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S. HRG. 109–397, PT. 1

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

MARCH 3, SEPTEMBER 29, AND OCTOBER 6, 2005

PART 1

Serial No. J–109–4

Printed for the use of the Committee on the Judiciary

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NOMINATIONS OF TERRENCE W. BOYLE, OF NORTH CAROLINA, TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT; ROBERT J. CONRAD, JR., OF NORTH CAROLINA, TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF NORTH CAROLINA; AND JAMES C. DEVER, III, OF NORTH CAROLINA, TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NORTH CAROLINA

THURSDAY, MARCH 3, 2005

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

The Committee met, pursuant to notice, at 2:00 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Lindsey Graham presiding.

Present: Senators Graham, Specter, Leahy, and Kennedy.

Senator GRAHAM. The hearing will come to order. I thank everyone for attending.

There is a vote at two o'clock, supposedly. If it is okay with everyone, we will hear from Senator Dole and Senator Burr, then go vote and come back and continue the hearing.

With that in mind, I will recognize the senior Senator from North Carolina, Senator Dole.

PRESENTATION OF TERRENCE W. BOYLE, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT, ROBERT J. CONRAD, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AND JAMES C. DEVER, III, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NORTH CAROLINA, BY HON. ELIZABETH DOLE, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator DOLE. Thank you very much. Senator, I want to thank you for holding today's hearing which is so important to North Carolina. Our Federal bench has been without the service of these able judges for far too long.

It is my honor to introduce to the Committee Judge Terrence Boyle, nominee for the Fourth Circuit Court of Appeals; Judge Jim Dever, nominee for the Eastern District of North Carolina; and Bob Conrad, nominee for the Western District of North Carolina.

I am so pleased to be sitting here with Senator Richard Burr. This is the first time that we have testified together as Senators. I am glad it is for such a worthy cause as making sure that we have excellent judges on the Federal bench.

Richard, I look forward to working with you on these and future judicial nominations.

When I first joined the United States Senate a little over 2 years ago, North Carolina had not a single judge on the Fourth Circuit Court of Appeals. Imagine, the largest State in the circuit and not one judge.

Currently, North Carolina enjoys the services of Judge Alison Duncan, but based on our proportion of the circuit, we should have at least four members of the court who consider North Carolina home. I look forward to a second North Carolinian joining the Fourth Circuit Court of Appeals in the near future.

Judge Terrence Boyle, of Edenton, was first nominated to the Fourth Circuit in 1991, then again more than a decade later in May 2001. Judge Boyle currently serves on the U.S. District Court for the Eastern District of North Carolina, a position he has held for 21 years. As a district court judge, he was designated to sit with the court of appeals 12 times, and he has authored over 20 appellate opinions. From 1997 until this past year, he served as past judge.

Terry received his undergraduate degree from Brown University and a law degree from American University. He began his career working in Congress at the House Subcommittee on Housing, Banking and Currency, and later served as an aide to Senator Jesse Helms.

Following more than a decade of private practice, Terry became a U.S. District Judge for the Eastern District. In his impressive judicial career, he has received praise from attorneys and colleagues of both political persuasions.

Wade Smith, a Raleigh lawyer and former North Carolina Democratic Party Chairman, said about Judge Boyle, and I quote, "I think he would happily rule against me and happily rule for me, whether I am a Republican or Democrat. I think he makes his decisions on the facts and that is the best we could ever hope." It is my fervent hope that the Committee will act expeditiously in sending Judge Boyle's nomination to the floor.

I would like to turn now to our district court nominees. North Carolina has had the longest district court vacancy in the country. For 6 years, a seat on the U.S. District Court for the Eastern District of North Carolina has been vacant. It is considered a judicial emergency by the Judicial Conference.

Jim Dever, a former editor-in-chief of the Duke University Law Journal, was first nominated to fill this longstanding vacancy 3 years ago. Jim lives in Raleigh and currently serves as United States Magistrate Judge in the Eastern District of North Carolina. Raleigh, the State's capital and the district's largest city, is without a resident district court judge. Elevating Jim to the district court will end this problem.

There hasn't been one single objection raised about Jim Dever's qualifications. He has broad bipartisan support. Robinson Everett, a Duke law professor and former Chief Judge of the Court of Ap-

peals for the Armed Forces, describes Jim Dever as having, and again I quote, "all the requisite qualities. He will be a superb jurist."

I am also proud to introduce Bob Conrad, nominated in April 2003 to be United States District Judge for the Western District of North Carolina. Bob is sorely needed. As our courts confront the ramifications of the Supreme Court's recent decision on the Federal minimum sentence guidelines, it is reasonable to expect that we will have even higher caseloads and need more judges to deal with them.

Bob Conrad is held in high esteem by his colleagues, both Republicans and Democrats. He is known for his prosecution of a cigarette smuggling ring funding the terrorist group Hezbollah, and in 1999 Bob Conrad was appointed by then-Attorney General Janet Reno to head the U.S. Justice Department's investigation into campaign fundraising abuses.

Bob is a graduate of Clemson and the University of Virginia Law School. While at Clemson, he was an academic All-American on the basketball team, and I think it looks like Clemson could use Bob in the ACC Tournament next week. Bob served as a Federal prosecutor in Charlotte starting in 1989. From 2001 until 2004, he was the U.S. Attorney for the Western District of North Carolina. Currently, he is in private practice at one of the largest law firms in the world as a partner in its Charlotte office.

All three North Carolina nominees come with impeccable credentials and it is my privilege to give them my strong support. Again, thank you for holding this hearing.

Senator GRAHAM. Thank you, Senator Dole.

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

Senator Burr.

PRESENTATION OF TERRENCE W. BOYLE, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT, ROBERT J. CONRAD, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AND JAMES C. DEVER, III, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NORTH CAROLINA, BY HON. RICHARD BURR, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator BURR. Mr. Chairman, I thank you, and I am here with tremendous pride to have the opportunity, along with Senator Dole, to introduce three distinguished North Carolinians nominated to judgeships by President Bush. Today is indeed a great day for North Carolina.

The gentlemen in question—Judge Terrence Boyle, Magistrate Judge James Dever and former U.S. Attorney Robert Conrad—have all served their State and their Nation admirably.

Mr. Chairman, I will also talk about the qualifications of these individuals and will be repetitive of what Senator Dole has said, and I say that for a reason, because these gentlemen should be judged based upon the record that they have. I believe that the record speaks for itself that they are more than qualified to be

nominated and every bit qualified to be confirmed by the United States Senate.

There are 15 circuit court judgeships in the Fourth Circuit and only one of these is occupied by a North Carolina judge. Our neighbor States to the north and to the south within the circuit both have four circuit judges. North Carolina is chronically underrepresented and not represented at all at the circuit court level.

A great deal of this can, of course, be attributed to the political nature of the debate surrounding nominations to the Fourth Circuit Court. That time has passed. The people of eastern North Carolina, and indeed all North Carolinians deserve another voice on the Fourth Circuit.

Judge Boyle, currently serving as District Court Judge for the Eastern District of North Carolina, has been nominated by the President to serve on the Fourth Circuit Court of Appeals. The American Bar Association has unanimously rated Judge Boyle as well qualified, and has stated he would make an outstanding appellate judge.

He has served as a district court judge for 21 years and has served in the position longer than 93 percent of the seated active Federal district court judges. He has presented over more than 12,000 cases, covering every possible kind of Federal criminal and civil trial. From time to time, he has been assigned to hear cases in the Western District of North Carolina and the Eastern District of Virginia, hearing criminal cases in both.

He also has experience at the appellate level, serving as a visiting judge on occasion from 1985 to the year 2000. During that time, he participated in oral arguments of more than 200 cases and wrote opinions in more than 50 cases in the court. I urge the Committee to move the nomination of Judge Boyle forward.

The Committee also has before it two nominees to North Carolina district courts. Even a Wake Forest grad like me is pleased to endorse them, despite the time that they spent at ACC rivals Duke and Clemson, and the University of Virginia. But I look past their academic choices even with March Madness upon us here in Washington, since they have accounted for themselves so well since leaving school.

Duke Law graduate Jim Dever, nominated by the President to the Eastern District, is currently serving the district as a magistrate judge. The seat to which he has been nominated has been vacant since December 7, 1997, more than 7 years. The Administration Office of U.S. Courts has classified the vacancy as a judicial emergency since the year 1999.

The Eastern District of North Carolina includes 44 of the State's 100 counties and extends from Wake County, which is Raleigh, to the coast of North Carolina. The civil and criminal caseloads in the district continue to increase and will continue to expand as a result of numerous initiatives launched by the U.S. Attorney.

Clemson and UVA Law grad Bob Conrad, nominated by the President to the Western District, is currently in private practice in Charlotte. He served as U.S. Attorney for the district from 2001 until late last year, and served as an Assistant U.S. Attorney for the district for 11 years, from 1989 to the year 2000. The Western District faces its own challenges, where there are currently two ju-

dicial vacancies, including one created by the untimely passing of Judge McKnight.

This time of the year is doubly important to Bob, who played on the Clemson basketball team that advanced to the Elite 8 of the NCAA Tournament in 1980. And I am sure they will not repeat this year, Mr. Chairman. I remind the Committee that he did this while earning an academic all-ACC selection.

This is indeed an all-ACC academic selection in the three individuals that we have here. This Committee and the United States Senate has before them the three most qualified individuals that I believe North Carolina can produce and I am proud to be here with Senator Dole to ask you for your support to move their nominations forward.

Thank you, Mr. Chairman.

Senator GRAHAM. Thank you, and on behalf of Clemson basketball, hope springs eternal. I thank both Senators very much for your testimony before the Committee. Thank you both for coming.

We have a vote on. I think the best thing for us to do is to adjourn to go vote. I think we have one vote, maybe two. We will try to come back to reconvene the hearing at 2:30, and I would like to welcome all the family and friends of the nominees here today and the nominees themselves.

We will stand in recess until 2:30.

[The Committee stood in recess from 2:13 p.m. to 2:49 p.m.]

Chairman SPECTER. The Judiciary Committee will resume. I thank Senator Lindsey Graham for conducting the hearing up to this point. This is a busy day in the Senate. We are undertaking consideration of a bankruptcy bill and we just finished two back-to-back roll call votes which occupy the Senators.

I just said I thank you, Senator Graham, and I would like to make some comments and then turn the gavel back over to you shortly.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. We have before us the confirmation proceeding for Judge Terrence Boyle, nominated for the Fourth Circuit Court of Appeals.

Welcome, Judge Boyle.

Judge BOYLE. Thank you, sir.

Chairman SPECTER. Judge Boyle was nominated by President Bush for this position by both 41 and 43—so that is up to 84; maybe that is a lucky number, Judge Boyle—by the first President Bush in 1991, and not given a hearing by the Judiciary Committee at that time. That is part of what I have characterized as the escalation of the controversy over judges where I have said that I think both parties bear some of the blame.

On May 9th of 2001, shortly after being inaugurated, the current President Bush sent his first judicial nominations to the Senate. There were 11 judges nominated at that time and Judge Boyle is the last one of those 11 to be given a hearing at the present time. He did not receive a hearing because a home State Senator did not return a blue slip.

Judge Boyle is currently a Federal judge in the Eastern District of North Carolina, nominated to that seat by President Reagan in 1984, and confirmed by unanimous consent. He has twice been appointed by Chief Justice Rehnquist to be serve on committees of the Judicial Conference, which is a high distinction. He worked with the Federal public defender's office in his district. He has gained broad Federal appellate court experience during 12 terms when he was designated to sit with the Fourth Circuit.

He began his career in Congress, where he was Minority Counsel to the House Subcommittee on Housing, Banking and Currency. Prior to becoming a Federal district judge, Judge Boyle practiced law in North Carolina, gaining experience on both the civil and criminal sides.

He has been the recipient of numerous accolades by those who have observed his work. The Raleigh News and Observer, the hometown newspaper, said this, quote, "Judge Terrence Boyle has a reputation as a Jesse Helms Republican, but to those who know the independent-minded jurist, his ruling Thursday against the Navy and in favor of environmentalists isn't such a shocker. Judge Boyle, the top Federal judge in eastern North Carolina, sided with environmentalists in several cases. For example, he ruled that a large wetland draining was illegal and that farmers couldn't stop the re-introduction of red wolves in eastern North Carolina; the State could not widen part of Interstate 26 in the mountains before studying the ecological impact. His ruling, like the veteran judge himself, is hard to pigeon-hole."

"In 20 years as a judge, he has won considerable support form eastern North Carolina lawyers, who say he is fair to both sides and plays it straight, often with tough questioning on both sides before him." That is from the same News and Observer article.

The Charlotte Observer had this to say, quote, "Boyle's detractors have long argued that such a conservative judge should not be confirmed to the Fourth Circuit Court of Appeals. But a lot of political moderates and liberals have come to admire his rulings in important cases."

Jack Betts: "The judge steps in where politicians dare not go." That is from the North Carolina Observer of April 25, 2004. I could go on at considerable length, but I am not going to. I will ask unanimous consent that this be made a part of the record.

We turn at this time to our distinguished colleague, Senator Kennedy, for an opening statement.

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

Senator KENNEDY. Thank you, Mr. Chairman. We are glad you are making a speedy and strong recovery.

Chairman SPECTER. Thank you.

Senator KENNEDY. As with all nominations for lifetime positions on the Federal courts, our Committee has a clear responsibility to review Judge Boyle's record on the Federal district court.

As you know, Mr. Boyle, your record raises a number of serious questions. There are real questions about whether you abused your power on the district court by wrongfully dismissing plaintiffs'

claims without giving them a fair chance to make their case or have their day in court.

You have been reversed on appeal far more than any other district judge in the Fourth Circuit. Too often, those reversals have come because you made the same mistake more than once. More troubling still is the fact that you seem to have been reversed most often and made the most serious legal errors in the cases that matter most to average citizens.

Again and again, the Fourth Circuit has ruled that you improperly dismissed cases on important individual rights, such as the right to free speech, free association and the right to be free from discrimination. You have repeatedly tried to strike down important parts of the Americans With Disabilities Act. You mis-applied or misinterpreted other landmark civil rights laws, including the Voting Rights Act and Title VII of the Civil Rights Act of 1964. In numerous cases, the Fourth Circuit has ruled that you abused your discretion and refused to follow the law.

In the Voting Rights Act case of *Cromartie* v. *Hunt*, the Supreme Court ruled unanimously in an opinion by Justice Thomas that you failed to follow the basic legal standard on summary judgment motions, and that you were wrong to decide, without even having a trial, that a Congressional district with a significant African-American population necessarily resulted from improper racial gerrymandering.

It is rare for any judge's decision to be unanimously reversed by the Supreme Court in a civil rights case or any other case. Yet, the Supreme Court later reversed you for a second time in the same case for failing to follow the law.

These are very important concerns and you will have an opportunity to respond. We must make absolutely certain that persons selected for lifetime appointments to the Federal courts will not abuse their power by failing to follow the law. We need judges who come to the Federal bench with an open mind and a commitment to fairness for all Americans, not judges who believe that they are above the law. Your record raises real questions about these basic issues.

The vast majority of your decisions are unpublished and have not been provided to the Committee. There is no way to tell whether the problems found so far are just the tip of a very large iceberg. The American people have a right to know how you have treated parties who appear in your court and how you have ruled in those unpublished opinions before we act on your nomination to a lifetime position on the appellate court.

Because of the obvious questions already raised, the Committee has a special responsibility, I believe, to review the entire record in assessing qualifications and judicial philosophy. I hope we will have the opportunity to review all the opinions and I look forward to the hearing and your responses to these serious concerns.

I thank the Chair.

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

Chairman SPECTER. Thank you very much, Senator Kennedy.

Judge Boyle, will you stand for the administration of the oath?

Do you solemnly swear that the evidence and testimony that you will give before this proceeding of the Senate Judiciary Committee will be the truth, the whole truth and nothing but the truth, so help you God?

Judge BOYLE. I will.

Chairman SPECTER. Judge Boyle, are there any members of your family present this afternoon? If so, we would like to meet them.

STATEMENT OF TERRENCE W. BOYLE, NOMINEE TO BE CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

Judge BOYLE. Yes, Senator. My wife, Debbie, is here and she has accompanied me, my wife of 33 years, and I am proud and pleased to have her by my side.

Chairman SPECTER. Thank you very much, Judge Boyle. Would you care to make an opening statement?

Judge BOYLE. I just want to briefly thank the President for extending this nomination to me, and thank you, Senator Specter and all the members of the Committee, for affording me an opportunity to have a hearing on the nomination. And I am ready to cooperate with the Committee and be as forthcoming and helpful as I can be in trying to understand the issues that are important that are a part of this proceeding.

[The biographical information of Judge Boyle follows.]

02/2005 Update

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Terrence William Boyle

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

Residence: Edenton, NC

Office: P. O. Box 306, 306 E. Main Street, Rm. 217
Elizabeth City, NC 27907-0306

3. Date and place of birth.

December 22, 1945 - Passaic, NJ

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 Ellis Boyle. My spouse is an artist, D. Boyle Studio, 837 Drummond Point Road, Edenton, NC 27932

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

College: Brown University, Providence, Rhode Island
Entered September 1963, Graduated June 1967
Bachelor of Arts Degree, June 1967

Law School: American University, Washington College of Law, Washington, D. C.
Entered September 1967, Graduated May 1970
Juris Doctor Degree, May 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

1978 - May 1984 - Partner, Locus in Quo Company (partnership in law office building in Elizabeth City, NC)

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.

Served U. S. Navy, Midshipman, 4th Class, United States Naval Reserve Officers Training, Brown University, Providence, Rhode Island, September 1963 through July 1964. Discharged on medical grounds. Serial number unknown.

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

None.

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.

1970 - present, District of Columbia Bar Association.

1971 - 1985, American Bar Association (Past Member of Litigation Section and Family Law Section).

1974 - 1989, North Carolina Bar Association (exclusive of 1985 to 1987) (Council Member, Family Law Section, 1982 to 1984; Member of the Bench, Bar & Law School Committee, 1988 to 1989).

1979 - 1984, North Carolina Association of Defense Attorneys.

1987 - 1992, Member, Committee on Judicial Resources, Judicial Conference of the United States.

1989 - 1992, Member, Subcommittee on Special Rates of Pay, Judicial Resources Committee, Judicial Conference of the United States

1989, Co-Chairman of Joint Judicial Workshop (Fourth Circuit, First Circuit, D. C. Circuit) held April 1989,

Annapolis, MD (Co-Chairman with Judge Bruce M. Selya of the First Circuit in the planning, coordination and execution of this Workshop).

