it will not preclude consideration of that nominee unless the Administration has not consulted with both home state Senators prior to submitting the nomination to the Senate. If such good faith consultation has not taken place, the Judiciary Committee will treat the return of a negative blue slip by a home state Senator as dispositive and the nominee will not be considered."

In the case of Judge McKeague, Judge Griffin and the other Michigan nominees, there is a clear record of consultation by the Bush White House with the Michigan Senators.

Over three years ago – on April 10, 2001 -- White House Counsel Alberto Gonzales began discussions with the offices of the Michigan senators regarding the vacancies on the Sixth Circuit and in the Eastern District of Michigan.

I understand that on May 17, 2001, Judge Gonzales provided the names of the individuals being considered for the Michigan vacancies, and invited both Senators to provide feedback. The record is clear that over the next year through subsequent telephone conversations, as well as written correspondence, there was extensive consultation and repeated invitations to the Michigan Senators to provide their input into the nomination process.

In fact, I understand the White House offered to consider nominating both of the individuals championed by the Michigan Senators to federal judgeships.

Although President Bush ultimately did not nominate those individuals, one can only conclude the consultation requirement was meaningfully fulfilled in the cases of Judge McKeague, Judge Griffin, and the other Michigan nominees.

I will continue to work with my friends and colleagues from Michigan – Senators Levin and Stabenow – the White House, Members of the House of Representatives, Senator Leahy, and others on the Committee to reach an acceptable resolution for the vacancies in Michigan and the Sixth Circuit.

I view resolution of the 6th Circuit situation as important as any other judicial nominations matter pending before the Committee.

I remain hopeful that we can reach an acceptable outcome.

Toward that end, this morning we welcome to the Committee Richard Allen Griffin, whom President Bush has nominated for a seat on the Sixth Circuit Court of Appeals.

Judge Griffin has exceptional qualifications for the federal appellate bench. After graduating from the University of Michigan Law School in 1977, Judge Griffin spent 11 years in the private practice of law. In 1985, Judge Griffin founded the firm Read & Griffin, in Traverse City, Michigan.

During his private practice Judge Griffin specialized in automobile negligence, premises liability, products liability, and employment law. Additionally, he provided pro bono legal services as a volunteer counselor and attorney with the Third Level Crisis Center. In 1988, Judge Griffin was elected to the Michigan Court of Appeals. He was elected to retain his seat in 1996 and again in 2002.

We are pleased to have him before us today, and look forward to hearing from him.

I would be remiss, if I did not note that Mr. Griffin's father was a distinguished member of the Senate and, as a father, I know how proud Senator Griffin must be today.

Our second nominee to the Sixth Circuit is David W. McKeague, who presently serves as a Federal District Court Judge for the Western District of Michigan. This is Judge McKeague's second appearance before this Committee, his first having occurred when he was nominated to his current position more than a decade ago.

In 1992, this Committee voted him to the floor with several other district court nominees en bloc, without any objection, and the full Senate confirmed him to the federal bench by unanimous consent.

Since 1992, he has served with distinction in the Western District of Michigan, and since 1994 has regularly been designated to sit on panels and draft appellate opinions for the Sixth Circuit Court of Appeals.

Judge McKeague graduated from the University of Michigan in 1968 and then attended the University of Michigan Law School. Upon graduation in 1971, he joined the law firm of Foster, Swift, Collins & Smith, P.C., in Lansing, Michigan.

He also served six years in the United States Army Reserve. Since 1998, Judge McKeague has also served as an adjunct professor of law at Michigan State University's Detroit College of Law.

Judge McKeague is a distinguished and well-respected federal judge who, in the words of one of his current colleagues on the federal district court, "lets the law and the facts take him where they take him." He will make an outstanding addition to the Sixth Circuit, and I look forward to hearing from him this morning. I will submit letters of support into the record for all the nominees.

Judge Virginia Maria Hernandez Covington is our nominee for the Middle District of Florida. Judge Covington has had a distinguished career on both sides of the docket and is a pioneer of sorts. She became the first Cuban-American woman ever appointed to Florida's appellate courts. She is the highest ranking Hispanic woman serving in Florida's judiciary, presently serving as a Judge, Second District Court of Appeal.

Prior to her appointment to the bench, Judge Covington served in various legal positions. After graduation from Georgetown University law school, where she was the editor of the Tax Lawyer law review, Judge Covington worked for the Federal Trade Commission as a trial attorney where she was responsible for ensuring that compliance agreements were enforced.

In 1982, she became an Assistant State Attorney for Hillsborough County Florida, where she prosecuted traffic and misdemeanor cases.

In 1983 Judge Covington became an Assistant United States Attorney for the Middle District of Florida where she rose to the position of Chief of the Asset Forfeiture. In addition to her prosecutorial and managerial duties, Judge Covington has lectured extensively on asset forfeiture, money laundering, and complex prosecutions to prosecutors and law enforcement personnel throughout the United States and abroad.

Throughout her career Judge Covington has received more than 70 commendations accolades and commendations for her professional and civic work. She is well deserving of the ABA's Unanimously Well Qualified rating.

Again, I am pleased to welcome these distinguished nominees to the Committee, and I look forward to their testimony.

I will now turn to Senator Leahy for his remarks, and then to our first panel for comments and introductions.

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December 6, 2001

#### VIA FACSIMILE

Senator Carl Levin  
459 Russell Senate Office Building  
Washington, DC 20510-2202

Dear Senator Levin:

I am writing to ask that you support the appointment of the Hon. David W. McKeague to the United States Court of Appeals for the Sixth Judicial Circuit. I am not going to support this with a number of general, laudable comments without foundation. Based on actual experience, I have found that Judge McKeague possesses outstanding qualifications for this position, and I feel qualified to offer my opinions on this subject.<sup>1</sup>

My trial experience with Judge McKeague was in a very sophisticated and significant case. That case was brought by the Federal Trade Commission to enjoin the pending merger of the two largest health care facilities in the area, Butterworth and Blodgett Hospitals. The case involved the application of the anti-trust laws to a complex set of facts and circumstances under considerable time pressure. It was aggressively prosecuted by the Federal Trade Commission which employed a large team of lawyers in its attempt to enjoin the merger. Judge McKeague's handling of the case was simply impeccable. Notwithstanding all the complexities, he successfully managed the case and brought it to an expeditious conclusion. The trial was extremely efficient, yet thorough and fair. It was apparent that Judge McKeague has an

<sup>1</sup> I have been in trial practice in the Western District of Michigan for 28 years, and have been elected a Fellow in the American College of Trial Lawyers. I have been active in the West Michigan Chapter of the Federal Bar Association and have held a number of its offices, including President.





Senator Carl Levin  
December 6, 2001  
Page 2

extraordinary quality to sift through mountains of information, arguments, issues, etc. and then to seize upon what is truly relevant to the decision of the matter. He clearly did that in this case, he wrote an incisive opinion, and he was subsequently affirmed on appeal by the Sixth Circuit.

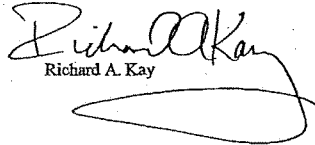
Judge McKeague's performance on the bench has reflected a very high degree of intellect, keen legal knowledge, a passion for his task, and that crucial ability to eliminate the irrelevant and to focus on the key issue(s) and facts. In my judgment, those are very important qualities for all judges, however, that they are critical qualities for the jurists that sit on our appellate courts.

Finally, I have had the privilege over a number of years of teaching trial advocacy in the Hillman Advocacy Program which is jointly sponsored by the United States District Court for the Western District of Michigan and the West Michigan Federal Bar Association Chapter. This year I am the chair of the Program. Judge McKeague has always been an outstanding supporter of the Program, and his support has been action based. He typically attends the full two and one-half day program in Grand Rapids. He helps the faculty by moving between different classrooms to offer his insights, suggestions, and critiques to the students. In my opinion, this speaks volumes of Judge McKeague's commitment to our system of justice.

Thank you for your consideration of my comments.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP



Richard A. Kay

RAK:lo



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RICHARD A. KAY

DIRECT DIAL XXXXXXXXXX  
E-MAIL: rkay@varnumlaw.com

October 15, 2003

**VIA FACSIMILE**  
(202) 228-1698

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
UNITED STATES SENATE  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: *Nomination of the Honorable David W. McKeague*

Dear Chairman Hatch:

I am writing to you in support of the nomination of the Honorable David McKeague for the United States Court of Appeals Sixth Circuit.

By way of background, I have been in practice for 30 years in the Western District of Michigan. I am a Fellow in the American College of Trial Lawyers and previously served as the President of the Federal Bar Association for the Western District of Michigan. Coupled with my experiences with Judge McKeague, I feel qualified to make this recommendation. In support of his nomination, I offer the following:

Based on my trial experience before Judge McKeague in complex litigation, I found him to be a skilled jurist with the very highest of legal skills. His understanding and application of the law has been superior. His ability to distill complicated matters to their core issues is likewise excellent.

Judge McKeague's contribution to the justice system goes beyond the courtroom. He has been a strong advocate and leader in the Western District of Michigan on facilitative mediation and training of mediators. He has also contributed much time and effort to the Hillman Advocacy Program which teaches basic trial skills to young lawyers.

Judge McKeague is equally demanding both of himself and the attorneys that appear before him. On every matter, Judge McKeague is totally and completely prepared for the conference, hearing, or trial. He expects the same from the attorneys that appear before him. Similarly, he expects the attorneys that appear before him to exhibit acceptable professional skills. By making those expectations clear, Judge McKeague has contributed to improving the professionalism of attorneys in the Western District. His expectations of himself and attorneys are both appropriate and commendable.



The Honorable Orrin G. Hatch  
October 15, 2003  
Page 2

Finally, I know many attorneys in Western Michigan and I know the widespread respect in which he is held. They are all treated fairly by Judge McKeague. Simply put, he applies the law without personal or philosophical bias.

I urge your support of his nomination.

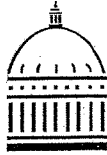
Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

*Richard A. Kay*  
Richard A. Kay

RAK:nlw

cc: Honorable Patrick J. Leahy  
Office of Legal Policy



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December 10, 2001

The Honorable Debbie Stabenow  
United States Senate  
280 E. Saginaw  
East Lansing, MI 48823

Dear Senator Stabenow, *Debbie*

David W. McKeague has been nominated to the U.S. Sixth Circuit Court of Appeals. I am writing to unconditionally support his appointment.

David has served honorably on the United States District Court for the Western District of Michigan for nine years. I have known David for all of those years. David McKeague is an individual possessing a unique combination of insight, intelligence and integrity. These qualities assure he is well suited to serve on the Sixth Circuit Court of Appeals.

Our precious and noble judicial system must continue to stand as a sentinel to the freedoms we hold most dear in this great country. The courts must continue to be a place where, to the best of our human abilities, we assure justice will truly be served. The judges to whom we entrust this significant responsibility must be persons who are steadfastly committed to the great values of freedoms our Constitution guarantees.

I believe David is such a man; such a judge. I believe he strives to make decisions that are based on the law. I believe he is even-handed and fair.

David McKeague will serve our country -- as an institution and as individuals -- evenhandedly and well. I urge your support for his appointment.

Please call at work (517) 484-6216 or home [REDACTED] if you would like to discuss my thoughts more fully.

Thank you for your serious consideration, and for working for the best interests of our state and our country.

Warm Regards,

*Nell*  
Nell Kuhnmuench  
Partner

NK/rt

*for Vickie*

**Opening Statement of Senator Patrick Leahy  
Ranking Member, Judiciary Committee  
Judicial Nominations Hearing  
June 16, 2004**

Today's hearing marks another unfortunate milestone in the Senate Judiciary Committee's break with longstanding precedent and Senate tradition. In the past year and a half, with the Senate and the White House under control of the same political party we have witnessed rule after rule broken or misinterpreted away.