1999 - present, Member, Committee on Judicial Branch, Judicial Conference of the United States.

April 2003 - October 2004, Member, Fourth Circuit Judicial Council

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.

None, as to both parts.

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

United States District Court for the District of Columbia, admitted November 23, 1970.

United States District Court for the Eastern District of North Carolina, admitted January 30, 1974.

United States Court of Appeals for the Fourth Circuit, admitted September 22, 1980.

General Court of Justice (All Courts) State of North Carolina, admitted October 29, 1973.

Court of General Sessions, District of Columbia, admitted in 1971. Exact date unknown.

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.

"N. C. Workers' Compensation-In a Nut Shell," North Carolina Workers' Compensation Manual, Wake Forest University School of Law, Continuing Legal Education (December 1983).

During my service both as a lawyer and a judge, I have accepted invitations, on occasion, to speak to primarily students at various levels about the law as a profession. These presentations have been informal, and none have resulted in published material.

For instance, I have spoken at local grammar schools, junior high schools, high schools, and community colleges, in the area, when asked, to contribute to the civics study of the students. Typically the comments will involve an explanation of the federal courts and their place in our constitutional government. I have also made remarks on several occasions in my hometown when there were public ceremonies involving the 4th of July or the anniversary of the signing of the Constitution to discuss the historical background of these documents and how they relate to our American government. These remarks have been extemporaneous, and there are no published materials or notes.

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

Good. Current physical 2001.

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.

United States District Judge, Eastern District of North Carolina, appointed May 3, 1984 (Chief Judge for a seven-year term from October 8, 1997, to October 8, 2004). The court has jurisdiction as a trial court over those cases cognizable under federal law in the U. S. District Courts.

I have been designated to sit with the United States Circuit Court of Appeals for the Fourth Circuit during the following terms: February 1985; October 1985; November 1986; November 1987; November 1988; March 1991; November 1996; July 1997; October 1997; October 1998; October 1999; December 2000.

I have also been assigned by designation to preside for weeks at a time in the Western District of North Carolina and in the Eastern District of Virginia. I conducted court in the Western District of North Carolina in 1992, 1993, 1994, 1995, and 1996, and in the Eastern District of Virginia in 1993 and 1994.

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

(1) citations for the ten most significant opinions you have written;

United States v. West, 877 F.2d 281 (4th Cir. 1989) (Terrence W. Boyle, United States District Judge for the Eastern District of North Carolina, sitting by designation)

United States v. Carolina Transformer Co., Inc., 739 F.Supp. 1030 (E.D.N.C. 1989) *affirmed* 978 F.2d 832 (4th Cir. 1992).

Glaxo Inc. v. Novopharm Ltd., 931 F.Supp. 1280 (E.D.N.C. 1996) *affirmed* 110 F.3d 1562 (Fed. Cir. 1997)

Gibbs v. Babbitt, 31 F.Supp.2d 531 (E.D.N.C. 1998) *affirmed* 214 F.3d 483 (4th Cir. 2000)

United States v. Quality Built Construction, Inc., 309 F.Supp.2d 756 (E.D.N.C. 2003)

Western North Carolina Alliance v. North Carolina Dept. Of Transportation, 312 F.Supp.2d 765 (E.D.N.C. 2003)

North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates, LLC., 278 F.Supp.2d 654 (2003)

Perkins v. Beck, No. 5:04-CT-643-BO (E.D.N.C. 2004) (unpublished - order attached)

Washington County, N.C. v. United States Dept. of the Navy, 2:04-CV-3-BO(2) (E.D.N.C. 2004) (unpublished - order attached)

Smith v. Reagan, 637 F.Supp. 964 (E.D.N.C. 1986) *motion for rehearing* 663 F.Supp 692 (E.D.N.C. 1987)

(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

Since May, 1984, it is my estimate that I have been involved in the decision of approximately 12,000 or more cases on the district court, and have participated in the decision of approximately 200 argued cases, sitting by designation, before the Fourth Circuit Court of Appeals.

In the trial court, these include all civil cases, criminal felony and misdemeanor cases, and habeas corpus petitions. Of the trial court cases, approximately 10% have been appealed for review. The following have been reversed, vacated, or otherwise adversely determined from the trial court.

Reversed

- *U.S. Dept. of Health and Human Services v. Smitley*, 347 F.3d 109 (4th Cir. 2003).

Adversary proceeding was brought for determination of dischargeability of Chapter 7 debtor's obligations on Health Education Assistance Loans (HEAL loans) and other student loan debt. The United States Bankruptcy Court for the Eastern District of North Carolina entered order discharging HEAL and non-HEAL debt, and creditor to which HEAL debt had been assigned appealed. The District Court affirmed. On further appeal, the Court of Appeals held that: (1) in assessing dischargeability, under "unconscionability" and "undue hardship" standards, of debtor's HEAL and other student loan debt, bankruptcy court should not have combined both debts and considered their dischargeability together, but should first have assessed dischargeability of non-HEAL debt; and (2) 47-year-old Chapter 7 debtor who was in good health, and two of whose children were within one year of reaching age of majority, failed to satisfy burden of proving that it would be "unconscionable" not to discharge his HEAL debt.

- *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003)

Nonprofit advocacy corporation, organized under the laws of North Carolina brought action against Federal Election Commission (FEC), challenging constitutionality of Federal Election Campaign Act (FECA) and related regulations with respect to prohibitions on corporate expenditures and contributions in connection with federal elections. The district court granted plaintiffs' summary

judgment motion. The Court of Appeals for the Fourth Circuit affirmed grant of summary judgment, and FEC petitioned for certiorari solely as to the constitutionality of the ban on direct contributions. The United States Supreme Court held that application of provisions and regulations barring direct corporate campaign contributions to nonprofit advocacy corporation was consistent with the First Amendment. Justices Kennedy and Thomas dissented.

3. *Easley v. Cromartie*, 532 U.S. 234 (2001)

Plaintiffs challenged North Carolina's congressional redistricting plan, alleging that the 1st Congressional District and the 12th Congressional District were composed in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. After a trial, the court found as a fact that the state did not violate the Equal Protection Clause in composing the 1st Congressional District with a majority African-American population.

A majority of the panel determined that the state did violate the Equal Protection Clause by using race as the predominate factor in establishing the 12th Congressional District.

The Supreme Court reversed the trial court's decision on the facts and the law.

4. *Hunt v. Cromartie*, 526 U.S. 541 (1999)

North Carolina residents brought action challenging North Carolina's congressional redistricting plan as racially motivated in violation of the Equal Protection Clause. Parties filed cross motions for summary judgment. A three-judge panel of the district court granted summary judgment in residents' favor and entered injunction against defendants. The Supreme Court held that triable issues regarding whether state legislature drew congressional redistricting plan with impermissible racial motive precluded summary judgment.

5. *Granutec, Inc. v. Shalala*, 139 F.3d 889 (4th Cir. 1998) (unpublished decision)

Drug patent case. District court held that FDA incorrectly failed to the terms of a regulation concerning 180-day exclusivity for the first company to market a generic drug. Fourth Circuit held that the FDA regulation was invalid because it amounted to an invalid addition to the statutory requirements for exclusivity in drug marketing.

6. *Burch v. Federal Ins. Admin.*, 23 F.3d 849 (4th Cir. 1994)

District court held that Plaintiff was entitled to federal flood insurance. Court of appeals reversed on basis that, although state agencies are authorized to assist in the certification of structures threatened by "imminent collapse", the federal agency nonetheless retains final authority over such matters. Federal agency's denial of flood insurance therefore entitled to deference.

7. *U.S. v. Gibson*, 924 F.2d 1053 (4th Cir. 1991) (unpublished decision)

Reversed and remanded for a new trial. Jury instructions held to go beyond scope of indictment.

8. *Rose, Rand, Ray, Winfrey & Gregory, P.A. v. Salter*, 877 F.2d 60 (4th Cir. 1989) (unpublished decision)

The plaintiff attached bond proceeds in the hands of the Clerk of State Superior Court. The defendant moved to dissolve the attachment claiming that the proceeds were his. The district court denied the motion to dissolve, and the Court of Appeals reversed holding that the property in question was not the property of the plaintiff's debtor.

9. *Smith v. Reagan*, 844 F.2d 195 (4th Cir. 1988)

Declaratory judgment action by family members of armed service personnel missing in action in Southeast Asia. The court affirmed the dismissal of the injunctive relief claims but reversed the denial of the government's motion to dismiss for lack of subject matter jurisdiction. The trial court held that subject matter jurisdiction existed only as to those questions of fact that may arise on the pleading for declaratory judgment but that the case may be dismissed for prudential reasons. The Court of Appeals held that this was a political question over which there was no subject matter jurisdiction.

10. *Booth v. Antill*, 849 F.2d 604 (4th Cir. 1988) (unpublished decision)

This is a civil rights case against the Nash County Sheriff's Department in which judgment notwithstanding the verdict was entered for the plaintiffs. On appeal, the Court of Appeals held that the sheriff's deputies had qualified immunity in executing the search warrant and reversed.

Reversed and Remanded

1. *U.S. v. Quackenbush*, 9 Fed. Appx. 264 (4th Cir. 2001) (unpublished decision)

Defendant was convicted by a jury as an accessory-after-the-fact to a bank robbery. District court sentenced defendant to 63 months' imprisonment and held him liable for restitution to the bank, a pre-robbery car-jacking victim, and the car-jacking victim's insurers. Court of Appeals affirmed that defendant was liable for restitution to the bank, but reversed the decision to hold defendant liable for restitution to the owner of the vehicle and its insurer. The losses to those victims were not linked to defendant's underlying offense.

2. *Hudson v. Hunt*, 235 F.3d 892 (4th Cir. 2000)

State prisoner's petition for habeas corpus was denied. The Court of Appeals held that: (1) it would decline to recognize procedural default of petitioner's claim where the state intentionally declined to assert the default, and (2) trial attorney's performance regarding consultation with petitioner about appeal was deficient, thus requiring remand to determine whether there was prejudice to defendant.

3. *Dowdy v. State of N.C. Dept. of Correction*, 205 F.3d 1332 (4th Cir. 2000) (unpublished decision)

Remanded to apply new Supreme Court standard on employer liability under Title VII. Standard changed while on appeal.

4. *Andrews v. Daw*, 201 F.3d 521 (4th Cir. 2000)

Section 1983 action against state highway patrol. Previous action held not res judicata. Remanded for further proceedings.

5. *U.S. v. Montague*, 202 F.3d 261 (4th Cir. 2000) (unpublished decision)

Jury conviction of postal employee for embezzlement. District court excluded evidence about the procedures for the redemption of obsolete stamps. Evidence held to be admissible on appeal.

6. *U.S. v. North Carolina*, 180 F.3d 574 (4th Cir. 1999)

Title VII case brought against State of North Carolina. District court allowed the state to withdraw from a proposed consent decree based on a material change in circumstances. The Court of

Appeals held that the state was bound by its agreement and ordered the agreement be enforced.

7. *Chamblee v. Espy*, 100 F.3d 15 (4th Cir. 1996)

Farmers' Home Administration debtors claim. Remanded to exhaust administrative remedies.

8. *Hogan v. Carter*, 85 F.3d 1113 (4th Cir. 1996)

Inmate sued prison physician under 42 U.S.C. Section 1983 for involuntary administration of antipsychotropic medication. District court denied summary judgment for the defendant. Fourth Circuit held that physician did not violate clearly established law when inmate was subjected to involuntary administration of antipsychotropic medicine without first conducting a predeprivation hearing.

9. *Marble Bank v. Commonwealth Land Title Ins. Co.*, 62 F.3d 1415 (4th Cir. 1995) (unpublished decision)

Findings by district court in nonjury trial between bank and title company regarding notice of title defect reversed on appeal. Case remanded for recalibration of damages.

10. *Hennessey v. U.S. Dept. of Defense*, 46 F.3d 356 (4th Cir. 1995)

District court held that labor claim by federal employees was subject to arbitration under Civil Service Reform Act. Court of Appeals reversed on basis that the collective bargaining agreement between the union and the Government exempted from the grievance procedure all matters regarding overtime entitlement.

11. *Hines v. Mayor and Town Council of Ahoskie*, 998 F.2d 1266 (4th Cir. 1993)

Voting rights action challenged town's at-large system for electing the fifth member of the town council. District court found at-large election unconstitutional and statutorily infirm; ordered town to eliminate fifth seat. Court of Appeals reversed, on basis that federal courts must defer to legislature unless the chosen district size was made "solely" to diffuse minority voter strength. Court of Appeals upheld the town's at-large system as non-violative of constitutional or statutory voting rights.

12. *U.S. v. Whedbee*, 964 F.2d 330 (4th Cir. 1992)

District court granted summary judgment for U.S. on its conversion claim against creditors. U.S. claimed security interest in certain property in which Defendants had also acquired an interest through state court proceedings. Court of Appeals held that U.S. could not prove Defendants' claim in property was unauthorized and remanded for further proceedings.

13. *U.S. v. Garcia*, 956 F.2d 41 (4th Cir. 1992)

Court of Appeals held that cover letter to plea agreement was a part of the agreement and that Government had breached such agreement by subpoenaing defendant to testify before grand jury. Proper remedy was to credit defendant for contempt sentence resulting from plea agreement. Remanded for further proceedings.

14. *Jean v. Rice*, 945 F.2d 82 (4th Cir. 1991)

Denial of a writ of habeas corpus to state prisoner reversed. The Court of Appeals held that the exclusion of certain Brady material in the state trial court warranted the issuance of a writ.

15. *In re Raynor*, 922 F.2d 1146 (4th Cir. 1991)

Appeal from a district court order affirming the bankruptcy court denying discharge to a debtor based on fraud. Reversed and remanded. Majority opinion held that default judgment in collateral state proceedings involving fraud could not be the basis for res judicata application of fraud determination in the federal bankruptcy proceedings. Dissent disagreed.

16. *Northside Pharmacy, Inc. v. Owens & Minor, Inc.*, 898 F.2d 146 (4th Cir. 1990) (unpublished decision)

The district court directed a verdict on statute of limitations grounds. The Court of Appeals reversed and remanded for further proceedings holding that the account was ongoing between the parties and not barred by the statute of limitations under certain circumstances.

17. *Tropical Winds Joint Venture v. Coker Builders, Inc.*, 884 F.2d 1390 (4th Cir. 1989) (unpublished decision)

The Court of Appeals held that because one of the parties had been a member of a joint venture at the time of the initial filing of the case in state court and had later been realigned and dismissed, there was not complete diversity.

18. *U.S. v. Clark*, 850 F.2d 690 (4th Cir. 1988) (unpublished decision)

The district court affirmed a magistrate's order detaining defendants without bail pending trial. The Court of Appeals held that the detention order was fatally flawed because the detention hearing was untimely. The case was remanded to determine appropriate conditions of pretrial release.

19. *Sterling Forest Associates, Ltd. v. Barnett-Range Corp.*, 840 F.2d 249 (4th Cir. 1988)

The district court refused to transfer venue based on its interpretation of a forum clause in a contract suit between the parties. The Court of Appeals reversed and remanded for transfer, holding that the venue provisions in the contract were preemptive and mandatory.

20. *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076 (4th Cir. 1987)

High school teacher who had spoken out in support of tenure for his principal brought § 1983 action against board of education, arguing that board's attempt to reassign him to another school was because of his exercise of his First Amendment right of free speech. District court granted summary judgment for Defendant. The Court of Appeals held that Plaintiff's comments constituted public speech and that his and the public's interest in the speech outweighed potential harm of speech to the school board. Reversed and remanded for further consideration.

21. *Systems Craft, Inc. v. British-American Ins. Co., Ltd.*, 835 F.2d 875 (4th Cir. 1987) (unpublished decision)

The district court dismissed plaintiff's contract complaint for failure to state a claim based on the lack of obligation to the third party beneficiary. The Court of Appeals reversed holding that the complaint, liberally construed, stated a third party beneficiary claim.

22. *McCauley v. City of Jacksonville, N.C.*, 829 F.2d 36 (4th Cir. 1987) (unpublished decision)

Plaintiff real estate developer sued the defendant city alleging civil rights violations for failure to approve zoning and land use applications. The district court allowed motion to dismiss for failure to state a claim. The Court of Appeals reversed, holding that broadly construed the plaintiff had stated a cause

of action. The district court subsequently allowed summary judgment for the defendant which was affirmed. 904 F.2d 700 (4th Cir. 1990).

23. *U.S. v. American Waste Fibers Co., Inc.*, 809 F.2d 1044 (4th Cir. 1987) (unpublished decision)

The district court dismissed a conspiracy indictment on vagueness grounds. The Court of Appeals held that the indictment was sufficient to appraise the defendant of the conspiracy charges.

24. *Dowless v. Warren-Rupp Houdailles, Inc.*, 800 F.2d 1305 (4th Cir. 1986) (unpublished decision)

A North Carolina plaintiff sued an Ohio defendant alleging breach of contract and unfair trade practice. The district court held that all of the contacts were in Ohio and dismissed for lack of personal jurisdiction. The Court of Appeals reversed and remanded, holding that the sale of products by the defendant in North Carolina, even though unrelated to the claim, was a sufficient contact to permit long-arm jurisdiction.

Affirmed in part, reversed in part, remanded

1. *North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418 (4th Cir. 2003)

Non-profit corporation and its internal political committees filed suit challenging constitutionality of provisions of North Carolina's election and campaign finance laws. The district court declared certain of the challenged provisions unconstitutional and permanently enjoined North Carolina from enforcing those provisions. Corporation and State appealed. The Court of Appeals held that: (1) express advocacy test which allowed consideration of communication's context violated free speech clause; (2) rebuttable presumption that major purpose of entity was to support or oppose candidate based on amount of contribution it made violated free speech clause; and (3) limit applying to contributions made to independent expenditure political action committees violated associational rights.

The judgment of the Court of Appeals was vacated by the Supreme Court at 124 S.Ct. 2065. The case was remanded to the Court of Appeals and subsequently to the district court.

2. *Franks v. Ross*, 313 F.3d 184 (4th Cir. 2002)

Town residents and neighborhood association brought action for

injunctive relief against county, county board of commissioners, and state officials, seeking to halt construction of landfill in town and asserting state, federal civil rights, and federal constitutional claims. The district court dismissed certain claims as untimely, dismissed others for failure to state claim or based on Eleventh Amendment immunity, and denied leave to amend complaint. Residents and association appealed. The Court of Appeals held that: (1) denial of leave to amend complaint was abuse of discretion; (2) state agency's issuance of permit authorizing construction of landfill triggered running of statute of limitations on claims against county; (3) county could not be held liable for contravening North Carolina public policy; and (4) claims against state officials came within *Ex parte Young* exception to Eleventh Amendment immunity.

3. *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999)

District court held that several North Carolina campaign laws were unconstitutional. Fourth Circuit affirmed holding of invalidity of state campaign laws except for one provision concerning contribution and solicitation limitations that was held constitutional.

4. *Godon v. North Carolina Crime Control*, 141 F.3d 1158 (4th Cir. 1998) (unpublished decision)

Title VII case in which district court dismissed the federal claims and declined to hear the state claims. Dismissal affirmed on Title VII claims but remanded to consider Section 1983 claims where the plaintiff did state a claim for retaliatory discharge in violation of the First Amendment.

5. *Kuiken v. Lee*, 52 F.3d 321 (4th Cir. 1995) (unpublished decision)

Habeas petition allowed in district court based on ineffective assistance of counsel at sentencing. Court of Appeals affirmed district court's denial of the writ on numerous bases, but reversed the court's allowance of the writ on the basis of ineffective assistance of counsel. Court of Appeals held that defense counsel's statements during sentencing were not prejudicial and denied habeas petition.

6. *U.S. v. Braswell*, 46 F.3d 1127 (4th Cir. 1995) (unpublished decision)

District court dismissed perjury indictment on the basis that

Defendant was victim of prosecutorial misconduct before the grand jury. Court of Appeals affirmed the money laundering conviction, finding that Defendant could not show that the prosecutorial misconduct was prejudicial.

7. *Tiffany v. Forbes Custom Boats, Inc.*, 959 F.2d 232 (4th Cir. 1992) (unpublished decision)

Plaintiff, having contracted to purchase a boat from Defendant, disputed the amount owed to Defendant who, in turn, refused to deliver the boat. Court of Appeals upheld the district court's preliminary injunction preventing Defendant from selling boat to another buyer pending resolution of dispute; overturned mandatory injunction requiring delivery of boat to Plaintiff prior to resolution of dispute, as sales contract precluded such a remedy.

8. *Moore v. Morton*, 958 F.2d 368 (4th Cir. 1992) (unpublished decision)

Section 1983 action in which Court of Appeals affirmed district court's dismissal of Plaintiff's false arrest and intentional infliction of emotional distress claims; reversed district court's grant of summary judgment as to the assault claim, finding material issues of fact remained regarding that claim.

9. *Wise v. Ruffin*, 914 F.2d 570 (4th Cir. 1990)

Suit by employers to determine withdrawal liability from multi-employer pension plan. The district court found no withdrawal liability where the fund fully funded in year prior to withdrawal. Court of Appeals affirmed in part and reversed in part and remanded for determination of employer status under the Act and subsequently whether withdrawal liability applied.

10. *South Carolina State Educ. Assistance Authority v. Cavazos*, 897 F.2d 1272 (4th Cir. 1990)

State agencies for guaranteeing student loans brought actions challenging constitutionality of statutes requiring agencies to transfer excess reserves to Secretary of Education and permitting Secretary to withhold reimbursements. The district court upheld constitutionality of excess reserve amendments. The Court of Appeals held that: (1) excess reserve funds held by agencies were not "private property" within meaning of takings clause, and (2) contractual rights of agencies to receive reimbursement payments destined for reserve funds were not vested and were not protected by takings clause.

11. *U.S. v. Wolff*, 892 F.2d 75 (4th Cir. 1989) (unpublished decision)

The Court of Appeals affirmed district court's decision to grant new trials on all of the counts in a bankruptcy fraud trial; but reversed district court's post-judgment verdict of acquittal on those counts, finding that evidence was sufficient to sustain convictions.

12. *U.S. Development Corp. v. Peoples Federal Sav. & Loan Ass'n*, 873 F.2d (4th Cir. 1989)

The dismissal of plaintiff's contract and deceptive trade practice claims was affirmed, but the dismissal of an amendment adding a contract claim was reversed and remanded for further consideration because of the lack of notice of the pending summary judgment consideration by the district court.

13. *Guy v. E.I. DuPont de Nemours & Co.*, 792 F.2d 457 (4th Cir. 1986)

Plaintiff sued defendants after contracting lung disease due to exposure to hazardous chemicals. The district court dismissed on statute of repose grounds and denied motions to amend alleging fraud and civil conspiracy. The Court of Appeals affirmed the denial of the motions to amend to add new claims but reversed on the motion to amend to allege a new date for the onset of injury. The Court of Appeals noted that the statute of repose had been recently held inapplicable to disease claims and remanded the case for reconsideration of the statute of limitations defense in light of the amended complaint.

Vacated / Vacated and remanded

1. *Travelers Indem. Co. v. Miller Bldg. Corp.*, 97 Fed. Appx. 431 (4th Cir. 2004) (unpublished decision)

The Court of Appeals vacated the district court's order granting summary judgment to Travelers because at least some of the claims asserted by PVC against Miller seek recovery for "property damage" caused by an "occurrence" as those terms are used in the policy, Travelers has a duty to defend Miller against PVC's claims. The case was remanded.
sion)

2. *St. Paul Reinsurance Co., Ltd. v. Rudd*, 67 Fed. Appx. 190 (4th Cir. 2003) (unpublished decision)

Insurer brought diversity action against its insured with commercial general liability insurance policy seeking declaration as to whether it had duty to defend underlying action in state court. The district court granted summary judgment for insurer. The Court of Appeals held that: (1) insured's notice to insurer of claim against him was untimely; (2) insured knew he was at fault, or knew that other person claimed he was at fault for her injuries; (3) fact issue existed as to whether insured deliberately decided not to notify insurer of claim; and (4) insurer was not undisputably prejudiced by insured's delay. The Court of Appeals vacated the district court's order and remanded the case.

3. *Ellis v. North Carolina*, 50 Fed Appx. 180 (4th Cir. 2002) (unpublished decision)

District court dismissed plaintiff's employment discrimination claim against the individual defendants since they were not subject to suit under Title VII since they were not employers. The state common law tort claims against the defendant North Carolina were dismissed on Eleventh Amendment immunity grounds. The Court of Appeals remanded. Even though there are no Title VII claims against the state, the Court of Appeals commented that Eleventh Amendment immunity is abrogated under Title VII in suits against the state.

4. *Lomas v. Red Storm Entertainment, Inc.*, 49 Fed. Appx. 396 (4th Cir. 2002) (unpublished decision)

District court granted summary judgment to employer as to plaintiff's claim for benefits under an individual retention/severance agreement, on basis that plaintiff had not exhausted administrative remedies as required under ERISA. Court of Appeals held that a material issue of fact remained as to whether agreement was governed by ERISA, and therefore remanded for further proceedings.

5. *Ridings v. Federal Prison Industries, Inc.*, 238 F.3d 414 (4th Cir. 2000) (unpublished decision)
Prisoner's Bivens claim remanded. It survives dismissal for failure to state a claim because the denial or prison employment based on race is a cognizable claim.

6. *McLesky v. Davis Boat Works, Inc.*, 225 F.3d 654 (4th Cir. 2000) (unpublished decision)

Jury verdict set aside. Summary judgment on claim of piercing the corporate veil denied by trial court. Vacated by appellate

court.

7. *Pine State Creamery Co. v. Land-O-Sun Dairies, Inc.*, 201 F.3d 437 (4th Cir. 1999) (unpublished decision)

Breach of contract case within context of bankruptcy proceeding. Summary judgment disallowed. Material evidence regarding the reasoning behind the contract breach held to be in dispute.

8. *Perdue Farms, Inc. v. N.L.R.B.*, 108 F.3d 519 (4th Cir. 1997)

District court entered preliminary injunction against NLRB. Fourth Circuit vacated and remanded, holding that judicial review of employer's claim was premature.

9. *K Hope, Inc. v. Onslow County*, 107 F.3d 866 (4th Cir. 1997) (unpublished decision)

District court concluded that county ordinance regulating adult business was preempted by state law and did not violate the North Carolina or United States Constitution. Fourth Circuit vacated with instructions that the district court should have abstained from deciding issues of state law.

10. *Taylor v. Freeman*, 34 F.3d 266 (4th Cir. 1994)

District court enjoined prison officials to comply with certain standards after prisoner made § 1983 claim, alleging unconstitutional conditions of confinement. Court of Appeals vacated the injunction, holding that courts have only limited remedial authority in such cases.

11. *Rice v. Phillips*, 30 F.3d 130 (4th Cir. 1994) (unpublished decision)

District court dismissed Plaintiff's Section 1983 action as frivolous. Remanded by the Court of Appeals, holding that the administration of anti-psychotic medication over the will of the patient was not frivolous.

12. *U.S. v. Hanno*, 21 F.3d 42 (4th Cir. 1994)

District court disbanded jury in one case in order to increase those available to sit on another case for which there was a shortage of jurors. Finding that there was no "manifest necessity" to do so, Court of Appeals vacated the drug conviction and remanded for retrial.

13. *U.S. v. Passarelli*, 935 F.2d 1288 (4th Cir. 1991) (unpublished decision)

Case remanded for new trial based on the exclusion of a defense witness who violated the court's sequestration rule. The appellate court held that a sanction less than exclusion was appropriate under the circumstances.

14. *Faulk v. Dixon*, 933 F.2d 1001 (4th Cir. 1991) (unpublished decision)

District court dismissed action with prejudice for failure to prosecute. Court of Appeals found no showing that Plaintiff purposely proceeded in dilatory fashion or that Defendants had suffered prejudice and reversed decision; noted that dismissal without prejudice was a lesser sanction available to the district court. Vacated and remanded for further proceedings.

15. *Becton v. Barnett*, 920 F.2d 1190 (4th Cir. 1990)

Dismissal of habeas corpus petition in district court. Vacated and remanded in order to conduct an evidentiary hearing on the habeas petitioner's claim that counsel was ineffective in the underlying state criminal trial.

16. *St. Paul Fire and Marine Ins. Co. v. Seafare Corp.*, 831 F.2d 57 (4th Cir. 1987)

Fire insurer brought declaratory judgment suit in connection with dispute over payment of proceeds in fire policy. The district court granted summary judgment for insurer. The Court of Appeals held that insured was not required to counterclaim and thereby litigate its fraud, constructive trust, and trust pursuit claims in light of reference in its answer to insurer's complaint to pending state court action raising those issues.

17. Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701 (4th Cir. 1986)

Plaintiff, an insurance agent formerly associated with defendant insurance company, sought retirement benefits under ERISA. District court, applying common-law agency principles, held that he was not an employee and not entitled to benefits. The Court of Appeals vacated and remanded for reconsideration, using a federal "employee" test as opposed to the common-law definition of the term. On remand, the district court held that agent was an employee under the federal test, but that extended earnings plan was not "pension plan". Court of Appeals affirmed. Aff'd

922 F.2d 203 (4th Cir. 1991), cert. granted, 1991 60 USLW 3292. The Supreme Court reversed the Court of Appeals and held, consistent with the original order of the district court, that common-law agency principles determine whether Plaintiff is "employee." Rev'd 503 U.S. 318, 112 S.Ct. 1344 (1992).

18. *U.S. v. Goodman*, 34 Fed.Appx. 137 (4th Cir. 2002) (unpublished decision)

Defendant filed motion for return of property seized by government during arrest, which district court denied. Court of Appeals noted that, although the government had served notice of its "motion for destruction of evidence" on Defendant's trial attorney, the attorney was no longer representing Defendant at the time such notice was served, so that notice was inadequate. Court of Appeals nonetheless found that information in the record was inadequate to determine whether Defendant's motion for return of property was timely, and thus remanded to the district court to determine when the cause of action accrued and whether Defendant's motion was timely.

Affirmed in part, vacated in part

1. *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999)

Section 1983 police employment case. Officer dismissed from his job for public speech. District court abused its discretion by not allowing the officer to amend his complaint.

2. *U.S. v. Smith*, 94 F.3d 122 (4th Cir. 1996)

Defendant was convicted in the district court of various offenses, including two counts of using or carrying two different firearms during and in relation to separate drug crimes, and he was sentenced to consecutive terms of imprisonment. The Court of Appeals affirmed. The U.S. Supreme Court granted certiorari, vacated judgment, and remanded for further consideration in light of its decision in *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472. On remand, the Court of Appeals held that: (1) jury was improperly instructed that mere possession, as opposed to active employment of firearm, was sufficient to support convictions on firearms charges; (2) evidence was insufficient to support verdict on first weapons count, thus requiring outright reversal of that conviction; (3) because evidence was sufficient to support jury's verdict on second

firearms count, that conviction would merely be vacated, and government could retry defendant; and (4) remaining convictions would be affirmed.

3. *Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992)

Death penalty habeas action. Affirmed with remand for resentencing based on later decided Supreme Court standard.

(3) citations for significant opinions on federal or s tate 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.

United States v. Richardson, 685 F.Supp. 111 (E.D.N.C. 1988)

Richard Anderson Photography v. Brown, 852 F.2d 114 (4th Cir. 1988) (Terrence W. Boyle, United States District Judge for the Eastern District of North Carolina, sitting by designation, concurring)

Gibbs v. Babbitt, 31 F.Supp.2d 531 (E.D.N.C. 1998) *affirmed* 214 F.3d 483 (4th Cir. 2000)

Barefoot v. City of Wilmington, 7:00-CV-182-BO(3) (E.D.N.C. 2001) (unpublished - order attached)

Foreman v. Bartlett, 4:01-CV-166-BO(4) (E.D.N.C. 2003) (unpublished - order attached)

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.

Staff Assistant; Counsel, Committee on Banking and Currency, U. S. House of Representatives, Washington, D. C., appointed March 1968 through January 1973.

Legislative Assistant; U. S. Senator Jesse A. Helms, United

States Senator, Washington, D. C., appointed February 1, 1973 through December 31, 1973.

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;

Did not clerk.

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

Did not practice 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;

At the time of my graduation from law school in the spring of 1970, I was employed on the professional staff of the Committee on Banking and Currency, Subcommittee on Housing, in the U. S. House of Representatives. In June of 1970, I successfully sat for the District of Columbia Bar. At some time during that summer, my position on the Committee staff was promoted from professional staff to minority counsel. I served as minority counsel on the Committee staff through succeeding Congresses until January 31, 1973.

Address: House Committee on Financial Services
Subcommittee on Housing & Community Opportunities
U. S. House of Representatives
2129 Rayburn House Office Building
Washington, D. C. 20515

(formerly Committee on Banking & Currency and Subcommittee on Housing)

On February 1, 1973, I became Legislative Assistant to United States Senator Jesse A. Helms, Republican from North Carolina. I served in that capacity until December 31, 1973.

Address: U. S. Senator Jesse A. Helms
Hart Senate Office Building
Washington, D. C. 20510

During July of 1973, I successfully sat for the North Carolina bar examination and was admitted to practice before the North Carolina courts in October of 1973.

Address: Hornthal, Riley, Ellis & Maland
301 E. Main Street, P. O. Box 220
Elizabeth City, NC 27907-0220

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?

As a member of the staff of the Committee on Banking and Currency prior to January 31, 1973, my responsibilities included assisting Committee members and other members of Congress in the legislative process, including the drafting of legislation, the drafting of Committee and conference reports, the attendance at all Committee meetings, research, and legislative opinions as requested and participation in the consideration and passage of legislation both in Committee and on the floor of the House of Representatives.

As Legislative Assistant to Senator Helms, I reviewed matters before the Senate and assisted Senator Helms on issues before the Committee on Aeronautical and Space Sciences of which he was a member at the time.

Prior to becoming a judge, I was engaged in the private

practice of law for approximately ten years. Throughout that time my practice was primarily a trial practice appearing in state superior court and district court in both jury and non-jury civil and criminal cases. I also regularly maintained a trial practice in federal court. With some regularity I was involved in appeals to the North Carolina Court of Appeals and less frequently in appeals to the United States Court of Appeals. I also appeared before regulatory tribunals and quasi-judicial tribunals, including the North Carolina Industrial Commission for workers compensation and state tort claims, the Social Security Administration for social security disability claims, and the North Carolina Utilities Commission for common carrier authority petitions.

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

From 1974 to 1977, approximately 25% of my trial practice involved criminal matters. Approximately 15% of my trial practice involved domestic matters. Approximately 40% of my trial practice involved general civil trial practice, including plaintiff and defense tort litigation, contract disputes, worker's compensation, and real property litigation. Approximately 10% of my trial litigation involved wills, estates and real property transactions.

Between 1978 and 1984, approximately 10% of my trial practice involved criminal litigation. Approximately 20% of my trial practice involved domestic litigation. Approximately 20% of my trial practice involved worker's compensation claims, both for employees and employers, and about 50% of my trial practice involved civil litigation.

My criminal trial practice included the representation of felony defendants in Superior Court jury trials and the handling of a large number of misdemeanor cases in District Court, often with non-jury trials in that forum.

I have represented both dependent and supporting spouses in domestic litigation for divorce, support and related relief. I have also handled a substantial number of child custody

cases.

I have represented plaintiffs and defendants in personal injury and product liability and professional negligence claims. I would estimate that approximately 40% of my representation was for plaintiffs or claimants and 60% of my representation was of defendants.

I also handled real estate transactions, both commercial and residential. These amounted to about 5 to 10% of my practice. I represented some business clients in corporate organization and corporate transactions. This amounted to 5% or less of my practice. I also represented clients in probate and estate work, preparing wills and handling decedents' estates. This amounted to approximately 5% of my practice.

From approximately 1977 until 1984, I had a regular practice in admiralty in federal court, and this amounted to about 10% of my civil trial practice. I also periodically handled employment discrimination claims, EEOC and Title VII claims, and this amounted to about 5% of my civil trial practice.

From 1974 until 1977, I handled some bankruptcy cases, and this amounted to approximately 10% of my civil practice during that time.

With respect to the type of clients that I represented, it consisted of a variety of clients from indigent criminal defendants to business corporation clients. There was no typical client. Most of the representation arose from employment by a party involved in litigation. The majority of my clients were individuals rather than corporate clients.