The Republican Way

The list is long. From the way that home-state Senators are treated to the way hearings are scheduled, to the way the Committee questionnaire is altered, to the way our Committee's historic protection of the minority by Committee Rule IV has been violated; the Republicans on the Committee have destroyed virtually every custom and courtesy that used to help create and enforce cooperation and civility in the confirmation process. Some are now beginning to talk openly about ignoring another longstanding practice, the Thurmond rule, for the first time in this particular presidential election year. We suffered through three years during which Republican staff stole Democratic files off the Judiciary computers during what has been a "by any means necessary" approach. Their approach to our rules and precedents follows their own partisan version of the golden rule, which is that "he, with the gold, rules." That has not been helpful to the process, the Senate or the country.

During the past several weeks we have begun to see how this Administration -- at the Department of Defense, at the Department of Justice and at the White House -- reinterpreted the law and treaties that had governed our nation's policy and practices for the detention and interrogation of prisoners and how it led to torture and abuse. That has severely undercut and endangered our men and women serving in Iraq and around the world. I cannot remember a time in decades when the United States has faced more criticism. And as Secretary Ridge conceded at our hearing last week, such abuses have had the effect of increasing recruiting by anti-American and terrorist organizations.

It is as if those currently in power believe that that they are above our constitutional checks and balances and that they can reinterpret any treaty, law, rule, custom or practice they do not like or they find inconvenient.

Some of these interpretations are so contrary to well-established understandings that it is like we have fallen down the rabbit hole in Alice in Wonderland. I am reminded that the imperious Queen of Hearts rebuked Alice for having insufficient imagination to believe contradictory things, saying that some days she had believed six impossible things before breakfast. I have seen things I thought impossible on this Committee in recent times, things impossible to square with the past practices of Committee and the history of the Senate. This Committee is entrusted by the Senate to help determine whether judicial nominees will follow the law. It is unfortunate that the Committee that judges the judges has not followed our own rules.

#### Partisan Patterns

Today's hearing is another example of the downward spiral this Committee continues to travel. Nearly a year ago, the Chairman crossed a line that he had never before crossed when he held a hearing for Henry Saad, a nominee to the U.S. Court of Appeals for the Sixth Circuit, who was opposed by both his home-state Senators. As I said at the time, I think it may not only have been the first time that this Chairman held a hearing for a nominee without two positive blue slips, indicating support from home-state Senators, but it may have been the first time any Chairman and any Senate Judiciary Committee proceeded with a hearing on a judicial nominee over the objection of both home-state Senators. It was certainly the only time in the last 50 years, and I know it to be the only time during my nearly 30 years in the Senate.

Today, having broken a longstanding practice of this Committee founded on respect for the wishes of a home-state Senator, whether in the case of a district or circuit court nominee, the Chairman does it again. But today he has chosen to up the ante by doubling the violation. The two nominations for which he set today's hearing are both opposed by their home-state Senators.

The Michigan Senators have come to the Committee and articulated their very real grievances with the White House and their honest desire to work towards a bipartisan solution to the problems filling vacancies in the Sixth Circuit. We should respect their views, as the views of home-state Senators have been respected for decades. I have urged the White House to work with them. I have proposed reasonable solutions to the impasse that the White House rejected. The Michigan Senators have proposed reasonable solutions, including a bipartisan commission, which the White House continues to reject.

It is telling that the other nominee today is the product of a bipartisan commission. Judge Virginia Maria Hernandez Covington, who has been nominated to the federal District Court in Florida, has the full support of both of her home-state Senators. I congratulate the Senators from Florida for their efforts to maintain this important mechanism for promoting experienced and consensus candidates for the federal bench.

Although President Bush promised on the campaign trail to be a uniter and not a divider, his practice once in office with respect to judicial nominees has been most divisive.

Citing the remarks of a White House official, *The Lansing State Journal* reported that President Bush is simply not interested in compromise on the existing vacancies in the State of Michigan. It is unfortunate that the White House is not willing to work toward consensus with all Senators.

#### Republican White House, Different Rules

Together with a White House of the same party, the Senate's majority over the past year and a half has launched an ongoing series of changed practices and broken rules on this Committee. The White House and some in the Senate have even suggested changing the Senate's rules to consolidate the White House's control over the judicial nominations process. Over the last three years, time and again the good faith efforts of Senate Democrats to repair the damage done to the judicial confirmation process over the previous six years have been rejected.

I have explained this before, but given the continued flaunting of precedent, it bears repeating. When Republicans chaired this Committee and we were considering the nominations of a Democratic President, one negative blue slip from just one home-state Senator was enough to doom a nomination and prevent a hearing on that nomination. This included all nominations, including those to the circuit courts. How else to explain the failure to schedule hearings for such qualified and non-controversial nominees such as James Beaty and James Wynn, African-American nominees from North Carolina? What other reason could plausibly be found for what happened to the nominations of Enrique Moreno and Jorge Rangel -- both Latino, both Harvard graduates, both highly rated by the ABA, both denied hearings in the Judiciary Committee? There is no denying that was the rule during the previous Democratic Administration. There is no way around the conclusion that with a Republican in the White House, the Republicans in the Senate have found it politically convenient to change the rules.

In all, more than 60 of President Clinton's judicial nominees and more than 200 of his executive branch nominees were defeated in Senate committees through the enforcement of rules and precedents that the Republican majority now finds inconvenient -- now that there is a Republican in the White House. Indeed, among the more than 60 Clinton judicial nominees who this Committee did not consider there were several who were blocked despite positive blue slips from both home-state Senators. So long as a Republican Senator had an objection, it appeared to be honored, whether that was Senator Helms objecting to an African-American nominee from Virginia or Senator Gorton objecting to nominees from California.

As I noted last year, this Committee under this Chairman took the unprecedented action of proceeding to a hearing on the nomination of Carolyn Kuhl to the Ninth Circuit over the objection of Senator Boxer. When the senior Senator from California announced her opposition to the nomination as well at the beginning of a Judiciary Committee business meeting, I suggested to the Chairman that further proceedings on that nomination ought to be carefully considered. I noted that he had never proceeded on a nomination opposed

by both home-state Senators once their opposition was known. Senator Feinstein has likewise reminded the Chairman of his statements in connection with the nomination of Ronnie White when he acknowledged that had he known both home-state Senators were opposed, he would never have proceeded. Nonetheless, in one in a continuing series of changes of practice and position this year, this Committee was required to proceed with the Kuhl nomination; a party-line vote was the result.

Now this Committee is making a further profound change in its practices. When a Democratic President was doing the nominating and Republican Senators were objecting, a single objection from a single home-state Senator stalled the nomination. The Chairman cannot cite a single example of a single time that he went forward with a hearing over the objection or negative blue slip of a single Republican home-state Senator. Now that a Republican President is doing the nominating, no amount of objecting by Democratic Senators is sufficient. The Chairman overrode the objection of one home-state Senator with the Kuhl nomination. The Chairman overrode the objection of both home-state Senators when he held a hearing on the Saad nomination last year. And now, he does so again with the two circuit court nominees on today's hearing agenda.

What I doubt we will hear from the other side of the aisle is the plain and simple truth of the two policies the Chairman has followed. While it is true that various Chairmen of the Judiciary Committee have used the blue-slip process in different ways, some to work unfairness and others to attempt to remedy it, it is also true that each of those Chairmen was consistent in his application of his own policy -- that is, until now.

The double standards that the Republican majority has adopted obviously depend upon the occupant of the White House. This change in practice marks another example of their double standards. Last year the Republican majority chose to abandon our historic practice of bipartisan investigation. The Republican majority also chose to abandon the meaning and consistent practice of protecting minority rights through a longstanding Committee rule that required a member of the minority to vote to cut off debate in order to bring a matter to a vote. With this hearing, the Committee takes another giant step in the direction of unprincipled partisanship. Republican Senators will apparently stop at nothing in their efforts to aid and abet this White House in its efforts to pack the federal judiciary.

I am disappointed that there are still vacancies on the Sixth Circuit. During President Clinton's second term, the Republican Senate majority shut down the process and three outstanding nominees to Sixth Circuit vacancies were not accorded hearings or consideration. When I chaired the Committee, we broke the impasse with the first Sixth Circuit confirmation in many years and proceeded to confirm two conservative nominees. We have since proceeded with and confirmed two more. That is four circuit confirmations in three years as opposed to no confirmation in the last three years of the Clinton Administration. We cut Sixth Circuit vacancies in half. With cooperation from the White House, we could have done even better.



The Republican Senate majority refused for over four years to consider President Clinton's well-qualified nominee, Helene White, to the Sixth Circuit. Judge White has served on the Michigan Court of Appeals with Judge Griffin since 1993, and, prior to her successful election to that seat, served for nearly 10 years as a trial judge, handling a wide range of civil and criminal cases. She was first nominated by President Clinton in January 1997, but the Republican-led Senate refused to act on her nomination. She waited in vain for over 1,454 days for a hearing, before President Bush withdrew her nomination in March 2001.

President Clinton had also nominated Kathleen McCree Lewis. She is the daughter of a former Solicitor General of the United States and a former Sixth Circuit Judge. She was also passed over for hearings for years. No effort was made to accord her consideration in the last 18 months of President Clinton's term. We have a double standard at work now.

#### Conclusion

Under our Constitution, the Senate has an important role in the selection of our judiciary. The brilliant design of our Founders established that the first two branches of government would work together to equip the third branch to serve as an independent arbiter of justice. As columnist George Will wrote: "A proper constitution distributes power among legislative, executive and judicial institutions so that the will of the majority can be measured, expressed in policy and, for the protection of minorities, somewhat limited." The structure of our Constitution and our own Senate rules of self-governance are designed to protect minority rights and to encourage consensus.

Despite the razor-thin margin of recent elections, the majority party is not acting in a measured way but in complete disregard for the traditions of bipartisanship that are the hallmark of the Senate. It has acted to ignore precedents and reinterpret longstanding rules to its advantage. This practice of might makes right is wrong.

#####

ATTORNEYS AT LAW

427 SOUTH BURDICK STREET

KALAMAZOO, MICHIGAN 49007

TELEPHONE 616.382.0444  
FACSIMILE 616.382.0464

December 12, 2001

Re: Appointment of the Honorable David McKeague to the Sixth Circuit Court of Appeals

I am writing in support of the Honorable David McKeague who I understand is being considered for an appointment to the Sixth Circuit Court of Appeals. I have practiced criminal law in the Western District of Michigan for 21 years. I am a former Assistant Prosecuting Attorney but have concentrated on criminal defense since 1982. I have appeared before Judge McKeague on several occasions and feel that I am well-qualified to express my opinion concerning the wisdom of his appointment.

~ Judge McKeague is an excellent judge. He is intelligent and fair minded. He is a "no nonsense" jurist who has the ability to cut through a lot of extraneous matter and get right to the legal issue involved. His integrity is beyond reproach.

I am a life long Democrat and know that Judge McKeague's party affiliation differs from my own. Nonetheless, I strongly endorse him because of his sense of justice to all litigants. He is an asset to the trial bench in the Western District of Michigan. He would be an asset to the Court of Appeals for the Sixth Circuit.

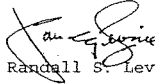
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LEVINE & LEVINE

Senator Carl Levin  
December 12, 2001  
Page 2

Thank you for this opportunity to express my views. I am available to discuss my experiences with Judge McKeague in greater depth if you desire.