I did represent some liability insurance carriers in connection with automobile accidents, fire insurance litigation, and products liability 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 regularly, weekly and daily for some periods, depending upon the trial calendar and the volume of court business. The dates are from 1974 to 1984. From 1980 to 1984, most of my court work involved trials and would result in weeks of preparation during which I was not in court and other weeks when I was regularly in court.

2. What percentage of these appearances was in:

(a) federal courts;

10-15 percent.

(b) state courts of record;

60-70 percent.

(c) other courts.

Approximately 20 percent.

3. What percentage of your litigation was:

(a) civil;

Approximately 70 percent.

(b) criminal.

Approximately 30 percent.

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 25 jury cases to verdict and well over 50 non-jury cases. Of the jury cases, approximately 15 of these were tried alone and 10 were tried

with co-counsel.

5. What percentage of these trials was:

(a) jury;

Approximately 25 jury cases tried to verdict.

(b) non-jury.

Over 50.

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.

(All of the following information predates May 1984 when I ceased practicing law and began service as a district judge.)

(1) Hercules Cole v. Elizabeth City Housing Authority, et al

This was an action in which the plaintiff, a former maintenance employee of the Elizabeth City Housing Authority, sued his employer under Sections 1981 and 1983 of Title 42 U.S.C. and Title 7 of the Civil Rights Act of 1964.

Plaintiff alleged discrimination in the denial of a promotion to a superior position.

The court held there was no pattern of discrimination by the defendant and that plaintiff's resignation was voluntary.

I represented the Elizabeth City Housing Authority. I prepared and filed the pleadings and conducted discovery.

The case was tried on September 8 and 9, 1981, before the Honorable W. Earl Britt, District Judge. Judgment was entered on September 9 for the defendants on all counts. Appeal was dismissed by order of Judge Britt on September 1, 1982.

The parties were represented by counsel as follows:

PARTY	COUNSEL
Hercules Cole	William T. Davis Attorney at Law P. O. Box 1311 Elizabeth City, NC 27906-1311 Telephone: (252) 338-2049
Elizabeth City Housing Authority, et al.	Terrence W. Boyle LeRoy, Wells, Shaw, Hornthal & Riley P. O. Box 220 Elizabeth City, NC 27909 Tel. (252) 335-0871

(2) James Henry Hyatt d/b/a H & S Truck Service v. Watkins Motor Lines, Inc. and James P. Adams, United States Court of Appeals for the 4th Circuit, No. 83-1006 (unpublished).

This was a negligence action for property damage arising out of the collision between two tractor trailers on a North Carolina highway. The case involved the defense of contributory negligence.

I represented the defendants and prepared the pleadings and discovery.

The case was tried before Judge Franklin T. Dupree, Jr., Chief District Judge, and a jury on November 1 and 2, 1982. The jury returned a verdict for the defendants. The plaintiff appealed. The Court of Appeals affirmed the District Court judgment.

The parties were represented as follows:

PARTY	COUNSEL
James Henry Hyatt, d/b/a H & S Truck Service	Rosbon D. B. Whedbee Attorney at Law P. O. Box 147 Ahoskie, NC 27910 Tel. (252) 332-3061
Watkins Motor Lines, Inc. and James P. Adams	Terrence W. Boyle LeRoy, Wells, Shaw, Hornthal & Riley P. O. Box 220 Elizabeth City, NC 27909 Tel. (252) 335-0871

(3) Dr. John East, et al. v. State Board of Elections of North Carolina, et al., United States Court of Appeals for the 4th Circuit, No. 80-1569 (unpublished).

This was an action for declaratory and injunctive relief. The plaintiff was a candidate for the United States Senate. He brought suit against the State Board of Elections of North Carolina alleging that the 1980 ballot for the U. S. Senate election violated state and federal law.

I represented the plaintiffs and assisted in the preparation and filing of the pleadings and discovery. I participated in the hearing on summary judgment and the appeal.

The case was heard on August 21, 1980, before the Honorable W. Earl Britt, District Judge. The court denied the plaintiffs' injunctive relief. The Court of Appeals affirmed.

The parties were represented by counsel as follows:

PARTY	COUNSEL
Dr. John East, East for Senate Committee, Jackson F. Lee, John Howard, Mary Jane Hollyday	John R. Bolton American Enterprise Institute 1150 17th St., N.W. Washington, D. C. 20036 Tel. (202) 862-5800 Terrence W. Boyle LeRoy, Wells, Shaw, Hornthal & Riley P. O. Box 220 Elizabeth City, NC 27909 Tel. (252) 335-0871 Robert A. Valois Maupin, Taylor & Ellis P. O. Drawer 19764 Raleigh, NC 27619-9764 Tel. (919) 981-4000
State Board of Elections of North Carolina, R. Kenneth Babb, Sydney Barnwell, Ruth Semashko Shirley Herring, and Jack Stickely, Members of the North Carolina Board of Elections, and Alex K. Brock, Executive Secretary-Director of North Carolina Board of Elections	James M. Wallace, Jr. Former Assistant Attorney General for Legal Affairs of the State of NC P. O. Box 629 Raleigh, NC 27602-0629 Tel. (919) 716-6400

(4) In the Matter of the Complaint of Oregon Inlet Queen, Inc., as Owner of the M/V Oregon Inlet Queen, Her Engine, Tackle, Apparel, Etc. for Exoneration from or Limitation of Liability. In the United States District Court for the Eastern District of North Carolina, No. 81-7-A-CIV-2.

This was an admiralty suit arising out of death and personal injury on a vessel during rough seas. Issues of limitation of liability were involved.

I represented the estate of the deceased passenger and seven other passengers claiming personal injury.

I assisted in the preparation and filing of claims, answers, and discovery.

The case was settled by judgment with consent of all of the parties, entered by the Honorable F. T. Dupree, Jr., Chief District Judge, on October 4, 1982.

The parties were represented by counsel as follows:

PARTY	COUNSEL
Isaac Benezra, Hilda Benezra, Arthur Kranish, Allye Kranish, Erica Kranish; David P. Sousa, Guardian ad litem for Andrew Meserole; W. Mark Spence, Ancillary Administrator of the Estate of David Meserole,	John B. King, Jr. (Deceased) Vandeventer, Black, Meredith & & Martin 500 World Trade Center Norfolk, VA 23510 Tel. (757) 446-8600 Terrence W. Boyle LeRoy, Wells, Shaw, Hornthal & Riley P O. Box 220 Elizabeth City, NC 27909 Tel. (252) 335-0871
Richard F. Wertheimer, II, and Kenneth Frishtick	Pro Se
The Oregon Inlet Queen	Daniel L. Brawley Ward & Smith P. O. Box 7068 Wilmington, NC 28406-7068 Tel. (910) 794-4800 Thomas L. White, Jr. Hornthal, Riley, Ellis & Maland P. O. Box 310 Nags Head, NC 27959-0310 Tel. (252) 441-0871

(5) Lucius R. Chappell v. Marshall S. Redding, Superior Court, Perquimans County, NC, No. 80-CVS-126; North Carolina Court of Appeals, No. 67 N.C.App. 397 (reversed & remanded).

This was an action for alienation of affections and criminal conversation.

I represented the defendant. I prepared pleadings, motions and briefs. I prepared and conducted discovery.

The case was tried before Judge David S. Reid and a jury in Perquimans County Superior Court from August 4 through 7, 1982.

The plaintiff recovered actual and punitive damages in a verdict which was later reversed on appeal for insufficient evidence of one claim.

PARTY	COUNSEL
Lucius R. Chappell	C. Everett Thompson Attorney at Law 208 N. Road Street Elizabeth City, NC 27909 Tel. (252) 335-7200
Marshall S. Redding	John V. Hunter III Bode, Call & Stroupe P. O. Box 6338 Raleigh, NC 27628-6338 Tel. (919) 881-0338 Terrence W. Boyle LeRoy, Wells, Shaw, Hornthal & Riley P. O. Box 220 Elizabeth City, NC 27909 Tel. (252) 335-0871

(6) Roy W. Miner, Administrator of the Estate of Sheldie Laverne Miner, Deceased v. William Lester Holly, Superior Court, Gates County, NC, No. 75-CVS-43.

This was an action for wrongful death. It was a pedestrian vehicle collision.

The case was tried to a jury on the issue of contributory negligence.

I represented the defendant. I assisted in the pleadings, discovery, and trial. The case was tried before Judge L. Bradford Tillery and a jury in Gates County Superior Court on June 1 and 2, 1977. The jury returned a verdict for the defendant.

PARTY	COUNSEL
Roy W. Miner, Administrator of the Estate of Sheldie Laverne Miner, Deceased	C. Everett Thompson Attorney at Law 208 N. Road Street Elizabeth City, NC 27909 Tel. (252) 335-7200
William Lester Holley	L. P. Hornthal, Jr. Terrence W. Boyle LeRoy, Wells, Shaw, Hornthal & Riley P. O. Box 220 Elizabeth City, NC 27909 Tel. (252) 335-0871

(7) Board of Education of Perquimans County v. Constance Urquhart Newton, et vir., et al. In the United States District court for the Eastern District of North Carolina, No. 77-6-CIV-2.

This was an eminent domain case to condemn a tract of land for school purposes. The defendants removed the action to the United States District Court for the Eastern District of North Carolina. The issue in the case was jurisdiction and later damages.

I represented the defendants. I prepared the pleadings, conducted discovery, and presented the evidence. Jurisdiction was affirmed by the court, and the parties settled in the value established by the court.

PARTY	COUNSEL
Board of Education of Perquimans County	Gerald F. White Attorney at Law P. O. Box 546 Elizabeth City, NC 27907 Tel. (252) 338-3906 John V. Matthews, Jr. Attorney at Law P. O. Box 516 Hertford, NC 27944 Tel. (252) 426-5451
Constance U. Newton, et al.	Terrence W. Boyle LeRoy, Wells, Shaw, Hornthal & Riley P. O. Box 220 Elizabeth City, NC 27909 Tel. (252) 335-0871

(8) Margaret S. Cartwright v. D. L. Cartwright and Margaret C. Davis, Guardians of the Estate of George Walter Cartwright, Jr., and Margaret C. Davis, Executrix of the Estate of George Walter Cartwright, Jr., Superior Court, Pasquotank County, NC, No. 76-CVS-52.

This was an action to recover equitable damages against an estate.

I represented the estate. I prepared pleadings, discovery, and prepared and tried the case with co-counsel.

The case was tried before Judge J. Herbert Small and a jury in Pasquotank County Superior Court from December 1 to December 3, 1977. The jury returned a verdict for the plaintiff.

PARTY	COUNSEL
Margaret S. Cartwright	Gerald F. White Attorney at Law P. O. Box 546 Elizabeth City, NC 27909 Tel. (252) 338-3906

connected as an officer, director, partner, proprietor, or employee since graduation from college.

1967 - June - Two Guys Stores, Garfield, New Jersey; Security Clerk

1967 - July through August - J. Fletcher Creamer Company, Fort Lee, New Jersey, Construction Laborer

1968 - March through June 1970 - Staff Assistant, Subcommittee on Housing, Committee on Banking and Currency, U. S. House of Representatives, Washington, D. C.

1969 - June through August 1969 - The Hawk & Dove Restaurant, Washington, D. C., Waiter

1970 - July through January 1973 - Minority Counsel, Subcommittee on Housing, Committee on Banking and Currency, U. S. House of Representatives, Washington, D. C.

1973 - February 1 through December 31, 1973 - Legislative Assistant to U. S. Senator Jesse A. Helms, United States Senate, Washington, D. C.

1974 - January 1 through December 31, 1976 - Associate, Law Firm of LeRoy, Wells, Shaw, Hornthal & Riley, Elizabeth City, NC

1977 - January 1, 1977 through May 1984 - Partner, Law Firm of LeRoy, Wells, Shaw, Hornthal & Riley, Elizabeth City, NC

1984 - May 1984 through Present - U. S. District Judge, Eastern District of North Carolina; October 1997 to 2004 - Chief Judge

1977 - 1979 - Director - Northeastern Rural Health Development Association, non-profit community organization

1983 - July to January 1984 - Director, Educational Foundation, Inc., non-profit organization

1979 - 1982, 1984 - 1986, Parish Council; 1990 - 1991, Finance Council - St. Anne's Catholic Church

1981 - May through December 1983 - Director, Coalition for Freedom, non-profit organization

Margaret C. Davis, Executrix of the Estate of George Walter Cartwright, Jr.	Terrence W. Boyle Dewey W. Wells LeRoy, Wells, Shaw, Hornthal & Riley P. O. Box 220 Elizabeth City, NC 27909 Tel. (252) 335-0871

(9) George Ward Thompson, et al v. John R. Ward, et al., 36 NCA 593, 244 S.E.2d 485; cert. denied, 295 N.C. 556, 248 S.E.2d 735.

This was a declaratory judgment action to interpret a will.

The issue was the legal meaning of words of conveyance in a will disposing of a farm.

I represented the defendants and prepared the pleadings and evidence for trial.

The case was tried on January 10, 1977, in Perquimans County Superior Court before Judge L. Bradford Tillery. The court awarded the farm to the plaintiffs with a life estate to the defendants. This was affirmed on appeal.

PARTY	COUNSEL
George Ward Thompson, et al.	C. Everett Thompson Attorney at Law 208 N. Road Street Elizabeth City, NC 27909 Tel. (252) 335-7200
John R. Ward	Terrence W. Boyle Dewey W Wells LeRoy, Wells, Shaw, Hornthal & Riley P. O. Box 220 Elizabeth City, NC 27909 Tel. (252) 335-0871

(10) Linda C. Berger v. Martin Berger, District Court, Dare

County, North Carolina, No. 82-CVD-287; North Carolina Court of Appeals, 67 N.C.App. 591; North Carolina Supreme Court, 311 N.C. 303 (defendant's petition for review denied).

This was a domestic action for support. I represented the wife and children.

Since the husband had moved to another state, there were issues of jurisdiction raised. All were resolved by the trial and appellate courts in favor of the wife and children.

I represented the plaintiff and prepared the pleadings and discovery.

A trial was conducted on the issues of support before Judge John T. Chaffin in Dare County District Court on November 30 and December 1, 1982. His awards were affirmed on appeal.

PARTY	COUNSEL
Linda C. Berger	Terrence W. Boyle LeRoy, Wells, Shaw, Hornthal & Riley P. O. Box 220 Elizabeth City, NC 27909 Tel. (252) 335-0871
Martin Berger	Robert L. Spencer (Deceased) Battle, Winslow, Scott & Wiley, P.A. 605 Sunset Avenue Rocky Mount, NC 27802-0269 Tel. (252) 977-2333

The following is a list of attorneys who have regularly appeared before me during my service as a judge on the United States District Court. These persons should be capable of expressing opinions regarding my judicial experience.

Thomas P. McNamara
Federal Public Defender

P. O. Box 25967
Raleigh, NC 27611-5967
Tel. (919) 856-4236

Jane J. Jackson
Assistant U. S. Attorney
310 New Bern Avenue
Suite 800 Federal Building
Raleigh, NC 27601-1461
Tel. (919) 856-4292

D. Keith Teague
Attorney at Law
P. O. Box 785
Elizabeth City, NC 27907-0785
Tel. (252) 335-0878

C. Everett Thompson
Attorney at Law
208 N. Road Street
Elizabeth City, NC 27909
Tel. (252) 335-7200

Wade M. Smith
Tharrington Smith, L.L.P.
P. O. Box 1151
Raleigh, NC 27602-1151
Tel. (919) 821-4711

Joseph B. Cheshire V
Cheshire, Parker, Schneider, Wells & Bryan
P. O. Box 1029
Raleigh, NC 27602
Tel. (919) 833-3114

James B. Craven, III
Craven Law Firm
P. O. Box 1366
Durham, NC 27702
Tel. (919) 688-8295

Trawick H. Stubbs, Jr.
Stubbs & Perdue, P.A.
P. O. Drawer 1654

New Bern, NC 28563
Tel. (252) 633-2700

R. Daniel Boyce
Boyce & Isley, PLLC
107 Fayetteville Street Mall, Suite 100
Raleigh, NC 27601
Tel. (919) 833-7373

Jonathan D. Sasser
Ellis & Winters, LLP
P. O. Box 33550
Raleigh, NC 27636
Tel. (919) 865-7000

Randall M. Roden
Tharrington Smith, LLP
P. O. Box 1151
Raleigh, NC 27602-1151
Tel. (919) 821-4711

Gale M. Adams
Office of the Federal Public Defender
P. O. Box 690
Fayetteville, NC 28302
Tel. (910) 484-0179

J. Frank Bradsher
Assistant U. S. Attorney
310 New Bern Avenue, Room 800
Raleigh, NC 27601-1461
Tel. (919) 856-4530

Rosemary Godwin
Attorney at Law
2 Hannover Square
Raleigh, NC 27601
Tel. (919) 834-6161

Patricia L. Holland
Cranfill, Sumner & Hartzog, L.L.P.
P. O. Box 27808
Raleigh, NC 27611-7808
Tel. (919) 828-5100

Richard T. Gammon
DeMent, Askew, Gammon & DeMent
P. O. Box 711
Raleigh, NC 27602
Tel. (919) 833-5555

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).

For the past approximately 21 years, my legal activities have been limited to service as a district judge and to activities arising out of that service designed to enhance and improve the administration of justice and the access of the courts to the public generally. I have fulfilled this goal through a number of different areas of service. For a number of years I have been a member of two committees, Judicial Resource and Judicial Branch, of the United States Judicial Conference, and have worked through those committees toward improving judicial services. I have participated whenever the opportunity presented itself in continuing legal education, trying to provide the bar with timely access to developments coming before the federal courts. I have been involved both as chief judge and previously as a district judge with the Federal Public Defender's Office in an effort to enhance the participation of the bar in the provision of legal services to indigent defendants and to support the mission of the Federal Public Defender in providing legal services generally within our district. I have supported, and coordinated with North Carolina Prisoner Legal Services in addressing the needs of prisoners and their access to the federal courts in this district. I have also been available to participate in class work at community colleges, colleges, and law schools, promoting an understanding of the law and access to the courts. Specifically, I have participated in class work at College of the Albemarle, the University of North Carolina School of Law, Wake Forest Law School, Campbell University School of Law, Davidson College, and Chowan College. I have

also visited public grammar schools, junior highs, and high schools to speak and answer questions regarding government and the courts.