Sincerely yours,

  
Randall S. Levine

RSL/psk

cc: ✓ Honorable David McKeague

**LEVINE & LEVINE**

ATTORNEYS AT LAW

427 SOUTH BURDICK STREET

KALAMAZOO, MICHIGAN 49007

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TELEPHONE 269.382.0444  
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October 14, 2003

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

Re: Honorable David W. McKeague

Dear Chairman Hatch:

I am an attorney practicing law in the Western District of Michigan for the last 23 years. I am a former assistant prosecuting attorney and have been actively involved in defending criminal cases since leaving the prosecutor's office in 1982. I have had occasion to appear several times before the Honorable David W. McKeague.

I am writing to encourage you to do whatever you can to bring his nomination to the floor so that he can become an appellate judge for the Sixth Circuit. Judge McKeague is extremely intelligent, possesses a sharp wit and a keen intellect. He is an excellent trial judge who is always well prepared to address the legal issues in every case in a meaningful way. He is a fair minded judge who favors neither the defense nor the government.

I am a life long Democrat. I understand that Judge McKeague is not a member of my party. Nonetheless, I feel compelled to write on his behalf and to endorse his nomination. He would make a fine addition to the Sixth Circuit. His integrity is beyond reproach.

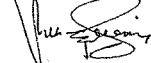
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LEVINE & LEVINE

The Honorable Orrin G. Hatch  
October 14, 2003  
Page 2

Thank you for your consideration. I am available to discuss  
this nominee in greater detail should you so desire.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "R. S. Levine", written over a horizontal line.

Randall S. Levine

RSL\psk

cc: Honorable Patrick J. Leahy  
Office of Legal Policy

\*\* TOTAL PAGE.03 \*\*

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C.

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GRAND RAPIDS, MICHIGAN 49501-0306  
616.831.1700  
616.988.1729 fax

December 7, 2001

VIA FACSIMILE

The Honorable Carl Levin  
United States Senator  
SR-269 Russell Senate Office Building  
Washington, DC 20510-2202

Dear Senator Levin:

I am writing to endorse the appointment of the Honorable David W. McKeague, United States District Judge, to a judgeship on the United States Sixth Circuit Court of Appeals.

I have known Judge McKeague since he first took the federal bench in 1992. I have appeared before Judge McKeague on several occasions in a variety of cases. Judge McKeague is an excellent jurist. He is always prepared, and he requires the attorneys who appear before him to be prepared as well. During oral argument, his questions are insightful and show a keen understanding of both the facts and the law. He engages the case and counsel. I count my appearances before Judge McKeague as among the most intellectually stimulating and challenging of my over thirty-year legal career.

In my appearances before Judge McKeague (and I should tell you they have not all been successful) I have always found him to base his decisions on the facts and the law and not on any preconceived notion or philosophy. I believe the other lawyers I know who practice before Judge McKeague would confirm that observation.

I have also come to know Judge McKeague as a member of a federal bar committee which he convened to study facilitative mediation and make that process part of the Western District of Michigan's alternative dispute resolution procedures. Facilitative mediation has been a tremendous success, resulting in the settlement of over two-thirds of the cases referred to facilitation. The Court's facilitative mediation process was honored by the State Bar of Michigan this year. Everyone involved in the facilitative mediation program in the Western District knows that Judge McKeague was the driving force in having that process successfully implemented.

I believe the implementation of facilitative mediation is an example of how Judge McKeague approaches situations and problems. He doesn't merely accept the way things have

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C.

The Honorable Carl Levin  
December 7, 2001  
Page 2

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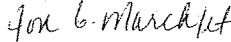
always been done, but looks for new and different ways to approach and resolve problems. As a direct result of his efforts and foresight regarding facilitative mediation, hundreds of litigants in this court have saved hundreds of thousands of dollars of legal fees as well as the emotional toll of litigation.

I have absolutely no reservation in recommending Judge McKeague for elevation to a court of appeals judgeship.

I will be happy to answer any questions concerning my experiences with Judge McKeague. I can be reached at the above number during the day, or at home at XXXXXXXXXXXX

Thank you for your attention to this matter.

Very truly yours,



Jon G. March

JGM/rt

P.S. Because I am presently out of state and there was some urgency to this matter, my secretary has signed this letter for me, but only after my review and upon my instruction and authority.

OSTER,  
WIFT,  
COLLINS &  
SMITH, P.C.  
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Walter S. Foster 1878-1961 Richard B. Foster 1908-1996 Theodore W. Swift 1929-2000 John L. Collins 1926-2001	William R. Schulz David H. Aldrich Scott A. Steery Charles A. Janssen Charles E. Barham James E. Jensen, Jr. Scott L. Mandel James B. Croon Michael D. Sundlett Sherry A. Stein Betsy A. Titus David J. Houston Brian A. Kaser Robert E. McFarland William K. Fisher Stephen O. Schultz	William R. Schulz David H. Aldrich Scott A. Steery Charles A. Janssen Charles E. Barham James E. Jensen, Jr. Scott L. Mandel James B. Croon Michael D. Sundlett Sherry A. Stein Betsy A. Titus David J. Houston Brian A. Kaser Robert E. McFarland William K. Fisher Stephen O. Schultz	Patricia A. Calvert Linda K. Nigg Michael J. Bonamonte Jean G. Schickel Clen A. Schmeigel Michael W. Parnes Brian G. Goodenough Matt G. Heber Mark H. Canady Eric E. Doster Stephen J. Rhodes Melissa J. Jackson Steven H. Lasher Nancy L. Kahn Deanna Swisher Mark J. Bureych	Thomas R. Meagher Douglas A. Mielock Scott R. Forbush Peter R. Albertson Christopher A. Ballard Scott A. Chernick Donald E. Martin Rebecca S. Davies Andrea J. Hood Jennifer M. Van Horn Anne M. Shilton Barbara J. Cyer Geoffrey D. Harrison Cherie V. Green Joel W. Baur Jennifer Kildea Dewane	John P. Nicolucci Michael D. Honner Larry R. Jensen, Jr. Molly L. Chan Meredith A. Jagetta Keith A. Cannon Kirsten M. McNelly Robert M. Hartley Lisa A. Finkbeiner David S. Lefere Johanna M. Novak Vivienne E. Wilke Emily L. Dawson William P. Webster Benjamin J. Piter Scott R. Lovernick	Cy Connors Thomas G. McDermott, Jr. Lawrence B. Lindgren John W. Ester David VandenHaagen Norman D. Hawkins Paul J. Millenbach Steven L. Owen Dale P. Beckwith John M. Nokes Richard L. Hillman Francis J. O'Donnell Michael G. Harrison Dennis R. O'Connell Joanne M. Dunk
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Water's Direct Phone: 248.539.9901

December 22, 2001

Via Facsimile

Senator Carl Levin  
United States Senate  
459 Russell Senate Office Building  
Washington, DC 20510-2202

Re: Confirmation of Judge David W. McKeague

Dear Senator Levin:

I am writing to ask your support for the confirmation of U.S. District Judge David W. McKeague, recently nominated by President George W. Bush for a judgeship on the United States Court of Appeals for the Sixth Circuit. Although Judge McKeague formerly practiced with my law firm, Foster, Swift, Collins & Smith, P.C., our mutual tenure here was only a few short months, as he resigned from the firm to become a judge of the United States District Court, Western District of Michigan shortly after I joined the firm in 1992.

However, my connection with Judge McKeague extends back long before my career at Foster, Swift as he and I entered the University of Michigan Law School together as first-year students in the fall of 1968. I have remained acquainted with him ever since. I appreciated his talents and abilities as a practicing lawyer. He has demonstrated his intelligence and legal skills from the bench as well in the last ten years, as well as a profound sense of fairness. I am certain that he would be a credit to the federal appellate judiciary, as he has been to the trial bench, if his appointment is confirmed. His acute intellect will serve well federal litigants and the country as a judge of the United States Court of Appeals for the Sixth Circuit.

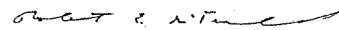


Senator Carl Levin  
December 22, 2001  
Page 2

Thank you for taking these views into consideration, and thank you for your continued service to the people of the State of Michigan.

Very truly yours,

FOSTER, SWIFT, COLLINS & SMITH, P.C.



Robert E. McFarland

REM:mmm

S:\REM\MISC\LEVIN\122.LTR



**McINERNEY & BOWEN**

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TELEPHONE (616) 458-6111  
800-819-2332

GARY J. MCINERNEY  
M. SCOTT BOWEN

FACSIMILE  
(616) 458-6446

December 6, 2001

Senator Carl Levin  
459 Russell Senate Office Building  
Washington, DC 20510-2202

**Re: Honorable David W. McKeague**

Dear Senator Levin:

As you know, I've been a friend of Judge David McKeague for several years. I am supportive of his appointment and feel that he will be an excellent member of the 6<sup>th</sup> Circuit Court of Appeals.

I understand the outstanding issues regarding the present appointment process but I feel that Judge McKeague's appointment ought to proceed in an expeditious manner if possible. As you may recall, we discussed this matter when you were in my office a while ago.

I look forward to seeing you at Scott's house next Saturday.

Very truly yours,

MCINERNEY & BOWEN

Gary J. McInerney

GJM:wab

FOSTER,  
SWIFT,  
COLLINS &  
SMITH, P.C.  
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December 7, 2001

*Via Facsimile and First Class Mail*

The Honorable Debbie Stabenow  
United States Senator  
280 E. Saginaw  
East Lansing, Michigan 48823

Dear Senator Stabenow:

Re: The Honorable David W. McKeague

I would like to encourage you to approve President Bush's nomination of the Honorable David W. McKeague to the U.S. Court of Appeals for the Sixth Circuit. I have had the pleasure and honor of working with Judge McKeague for over 20 years while he was a partner of mine at Foster, Swift, Collins & Smith, P.C. He is one of the brightest lawyers I have ever worked with, and his integrity is impeccable. He has had a long and distinguished career, both with our firm and now with over 10 years serving on the United States District Court, Western District of Michigan.

David represents the very best we want to see in our judiciary, whether you are a Democrat or a Republican. His legal intellect, common sense and sense of fairness and justice make him an exceptional choice. David will serve with distinction and honor on the Sixth Circuit Court of Appeals and I urge you to confirm his nomination as expeditiously as possible. This is a superb appointment and you will be proud of your involvement years from now when his record on the Sixth Circuit confirms the wisdom of this choice.

If you have any questions concerning this unqualified recommendation, please don't hesitate to contact me.

Happy holidays,

FOSTER, SWIFT, COLLINS & SMITH, P.C.

Gary J. McRay

GJM:pjb

bcc: Honorable David W. McKeague

S:\280\GJM-LSTABENOW

Congress of the United States

Washington, DC 20515

February 26, 2003

The Honorable Orrin G. Hatch  
Chairman  
Senate Committee on the Judiciary  
United States Senate  
SD-224 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Hatch:

We write as members of Michigan's congressional delegation to respectfully encourage the Senate Judiciary Committee to provide hearings as soon as reasonably practical for President Bush's nominees, from Michigan, to the Sixth Circuit Federal Court of Appeals.

These four judges, Honorable Richard Allen Griffin, Honorable David McKeague, Honorable Susan Bieke-Neilson and Honorable Henry William Saad, are all distinguished jurists who have served the citizens of Michigan with competence and integrity. All four judges have received favorable ratings from the American Bar Association and have widespread bipartisan support and respect from the legal community.

Fairness to these judges, and to the American citizens who seek the timely administration of justice, requires that these nominees be provided a hearing before the Judiciary Committee and a vote in the full Senate. The continued wholesale blocking of all nominees, despite their unquestioned merit, is inconsistent with the dignified traditions of the United States Senate.

Moreover, the Sixth Circuit is critically understaffed and Judges Saad, Bieke-Neilson and Griffin have all been nominated to fill vacancies that have been designated by the non-partisan National Judicial Conference as judicial emergencies. Additionally, the United States Attorney's Office of the Eastern District of Michigan issued a formal letter indicating that the severe understaffing in the Sixth Circuit hinders effective prosecution of criminal cases.

Finally, we are concerned that if the President's nominations are permitted to be held hostage, for reasons not personal to any nominee, that these judicial seats traditionally held by judges representing the citizens of Michigan may be filled with nominees from other states within the Sixth Circuit. This would be an injustice to the many citizens who support these judges and who have given much to their professions and government in Michigan.

The Honorable Orrin G. Hatch  
February 26, 2003  
Page Two

Thank you for your consideration of our request.

Sincerely,


cc: The Honorable Bill Frist  
Majority Leader, United States Senate

Statement  
United States Senate Committee on the Judiciary  
**Judicial Nominations**  
June 16, 2004

**Senator Bill Nelson**  
United States Senator , Florida

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Members of the Judiciary Committee, it is with great pride and pleasure that I have the opportunity to introduce Judge Virginia Hernandez Covington for appointment to the United States District Court for the Middle District of Florida.

I would also like to acknowledge the presence of Judge Covington's two children who have accompanied her today, Laura and Stephen. It is my understanding that Judge Covington's oldest son Michael could not attend. He is a law student at Stetson College of Law, no doubt following in the footsteps of his parents. Judge Covington's husband, Douglas Bagge, also an attorney, has remained in Florida to care for her mother whose health would not allow her to travel.

Judge Covington's story should serve as an inspiration to us all. Judge Covington's family left Cuba in December 1953, for Florida. They settled in Tampa, spoke no English, knew no one, and had very limited resources. The citizens of Tampa welcomed her family with open arms, and Judge Covington, who was born on July 12, 1955, learned a valuable lesson about the importance of community. Judge Covington, in addition to having a very distinguished and impressive legal career, which I will get to in a moment, has been extremely active in community affairs and dedicated to giving back to the community by helping those less fortunate. This is a lesson she passed on to her children who are each involved in community service.

Judge Covington graduated cum laude with a Bachelor of Science degree from the University of Tampa, where she also received the Outstanding Female Graduate Award. She went on to earn a Master of Business Administration at the University of Tampa before leaving Florida to earn her law degree at Georgetown University Law Center. After graduating from Georgetown University Law Center, she worked as a trial attorney for the Federal Trade Commission and then as an Assistant State Attorney for Hillsborough County, Florida. She then joined the United States Attorney's Office in 1983. For 12 of the nearly 20 years she was at the U.S. Attorney's Office, she served as Chief of the Asset Forfeiture Section of the United States Attorney's Office. During her tenure at the United States Attorney's Office she received more than 70 written commendations. Governor Bush appointed Judge Covington to the Second District Court of Appeals in 2001.

In addition to Judge Covington's experience as a prosecutor, she has lectured extensively on asset forfeiture, money laundering, and complex prosecutions to prosecutors and law enforcement, as well as teaching trial advocacy practice and procedure throughout Latin America.

Judge Covington has received numerous honors and awards throughout her distinguished career. She was the 1999 winner of the Raymond E. Fernandez Award given by the Hillsborough County Sheriff's Hispanic Advisory Council in recognition of her outstanding contributions to the Hispanic Community. In 2002 she was selected as one of Hillsborough County's Outstanding Latin Women; and in 2003 she received Tampa's Hispanic Woman of the Year Award.

We have an extraordinarily qualified candidate in Judge Covington, and I give her my full-hearted endorsement. Senator Graham, who has asked me to submit his remarks for the record, has also indicated his support for Judge Covington.

## HAEHNEL & PHELAN

Attorneys at Law

Craig W. Haehnel  
Freeman M. Haehnel  
Lawrence J. Phelan

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Grand Rapids, Michigan 49503  
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Of Counsel:  
James M. Catchick

December 12, 2001

Senator Carl Levin  
459 Russell Senate Office Building  
Washington, DC 20510-2202

RE: Hon. David W. McKeague, District Court Judge

Dear Senator Levin:

I have been asked to write a letter on behalf of the Honorable David W. McKeague, who, as you know, has been nominated by President Bush to fill one of the vacancies at the United States Court of Appeals for the Sixth Circuit. As a local lawyer, I believe that it is very important that you receive comments from the local Bar as you prepare to make this most important decision.

I am currently in my eighteenth year of practicing law in Grand Rapids, Michigan, concentrating solely on criminal defense. During the ten years or so that Judge McKeague has been on the bench, I have appeared many times before him on a variety of criminal cases. I can honestly and sincerely say that it has been an honor and a privilege to appear in his Court. First and foremost, Judge McKeague's demeanor has always been exemplary. He has always treated the lawyers and their clients with dignity and respect.

Secondly, Judge McKeague has had a firm grasp on the issues for each and every criminal case that I have had and demanded that I knew the issues as well. Judge McKeague's rulings on these issues were always well-reasoned in the law and ultimately quite fair. While I did not always agree with some of his rulings, I always felt that my client was treated justly and fairly by Judge McKeague.

Finally, I have appeared many times before the United States Court of Appeals for the Sixth Circuit on a variety of criminal cases. I know that Judge McKeague will be a valued and trusted member of that Honorable Court. I am aware that the Sixth Circuit is critically short of Judges and therefore, I would sincerely hope that you would look at Judge McKeague's qualifications rather than other issues.

Senator Carl Levin  
Page 2  
December 12, 2001

Thank you very much for taking the time to review this letter. Not only will the Sixth Circuit be a better Court if Judge McKeague is approved by the Senate, the citizens of the Circuit will reap the benefits. If you or your staff have any questions, please feel free to contact me. Again, thank you for your time and efforts on this most important matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lawrence J. Phelan", with a stylized flourish at the end.

Lawrence J. Phelan

LJP:ld



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H. RHETT PINSKY  
EDWARD (NED) M. SMITH  
MICHAEL L. FAYETTE  
DAVID E. HULSWIT, JR.  
KATHERINE M. SMITH

A. ROBERT KLEINER  
1916-1987

December 7, 2001

Senator Carl Levin  
Via Facsimile (202/228-2062)  
c/o Helen Galen

Dear Senator Levin:

It gives me great pleasure to support the nomination of the Honorable David W. McKeague to the Sixth Circuit Court of Appeals.

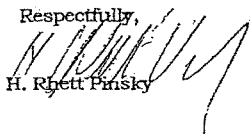
As an attorney practicing in Grand Rapids, Michigan, I have had the opportunity to appear before Judge McKeague on many occasions and to work with him on the committee that established the voluntary facilitative mediation program in the United States District Court for the Western District of Michigan. This program has recently received recognition from the State Bar of Michigan.

I believe that Judge McKeague richly deserves to be appointed to the Sixth Circuit Court of Appeals. Appearing before him, particularly with respect to motions for summary judgment, is an enjoyable judicial experience. He is always prepared, asks penetrating questions, and decides the issues fairly and in accordance with the law. His judicial integrity and intellectual honesty are beyond question.

I believe Judge McKeague will make an excellent addition to the Sixth Circuit.

If you wish further information, please advise.

Respectfully,

  
H. Rhett Pinsky

HRP/esd

LAW OFFICES

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DETROIT, MICHIGAN  
BINGHAM FARMS, MICHIGAN

December 7, 2001

Senator Carl Levin  
459 Russell Senate Office Bldg.  
Washington, DC 20510-2202

Via Facsimile  
(202) 228-2062

Re: *Honorable David W. McKeague, U.S. District Court Judge,  
Western District of Michigan*

Dear Senator Levin:

I am writing to express my support for Judge David W. McKeague who has been nominated by President George W. Bush for a seat on the Sixth Circuit Court of Appeals. I have known Judge McKeague for over 20 years and have had the opportunity to practice with him as well as having cases heard and decided by him as a Federal District Judge in Lansing.


Judge McKeague is indeed qualified to serve as a judge on the Sixth Circuit Court of Appeals. He possesses a keen intellect, a fundamental fairness to all who appear before him and a work ethic and standard of judicial demeanor that is admirable.

As a practitioner in the Federal Court system and as a Life Member of the Sixth Circuit Judicial Conference, I respectfully provide my endorsement for his confirmation by the United States Senate. Having argued before the Sixth Circuit Court of Appeals in Cincinnati on many occasions since 1974, I can personally attest to the qualities, experience, and demeanor that Judge McKeague would bring to the Court. Judge McKeague's experience, talent and fairness would serve all who have matters before the Court with the same dispatch and fairness that he has exhibited on the Federal District Court bench.

I am willing to provide any further information regarding my experiences with Judge McKeague for you or any of your colleagues during the confirmation procedure. I look forward to speaking with you if your schedule permits and extend my best personal wishes for your continued success in the United States Senate on behalf of the people of the State of Michigan.

Very truly yours,

HONIGMAN MILLER SCHWARTZ AND COHN

  
John D. Pirich

JDP/cf

**HONIGMAN**

Honigman Miller Schwartz and Cohn LLP  
Attorneys and Counselors

John D. Pirich

517-377-0712  
Fax: 517-364-9512  
jdp@honigman.com

September 25, 2003

Via Facsimile

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: United States District Judge David W. McKeague

Dear Mr. Chairman:

I am writing in regard to the nomination of Judge David W. McKeague to the Sixth Circuit Court of Appeals. I have known Judge McKeague for more than 20 years. I was actively involved with many matters with Judge McKeague when he was in private practice and found his professionalism, integrity, and his legal abilities to be outstanding.

Since Judge McKeague was appointed to the United States District Court, I have had the opportunity to appear in front of him on numerous occasions. On those occasions, I have found his demeanor to be professional, courteous, as well as appropriate in regard to questions asked or the legal theories raised in such proceedings. I have been informed that contentions have been made that Judge McKeague has had a propensity to grant dispositive motions at a rate or percentage which is above that of other Judges. From my experience, Judge McKeague's disposition of dispositive motions has been exclusively based on the facts and the law of the individual matters before the Court. Whether I have succeeded or not on behalf of a client in matters before Judge McKeague, I have always felt that his rulings have been based exclusively on his analysis and understanding of the law and its applicability to the facts of the case then pending before the Court.

As an active trial practitioner in the Western District of Michigan, I wholeheartedly support the confirmation of Judge McKeague to the Sixth Circuit Court of Appeals. I believe his presence on the Sixth Circuit will further the interest of the litigants before the Court, whether they be from Michigan, Ohio, Tennessee, and Kentucky.