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 will avoid any conflict of interest, potential conflict of interest, or appearance of conflict of interest. I am disqualified from presiding over, or being involved with, any litigation involving any party with whom I might have any financial interest, and I will follow the procedures that are established for identifying conflicts of interest in the United States Court of Appeals, as I presently follow procedures in the United States District Court so that I do not preside over or otherwise affect any case in which I have a financial interest of any kind.

I believe that the Canons of Judicial Ethics require this practice at a minimum.

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).

Financial 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 have not served in a formal position in a political campaign. However, I was an alternate delegate to the Republican National Convention in both 1976 and 1980. From April 1977 until January 1, 1984, I was the elected chairman of the Chowan County, North Carolina, Republican Party. Consequently, leading up to my election as county chairman and during my service in that capacity, I attended various state and district Republican Party conventions and supported Republican candidates for federal, state and local election in various campaigns throughout that period.

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.

   From 1974 to 1984, I practiced law in a small firm in Elizabeth City, NC. As a lawyer in a small town, my practice regularly involved the disadvantaged, those who were poor, elderly, young or vulnerable. I represented indigent defendants and served as appointed counsel in criminal cases. I regularly represented minor children and dependent spouses in their efforts to receive adequate support. These cases often were handled without expectation of being paid either in full or at all. I regularly handled disability claims for social security claimants and often received no compensation. I would estimate that more than 200 hours each year was devoted to the provision of legal services to people in the community who were in need of legal assistance but unable to pay for any help.

   Between 1982 and 1993, I volunteered as a coach with the Edenton-Chowan County Recreation Department and worked with children ages 6-12 during two seasons each year as a soccer coach. This involved about six months of each year and probably between 10-20 hours each week of volunteer time. I have also volunteered with the Youth League junior high and high school basketball program between the years 1996 and 1999 as a team coach and coordinator. This would involve two evenings a week for approximately two months and probably ten hours a week of volunteer work. I have also done volunteer work with teenage youth in the Edenton Youth Council, which is an interfaith church-sponsored civic organization for teenagers. At various times over the past 15 years, I have served on the Parish Council at St. Anne's Catholic Church and on the Finance Committee, and was Chairman of the Building Committee for the construction of a new parish hall between 1991 and 1996.

From 1989 until the present, I taught either Sunday School class for grade school children or adult introduction class for new communicants at St. Anne's Church.

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

I am not a member of any organization which discriminates based on race, sex or religion. From approximately 1978 until 1984, I belonged to the Elizabeth City Rotary Club, which at that time only had male membership. I have not belonged to it since 1984, and it no longer excludes membership based on gender.

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 not a selection commission in this jurisdiction to recommend candidates for nomination to the federal court.

With respect to this nomination to the United States Court of Appeals for the Fourth Circuit, I was called on February 9, 2001, by the Office of White House Counsel and invited to attend an interview on February 12 at the Counsel's Office in Washington, D. C. I attended this interview and was later called on March 6, 2001, and a request was made that I complete a background questionnaire and relevant FBI documents. This led to my nomination on May 9, 2001. I have subsequently been renominated in September 2001, January 2003, and the current 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.

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 criticism addressed in this question primarily focuses on issues of federalism and separation of powers as these doctrines apply to the federal courts. Also addressed by

this question is the legitimate role of the federal courts in the discharge of their duties within our federal system of government. A fundamental precept of our constitutional system of government is that function and authority have been divided among the branches of government within the federal system in order to best assure the effective performance of government and in order to avoid a concentration of power in the hands of one branch which might result in abuse. The system also creates a dynamic tension between the powers and authority of the national government and those reserved to the states and to the people. The Bill of Rights is superimposed on this organization of government in order to guarantee fundamental and articulated rights, free from intrusion by government.

Within that setting it is critical that the federal courts, first, recognize and discharge their legitimate duties; and, second, recognize the limits of judicial power and restrain themselves from intrusion into those areas of legal and political life that are left to the control of one of the coordinate branches of the federal government or to the states or people.

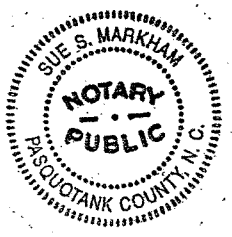
Consequently, the federal courts are most effective when they limit their interest to live controversies between parties for whom the resolution of a particular dispute may be achieved by the forum of a federal court. The federal courts are least effective when their focus is directed beyond the scope of the parties involved in a particular suit toward broad societal or government ends.

AFFIDAVIT

I, TERRENCE W. BOYLE, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Feb. 16th, 2005 (DATE)

Terrence W. Boyle (NAME)



Sue S. Markham (NOTARY)

My Commission expires:
March 12, 2007

Chairman SPECTER. Thank you, Judge Boyle.

The Committee will proceed with seven-minute rounds. I see we have just changed to five-minute rounds. Let's go back to seven-minute rounds.

Judge Boyle, let's proceed right to the core concerns which have been raised about your record that you were anti-civil rights. What are your views on the rights of Americans under the United States Constitution, the Voting Rights Act and civil rights?

Judge BOYLE. Thank you for that question, Senator. I think that is a critical matter for this hearing. I can say categorically that I am committed, and committed to enforcing the law that provides civil liberties, civil rights, the rights of employees.

And I regret that I am having to defend what I think a more complete examination will show is a record of sensitivity to plaintiffs and to the underprivileged and to those who don't have a voice otherwise.

Chairman SPECTER. Can you be more specific in support of the statement you just made?

Judge BOYLE. More specific?

Chairman SPECTER. Well, with respect to cases, with respect to specific decisions beyond the generalization.

Judge BOYLE. Well, you mean cases other than those that have been raised in criticism or the ones specifically that have been raised in—

Chairman SPECTER. Yes, give us a broader view.

Judge BOYLE. Well, I have had voting rights cases other than the Cromartie case in which I have certainly enforced and been sensitive to Section 2 and the rights of minority voters. I have presided over cases involving the enforcement of school desegregation cases and have enforced that across the board. I have had cases involving the widespread application of the Americans With Disabilities Act to residential housing.

So I think that a careful look at my record will show that I am even-handed, that the cases I have decided have been decided on the facts as I understood them at the time and not based on any agenda. There certainly is no agenda or philosophy on my part that is disrespectful from individual rights, civil rights and the rights of employees.

Chairman SPECTER. In reviewing your record, one of the cases which caught my attention particularly was *EEOC* v. *Federal Employees*, where you ruled against a claim by the defendant on a sexual harassment allegation by male employees against a female employee.

You found that, quote, "The sustained level of abuse alleged would certainly constitute an alteration in the condition of employment, creating an environment of fear and humiliation. The alleged misconduct often took place in a predatory manner with a male employee cornering her in a secluded part of the ramp area. No doubt, such behavior would substantially interfere with the work performance of any reasonable person."

I have just given a thumbnail description. Can you amplify on what happened in that case?

Judge BOYLE. Senator, I am very sorry. I don't have a personal recollection of the case, *EEOC* v.—I apologize. It is not one that readily comes to mind.

Chairman SPECTER. That is understandable. How many cases have you decided?

Judge BOYLE. There have been a lot over time, and we have a busy court and we try to be efficient and conscientious about that.

Chairman SPECTER. If somebody asked me what I said in a speech at some protracted period of time, I would have a hard time myself, maybe like yesterday, as to what was said.

You worked with the Federal public defender's office in your district in order to expand the local bar's participation in providing legal services to indigent criminal defendants. The first experience I had at the law was I joined a big firm and the county jail was overloaded and they assigned a couple of recent law school graduates to represent indigent defendants. That got me interested in criminal law and one thing led to another.

Tell us about your participation on the staff of the Federal public defender.

Judge BOYLE. Well, I think that my participation has been a judge, a district judge, and then as the chief judge for some period of time. I have tried to work closely with them, supporting the inclusion of not just the Federal public defender, but lawyers in private practice who take appointment of indigent cases. I have tried to work with them in their training and generally outreach to make sure that we have full, ready and adequate representation of defendants.

I have also worked extensively with North Carolina prisoner legal services to make sure that prisoners who appear in cases in our court are properly represented and there is an opportunity for them to have representation when they have important claims. I think this is very important.

Chairman SPECTER. Do you recollect a case where you granted a permanent injunction prohibiting the Navy's construction of a landing field which would have adversely impacted a nearby wildlife refuge, which was a matter before your court having a very substantial environmental impact?

Judge BOYLE. That is a very recent case, yes, sir.

Chairman SPECTER. What was involved in that case?

Judge BOYLE. Well, it is a case brought by various parties under the National Environmental Policy Act against the Navy, but I would be glad to discuss it. I am a little concerned because the case is still alive in court. There is a permanent injunction, but I wouldn't want to create the impression that what I said here might influence the later proceedings in the case.

Would you indulge me not to—

Chairman SPECTER. Judge Boyle, that is a very judicious statement.

Judge BOYLE. —not to talk about that?

Chairman SPECTER. No, no. I think you have just established some of your mettle, some of your qualifications by declining to answer a question from the Chairman of the Judiciary Committee. I think you are on solid ground and I admire that.

I am going to yield at this time to my distinguished colleague, Senator Lindsey Graham, to preside over the hearings.

Judge BOYLE. Thank you very much for being here, Senator.

Senator GRAHAM. [presiding]. Senator Kennedy, are you ready?

Senator KENNEDY. Thank you.

Judge Boyle, in your response to the Chairman about the actions of your own as a judge on the court or other activities that show the sensitivity to these issues, if you want to submit letters, cases or other kinds of activities that show that that you think would be useful or helpful to us, we would welcome it. You can either comment now or you can file them. I am glad to have it either way, whatever way.

Judge BOYLE. Thank you for that offer, Senator.

Senator KENNEDY. But I think you should be able to do it, and we will certainly make that part of the record and we would be interested in your response to that.

Judge BOYLE. Thank you very much.

Senator KENNEDY. I am concerned primarily on these issues on the 1991 Act which I was a principal sponsor of that overturned the Ward's Cove decision. Actually, our Chairman of the Committee, Senator Specter—it started off with Senator Danforth and then Senator Specter was the principal cosponsor on it.

I want to talk with you about some of these issues, some of these decisions, and get your reactions to it. First of all, you have, as I at least understand it, repeatedly misinterpreted Title VII of the 1964 Civil Rights Act. That deals with employment, as you know, the landmark law against job discrimination.

In *U.S.* v. *North Carolina*, you refused to enter a consent decree agreed to by the Justice Department and the State of North Carolina settling a suit alleging a pattern or practice of gender discrimination in hiring and promoting prison guards. That case was originally investigated and the lawsuit was authorized by the first President Bush.

North Carolina had agreed to establish an office to oversee compliance with Title VII, recruit female applicants and compensate women who had not been hired because of their sex. The department identified over 600 women who had been harmed by discriminatory practices. You refused to enter the decree, urging the State to withdraw from the binding contract, and ruled that your court had no jurisdiction over the case. Courts across the country frequently enter into similar Justice Department consent decrees.

On appeal, the Fourth Circuit unanimously held that your decision was an abuse of discretion—unanimously, the Fourth Circuit—and it ordered you to enter the consent decree. So this is a case of an extreme example of a judge making a decision based on his personal opinion, not the law. You actually criticized the Department of Justice for including as evidence of discrimination the fact that the State hired significantly fewer female prison guards than other States, including States in the South.

You wrote that, "Nothing is more offensive to the idea of federalism than the notion that the Federal Government will punish a State for having a non-conforming culture, for being different than other States." Of course, that kind of argument was made against desegregation in the 1960's, when some said it wasn't the

South's culture to educate blacks and whites in the same classroom. That argument was wrong then and it is wrong now.

So doesn't it violate our most basic principles of equality enshrined in the Constitution and Federal statutes for States to discriminate against women for cultural reasons?

Judge BOYLE. Absolutely.

Senator KENNEDY. Do you want to comment about your decision?

Judge BOYLE. Well, I think that, you know, I respect your criticism of it, and obviously it was criticized in the Fourth Circuit. And what came to me and my reasoning—and apparently it was ineffective reasoning—was to have a parties make a showing to me and to provide the court with a basis for invoking the injunctive power of the court.

During the hearings and in the discussion, it was well understood that they could settle a case and enter into a compliance arrangement without having a continued injunction and subsequent court proceedings that would involve the remediation and the remuneration of the people who were going to make claims.

And I won't take up too much time in trying to explain it unless you would like, but the point that I entered the case was whether or not they were going to make a complete showing, because later on I presided over, after the reversal and remand, all of the remediation in the case, heard the claims of the persons who came forward, made the distributions. So I faithfully complied with that, and I hope that in some way answers your question.

Senator KENNEDY. Well, the only issue, as I understand it, was whether the settlement agreement was fair. That was the only issue that was really before you, as I understand it, and the decision that had been made was based upon—the Justice Department relied on various statistics in making their own judgment. You had one judgment to decide and that was whether it was fair, and you evidently decided that it wasn't fair. Then your actions were overruled unanimously by the court.

Judge BOYLE. They were.

Senator KENNEDY. When Congress enacted the 1991 Civil Rights Act, we expressly provided for a process in which a plaintiff could prove discrimination by looking at the effects of various practices. It is very difficult to prove what is in someone's mind, but you can look at a practice and see that it has the effect of discriminating against a certain group and there is no legitimate business necessity for that requirement.

That change amended Title VII to include the kind of disparate impact analysis that the Supreme Court recognized in *Griggs* v. *Duke Power* when it held that facially neutral employment practices cannot be allowed to act as a built-in headwind to employment opportunities for any group.

So your opinion in the North Carolina tried to, as I understand, impose the opposite result. You held that instead of disparate impact analysis, the 1991 amendments overruled it. Two years earlier, the Supreme Court had held exactly the opposite of what you decided. In *Lanzgraf* v. *USI Film Productions*, the Supreme Court interpreted the 1991 Act's legislative history as expanding Title VII to allow proof of discrimination using disparate impact analysis without proving intent.

The Supreme Court specifically noted that Section 205 of the 1991 Act, entitled "Burden of Proof and Disparate Impact," was passed in response to the problem of cases like Ward's Cove to clarify the requirements in disparate impact cases.

Do you agree today that your opinion misrepresented the 1991 amendments and that proof of discriminatory intent is not required in a Title VII disparate impact case?

Judge BOYLE. I agree with your statement, Senator, that proof of disparate impact is not required, and I certainly abide by the 1991 amendments and I have heard cases and applied that law since then.

Senator KENNEDY. Well, that is completely contrary to your decision in the North Carolina case.

Judge BOYLE. Well, that language wasn't the rule of decision because the case was never decided by me. But you are correct that you are pointing out that what I said in that case was subject to criticism.

Senator KENNEDY. Now, I see the time. I will withhold. I have some additional questions.

Senator GRAHAM. Well, there are three of us and I think we need to be flexible.

Senator Leahy, would you like to make an opening statement?

Senator LEAHY. Mr. Chairman, I will put my opening statement in the record, in the interest of time.

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

Senator LEAHY. I would also put in the record a number of letters of opposition, including the National Association of Police Organizations, the North Carolina Police Benevolent Association, the Alabama Police Benevolent Association, the South Carolina Police Benevolent Association, the Virginia Police Benevolent Association, the North Carolina Troopers Association, and the Professional Fire Fighters and Paramedics of North Carolina.

I will put those in the record, and when it is my turn to ask questions, I do have some questions.

Senator GRAHAM. Without objection, they will be entered into the record.

Senator Leahy, you may proceed.

Senator LEAHY. Thank you, Mr. Chairman.

Judge Boyle, it has been mentioned by some already, and you may even have caught word that some in the press have said the same thing, that your nomination has had some controversy, partly because of your record on the district court. People have highlighted your high number of reversals—actually, the high percentage of reversals, which is probably even more significant.

Now, by our calculations, based on the information you have given us, 12 percent of your decisions that have been appealed were reversed. Of course, those are the only ones you look at, the ones that were appealed. But that is twice as often as the average for the entire Fourth Circuit. The Fourth Circuit is a pretty conservative circuit, the most conservative in the country.

Now, I looked at that information and I was kind of surprised. A couple of weeks ago, I was looking at your updated questionnaire, and in that one you reported fewer than half of the 142 re-

versals, partial reversals, or affirmances with criticism that you reported back in 2000 and 2003. Actually, you reported only about a third of the 150 we found. You told the Committee the cases you left out did not include a significant criticism of a substantive or procedural ruling. But when I compare those, this doesn't seem to add up.

Let me give you just a few examples from the 82 cases which I believe you shouldn't have left off your questionnaire. In *U.S.* v. *Barry*, the Fourth Circuit, writing about your opinion, said "The court's departure constitutes error that was plain." In *U.S.* v. *Tanner*, the appellate court criticized you and they held "The district court abused its discretion."

In *U.S.* v. *Sherrill*, the appellate judges remanded the case because you failed to make factual findings even though there was clear precedent that you had to do that. In *U.S.* v. *Phalan*, the defendant's sentence was vacated because the sentence exceeded the Federal statutory maximum—a very clear error of law.

In *U.S.* v. *Privott*, the Fourth Circuit vacated your order; more than vacated it, they told you to comply with a Fourth Circuit precedent—as you know, of course, the Fourth Circuit precedent would control what you are doing—that was 5 years old. And if that point didn't make it clear enough, they said there was also a Supreme Court precedent 2 years old that you had not complied with. In fact, that was one of at least two different times you ignored that particular precedent which is binding on you as a district judge. Now, these are just a few of the cases as we go down the list.

Can you give me a better explanation than the one you submitted last week about why you left out so many cases when an appellate court decided you made a substantive or procedural error, especially since you didn't include some of the cases you left out the last time you were before us?

Judge BOYLE. Thank you, Senator. I would like to explain this questionnaire response. Starting in 1991, my interpretation of the question was to provide all the cases in which you have been other than affirmed. I did that in 1991. I built on that in 2001. I built on that again in September of 2001 and in January of 2003.

And it was my impression that rather than that characterization, the response was that these were all reversals, and they weren't, in fact, all reversals. They had some other treatments, some of them, and so I tried to answer the question.

I knew that all of the things I had submitted heretofore were before the Committee. There is no attempt to be evasive or non-compliant. I can assure you of that, and what I did was recharacterize the decisions by reversed, remanded, vacated, and I didn't include those that appeared to be cases of not significant comment on the law or procedure.

Now, if the *Privott* case—you mentioned a number of cases and I am sorry that my memory doesn't pull every one of them out, but I think the *Privott* case might be a fairly recent one. And I know about that case and I would be glad to explain it to you.