Sincerely,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

By:

John D. Pirich

JDP/cf

c: The Honorable Patrick J. Leahy

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Walter S. Foster  
1878-1961  
Richard B. Foster  
1908-1996  
Theodore W. Swift  
1928-2000  
John L. Collins  
1926-2001

Walter A. Smith  
Alan J. Clappold  
Gary J. McRay  
Robert J. McCullen  
Stephen L. Jurnu  
William K. Fahey  
Stephen O. Schultz  
William R. Schultz

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Scott L. Mandel  
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Sherry A. Stein  
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David J. Houston  
Brian A. Katz  
Robert E. McFarland  
Stephen J. Lowrey  
Kenneth T. Brooks  
Patricia A. Calore  
Michael J. Bonmassaro  
Jean G. Schukal

Glen A. Schmege  
Michael W. Fuernner  
Brian G. Goodenough  
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Eric E. Dwyer  
Stephen J. Rhodes  
Melissa J. Jackson  
Steven H. Lasher  
Nancy L. Kahn  
Deanna Swisher  
Mark J. Barrych  
Thomas R. Meagher  
Douglas A. Meislock  
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Peter R. Albertina  
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Scott A. Chernick  
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Jennifer M. Van Horn  
Paul J. Millenbach  
Dik H. Beckwith  
Rebecca S. Davies  
Andrea J. Hoal  
Anne M. Skilton  
Barbara J. Oyer  
Chae Y. Green  
Jodi W. Bang  
Jennifer Kildea Dewane  
John P. Nicolucci  
Michael D. Howter  
Larry R. Jensen, Jr.  
Molly L. Chan  
Meredith A. Jaguth

Keith A. Castora  
Kurtin M. McNelly  
Robert M. Harley  
Lisa A. Funkhouser  
David S. Effner  
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David Vanderhaagen  
Norman D. Hawkins  
Steven L. Owen  
John M. Naber  
Richard L. Hillman  
Francis J. O'Donnell  
Michael G. Harrison  
Dennis R. O'Connell  
Jeanne M. Dunk  
Alan C. Mali

Writer's Direct Phone: 517.371.8157

April 22, 2002

Via 1<sup>st</sup> Class Mail

The Honorable Debbie Stabenow  
United States Senator  
280 East Saginaw  
East Lansing, Michigan 48823

The Honorable Carl Levin  
United States Senator  
124 West Allegan, Suite 1810  
Lansing, Michigan 48933

Dear Senator Stabenow and Senator Levin:

Re: Appointment of Honorable David W. McKeague  
for the Sixth Circuit Court of Appeals

I am writing to express my enthusiastic support for confirmation of the appointment of District Judge David W. McKeague for the U.S. Court of Appeals for the Sixth Circuit. I have known Judge McKeague, through regular contacts in his capacities both as a judge and a lawyer, over the last 14 years. I believe that Judge McKeague possesses the judicial skill, common sense, and conviction to justice that qualifies him for this position.

Judge McKeague possesses superior intelligence and skill. He is widely known for his superlative organization and preparation. Judge McKeague also possess integrity and conviction to basic fairness and justice. He decides issues with an open mind, based on the law and common sense. As an appellate judge, he will faithfully and diligently uphold the law.

Judge McKeague has also made considerable effort to enhance bench-bar relations. I am the immediate past president for the Federal Bar Association, Western Michigan Chapter (FBA). Judge McKeague has participated extensively in numerous FBA functions. For example, Judge McKeague is currently one of the driving forces behind the FBA's Hillman Advocacy Program, an intensive workshop conducted annually for the benefit of emerging lawyers. Further, Judge McKeague has regularly participated in the FBA's Bi-Annual Bench-Bar Conference. He likes to be actively involved in bench-bar issues, and is always available to hear concerns of, and suggestions from, the bar.

April 22, 2002  
Page 2

In summary, I believe that Judge McKeague makes an outstanding candidate to serve at the appellate level. I encourage the Senate to confirm Judge McKeague as soon as reasonably possible.

Thank you for your consideration of my comments.

Very truly yours,

FOSTER, SWIFT, COLLINS & SMITH, P.C.

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Michael W. Puerner

/lkp

bcc: Honorable David W. McKeague  
Richard A. Kay

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The Reynolds Law Firm, P.C.

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December 6, 2001

VIA FACSIMILE ONLY

Senator Carl Levin

Dear Senator Levin:

**RE: HONORABLE DAVID W. MCKEAGUE**

I am sending this letter in support of the nomination of David McKeague to the Sixth Circuit Court of Appeals. I have known Judge McKeague for close to 20 years, both as a practicing attorney and United States District Court Judge for the Western District of Michigan.

I have practiced in the State and Federal Courts here in Michigan for over two decades and have had the opportunity to litigate cases all over the State of Michigan. I feel that with this experience, I am able to offer my unqualified support for Judge McKeague.

I have also been involved in a variety of professional activities, as well as community activities over the years. Rather than list those, I am pleased to attach my curriculum vitae by way of background.

I have worked with Judge McKeague over the past three years at the Michigan State University - Detroit College of Law Chapter of the American Inns of Court. This is a mentoring program designed to promote professionalism and civility within our profession. Judge McKeague was the first President of the Inn and also a founding member. I have worked with him on this mentoring program since its inception. I am pleased to advise you that he has donated countless hours supporting, participating and promoting this mentoring program. Additionally, I have participated in seminars and Bench Bar programs wherein Judge McKeague has donated additional countless hours over the years. He has also participated at local law schools to judge moot court competitions.

I am a practicing criminal defense attorney and have been for the majority of my career as an attorney. As I represent clients in the judicial system, I look for fairness, decisiveness, clear legal reasoning and good judicial temperament from the bench. I have been able to observe these qualities in Judge McKeague during jury trial as well as during motions and argument over the years since his appointment as an Article III District Court Judge.

Senator Carl Levin

December 6, 2001

Page 2

Judge McKeague possesses outstanding intellectual abilities and excellent scholarship. Having read opinions that he has authored, I can also tell you that he is an extremely good and reasoned legal writer. His opinions are concise and written with the type of clarity necessary to provide guidance to those relying upon those opinions. He would serve the Federal Judiciary extremely well in the Sixth Circuit Court of Appeals.

As a comparative example, having appeared before hundreds of judges over the years, I can tell you that I look forward to having cases before him. I can always rest assured that I will be treated with respect as a professional and that my clients will receive a fair opportunity to present their case. Although, as a lawyer, it seems I always want more than what I get, I have never had occasion with Judge McKeague where I have left the courtroom feeling that justice was not served.

Judge McKeague's work habits are excellent and I can assure you, through my involvement with the American Inns of Court, along with Judge McKeague and others, that he is a willing participant who does not avoid putting in extra time to benefit the profession, the judicial system and our community. His involvement and oversight have been a major factor contributing to the success of our project at Michigan State University - Detroit College of Law.

Last year I was appointed to the Federal Judicial Center, Magistrate Judges Education Committee by Chief Justice Renquist. There were two attorneys appointed in the country to contribute to the training program for Federal Magistrate Judges. I have been able to participate in the programs and look forward to my continued involvement. Having said this, I would advise you that Judge McKeague is the chairperson of the Federal District Judges Education Committee for the Federal Judicial Center and has made significant contributions to the training provided for Federal Judges. This training is for Federal District Judges throughout the United States.

If you have any questions of me, do not hesitate to contact me.

Wishing you and your family a safe and joyous holiday season, I remain, very truly yours,

THE REYNOLDS LAW FIRM, P.C.



Frank Harrison Reynolds

FHR:JRH

Enc.

pc: Honorable David W. McKeague w/enc



Reynolds Law Firm, P.C.



The Reynolds Law Firm, P.C.

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October 8, 2003

**VIA FACSIMILE ONLY**

**The Honorable Orrin G. Hatch**  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Chairman Hatch:

**RE: HONORABLE DAVID W. MCKEAGUE**

I am sending this letter in support of the nomination of David McKeague to the Sixth Circuit Court of Appeals. I have known Judge McKeague for close to 20 years, both as a practicing attorney and United States District Court Judge for the Western District of Michigan.

I have practiced in the State and Federal Courts here in Michigan for over two decades and have had the opportunity to litigate cases all over the State of Michigan. I feel that with this experience, I am able to offer my unqualified support for Judge McKeague.

I have also been involved in a variety of professional activities, as well as community activities over the years. Rather than list those, I am pleased to attach my curriculum vitae by way of background.

I have worked with Judge McKeague over the past three years at the Michigan State University - Detroit College of Law Chapter of the American Inns of Court. This is a mentoring program designed to promote professionalism and civility within our profession. Judge McKeague was the first President of the Inn and also a founding member. I have worked with him on this mentoring program since its inception. I am pleased to advise you that he has donated countless hours supporting, participating and promoting this mentoring program. Additionally, I have participated in seminars and Bench Bar programs wherein Judge McKeague has donated additional countless hours



Honorable Orrin G. Hatch

October 8, 2003

Page 2

over the years. He has also participated at local law schools to judge moot court competitions.

I am a practicing criminal defense attorney and have been for the majority of my career as an attorney. As I represent clients in the judicial system, I look for fairness, decisiveness, clear legal reasoning and good judicial temperament from the bench. I have been able to observe these qualities in Judge McKeague during jury trials as well as during motions and arguments over the years since his appointment as an Article III District Court Judge.

Judge McKeague possesses outstanding intellectual abilities and excellent scholarship. Having read opinions that he has authored, I can also tell you that he is an extremely good and reasoned legal write. His opinions are concise and written with the type of clarity necessary to provide guidance to those relying upon those opinions. He would serve the Federal Judiciary extremely well in the Sixth Circuit Court of Appeals.

As a comparative example, having appeared before hundreds of judges over the years, I can tell you that I look forward to having cases before him. I can always rest assured that I will be treated with respect as a professional and that my clients will receive a fair opportunity to present their case. Although, as a lawyer, it seems I always want more than what I get, I have never had occasion with Judge McKeague where I have left the courtroom feeling that justice was not served. I have also experienced professional and judicial good temperament on the part of Judge McKeague. His rulings have always been based upon the law.

Judge McKeague's work habits are excellent and I can assure you, through my involvement with the American Inns of Court, along with Judge McKeague and others, that he is a willing participant who does not avoid putting in extra time to benefit the profession, the judicial system and our community. His involvement and oversight have been a major factor contributing to the success of our project at Michigan State University - Detroit College of Law.

In 2000, I was appointed to the Federal Judicial Center, Magistrate Judges Education Committee by Chief Justice Rehnquist. There were two attorneys appointed in the country to contribute to the training program for Federal Magistrate Judges. I have been able to participate in the programs and look forward to my continued involvement. Having said this, I would advise you that Judge McKeague is the chairperson of the Federal District Judges Education Committee for the Federal Judicial Center and has made significant contributions to the training provided for Federal Judges. This training is for Federal District Judges throughout the United States.

**R**

Honorable Orrin G. Hatch

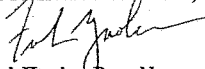
October 8, 2003

Page 3

If you have any questions of me, please do not hesitate to contact me.

Very truly yours,

THE REYNOLDS LAW FIRM, P.C.



Frank Harrison Reynolds

FHR:JRH

Enc.

pc: Honorable David W. McKeague w/enc  
Honorable Patrick J. Leahy, Ranking Member,  
Committee on the Judiciary w/enc  
Office of Legal Policy w/enc



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**Congress of the United States**  
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**Washington, DC 20515-2208**

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**The Honorable Mike Rogers (Michigan)**  
**United States House of Representatives**

**Nomination of the Honorable David W. McKeague**  
**U.S. Court of Appeals for the Sixth Circuit**  
**Senate Committee on the Judiciary**  
**June 16, 2004**

Good morning, Chairman Hatch, Senator Leahy and members of the committee.

It is my distinct privilege and honor to introduce David McKeague to this distinguished panel. David is not only a constituent of Michigan's Eighth Congressional District, but he is a good friend, a widely respected member of Michigan's legal community and a distinguished jurist with over a decade of experience on the federal bench.

At this time, Mr. Chairman, I would ask David to introduce himself to the committee.

Mr. Chairman, I would be remiss if I did not thank and applaud you for your principled decision to continue hearings for President Bush's nominees, from Michigan, to the Sixth Circuit Federal Court of Appeals. This hearing is evidence of progress toward filling vacancies that have been deemed judicial emergencies by the Administrative Office of the U.S. Courts.

An independent federal judiciary is the hallmark of America's tripartite system of government. A judiciary free of partisan political wrangling stands as a counterweight to the political passions of the Congress and the executive branch. Appearing before the committee today is a nominee to the federal appellate bench who embodies the temperament, compassion and intelligence implicit in Article III's creation of an independent judiciary.

Judge David McKeague is a distinguished federal district court judge with over a decade of experience on the bench. In 1992, Judge McKeague was unanimously confirmed by the United States Senate to serve on the U.S. District Court for the Western District of Michigan. Additionally, the American Bar Association rated Judge McKeague "Well Qualified" to sit on the Sixth Circuit.