Senator LEAHY. Before we go to that—and I would like the explanation, but let me take one. I still can't escape the idea that because in so many of these cases the criticism was so strong that

it leads to the conclusion by some of us that they were left out not because of the nature of the form or something like that, but left out because of the criticism.

I will give you a case, *Cromartie, C-r-o-m-a-r-t-i-e*, v. *Hunt*.

Judge BOYLE. *Cromartie.*

Senator LEAHY. *Cromartie.*

Judge BOYLE. Yes, sir.

Senator LEAHY. Thank you. That was a voting rights case.

Judge BOYLE. Right.

Senator LEAHY. The United States Supreme Court reversed you twice, one time by a vote of nine to zero. I am not sure that our current Court could agree on a lunch order nine to zero, to say nothing about a major case, and they reversed you on it. But you leave that out and it does bother me, Judge. It really does bother me because your number of reversals—you had included that one, I am advised, but not as a significant constitutional case. The Supreme Court reversed it nine to nothing. I would consider it significant.

What I am getting at is you get reversed so much. You get reversed by a court that should be ideologically with you. I began my public life in law enforcement and I hear from so many in law enforcement who are opposed to you. I try to separate my former life from that, but I just wonder are you so out of the mainstream that you shouldn't be on an important appellate court.

I will stop with that because I think out of fairness to you, you ought to be able to respond to that.

Judge BOYLE. Which part of that, Senator, the out of the mainstream or the—

Senator LEAHY. Based on these reversals.

Judge BOYLE. I hope that I am clearly in the mainstream, and have done my best to apply the law and hear cases on an individual basis, have no agenda or predisposition about cases. I really can't give you any sort of justification about the reversals. The reversals are there and I will just have to address those.

I think that the comments by these PBA organizations all arise out of a single case in which a police officer was working part-time at night and was disciplined. And it was a public speech case and I ruled against him, and it was reversed and then came back, was heard and they ultimately lost. But I don't think you will find that I have been hostile to enforcing the law or protecting people in their rights and safety.

Thank you very much, Senator.

Senator LEAHY. Thank you, Mr. Chairman. I wanted him to have a chance to answer that. I would note that a number of Senators planned to be here. Senator Feingold had planned to be here, and there has been a death in his family and he has flown back to Wisconsin because of that.

As you know, we have a major issue on the floor which is tying up both Republicans and Democrats at great length. In fact, I am told that we actually had to waive the Senate rules to make it possible to have this hearing. Normally, the hearing would not have been allowed. I mention that because I have heard from both Republican Senators and Democratic Senators who wanted to be here, and on a Thursday afternoon it has made it almost impossible.

I will have further questions. If I get stuck on the floor, because I am also one of the managers of the bill on the floor—

Judge BOYLE. Yes, sir.

Senator LEAHY.—I will submit the questions if I don't come back.

Judge BOYLE. Thank you, Senator.

Senator GRAHAM. If I may just a moment here, Judge Boyle, I certainly come to this hearing very open-minded and I have been given some paper that suggests that according to the Administrative Office—and I really can't tell you who they are, but apparently they are the folks that keep track of reversal rates.

There is a dispute about how many cases fall into the category of reversal that you have authored or been involved in. This talking paper I have says that 92 out of 1,200 cases you have decided would be consider reversals under the Administrative Office procedures, with a 7.5-percent reversal rate. I have also been told that the national average is 9.7. So this is a little bit like basketball.

What I would like to do is have our staffs at an appropriate time look at the Administrative Office standards, compare that to what we know about Judge Boyle's record and see if it is 7.5 or 12 percent. And I am not going to ask you to explain this to me because I think that would be highly unfair.

United States v. *North Carolina.* When it was reversed and remanded, was there an effort to have the case sent to another judge? Do you remember?

Judge BOYLE. I remember there was comment, I think—and I haven't looked at this carefully—I think there was a comment in the appellate opinion that said that there was no reason why I couldn't continue to hear and abide by the law of the case. And it continued in front of me and we had a very successful remediation of the case, and many people came in and were compensated and it was all handled in a very progressive way from the rights of the employees and those prospective employees.

But anyway, thank you.

Senator GRAHAM. I just mention that because I believe the court disagreed with you, as Senator Kennedy has pointed out and you readily accept, that your interpretation had to give way to theirs. But there was a dispute about whether or not you are the right guy, given the circumstances, to carry this case out, and apparently the appellate court had faith in your ability to do that and you performed that role after the reversal and remand. Is that correct?

Judge BOYLE. That is correct, Senator.

Senator GRAHAM. All right. Now, you have been on the Fourth Circuit in a fill-in capacity, for lack of a better word. You have authored 50 opinions. Is that right?

Judge BOYLE. I think that is correct. I know I have sat on more than 200 argued cases, and the typical distribution is about a third. And I think that someone made reference to 20 opinions. That may have been published ones, but there are per curiam opinions and ones that don't bear the panel member's name. So I would say that is correct.

Senator GRAHAM. Have you had reversals there?

Judge BOYLE. I really don't—that would be in the Supreme Court. I really don't recall.

Senator GRAHAM. Okay, thank you.

I will yield to Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

I would like to have you think about *Ellis* v. *North Carolina*, in which an African-American woman claimed that she was fired because of her race, in violation of Title VII. In 2002, you dismissed her case because you said the Act doesn't apply to States.

That decision was wrong. Congress amended Title VII in 1972 to cover job discrimination by States, and the Supreme Court has held repeatedly for two decades before you issued your opinion that States are not exempt from Title VII. When the Fourth Circuit reviewed your opinion on appeal, it unanimously found that you had violated Supreme Court precedents.

Judge BOYLE. Senator, would you permit me to explain that?

Senator KENNEDY. Sure.

Judge BOYLE. Thank you very much, and I have to say that there is no way that you could know the mistake in there because you are reading and you are entitled to look at the Fourth Circuit's case.

I looked at the case file and my opinion in that. The plaintiff, represented by counsel, brought a Title VII claim and three State tort law claims. In the Title VII claim, the employee failed to file a claim with the administrative agency or with the EEOC, and consequently we had no subject matter jurisdiction.

The 11th Amendment defense only applied to the State tort claims. And, of course, the States are exempt in Federal court from State tort claims. And it was on that basis that I wrote my district court opinion which was appealed to the Fourth Circuit.

How they came up with their opinion is beyond me, with all due respect, Senator, and I was shocked when I saw that opinion. I immediately went to it and tried to find the facts. The facts are categorically as I am telling you and I am sorry that that has become an issue.

Senator KENNEDY. Well, as I understand it, the question was whether Title VII and the amendments of Title VII would have applied to job discrimination by the States. Now, your are saying—what was your view?

Judge BOYLE. Absolutely. I mean, as soon as I saw that opinion come back, I said, my gosh, in my sleep I know that Title VII applies to the State. Section 5 of the 14th Amendment was used by Congress to abrogate State sovereign immunity. I never would have held that there was 11th Amendment immunity on a Title VII case.

And what happened was it was a submitted case. It was not argued. And I am sorry that, you know, we have had to have this discussion about it, but I hope it will clear the record.

Senator KENNEDY. So in your own words, in the discussion you say, "Next, the State and the DAHS, an agency of the State, are entitled to sovereign immunity, pursuant to the 11th Amendment in the United States Constitution." Those are your own words.

Judge BOYLE. Only with respect to the three State tort claim claims. The first claim there was no subject matter jurisdiction over because they had failed to make an administrative complaint, with all due respect. I am sorry, Senator.

Senator KENNEDY. No. That is good. It is helpful.

In the *Cromartie* case, the reversal by the court of appeals has raised certain concerns. I mean, it is so high. It is almost, as I understand it, twice as high as any other district court judge. I think the Chairman, Senator Graham, has indicated that we are going to have a chance to review it.

You were often reversed for plain error because you disobeyed the law or ignored the relevant legal standards. I am troubled by your decisions in the civil rights case. My concern is the apparent hostility to civil rights claims by minorities and women or persons with disabilities. You have been quick to rule in favor of whites who challenge State actions favorable to minorities.

Your decision in *Cromartie* v. *Hunt* illustrates the problem. White voters in North Carolina challenged a Congressional district with a substantial African-American population claiming it had been unconstitutionally drawn for racial reasons. The issue was whether the white voters could prove that the lines had been drawn for racial rather than political reasons. You granted the summary judgment for the plaintiffs before the parties could gather evidence in discovery and without even holding a trial.

In the opinion, Justice Thomas ruled, nine-zero, that you failed to follow the law and you were to quick to conclude that the district was an illegal racial gerrymander. The Supreme Court specifically found you ignored the proper legal standard for summary judgment by disregarding the State's evidence which required a trial.

Then when the case came back from the Supreme Court, you held the trial, disregarded the evidence and simply entered the same decision you made before. Some parts of your second opinion are almost word-for-word the same as the earlier decision. The Supreme Court reversed you again and said your second opinion was clearly erroneous and "you improperly relied on precisely the kind of evidence we said was inadequate the last time the case was before us."

So looking at your two opinions, it is hard to avoid the conclusion that you ignored the facts or ignored the law and ignored the Supreme Court to reach the result that you might have wanted.

Your reaction?

Judge BOYLE. Thank you, Senator. And will you permit me to explain that?

Senator KENNEDY. Sure.

Judge BOYLE. It is an important case and I will try to be as expeditious as I can.

Senator KENNEDY. Do you want to, Chairman, just hold so you can have your full—we have I guess 7, 6 minutes, and I do not want to rush you. I am going to be right back.

Judge BOYLE. Okay. Do you want me to hold it until you come back?

Senator KENNEDY. Yes.

Judge BOYLE. That will be great.

Senator KENNEDY. Thank you very much.

Senator GRAHAM. The Committee will be in recess for 15 minutes.

[Recess from 3:26 p.m. to 3:57 p.m.]

Senator GRAHAM. The hearing will come back to order, and Senator Kennedy's question I think is before Judge Boyle. If you would like to answer it.

Judge BOYLE. Yes, thank you, Senator. Are you ready? Okay, great.

Senator KENNEDY. Thank you.

Judge BOYLE. I think the first thing that I'd like to point out, and this is important, is that there were two Congressional districts under challenge in that case. One was the 1st and the other was the 12th. The three-judge court that I was assigned to heard challenges to both of those, and throughout both cases that we're talking about, Comartie I and Comartie II, we consistently held that the African-American district, the majority district in the 1st, was a constitutional exercise of the State's districting power. The challenge was to the 12th that had a more attenuated geographic composition, and the vote was 2–1 on that.

But just in summary—and I'll be more than happy to discuss this case at length—I think it's important to see that we stood up for and vindicated the rights of African-Americans in the districting decision in the 1st District, and we ruled that the 12th District was unconstitutional. It was a three-judge panel, and I ended up writing the majority opinion on the 12th District.

As I say, Senator, thank you for that question.

Senator KENNEDY. I will be glad to look through your answer on this, and also the Court's statement and comments about what their characterization was in terms of they felt was the rationale and the reasoning.

I want to go to the ADA if we could. Judge Boyle, in the Americans with Disabilities Act, I think a fair reading of this would be that you repeatedly misinterpreted the ADA in favor of the big business to limit the rights of the disabled. When Congress passed the ADA, we specifically listed the examples of reasonable accommodation. Reassigning an employee with a disability to a vacant position was one of them. But in the *Williams* v. *Avnet*, you ruled that reassigning a disabled worker to another vacant position is never a reasonable accommodation. So the ruling was incorrect. The ADA itself clearly, specifically cites reassignment to a vacant position as an example of reasonable accommodation. You held these plain words in the law were merely suggestive and not a force of law.

Your summary judgment was upheld by the Fourth Circuit on other grounds, but the appellate court made absolutely clear that you were wrong when you stated the examples of reasonable accommodation listed in the statute did not have the force of law. The Court noted that obviously Congress considered these types of accommodations to be reasonable. So if the Congress gave the specific examples of the reasonable accommodation, how could you hold that those examples are never reasonable under the statute?

Judge BOYLE. Thank you for the question. And I agree with you that the Americans with Disabilities Act is a very important and essential law. The Fourth Circuit, apparently correctly overruled me in that case. That was a judgment that was not correct. And I think I can say categorically that I agree that the Congressional language is the governing language.

Senator KENNEDY. But you do not know why, given the Act itself specifically cites the reassignment to a vacant position, you do not know why you interpret those words to be merely suggestive rather than the force of law?

Judge BOYLE. I think they have the force of law, and I was obviously correctly criticized in that case.

Senator KENNEDY. I think this just raises the kind of question in people's minds about whether your respect for the plain language in the statutes and whether we can assume that you will properly interpret the statutes in the future. This is the point I am getting at.

In the *Williams* case you also ruled that courts should not second guess the employer about whether an accommodation is reasonable, and should defer to employers what is a reasonable accommodation. You stated that if a court did not determinable reasonableness from the employer's point of view, it would be engaging in a subjective legislative exercise.

In reviewing your decision the Fourth Circuit criticized this part of your opinion, explaining that it is the court's responsibility to determine what accommodation is reasonable. So why do you think that considering a key legal issue strictly from the view of one party, which is the employer, is not subjective? If that is your view of objectivity, how can we trust that you will not simply decide cases from the viewpoint of big business over whichever party is the more powerful?

Judge BOYLE. Is that the same case, the *Williams* v. *Avnet*?

Senator KENNEDY. This is the *Williams* case, yet.

Judge BOYLE. The *Avnet* case, the one I just commented on.

Senator KENNEDY. Yes.

Judge BOYLE. Yes. I think that I'm saying to you here that I'm committed to applying the law, and respect the inclusion that Congress made of the specifics on that law.

Senator KENNEDY. There is sort of two issues. One is the statute for reasonable accommodation, and the other is the interpretation you used, reasonableness from the employer's viewpoint, and that is what I was looking at.

Judge BOYLE. Yes, sir.

Senator KENNEDY. I think probably your answers have probably covered those.

You repeatedly overruled in other ways from misreading the Americans with Disabilities Act. Moreover, you ruled that Title II of the Act is unconstitutional. One of the most disturbing aspects of your opinion is that you have repeatedly criticized the landmark statute for giving what you call special privileges to the disabled.

In *Brown* v. *North Carolina Division of Motor Vehicles*, you wrote that Title II of the Act which prohibits discrimination against the disabled by the States is unconstitutional because it seeks to single out the disabled for special advantageous treatment.

In another case, in *Pierce* v. *King* you held that Title II was unconstitutional as it applied to State prisons, stating that the Act granted special treatment tailored to the claimed disability. The Supreme Court overruled your decision in that case. Your view that accommodations have nothing to do with equal treatment is really wrong. For a person who needs the wheelchair ramp to get into the

courtroom, or for a deaf child who needs assistance in the classroom, failing to provide an accommodation means inability to access justice or inability to learn. So without taking into account the particular needs and circumstances of persons with disabilities, there is no way to ensure that they have the equal opportunity.

Judge BOYLE. You want me to comment on the *Brown* case or—

Senator KENNEDY. Well, on your opinion which you followed which severely limited participation of the disability groups in society. If we followed your interpretation of special advantaged treatment, if that was to be criteria, we would disadvantage many in the disadvantage movement and that is the point I am driving at.

Judge BOYLE. I recognize your point, and again, I can say categorically that I am committed to enforcing the rights of the disabled and the rights of the Americans with Disabilities Act.

I know there's been criticism of the *Brown* case, Senator, and that case turned an 11th Amendment interpretation. Whether or not I agreed with it personally, it was an application that I felt was compelled, and it ends up being the law right now, but that is all I can say. It was affirmed on appeal.

I quite understand and am sensitive to your concerns and to the rights of the disabled.

Senator KENNEDY. The Supreme Court has recognized that reasonable accommodations are about equal treatment for people with disabilities, and they are needed for people with disabilities to have the same opportunities as others. That is the *Tennessee* v. *Lane* and *U.S. Airways* v. *Barnett.* Rather than being special treatment, rather than equality, that was a very important concept that was rooted in the Americans with Disabilities Act, and that is enormously important to have the Act interpreted in that way.

Judge BOYLE. And I'm committed to that, Senator, both as a District Judge, and in the event that I move to a different court, I will continue to be committed to that. And I very much appreciate your comments on it.

Senator KENNEDY. I just have a few more questions, Mr. Chairman.

Do you stand by your opinions that Congress exceeded its authority by allowing individuals to sue States for disability discrimination and public programs?

Judge BOYLE. Is that the *Brown* v.—

Senator KENNEDY. It is just about whether you—that we exceeded the authority by individuals being able to sue when you have disability discrimination in public programs, should we—

Judge BOYLE. No. I think the only issue that I've ruled on—and it was a discrete issue. It was not focused on the Americans with Disabilities Act so much as it was focused on Section 5 of the 14th Amendment and whether there had been a constitutional abrogation of sovereign immunity. And quite honestly, the law appeared to be the way I wrote it, and it was affirmed, and I couldn't get around that.

Senator KENNEDY. On the issue on criminal justice, the Fourth Circuit has repeatedly reversed decisions in criminal cases, often for making the same clear error more than once. You were twice reversed for wrongfully allowing a criminal suspect to go free, in *U.S.* v. *Braswell*, and *United States* v. *Wolfe*, several criminal cases

the Fourth Circuit held that you committed plain error, an error so severe that it undermines the fairness, integrity or public reputation of the court proceedings. That is the Fourth Circuit holding.

You were reversed for plain error for permitting the Government to break a plea agreement in *United States* v. *Garrison.* You were reversed for plain error for mistakes you made in empaneling a juror, *United States* v. *Hanno*. You have been reversed for plain error in sentencing cases, *United States* v. *Barry*. The list goes on.

In matters regarding the guilt or innocence and whether someone goes to jail for how long, it is crucial that judges get the law right. So given your record in the criminal cases, how we possibly feel a sense of confidence in you with regard to the courts?

Judge BOYLE. Thank you, Senator. I've handled a lot of criminal cases, felonies and misdemeanors, jury trials and pleas and sentencings over these several years, and it has been my commitment to recognize and provide all criminal defendants the criminal process with their rights and dignity, and obviously I've been criticized at times. That's part of the world of working in the criminal justice system. But you have my commitment—

Senator KENNEDY. Politics too.

[Laughter.]

Judge BOYLE. Yes.

Senator KENNEDY. Let me just, there are two final areas.

Judge BOYLE. Certainly.