Prior to his service on the federal bench, David practiced law, first as an associate and later as a partner, with the respected Lansing, Michigan law firm of Foster, Swift, Collins and Smith. He had a diverse practice, handling a variety of matters involving financial transactions and mergers, regulations of public utilities, commercial litigation, and bankruptcy. David earned both his undergraduate and law degree from the University of Michigan.

Before offering my opinion on why Judge McKeague is an ideal nominee for the federal appellate bench, I believe it is best to hear from those in Michigan's legal community who have observed or worked with David during his time on the federal district court. Here are what a number of David's colleagues have said regarding his fitness for the Sixth Circuit:

- "... Judge David McKeague possesses the character, intellect, experience, and judicial demeanor to service with distinction on the Sixth Circuit."
- "Although we had very different political beliefs and associations ... The law was always [Dave's] guide and he studied it carefully and interpreted it fairly."
- "Despite the fact that Judge McKeague and I do not share party affiliation ... [H]e will bring experience and boundless wisdom to the United States Court of Appeals."
- "We are not unmindful of the political situation presented by judicial nominations ... however, Judge McKeague's is one that will make you proud for exercising independence. He is Michigan's best, and he has proven it."

It must be noted that the preceding testimonials are all from prominent Democrats in Michigan's legal community. In addition, here is what one *Detroit News* columnist said regarding Judge McKeague's nomination:

- "David McKeague [is] an uncontroversial and respected federal district judge from western Michigan .... [He] deserve[s] a prompt hearing and, if approved by the Judiciary Committee, an up-or-down vote in the Senate."

#### Improving the Law and Administration of Justice

While cognizant of the significant restraints federal judges face on non-judicial activities, David has given much back to his profession and the legal community. He has been at the forefront in mentoring tomorrow's legal leaders while training and educating his peers.

In mentoring and developing the legal minds of tomorrow's leaders, David is a long-time adjunct professor at Michigan State University School of Law. Additionally, David is a founding Master and President of the American Inns of Court at the Michigan State University School of Law.

Leaders within the federal judiciary have also recognized Judge McKeague's intellect and leadership abilities. United States Supreme Court Chief Justice Williams Rehnquist has appointed Judge McKeague to two positions of prominence. He currently serves on the Defender Services Committee, which is responsible for insuring adequate representation to all persons accused in federal court of having committed a crime, and he is the chairman of the budget subcommittee of this important committee. He also just completed six years of service on the District Judge Education Committee of the Federal Judicial Center, the last five of which as chairman. In this position, he was responsible for all of the educational programs provided to district judges throughout the country.

Judge McKeague has proven an excellent steward of the court's resources as he has led his district to a national reputation for innovation in technology and is a leader in modernizing dispute resolution. As Chairman of the Automation Committee of the Western District of Michigan, Judge McKeague instituted a pilot civil electronic filing program, which allows attorneys in civil cases in his district to file case documents electronically. It is the first such program in Michigan, and only the seventh nationwide.

David also serves as Chairman of the Alternative Dispute Resolution (ADR) Committee of the Western District of Michigan, where he is recognized as a leader in reforming a system encouraging parties to settle disputes short of trial. The cost of litigation and a trial can be immense, both economically and psychologically, for the involved parties. In terms of both tax dollars and case backlog, settling a case before trial can improve the administration of justice in the federal district court system. Through a facilitative mediation program advocated by Judge McKeague, countless parties in the Western District have been able to resolve their disputes before reaching trial. In fact, facilitative mediation has resulted in the settlement of over two-thirds of the cases referred to facilitation - resulting in a savings of \$25 million for the Western District of Michigan since 1996. In fact, the State Bar of Michigan has begun instituting facilitative mediation in the Michigan courts.

Mr. Chairman, in addition to filling a declared "judicial emergency" on the Sixth Circuit, it is clear that Judge David McKeague is a highly respected and imminently qualified jurist who would be an excellent addition to the federal appellate bench.

Again, I applaud your decision to continue hearings for Michigan nominees to the Sixth Circuit, and steadfastly urge, without delay, the swift confirmation of Judge David W. McKeague to the U.S. Court of Appeals for the Sixth Circuit.

Thank you.

DILLEY & ROMINGER, PLC

Attorneys at Law

"A Tradition in Excellence for Generations"

Robert R. Dilley  
Charles S. Rominger  
Nancy L. Dilley

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Grand Rapids, MI 49503-4302

Phone 616-454-9200  
Fax 616-458-6446

December 7, 2001

Senator Carl Levin  
Via Facsimile: 202-228-2062  
Attn: Helen Galen

Dear Senator Levin:

I take great personal and professional pride in my recommendation and endorsement of the Honorable David W. McKeague, District Judge for the Western District of Michigan, for appointment to the Sixth Circuit Court of Appeals. I have practiced before Judge McKeague since his appointment to the District Court Bench, and I have found his contribution to the judicial process to have been extraordinary in all regards.

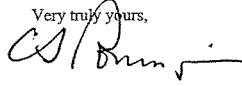
Judge McKeague is a jurist of significant and keen intellect. I have been consistently impressed with not only his capable understanding of the many complex issues put before him, but more importantly, his unique and savvy ability to reduce the complexity to manageable understanding. The results flowing from this "common sense" dissection drives toward justice in a way that the parties and the process can embrace.

In addition to Judge McKeague's obvious intellect, he represents the Bench with a temperament consistent with the dignity, compassion, and trust the Court deserves. I have always found him to be straightforward, friendly, and comfortable. He does not rule his Court, he presides in service to the law.

I recommend the Honorable David W. McKeague in the highest terms possible. I trust him to answer the call of appellant consideration with a view toward the value of tested precedent, but with the courage to embark on change. I trust him to not merely fall into step with the prevailing view, but to do what is right, fair, and just.

I thank you for your favorable consideration of the Honorable David W. McKeague.  
Please endorse his appointment

Very truly yours,



Charles S. Rominger

CSR:tlb



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FERRIN RYNDERS

DIRECT DIAL XXXXXXXXXXXX  
E-MAIL: prynders@varnumlaw.com

October 16, 2003

*Via Facsimile & First-Class Mail*

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

Re: Nomination of the Honorable David W. McKeague

Dear Chairman Hatch:

I write to enthusiastically endorse and support the nomination of Judge David W. McKeague to the United States Court of Appeals for the Sixth Circuit. He is a smart and practical judge who is interested solely in resolving conflict consistent with the evidence and established law, and my district's loss would be the Sixth Circuit's gain.

My litigation practice has taken me to a number of state and federal courts around the country. With that background, I can say that Judge McKeague has the intellectual and personal qualities to be an excellent judge. My most recent experience showed that he is approachable, concerned about the reasonable objectives of the parties and their counsel, and steadfastly focused on reaching a fair result. The majority of my contacts with Judge McKeague arise from my involvement with the mediation program sponsored by the United States District Court for the Western District of Michigan. I have been a mediator approved by that Court since the program's inception approximately five years ago. Judge McKeague has faithfully nurtured that program from the beginning. He has worked closely with the bar to develop a successful program that has generated considerable support from the attorneys and litigants who use it. In so doing, he has certainly advanced the interests of justice. Judge McKeague is hardly a figurehead. He has consistently attended the bi-annual meetings and annual training sessions sponsored by the Court. His personal involvement has been an encouragement to me, and I am sure to my fellow mediators.



Chairman Hatch  
October 16, 2003  
Page 2

I hope my observations are useful to your Committee as it considers Judge McKeague's nomination. I would welcome any further inquiries.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP

Perrin Lynders

PR:sm

cc: The Honorable Patrick J. Leahy (via facsimile & first-class mail)  
Office of Legal Policy (via facsimile)



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Lori M. Silsbury  
Direct Dial: XXXXXXXXXXXX  
Email: LSILSBURY@DYKEMA.COM  
Via Facsimile and First Class Mail

September 26, 2003

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Nomination of the Honorable David W. McKeague

Dear Mr. Chairman:

I am writing to express my strong support for the nomination of the Honorable David W. McKeague for the Sixth Circuit Court of Appeals. I am an attorney admitted to practice in the State of Michigan, the Western District of Michigan where Judge McKeague sits, the Sixth Circuit Court of Appeals and the United States Supreme Court. As a result, I have had the privilege to appear before a number of Judges of both the State and Federal courts. I have appeared before Judge McKeague on a number of cases. In some of those cases, my clients have prevailed. In other cases, they have not.

When Judge McKeague has been assigned to one of our client's cases, I am always confident that the client will receive a fair, considered review of the relevant facts and law. In my opinion, Judge McKeague does not decide cases based on political views or with a predisposition toward a plaintiff or a defendant. He meticulously works through the briefs and arguments presented by the parties, and is one of the best prepared Judges that I have had the privilege of appearing before. That dedication to the law is but one demonstration of his professionalism and commitment to deliver justice to all that appear before him.

It is my understanding that some people have raised an issue regarding Judge McKeague's demeanor in the courtroom. I would guess that these comments are coming from attorneys who have not prepared their case or prepared for oral argument before the Court. Judge McKeague does actively engage the parties during oral argument, pressing attorneys to provide him with appropriate authority for their positions and exploring the logic of arguments advanced. I respectfully submit that these are the hallmarks of a careful, thoughtful Judge that is fully prepared and actively seeking the result consistent with the law. Judge McKeague does not ask questions to entertain himself, but to act as a "devil's advocate" with respect to arguments made before him so that all issues are fully presented and considered before he rules.

**DYKEMA GOSSETT PLLC**

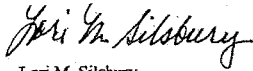
The Honorable Orrin G. Hatch  
September 26, 2003  
Page 2

I also understand that some people have questioned whether Judge McKeague is too hasty to issue summary judgments in cases. From my experience, and those of others in our firm, Judge McKeague only grants summary judgment when it is appropriate to do so. His decisions are the thoughtful application of the facts to the law, not a rush to create a result. I have not noted any bias toward granting summary judgments in cases, particularly when compared to other Judges before which I appear.

The Sixth Circuit Court of Appeals would be well-served by the addition of Judge McKeague. I hope that you will fully consider his qualifications and welcome him to a position for which he is extremely well qualified.

Thank you for your consideration of this matter.

Sincerely,



Lori M. Silsbury

LMSI:kks

cc: Honorable Patrick J. Leahy  
Office of Legal Policy



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ELIZABETH WELLS SKAGGS

DIRECT DIAL XXXXXXXXXX  
E-MAIL ewskaggs@varnumlaw.com

October 15, 2003

VIA FACSIMILE (202-228-1698)  
AND FIRST CLASS U.S. MAIL

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Mr. Chairman:

I write to you in support of the nomination of the Honorable David W. McKeague, United States District Judge for the Western District of Michigan, to the United States Court of Appeals for the Sixth Circuit.

I had the honor of serving as one of Judge McKeague's law clerks from 1993 to 1994 following my graduation from the University of Michigan Law School. During my tenure, I worked closely with Judge McKeague in researching and drafting legal memoranda and judicial opinions, debating legal and factual issues, and preparing for oral arguments, evidentiary hearings, and trials. I was able, on a daily basis, to personally observe the Judge's intellect, his demeanor, and his interactions with his staff and the attorneys and parties who appeared before him.

Based on my personal observations of and experiences with Judge McKeague, I can state without reservation that he is eminently qualified to serve on the Sixth Circuit Court of Appeals. Judge McKeague possesses a keen intellect and a great respect for the law. Indeed, he is widely considered to be one of the most intellectual and thoughtful jurists in West Michigan. When rendering a legal decision, Judge McKeague goes to great lengths to ensure he has reviewed each party's submissions, has a thorough understanding of the legal issues at stake, and is capable of rendering a fair and impartial opinion. He endeavors to treat each attorney and litigant with respect and to give them their "day in court." Although Judge McKeague has a reputation for being demanding of the attorneys and parties who appear before him, he only asks of them what he expects of himself: thorough preparation, integrity, and respect for the Court, the other litigants, and the legal system.

As a Democrat and financial contributor to Democratic candidates and causes, I can also state without reservation that Judge McKeague is a fair and impartial jurist. He reaches legal decisions based only on the law, the legal pleadings, and the evidence before him, without



The Honorable Orrin G. Hatch  
October 15, 2003  
Page 2

reference to outside influences or his own political convictions. Indeed, during the period of time I clerked for Judge McKeague, there were several occasions when Judge McKeague rendered decisions with which a politically conservative individual might not agree. He rendered these decisions – as he renders all decisions – because they were the fair and just result, not because they may – or may not – have been "politically correct."

Judge McKeague has also proven to be an excellent mentor and friend. He was an exemplary teacher and guide to the U.S. legal system when I clerked for him. He was very supportive of my decision to join the law firm of Akin, Gump, Strauss, Hauer & Feld, LLP, in Washington, D.C., immediately following my clerkship. Six years later, he provided invaluable advice when family concerns brought me back to Michigan and to my current firm, Varnum, Riddering, Schmidt & Howlett, LLP. I have benefited greatly, both personally and professionally, from knowing and working with Judge McKeague.

In sum, Judge McKeague is eminently qualified to serve on the United States Court of Appeals for the Sixth Circuit. His integrity, intellect, fairness, and impartiality are proven assets. I urge the Committee to approve his nomination and forward it to the full Senate for further consideration.

Respectfully yours,

Varnum, Riddering, Schmidt & Howlett, LLP

A handwritten signature in cursive script, reading "Elizabeth Wells Skaggs".

Elizabeth Wells Skaggs

cc: The Honorable Patrick J. Leahy (via facsimile and U.S. Mail)  
The Honorable Carl Levin (via facsimile and U.S. Mail)  
The Honorable Debbie Stabenow (via facsimile and U.S. Mail)  
Office of Legal Policy (via facsimile)

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1878-1961  
Richard B. Foster  
1908-1996  
Theodore W. Swift  
1928-2000  
John L. Collins  
Webb A. Smith  
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David VanderHagen  
Norman D. Hawkins  
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Steven L. Owen  
Dek H. Beckwith  
John M. Naber  
Richard L. Hillman  
Francis J. O'Donnell  
Michael G. Harrison  
Dennis R. O'Connell  
Joanne M. Dunk

Writer's Direct Phone: 517.371.8157

December 6, 2001

Via Facsimile

The Honorable Debbie Stabenow  
United States Senator  
280 E. Saginaw  
E. Lansing, MI 48823

The Honorable Carl Levin  
United States Senator  
124 W. Allegan, Suite 1810  
Lansing, MI 48933

Dear Senator Stabenow and Senator Levin:

Re: Appointment of Honorable David W. McKeague for the Sixth Circuit Court of Appeals

I am writing to express my strongest support for confirmation of the appointment of District Judge David W. McKeague for the U.S. Court of Appeals for the Sixth Circuit. I have gotten to know Judge McKeague, through extensive contacts in his capacities both as a judge and a lawyer, over the last 30 years. I believe that Judge McKeague possesses the judicial intellect, common sense, and passion for fairness and justice that uniquely qualify him for this position.

Judge McKeague possesses a level of intelligence and technical skill that is truly unique in the legal profession. In my dealings with him, he has always acquired an impressive command of both small details and the larger issues. As a judge, he is widely known for his superlative organization and preparation. He is an exceptionally clear thinker and communicator.

I also commend Judge McKeague's integrity and conviction to basic fairness and justice. He has the refreshing tendency of deciding issues with an open mind, based on the law and basic common sense. He clearly and frankly expresses the rationale for each of his decisions, without hidden agendas or preconceived conceptions. I believe that, as an appellate judge, he will faithfully and diligently uphold the law.

December 6, 2001  
Page 2

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Judge McKeague has also made it a priority to foster healthy bench-bar relations, and contribute to the enhancement of the legal profession. I remain an active member of the Federal Bar Association. Judge McKeague has participated in, and indeed taken a leadership role in, innumerable bar and similar functions. To name just two examples, Judge McKeague is one of the driving forces behind the FBA's Hillman Advocacy Program, an intensive workshop conducted annually for the benefit of emerging lawyers. Further, Judge McKeague has been a faithful participant in the Federal Bar's bi-annual Bench-Bar Conference. His mentoring of younger lawyers, and keen interest in professional civility, is highly appreciated in our district.

Frankly, we will be sorry to lose Judge McKeague as a trial judge. Without question, however, he will excel at the appellate level.

Thank you for your consideration of my comments.

Very truly yours,

FOSTER, SWIFT, COLLINS & SMITH, P.C.

5/

Webb A. Smith

WAS:lkp

bcc: Honorable David W. McKeague  
Richard A. Kay

SA41\FEDERAL BAR\APPT.LTR

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Y

OSTER,  
VIFT,  
OLINS &  
P.C.  
17371 8100

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SING:  
Washington Square  
25, MI 48933-2193  
17371.8100  
17371.8200

INGTON HILLS:  
Western Hwy.

gwin Hills, MI 48334  
48.539.9900  
48.551.7504

Walter S. Foster  
1878-1961  
Richard B. Foster  
1908-1996  
Theodore W. Swift  
1928-2000  
John L. Collins  
1926-2001

Webb A. Smith  
Allen J. Claypool  
Gary J. McElroy  
Robert J. McCullen  
Stephen J. Jernau  
William K. Peley  
Stephen O. Schulz  
William R. Schulz  
David R. Altlich

Scott A. Storey  
Charles A. Jansica  
Charles E. Bachert  
James B. Jensen, Jr.  
Scott L. Mansel  
Michael D. Sanders  
Sherry A. Sutin  
Brian A. Tinn  
Brian A. Keller  
Robert E. McFarland  
Stephen J. Lowmeyer  
Kenneth T. Elliott  
Faciola A. Calbee  
Michael J. Boninacito  
Jean G. Schunkel  
Glen A. Schmitz  
Michael W. Fuzister  
Brian G. Goodenough

Mark G. Hebert  
Mark H. Canady  
Eric E. Deater  
Stephen J. Rhodes  
William J. Jackson  
Steven H. Lisher  
Nancy L. Kahn  
Deanna Swisher  
Mark J. Burch  
Alan G. O'Brien  
Thomas R. Mesinger  
Douglas A. Mordick  
Scott R. Forbach  
Peter R. Albershus  
Christopher A. Ballard  
Scott A. Chermick  
Donald R. Martin  
Jennifer M. Van Horn

Paul J. Millenbach  
Dora M. Beckwith  
Bruce A. Vande Veen  
Anne M. Scymnick  
Richard L. Hillman  
Alan T. Rogalski  
Rebecca S. Davies  
Barbara J. Coyer  
Clare V. Green  
Jennifer Kildes Dewane  
John P. Nicolletti  
Michael D. Hensley  
Molly L. Chan  
Meredith A. Jagutti  
Keith A. Cantos  
Kirsten M. McNelly  
Robert M. Hantley  
Johanna M. Novak

Emily L. Matthews  
Benjamin J. Price  
Scott R. Loversick  
Ronald D. Richards, Jr.  
Joseph E. Kevly  
Terrence G. Quinn  
Jacqueline E. Bayley  
Edwin E. Eli  
Nancy A. Vashaw

O'Connor  
Thomas G. McQuinn, Jr.  
Lawrence B. Lindauer  
John W. Bacz  
David VandenHagen  
Andrea J. Hood  
Steven L. Owen  
John M. Nohel  
Francis J. O'Donnell  
Michael G. Harrison  
Dennis E. O'Connell  
Alvin G. Maki  
Frederick B. Bellamy  
Gilbert M. Fritzes  
Deborah J. Williamsch

Writer's Direct Phone: (317) 371-1577

Reply To: Lansing

October 6, 2003

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: United States District Judge David W. McKeague

Dear Mr. Chairman:

I write in support of the nomination of Judge David W. McKeague to the Sixth Circuit Court of Appeals. I have had the good fortune to have known Judge McKeague for over 31 years. I first met him when he joined our firm in 1971, and we practiced law together for over 20 years. We did work for several mutual clients and served on the Firm's Executive Committee together for a number of years. Later, after he was appointed as District Judge, I have appeared before him.

Throughout the 31 years, I have known Judge McKeague to be honest, professional and fair. He demands high standards of performance from those who appear in his Court, without regard to the client one represents or the philosophy one espouses. At the same time, he blends wisdom and reality when making his rulings. He treats all litigants and litigators with courtesy and respect. His rulings are well reasoned with due regard for precedent and the law provided by the Legislative Branch of government.

I have been informed that someone has suggested that Judge McKeague has a propensity for granting dispositive motions at a greater rate than other judges. That has not been my experience nor that of our Firm. His rulings have always been based on his analysis and understanding of the law and the facts presented to him.



October 6, 2003  
Page 2

Judge McKeague is extremely intelligent and he will serve the people of the 6<sup>th</sup> Circuit well. It is without reservation that I support and urge his confirmation.

Sincerely,

FOSTER, SWIFT, COLLINS & SMITH, P.C.

A handwritten signature in cursive script, reading 'Webb A. Smith', is written over the typed name.

Webb A. Smith

WAS:kz

cc: The Honorable Patrick J. Leahy



LAW WEATHERS & RICHARDSON

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James L. Wernstrom  
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Direct Fax: (616) 732-1740  
E-Mail: [Jim.Wernstrom@lwr.com](mailto:Jim.Wernstrom@lwr.com)

October 15, 2003

VIA FACSIMILE/U.S. MAIL

The Honorable Orrin G. Hatch  
Chairman, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20510

RE: David McKeague

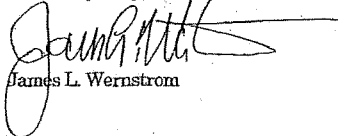
Dear Mr. Chairman:

The purpose of my letter is to lend support to the nomination of David McKeague for the Sixth Circuit Court of Appeals. I have been practicing in Federal Court in the Western District of Michigan since 1973. During that 30 year timeframe, I have obviously appeared in front of all of the judges who have honorably served this district on the federal bench. Of course, one of them is the Honorable David McKeague who has sat in Lansing for the past 15 years.

I have found Judge McKeague to be one of the most intelligent as well as decisive members of the judiciary before whom I have had the honor of appearing. Judge McKeague runs a tight ship. He has demonstrated judicial wisdom and an ability to quickly focus on some rather intricate issues of both motion practice and trial. Whereas he had little tolerance for those who are ill prepared and/or whose behavior is inappropriate, he is extremely professional with those who present themselves as one would expect in his court and in accordance with both procedural rules and the rules of evidence.

There is little doubt that Judge McKeague's propensity for hard work, thoughtfulness and decisiveness would further strengthen the Sixth Circuit.

Yours very truly,

  
James L. Wernstrom

JLW:tml  
cc: The Honorable Patrick J. Leahy  
Office of Legal Policy



STATE OF MICHIGAN  
COURT OF APPEALS

WILLIAM C. WHITBECK  
CHIEF JUDGE

July 19, 2002

100 WEST MICHIGAN AVENUE  
P.O. BOX 20022  
LANSING, MICHIGAN 48209-7522  
TELEPHONE (517) 373-3334  
FAX (517) 334-7810  
E-MAIL WWHITBECK@JUD.STATE.MI.US

Senator Carl Levin  
Attn: Chief of Staff Linda Gustitus  
269 Russell Senate Office Building  
Washington, D.C. 20510-2202

Dear Senator Levin:

I am writing this letter to support, strongly, the nomination of Judge Richard A. Griffin of the Michigan Court of Appeals to the United States Court of Appeals for the Sixth Circuit. I am fully aware that this situation is one in which politics and sound policy intersect. I respectfully suggest, however, the United States Senate should consider Judge Griffin's nomination on the merits, with the primary considerations being his ability, his integrity, and his qualifications.