Senator KENNEDY. You have misapplied the law to denying claims by citizens based on the right to free speech, the *Edwards* v. *City of Goldsboro*. You improperly dismissed the First Amendment claims by Police Officer Sergeant Ken Edwards, who has been suspended for teaching courses on concealed handgun safety. The Fourth Circuit held that you abused your discretion by failing to allow Sergeant Edwards to amend his complaint before you dismissed his case. Federal Rules of Civil Procedure clearly require that permission to amend a complaint shall be freely given when justice so requires. The Fourth Circuit ruled that you ignored well-settled law, that permission to amend a complaint can be denied only if it would be futile, is requested in bad faith or would result in prejudice to the defendant. So how could you not be aware of this basic requirement in Federal rules and well-settled interpretation be followed?

Judge BOYLE. Thank you, Senator. I hope I'm not being too—

Senator KENNEDY. No, it is fine.

Judge BOYLE. I remember that case well, and that's the liability of my being here. And that was a police officer who, as you mentioned, was working moonlighting, and I mentioned that earlier in our conversation here today, and he was disciplined. He wasn't suspended. He was given some discipline. And he brought a First Amendment 1983 Civil Rights claims against the police department.

Well, the issue was whether his speech, his work in this moonlight job, was public or private speech. And it was pretty manifest to me—and I think the outcome of the case ultimately—which we don't have to worry about today—was that it was private speech. So the case was dismissed on those ground.

The fact that it has been, you know, sort of given a life of its own is nothing that I have any control over, but it was a public/private speech case, and there was no animus or lack of respect for police officers and the rights and dignity of police officers. There's a whole body of case law about quasi-military, i.e., police, fire and what rights they have within their organization to free speech and—I won't go into that. But anyway, thank you.

Senator KENNEDY. As I understand, it dealt with teaching courses on concealed handgun safety?

Judge BOYLE. The State had adopted a permitting law sometime around then, allowing you to carry a concealed weapon. And he was teaching in a community college, my memory is, and there was a general policy in his police department—can't remember which one, I think it may have been Goldsboro—in his police department against engaging in quasi-police outside activity. And that was more or less the long and the short of it.

Senator KENNEDY. Did you feel that his right to amend his plea failed to meet the Federal Rules of Civil Procedure that says that he is able to amend the complaint shall be freely given when the Fourth Circuit ruled that you ignored the well-settled law—it is not me that is saying that. It is the Federal Court, it is the Circuit that is saying that you ignored it. It is not me saying it, your judgment about whether it is public/private teaching, public expression, private expression. The Fourth Circuit said you ignored the well-settled law, and I am just wondering the reasons why.

Judge BOYLE. Again, I apologize for being defensive, if that's the way it appears. I'm not trying to be. I'm just trying to be—explain it. The dismissal motion had been well briefed and the facts were focused on that, and it appeared to me that the amendment, I believe, would have been futile because the critical issue was whether the speech was private or public, and that wasn't going to change by the amendment. But that's an imperfect memory of how things worked.

Senator KENNEDY. You have served as a judge on the District Court for 20 years, and in that time you have authored over 1,000 opinions, the vast majority of which you chose not to publish. Most of those unpublished opinions have still not been given to the Committee. I believe the American people are entitled to know your record on the district before you are promoted to a lifetime position on the Federal Court of Appeals. Do you have any problem in submitting your unpublished opinions to the staffs?

Judge BOYLE. Thank you, Senator. Everything that I do, as certainly you well know, is a matter of public record, and so my opinions are filed with the court and are there with the case files, and everything I've done has been open and subject to public scrutiny. And I'll be more than happy to work with the Committee to resolve this.

Senator KENNEDY. I have some others, Mr. Chairman. I'll submit additional questions. I want to thank you very much, Judge Boyle, for being here this afternoon.

Judge BOYLE. Thank you very much, Senator.

Senator GRAHAM. Thank you, Judge Boyle. I know we should stop, but I just want to make a few points. I know you do not feel

well, and thank you for being here today, and I thank Senator Kennedy for I think a pretty good exchange.

As I understand *Brown* v. *North Carolina Division of Motor Vehicles*, it is not about whether the Americans with Disabilities Act is a good thing or a bad thing, it is about whether or not the State, when the State finds itself having to comply with Americans with Disabilities Act, whether or not we in Congress wrote the statute to absolve the 11th Amendment sovereign immunity, and that is the issue. It is about the role of the State when the State finds itself as a defendant. The State has constitutional protections in our Constitution, and how that Act affected the 11th Amendment was later decided in *University of Alabama* v. *Garrett*, very much along the line of thinking that you had in Brown.

When it comes time to amend the complaint in the case that you are talking about with the police officer, I think the concern that some people have is that you just for some reason were hard over. If your belief was that the amendment would not change the outcome based on your reasoning, that is something that was helpful to me.

You have had 12,000 cases they tell me, somewhere in that neighborhood. You have had 1,200 appealed. According to the Administrative Office of the Courts, which is a group of people in the Federal Judiciary that keep count of what is the reversal, our numbers say that 92 of the 1,200 were reversed, which would be a 7.5 percent reversal rate, and that the national average is 9.7. If there is any doubt about that, I would like our staffs to get together and see if we can come up with common agreement.

The last thing that I would make a comment about, Judge Boyle, is that after 20 years and 12,000 cases, the American Bar Association unanimously agreed that you are well qualified, and thank you for coming.

Judge BOYLE. Thank you.

Thank you, Senator Kennedy.

Senator KENNEDY. Thank you.

Judge BOYLE. May I be excused?

Senator GRAHAM. Yes, sir. Thank you.

Next we will have our next panel. Would you please raise your right hands, please?

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

Judge DEVER. I do.

Mr. CONRAD. I do.

Senator GRAHAM. Thank you both for coming. We will start with Mr. Conrad. Do you have your family here?

STATEMENT OF ROBERT J. CONRAD, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Mr. CONRAD. I do, Senator.

Senator GRAHAM. If you would like to introduce them.

Mr. CONRAD. I have my wife, this June, my wife of 25 years, Ann Conrad with me, and I would note for the record that on my 20th

anniversary I spent the day testifying before Senator Specter 5 years ago.

I have two children with me, Kimberly Conrad and Branden Conrad who's a midshipman at the United States Naval Academy. My mother, Dorothy Conrad, is here from Chicago, Illinois, as is my sister-in-law, Mary Conrad, and her two daughters, Bethany and Anna Conrad.

My father- and mother-in-law are here from Greensboro, Charlie and Mazie Atkinson, as is their daughter, Barbara Atkinson and her son, Will Young.

Senator GRAHAM. Welcome. You all must have come up in a bus.

[Laughter.]

Senator GRAHAM. I am very impressed. Welcome to all of you.

Would you like to make a statement?

Mr. CONRAD. No, sir.

[The biographical information of Mr. Conrad follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Robert James Conrad, Jr.; Bobby Conrad, Bob Conrad

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

Residence:
Charlotte, North Carolina

Office:
United States Attorney's Office for the
Western District of North Carolina
Suite 1700 Carillon Building
227 West Trade Street
Charlotte, North Carolina 28202

3. Date and place of birth.

May 17, 1958
Chicago, Illinois

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

Married - Spouse Elizabeth Ann Atkinson Conrad
Self-employed Artist
1400 Byerly Court
Charlotte, North Carolina 28209

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

8/81 to 5/83, University of Virginia, JD awarded 5/83
8/80 to 7/81, DePaul University School of Law
8/76 to 5/80, Clemson University, BA/History awarded 5/80

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were

connected as an officer, director, partner, proprietor, or employee since graduation from college.

Employment

U.S. Department of Justice U.S. Attorneys Office Western District of North Carolina (AUSA, Chief Campaign Financing Task Force, U. S. Attorney) 227 W. Trade Street, Suite1700 Charlotte, N.C., 28202	1989-Present
Bush Thurman & Conrad (Partner) 1201 East Boulevard Charlotte, N.C., 28203	1988
Robert J. Conrad Jr., PA Attorney at Law 1201 East Boulevard Charlotte, N.C., 28203	1987-1988
Horn & Conrad (Partner) 1201 East Boulevard Charlotte, N.C., 28203	1986-87
Baker & McKenzie (Summer Law Clerk) Standard Oil Building Chicago, IL	1982
Michie, Hamlett, Donato & Lowry (Law Clerk 1981-1983) (Associate 1983-1986) Court Square Charlottesville, Virginia, 22902	1981-1986
Weidner & McAuliffe (Law Clerk) 111 West Washington Ave. Chicago, Illinois	1981

Wilson Sporting Goods 1980
(Warehouse Worker)
2233 West St
River Grove, Il., 60171

Officer or Director

Entity	Year
Clemson University President's Advisory Board	2000 -Present
Ave Maria School of Law Board of Visitors	2000 - Present
Clemson University Letterman's Association	1999 - Present
Barclay Downs Swim and Racquet Club	1994 - 1997
Dilworth Little League	1994 - 1995
Partners In Christ	1991 - 1995
Barnabas Counseling Center	1990 - 1991
Clemson University Honors College Advisory Board	1990 - 1998
Charlottesville Pregnancy Center	1983 - 1986

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.

Rhodes Scholar Candidate
Norris Medal (Outstanding Undergraduate Student - Clemson University)
Jim Weaver Postgraduate Scholarship (awarded annually to one male ACC student-athlete)
NCAA Postgraduate Scholarship
Phi Kappa Phi
Clemson University Hall of Fame (Basketball)
Academic All-American (1979-1980)
All ACC Academic First Team (1979-1980)
FBI Director's Award (2001)
DOJ Special Achievement Award, October (2000)
DOJ Sustained Superior Performance (1990)
BATF Director's Award (1990)
Numerous letters of commendation from FBI, USSS, USPS, BATF

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.

Bar Association	Title	Dates
Christian Legal Society	member	1981 - 1988 (Approx.)
Virginia State Bar	member	1983 - 1991
Virginia Bar Association	member	1983 - 1986
Charlottesville/Albemarle Bar Association	member	1983 - 1986
ABA	member	1983 - 1986
American Trial Lawyers Association	member	1983 - 1986
Virginia Trial Lawyers Association	member	1983 - 1986

Virginia Association Of Defense Attorneys	member	1983 - 1986
North Carolina Bar Association	member	1987 - 1989
N.C. Trial Lawyers Association	member	1987 - 1989
North Carolina State Bar	member	1987 - Present
Mecklenburg County Bar Association	member	1987 - 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.

Ave Maria School of Law Board of Visitors
Barclay Downs Swim and Racquet Club
Clemson University Honors College Advisory Board
Clemson University President's Advisory Board
Clemson University Tiger Brotherhood
Clemson University Tiger Letterman's Club
National Association of Assistant U.S. Attorneys

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.

Bar or Court Membership	Date	Reason for Lapse of Membership
Commonwealth of Va.	**1983-1986**	**Moved to N.C.**
U.S. District Court for the Western District of Virginia	**1983-1986**	**Moved to N.C.**

U.S. District Court for the Eastern District of Virginia	1986	Litigation concluded
State of North Carolina	1987-Present	
U.S. District Court for the Western District of North Carolina	1987-Present	
United States Court of Appeals For the Fourth Circuit	1989-Present	
D.C. District Court	2000-2001	Litigation concluded

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.

"Rules for Athletes' Parents," *The Charlotte Observer*, February 19, 2002.

"Habitually Wrong," *Catholic Dossier*, Jan-Feb, 1999, Vol. 5, No. 1.

"Virtues of Sports and Sex Play by the Same Rules on Both Fields: Sacrifice, Commitment and Self-Control," *The Charlotte Observer*, November 18, 1991.

"Planned Parenthood, A Radical, Pro-Abortion Fringe Group," *The Charlotte Observer*, June 14, 1988.

In addition, speeches were made concerning the topics listed, on the dates and at the places set forth below. Except for the transcript of Senate testimony on Terrorism Financing, none of these speeches were recorded or were the subject of press reports.

Speeches:

Date	Place	Description
October 28, 1999	DOJ National Advocacy Center, Columbia, SC	Capital Crimes Seminar Victim Impact Issues
September, 2000	USC Law School	Ethics and Federal Prosecution
March 14, 2001	Charlotte Catholic H.S.	Campaign Finance Laws
May 18, 2001	Westover Shopping Center	"A Time To Build" Ground breaking ceremony for property donated by USAO to City of Charlotte
May 22, 2001	Queen City Optimist Club	"Heroes" - Officer of the Year Luncheon
November 11, 2001	U.S. Courthouse	Response to the Administration of the Oath of Office as U.S. Attorney
December 19, 2001	ATTF/LECC Meeting,	Update on AG's directives on Anti-Terrorism Hickory, NC
January 30, 2002	UNC-Asheville	ACLU Forum on Civil Rights

March 12, 2002	U.S. Attorneys Office	Weed & Seed Gastonia, Official Recognition Press Conference
March 19, 2002	Pfeiffer University	Legal Forum: "Preparing Yourself for Servant Leadership"
July 23, 2002	"Charlotte Talks" Radio Show	Prosecution Priorities of U.S. Attorney's Office and Corporate Fraud
August 20, 2002	Bank of America	Bank Robbery Conference: U.S. Attorneys Approach to Bank Robbery Prosecutions
October 24, 2002	Morton's of Chicago	"Crime in the Suites" seminar sponsored by Alston and Byrd and ABA: Topic: U.S. Attorney Perspective on Corporate Fraud Prosecutions
October 30, 2002	Ave Maria School of Law	Thomas More and the Rule of Law
November 20, 2002	Committee on the Judiciary United States Senate	Terrorism Financing

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

In excellent health
January 21, 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 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.

Not applicable

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.

Appointed U.S. Attorney for the Western District of North Carolina by President George W. Bush on November 1, 2001.

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;

8/87 to 2/88 practiced alone
1201 East Boulevard
Charlotte, NC 28203

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;

1/89 to Present; U.S. Attorney's Office
227 West Trade Street, Suite 1700,
Charlotte, NC 28202
Employed as AUSA until March 2001.
Appointed U.S. Attorney by Department of Justice (March 9, 2001); the District Court (July 6, 2001); and Presidentially-appointed and Senate-confirmed (November 1, 2001)

3/88 to 12/88; Bush, Thurman & Conrad, PA
Partner in law firm.
1201 East Boulevard, Charlotte, NC 28203

7/86 to 8/87; Horn & Conrad
Partner in law firm.
1201 East Boulevard, Charlotte, NC 28203

8/83 to 7/86; Michie, Hamlett, Donato & Lowry
Associate in law firm.
500 Court Square, Suite 300,
Charlottesville, Virginia 22902

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

My law practice is divided into three periods: Part I, from 1983 - January, 1989, I engaged in the general practice of law with an emphasis on civil litigation. Part II, from January, 1989 to March 2001, I was a federal criminal prosecutor. Phase III, from March 2001 until the present, I have been U.S. Attorney for the Western District of North Carolina supervising representation of the United States in both criminal and civil matters.

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

Period I: I engaged in the general practice of law. Typical clients included personal injury plaintiffs, private adoption, residential real estate closings and commercial litigation. Period II involved representation of the United States in criminal prosecutions. Period III involved supervising the representation of the United States in both criminal and civil matters.

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.

Period I, involved civil litigation, appearing in court regularly. Period II, involving criminal

prosecutions, court appearances were frequent from 1989-1995; less frequent with increased supervisory responsibilities after 1995 but still handling some of the more complex court cases. Period III involved mostly administrative and supervisory duties with less frequent court appearances.

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

   Period I: less than 10%

   Periods II & III: 100%

   (b) state courts of record;

   Period I: 90%

   Periods II & III: 0%

   (c) other courts.

   Periods I, II & III: 0%

3. What percentage of your litigation was:

   (a) civil;

   Period I: over 90%

   Periods II & III: less than 10%

   (b) criminal.

   Period I: less than 10%

   Periods II & III: over 90%

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.

   More than 50 cases in which I was sole or chief counsel.

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

90%

(b) non-jury.

10%

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.

Ten most significant matters:

Case Identifiers:	**Party Represented/ Co-counsel(CC) & Principle Opposing Counsel(POC)- Address & Phone #**	**Capsule Summary/ Final Disposition**
1. U.S.v. Barnette, No. 3:97CR-P (WDNC); 211 F.3d 803 (4th Cir 2000);District Court Judge Robert D. Potter (WDNC); J&C: 2/20/98	Represented the United States/ CC: Thomas G. Walker c/o North Carolina A.G. Roy Cooper P. O. Box 629 Raleigh, NC 27602. w: 919.716.0045 POC: George Laughrun Goodman, Carr, Laughrun, Levine & Murray, PA Suite 602 Cameron Brown Bldg. 301 S. McDowell St. Charlotte, NC 28204 w: 704.372.2770	Lead counsel in first federal capital case tried in NC since capital punishment was reinstated in 1988. Barnette firebombed the occupied apartment of his ex-girlfriend Robyn Williams. After she was released six weeks later from hospital burn unit, he murdered Donnie Lee Allen during a carjacking; drove Allen's stolen car to Roanoke, Virginia where he murdered Williams. Government tried Barnette for violations of carjacking and Violence Against Women (VAWA) statutes and use of firearm during commission of violent crime. Barnette was convicted of all charges and sentenced to death. Death sentence was vacated and remanded for error in exclusion of expert witness. Barnette was re-sentenced to death on August 20, 2002. Appeal pending.

2. U.S. v. Riady,CR 01-00026 (CDCa); District Court Judge Consuela Marshall; J&C: 3/19/01	Represented the United States\ CC: AUSA Dan O'Brien,U.S. Attorney's Office, Central Dist. Of California 312 N. Spring St. Room 1200, Los Angeles, CA 90012 W:213.894.2468 POC: Abbe Lowell, Mannatt, Phelps & Phillips, LLP, 1501 M Street, N.W., Suite 700, Washington, D.C. 20005 W:202.463.4300 Earl Silbert, Piper Marbury Rudnick & Wolfe, LLP, 1200 19th St., NW, Washington, DC 20036-2412 W:202.965.7910	James Riady pled guilty to a felony charge of conspiring to defraud the United States by unlawfully reimbursing campaign donors with foreign corporate funds in violation of FECA laws. LippoBank California pled guilty to 86 misdemeanor counts charging its agents Riady and John Huang with making illegal foreign campaign contributions and agreed to pay a record fine of $8.6 million. This investigation and prosecution included interviewing the President and Vice-President, conducting interviews and pursuing documents in Indonesia and other foreign countries. I also played an active role in the negotiated resolution. In addition to the *Riady* case, the Campaign Financing Task Force, which I supervised, and actively participated in as co-counsel, prosecuted 25 other defendants, obtaining approximately 19 convictions, including, during the time period of my supervision: *United States v. Hsia,* 98-0057(PLF)(D.D.C. 2000)(J. Friedman) (convicted of five felony counts after trial); *United States v. Kanchanalak et.al.*, CR-98-0241 (D.D.C. 2000)(J. Friedman); *United States v. Chang,* CR99-726 (D.N.J. 2000)(J. Wolin); *United States v. Yu,* CR99-726 (D.N.J. 2000)(J. Wolin); *United States v. Cha-Kuek Koo*, CR-00-353 (D.N.J. 2000)(J. Wolin); *United States v. Hababou*, CR-00-629 (D.N.J. 2000)(J. Bassler).