With these criteria in mind, there is no question that the United States Senate should promptly confirm Judge Griffin for the position on the Sixth Circuit. Judge Griffin has served with great distinction on the Michigan Court of Appeals for fourteen years. He is a decisive, scholarly judge with an instinct for the core issues and with a flair for authoring crisp, understandable opinions. He has written over 280 published opinions, has written hundreds of unpublished opinions, and has decided thousands of cases. His integrity has been above reproach; indeed, I am unaware of *any* circumstance in which *anyone* has called Judge Griffin's integrity into question. Certainly, he is highly qualified, by education, by background, by practical experience, by work ethic, and by temperament to serve on the Sixth Circuit. In particular, I should emphasize that Judge Griffin works hard, and successfully, at the job of being a judge. Thus, not only does he prepare for and decide his cases and circulate his opinions promptly, he has served on several of this Court's operating committees and has made important contributions to this Court's continued standing as one of the premier intermediate appellate courts in the country.

I know that, on occasion, letters of support such as this one are considered to be matters of routine personal or political obligation. I hope that this will not be the case in this circumstance. Judge Griffin is a good man and a good judge. Considered on the merits, there is no question in my mind that he is fully qualified to serve on the Sixth Circuit; the operative word here is "serve" as that is precisely what Judge Griffin will do, serve the people and the public interest to the full extent of his considerable abilities. I urge you to give prompt and favorable consideration to his nomination.

565

Senator Carl Levin  
July 19, 2002  
Page Two

Thank you for your attention to this important matter and please contact me at any time if I can provide further information or answer any questions that you may have.

Best personal regards.

Sincerely,

A handwritten signature in black ink, appearing to read "Whitbeck", written over a horizontal line.

William C. Whitbeck  
Chief Judge, Michigan Court of Appeals

cc: Judge Richard A. Griffin

**Blue Cross  
Blue Shield**  
of Michigan



Richard E. Whitmer  
President and  
Chief Executive Officer

600 Lafayette East  
Detroit, Michigan 48226-2998

December 13, 2001

Honorable Carl Levin  
United States Senate  
459 Russell Senate Office Building  
Washington, DC 20510

Dear Senator Levin:

It was my good fortune to meet Dave McKeague when I first moved to the Lansing area in the mid-sixties. Since that time, I have relied on his sound judgment in a variety of matters.

During the past nine years, he has served in his current capacity of District Judge for the Western District of Michigan. His record on the bench speaks for itself. It is truly outstanding.

In addition to his professional activities, Judge McKeague has been an outstanding citizen, community leader and role model. For all of these reasons, I sincerely believe he would make an outstanding contribution as a member of the U.S. Court of Appeals, 6<sup>th</sup> Circuit.

Your consideration is most appreciated.

Best Wishes.

Sincerely,

Richard E. Whitmer

REW:sls

LAW OFFICES  
**WILLEY & CHAMBERLAIN**  
LIMITED LIABILITY PARTNERSHIP

LARRY C. WILLEY  
 CHARLES E. CHAMBERLAIN, JR.

940 TRUST BUILDING  
 40 PEARL STREET, N.W.  
 GRAND RAPIDS, MICHIGAN 49503-3032  
 (616) 458-2212  
 (616) 458-1158 (FACSIMILE)

December 10, 2001

Honorable Carl Levin  
 United States Senator  
 SR-269, Russell Senate Office Building  
 United States Senate  
 Washington, D.C. 20510

**FACSIMILE TRANSMISSION**  
**(202) 228-2062**

Re: Nomination of Hon. David W. McKeague to the United States Court of Appeals

Dear Senator Levin:

We strongly support the nomination of Hon. David W. McKeague to the United States Court of Appeals for the Sixth Circuit. He is the best candidate for the Court, and his appointment is one that will bring nothing but honor to our state. Please support this worthy nominee.

Our practice is devoted primarily to criminal law, and much of our work is in federal court. We both know Judge McKeague well as a lawyer, colleague, friend and judge. He is a man of exceptional intellect who is dedicated to the delivery of fair and impartial justice. He is an independent and thoughtful decision-maker who encourages debate and dialogue to arrive at just results. He is direct and forthright, and he is quick to identify the dispositive point to any legal issue. Although he is demanding, he expects no more from the lawyers than he expects from himself, and he treats everyone with respect.

Fair and impartial decisions are, of course, essential to criminal law. Judge McKeague is faithful to follow the law, yet not blind to the practical aspects of its application to the individuals who appear before him. He does not hesitate to criticize the government when he believes it is over-reaching, nor does he avoid the consequences of the law when justice demands it. He is creative, and he invites the lawyers and parties to be creative in reaching resolutions.

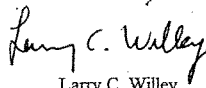
As an appellate judge, Judge McKeague will bring to the bench a wealth of experience which would be invaluable to the development of decisional law. Not only is he a faithful student of the law, he knows and understands the practical implications of the many legal decisions he will be called upon to make.

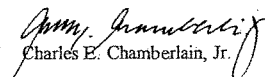
WILLEY & CHAMBERLAIN

Honorable Carl Levin  
December 10, 2001  
page 2

We are not unmindful of the political situation presented by judicial nominations. Of all the nominations on which you will have to pass, however, Judge McKeague's is one which will make you proud for exercising independence. He is Michigan's best, and he has proven it.

Very truly yours,

  
Larry C. Willey

  
Charles E. Chamberlain, Jr.

bcc: Hon. David W. McKeague &  
Frederick D. Dilley, Esq.

LAW OFFICES  
**WILLEY & CHAMBERLAIN**  
LIMITED LIABILITY PARTNERSHIP

LARRY C. WILLEY  
 CHARLES E. CHAMBERLAIN, JR.

940 TRUST BUILDING  
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 GRAND RAPIDS, MICHIGAN 49503-3032  
 (616) 458-2212  
 (616) 458-1158 (FACSIMILE)

October 16, 2003

Honorable Orrin G. Hatch  
 Chairman, Committee on the Judiciary  
 United States Senate  
 224 Dirksen Senate Office Building  
 Washington, D.C. 20510

**FAX TRANSMISSION**  
 (202) 228-1698

Re: Nomination of Hon. David W. McKeague to  
 United States Court of Appeals for the Sixth Circuit

Dear Mr. Chairman:

We strongly support the nomination of Hon. David W. McKeague to the United States Court of Appeals for the Sixth Circuit. He is the best candidate for the Court, and his appointment is one that will bring nothing but honor to our state. We respectfully urge prompt hearings on his nomination and confirmation.

Our practice is devoted primarily to criminal law, and much of our work is in federal court. We both know Judge McKeague well as a lawyer, colleague, friend and judge. He is a man of exceptional intellect who is dedicated to the delivery of fair and impartial justice. He is an independent and thoughtful decision-maker who encourages debate and dialogue to arrive at just results. He is direct and forthright, and he is quick to identify the dispositive point to any legal issue. He is always prepared, and is a tireless and dedicated worker.

Judge McKeague is also an innovator. He has spearheaded the effort in our court at electronic case filing, and his courtroom includes state-of-the-art equipment for evidence presentation. He is an excellent ambassador for technology, making himself and his staff available to answer any questions regarding the use of technology in the courtroom. He is also mindful of the potential disparity among parties in their ability to use technology, and he goes out of his way to level the playing field.

Fair and impartial decisions are, of course, essential to criminal law. Judge McKeague is faithful to follow the law, yet not blind to the practical aspects of its application to the individuals who appear before him. He does not hesitate to criticize the government when he believes it is over-reaching, nor does he avoid the consequences of the law when justice demands it. He is creative, and he invites the lawyers and parties to be creative in reaching resolutions.

## WILLEY &amp; CHAMBERLAIN

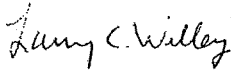
Honorable Orrin G. Hatch  
October 16, 2003  
page 2

As an appellate judge, Judge McKeague will bring to the bench a wealth of experience which would be invaluable to the development of decisional law. Not only is he a faithful student of the law, he knows and understands the practical implications of the many legal decisions he will be called upon to make.

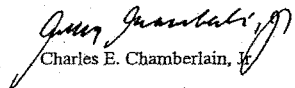
On a personal note, Judge McKeague is well known to the Chamberlain family. He grew up in our neighborhood in East Lansing, and my late father, a long-time Republican member of Congress, knew him well and followed his career with interest and pride. He was an ardent supporter of Judge McKeague's nomination and very much wanted to see him on the Sixth Circuit.

We are not unmindful of the political situation presented by judicial nominations. Of all the nominations on which you will have to pass, however, Judge McKeague's is one which will make you proud. He is Michigan's best, and he has proven it.

Very truly yours,



Larry C. Willey



Charles E. Chamberlain, Jr.

cc: Hon. Patrick J. Leahy  
Office of Legal Policy



Christopher P. Yates  
73 Campau Circle, N.W.  
Grand Rapids, Michigan 49503

The Honorable Carl Levin  
United States Senate

Dear Senator Levin:

I am writing to you in support of the nomination of Judge David McKeague to the United States Court of Appeals for the Sixth Circuit. As the Federal Public Defender for the Western District of Michigan and a lifelong, active Democrat, I have concerns about some of the Bush Administration's nominees to the United States Courts of Appeals across the country. I also am troubled by the way in which President Clinton's nominees to the Sixth Circuit were treated by the Senate Judiciary Committee. But I firmly believe that Judge McKeague should be promptly confirmed because he is such an ideal candidate for the Sixth Circuit.

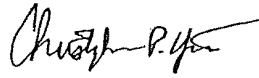
During my tenure as Federal Public Defender in West Michigan, I have often appeared before Judge McKeague. He is always well-prepared, unfailingly fair, and intelligent beyond description. He treats my clients with respect and dignity, and he always wants to know what I can tell him about their best qualities. In sum, he is a judge who understands the value of mercy when it is appropriate and justice when it is essential. He will bring experience and boundless wisdom to the United States Court of Appeals.

I have also come to know Judge McKeague quite well off the bench. He currently serves on the Defender Services Committee. In that capacity, he is one of a handful of federal judges charged with overseeing the Federal Public Defenders' program, and he has served with great distinction. He has conferred with me regularly to gain a comprehensive understanding of the needs of the defense community, and he has fought for our independence and financial stability. Judge McKeague never takes any responsibility lightly. I have been so pleased and impressed with his contribution to the Federal Public Defender program that my respect for him has grown beyond what words can convey.

Finally, and perhaps most importantly, Judge McKeague is a man of his word. Whenever he assures me that he will accomplish a task that is important to me or to my office, I know that I can count on him to follow through with his promise. When I first arrived in West Michigan to run the Federal Public Defender's Office, the office was in shambles. Judge McKeague gave me his word that he would allow me the time and provide me with the support necessary to bring the office back from the brink of dissolution. He never faltered in this commitment, and he can now take credit for the fact that there is a strong, independent Federal Public Defender's Office in the Western District of Michigan.

I sincerely appreciate how much the federal judiciary means to you. I share this interest, and I would not write this letter if I had any doubt whatsoever about Judge McKeague's fitness for the federal appellate bench. Despite the fact that Judge McKeague and I do not share party affiliation, my respect and admiration for him prompt me to write in the hope that you will assist him in obtaining swift confirmation to the United States Court of Appeals for the Sixth Circuit. Although his confirmation will be a significant loss for the district court on which he now sits, I am absolutely confident that you will ensure that his replacement on the district court bench will be someone approaching Judge McKeague's caliber.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher P. Yates". The signature is fluid and cursive, with a long horizontal stroke at the end.

Christopher P. Yates