3. U.S. v. Finley, 4:98CR243, District Court Judge Lacy H. Thornburg (WDNC); J&C: 4/20/99	Represented the United States\ CC: Thomas G. Walker c/o North Carolina A.G. Roy Cooper P. O. Box 629 Raleigh, NC 27602. W: 919.716.0045 POC: Jack W. Stewart P.O. Box 1920, Asheville, NC 28802 W: 828.253.5673	Lead counsel in prosecution of capital case involving the murder of two twenty-year-old campers in the Pisgah National Forest. Jury convicted the defendant, and, he was sentenced to life imprisonment.
4. United States v. Falice, 3:98CR224-MU District Court Judge Graham C. Mullen (WDNC); J&C: 7/25/00	Represented the United States\ CC: Thomas G. Walker c/o North Carolina A.G. Roy Cooper P. O. Box 629 Raleigh, NC 27602 W: 919.716.0045 POC: Claire Rauscher 435 East Morehead Street, Charlotte, NC 28202-2609 W: 704.331.0863	Lead counsel in prosecution of first-degree murder case involving application of the Violence Against Woman Act and the use of a firearm during commission of crime of violence. Defendant purchased the murder weapon and other equipment in Atlanta, Georgia, drove to Charlotte, N.C. and accosted his ex-girlfriend who was six months pregnant. When she refused to leave with him, he drove past her car on the road, forced her to stop, and shot her multiple times causing her death. Jury convicted the defendant and he was sentenced to life imprisonment.

5. U.S. V. Linney, 1:95M34, District Court Judge Charles E. Simons, Jr. (WDNC); *United States v. Linney,* 134 F.3d 274 (4th Cir. 1998); 91 F3d 135 (Table)(4th Circuit 1996)	Represented the United States\ POC: Robert B. Long, Jr., Long, Parker, Warren & Jones, PA, 14 S. Pack Square, Suite 600, Asheville, NC 28801 W: 828.258.2296	Prosecuted contempt case against Asheville lawyer/ state legislator who ignored district court's order to be present for the trial of a criminal case. Defendant chose to attend legislative session in lieu of representing his criminal client. Defendant was found in summary contempt by the presiding district court, which finding was reversed by Court of Appeals and remanded for trial before another judge. I represented the United States on remand. The defendant was convicted after a bench trial.
6. U.S v. Dwight Hunter, et. al., 3:94CR 111; 166 F.3d 1211 (Table)(4th Cir. 1998) District Court Judge Graham C. Mullen J&C: 4/8/96	Represented the United States\ POC: William L. Osteen Jr., BB&T Bldg., Suite 410, 201 W. Market St., Greensboro, NC 27401-2527 W: 336.274.2947	Supervised two year investigation of drug organization and prosecuted more than 60 members of conspiracy including Charlotte distribution organization, New York City suppliers and Columbian sources. Lead defendant received life sentence after trial. Other charges successfully brought included attempted murder for hire, obstruction of justice, and various firearm and drug offenses.
7. United States v. McFarlane et. al.,3:97CR290-V, District Court Judge Richard L. Voorhees (WDNC) J&C: 3/12/99	Represented United States\ POC: Norman Butler Court Arcade, Suite 115, 725 E. Trade St., Charlotte, NC 28202 W: 704.335.8686	Supervised two year investigation of, and prosecuted,international drug smuggling ring which controlled smuggling out of the islands of St Croix and St. Thomas, V.I. Over 30 search and seizure warrants executed in the Virgin Islands, Atlanta, Georgia, Montgomery, Alabama, Charlotte, North Carolina, and elsewhere. More than 30 defendants prosecuted in different states with leaders of organization prosecuted here in Charlotte. Lead defendant received lengthy sentence and his brother, a corrupt U.S. Customs Inspector, also pled guilty.

8. U.S. v. Jackson, et. al., C-CR-90-85 District Court Judge Robert D. Potter (WDNC) J&C: 10/26/90	Represented United States\ POC: Jesse J. Waldon, Jr., 6760 Tree Hill Road, Matthews, NC 28105 W: 704.821.6582 POC: Lawrence W. Hewitt, James, McElroy & Diehl, 600 S. College St., Suite 300, Charlotte, NC W: 704.372.9870 POC: Kenneth P. Andresen, 2135 Lombardy Circle Charlotte, NC 28203 W: 704.377.8881 POC: Harold J. Bender 200 N. McDowell St., Charlotte, NC 28204 W: 704.333.2169 POC: Joseph Lyles -*address unknown– removed from NC State Bar listing* POC: Earle D.Roberts, Jr., 101 N. McDowell St., Ste. 214, Charlotte, NC 28214 W: 704.375.8980 POC: Dale S. Morrison, Harkey, Lambeth, Nystrom & Fiorella, LLP, 300 Morehead Corp. Plaza, 1043 E.	Prosecuted first case in district where CCE laws were combined with firearm and drug laws to dismantle violent street gang. The "Cecil Jackson" gang was responsible for high volume drug distribution, numerous firearm assaults including shooting into an occupied police vehicle, and at opposing gangs; threats made against family members of police officer and one kidnaping. During trial, an attempt was made to bribe a juror and obscenities were shouted in open court. A star witness for the government was beaten in a prison cell the morning of his testimony. Leaders of organization were convicted after trial and given sentences of life plus a number of years.

9. *United States v. Michael H. Spieles, et. al.*, C-CR-90-91-MU, District Court Judge Graham C. Mullen (WDNC) J&C: 5/18/94	Represented United States\ CC: Thomas J. Ashcraft, 521 East Morehead, Suite 120, Charlotte, NC 28202 W: 704.333.2300 POC: Michael S. Scofield, 212 S. Tryon St., Ste. 1280, Charlotte, NC 28281 W: 704.331.9348	Prosecuted "Cap Staffing" case, which was a 42-count indictment charging six individuals with a multi-state scheme to defraud companies and their employees of their health insurance, ERISA benefits and savings through an "employee leasing" scam. Seizures in several states. All defendants pled guilty, including the ringleaders on the eve of trial.
10. United States v. Amadi, et. al.,C-CR-89-104, District Court Judge Robert D. Potter (WDNC) J&C: 3/28/90	Represented United States\ POC: Dale S. Morrison Harkey, Lambeth, Nystrom & Fiorella, LLP, 300 Morehead Corporate Plaza, 1043 E. Morehead St., Charlotte, NC 28203 W: 704.337.4700 POC: Jean Lawson, P.O. Box 4275, Charlotte, NC 28226-0099 W: 704.341.1865 POC: Michael S. Scofield, 212 S. Tryon St., Ste. 1280, Charlotte, NC 28281 W: 704.331.9348	Prosecuted bank fraud scheme involving con artists whose scheme involved assuming fictitious identities, opening numerous bank accounts, depositing worthless or forged checks and passing bogus checks at various merchants in attempts to purchase high technology equipment which was shipped back to the defendants' home country of Nigeria. Three of seven defendants went to trial and were convicted.

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 matters listed in response to Question #18, above, I have been involved in other significant legal matters.

Prior to my career in the United States Attorney's Office, I worked for a law firm in Charlottesville, Virginia which, among other things, represented injured plaintiffs in products liability litigation. In that representation, I helped a series of victims recover damages from the manufacturer of a defective prosthetic device. That federal court litigation involved extensive discovery, consultations with experts in the field, numerous depositions, and other pre-trial litigation. All the cases were settled favorably to the needs of the injured clients.

In private practice, I developed an expertise in interstate adoption law. I became involved in numerous matters dealing with the Interstate Compact for the Adoption of Children, and advised clients on the legal difficulties involved in adoptions across state lines.

As U.S. Attorney, I was a member of the Attorney General's Advisory Committee, which met with the Attorney General and other senior members of the Department of Justice. In that capacity, I chaired a Subcommittee on Violent Crime and served as a member of the Terrorism Subcommittee. I also testified before a Subcommittee of the United States Senate Judiciary Committee on Terrorism Financing.

As an Assistant United States Attorney and later as United States Attorney, I was involved in the Department of Justice's Weed and Seed Program. In particular, I assisted in the conveyance of a shopping center seized as a result of a major narcotics investigation, to the city of Charlotte and local community groups for purposes of community revitalization. This shopping center on the City's west side, once a magnet for criminal activity, is now being developed for occupancy by commercial and other community enhancing tenants. It is 100% rented out with tenants, including a police substation, YMCA, and commercial establishments.

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 engaged in numerous activities over the course of my professional life to assist disadvantaged and other youths. Those activities draw mostly on my love for youth sports. They include coaching girls and boys athletic teams, including AAU basketball teams; sending teams and sponsoring individuals to sports camps, and taking one week each year to instruct at a youth basketball camp.

For years, I served as a board member for an organization called "Partners in Christ" (PIC). Their mission was to raise funds and identify disadvantaged high school youths who were unable to afford college. PIC provided scholarships and monitored the collegiate progress of those individuals.

I have been involved in the Department of Justice's Weed & Seed Initiative, the DEFY (Drug Education For Youth) Camps, and other programs. As an Assistant United States Attorney and as U.S. Attorney, I was involved in an effort to convey a shopping center, seized from drug traffickers, to the City of Charlotte and neighborhood organizations for the purpose of promoting development on the city's west side. I am involved in an effort to send AUSAs and other law enforcement officials into the city's middle schools to promote a gun free and drug free school message.

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 committee in the Western District of North Carolina. I interviewed with The White House Counsel's Office and the Department of Justice. I was also interviewed by the FBI as part of their background investigation.

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.

A district judge's role is to decide cases and controversies fairly, accurately, expeditiously, and judiciously, deciding what needs to be decided, but not reaching out and trying to decide issues not properly before the court.

Jurisdiction, standing, and ripeness are based on standards set by the Constitution and Congress and authoritatively interpreted by the Supreme Court and courts of appeal. A district judge is responsible for fairly and accurately finding the facts relevant to these issues and applying the law to those facts regardless of any personal preferences as to whether the litigant or the remedy is a good social policy.

District court judges are bound to follow the decisions of their circuit and, of course, the Supreme Court. The doctrine of *stare decisis*, the principle that a decision made in one case will be followed in the next, is a sound one that tends toward stability and consistency in the law.

Change or Updates to Questionnaire For Nominees Referred to the U.S. Senate Committee on the Judiciary

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Office address is amended as follows:
Mayer Brown Rowe & Maw
214 N. Tryon Street
Suite 3800
Charlotte, North Carolina, 28202.
704.444.3619

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

Employment

From June 1, 2004 to the present:
Partner
Mayer, Brown, Rowe & Maw LLP
214 N. Tryon Street, Suite 3800
Charlotte, NC 28202

The undersigned previously listed employment with U.S. Department of Justice from "1989 to the present." This response is amended to read "from 1989 to May 31, 2004"

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.

Response is amended to include:

"Can the Ordinary Practice of Law Be a Religious Vocation? A Panelist's Response," to be published in 2005 by Pepperdine Law Review.

17. Legal Career:

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

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:

June 1, 2004 to present: Mayer, Brown, Rowe & Maw LLP, 214 N. Tryon Street, Suite 3800, Charlotte, NC 28202 – Partner in law firm litigation practice section engaging primarily in civil litigation and corporate internal investigations.

III. ([illegible] PUBLIC)

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

In 2004, I became involved in efforts to secure public and private funding for the Mecklenburg County Drug Treatment Court which is a non-traditional, court sponsored program aimed at stopping the cycle of abuse of alcohol and other drugs related to criminal activity.

I, Robert James Conrad, Jr. do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

2.16.05

Date

Robert James Conrad, Jr

Senator GRAHAM. Judge, would you like to introduce your family?

STATEMENT OF JAMES C. DEVER, III, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Judge DEVER. Yes. Thank you, Senator.

With me is my wife of nearly 20 years, Amy Dever, and our three children, Maggie Dever, who's our youngest; Patrick Dever and Colum Dever. And my parents, James and Kathy Dever, are here, as is my sister, Sharon Fleischman.

Senator GRAHAM. Would you like to make a statement?

Judge DEVER. No, Senator, other than to thank the President for the nomination, the Committee for holding this hearing, and for the support of Senator Burr and Senator Dole.

[The biographical information of Judge Dever follows.]

QUESTIONNAIRE FOR NOMINEES BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

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

   RESPONSE:

   James Columcille Dever, III

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

   RESPONSE:

   U.S. District Court Judge, Eastern District of North Carolina

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.

   RESPONSE:

   Maupin Taylor & Ellis, P.A., 3200 Beechleaf Court, Suite 500, Raleigh, North Carolina 27604, (919) 981-4078

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

   RESPONSE:

   05/25/62; Lake Charles, Louisiana

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.

   RESPONSE:

   Married; Amy Nichols Dever; Homemaker; three 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.

   RESPONSE:

   August 1984 - May 1987, Duke University School of Law, J.D., with high honors, 1987
   August 1980 - May 1984, University of Notre Dame, B.B.A., with high honors, 1984

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.

RESPONSE:

October 1992 - date: Maupin Taylor & Ellis, P.A., 3200 Beechleaf Court, Suite 500, Raleigh, North Carolina 27604

- Shareholder & Director, 1998-date
- Member, Executive Committee, 1998-date
- Associate, 1992-1997

August 1997 - December 2001: Campbell University, Norman Adrian Wiggins School of Law, 113 W. Main Street, Buies Creek, North Carolina 27506; Adjunct Professor of Employment Law during each fall semester from 1997-2001.

October 1988 - September 1992: Captain, United States Air Force, Office of the Air Force General Counsel Honors Program, 1740 Air Force (Room 4D980), Pentagon, Washington, D.C. 20330-1740

August 1987 - August 1988: Law Clerk, Judge J. Clifford Wallace, U.S. Court of Appeals for the Ninth Circuit, Federal Courthouse, 940 Front Street, Suite 4N25, San Diego, California 90274

May 1986 - August 1986: Summer Associate, Latham & Watkins, 555 11th Street, N.W., Suite 1000, Washington, D.C. 20004

May 1985 - August 1985: Summer Associate, Anderson, Walker & Reichert, LLP, Suite 404 Sun Trust Bank Building, Macon, Georgia 31208

June 1984 - August 1984: Messenger, Latham & Watkins, 555 11th Street, N.W., Suite 1000, Washington, D.C. 20004

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.,

RESPONSE:

August 1980 - May 1981: U.S. Air Force ROTC, University of Notre Dame

August 1981 - May 1984: U.S. Army ROTC, University of Notre Dame

May 1984: Commissioned as a Second Lieutenant in the U.S. Army; received educational delay to attend law school and later received a one year delay for a federal judicial clerkship

August 1988: Honorable Discharge from U.S. Army as a First Lieutenant

August 1988: Branch transfer to United States Air Force as a First Lieutenant

October 1988 - September 1992: Served on active duty as an attorney in the Office of the Air Force General Counsel Honors Program, Captain, Pentagon, Washington, D.C.

October 1992 - February 2000: Individual Ready Reserve, Captain, U.S. Air Force

February 2000: Honorable Discharge from U.S. Air Force as a Captain

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.

RESPONSE:

Listed in Best Lawyers in America, Labor & Employment Law since 2001

Selected by 6,000 N.C. attorneys to be a member of *Business North Carolina's* "Legal Elite" for Employment Law (2002)

Adjunct Professor of Employment Law, Norman Adrian Wiggins School of Law, Campbell University (1997-2001)

Rated AV by Martindale-Hubbell since 1996

Meritorious Service Medal (1992)

National Defense Service Medal

Air Force Longevity Service Award Ribbon

Air Force Training Ribbon

Described by Air Force General Counsel in final officer evaluation report as "the best of the best."

Sole attorney entering active duty in the Air Force in 1988 selected to serve as a member of the Office of the Air Force General Counsel's Honors Program, Pentagon, Washington, D.C.

J.D., with high honors, Duke University School of Law (1987)

Editor-in-Chief, *Duke Law Journal* (1986-1987)

Order of the Coif (1987)

Special Faculty Award of Merit for Contribution to Legal Scholarship (1987)

Corpus Juris Secundum Award (1987)

Bidlake Legal Research and Writing Award (1985)

B.B.A., with high honors, University of Notre Dame (1984)

Attended Notre Dame on four-year ROTC scholarship

Beta Gamma Sigma Honor Society (1984)

Raymond P. Kent Award (awarded to graduating senior at Notre Dame with highest G.P.A. in finance/economics courses)

Distinguished Military Graduate (1984)

Honor graduate, Mt. de Sales High School, Macon, Georgia (1980)

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.

RESPONSE:

American Bar Association (1989-date)
- Litigation Section
- Labor & Employment Section
- Public Contract Law Section

North Carolina Bar Association (1992-date)
- Constitutional Rights and Responsibilities Section (1998-date)
- Section Council Member (1999-2001)

Wake County Bar Association (1992-date)
Federalist Society (1994-date)
- President, Triangle Lawyers Chapter (1996-2000)

North Carolina Association of Defense Attorneys (1998-date)
Fourth Circuit Judicial Conference (2000-date)

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.

RESPONSE:

North Carolina Bar (1987)
District of Columbia Bar (1990)
U.S. District Court for the Eastern District of North Carolina (1994)
U.S. District Court for the Middle District of North Carolina (1994)
U.S. District Court for the Western District of North Carolina (1994)
U.S. Court of Appeals for the Fourth Circuit (1994)
U.S. Supreme Court (1995)

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.

RESPONSE:

Our Lady of Lourdes Catholic Church (1992-date)
Our Lady of Lourdes Home & School Association (1993-date)
- President (1996-98)
- Principal Search Committee (2000)

Coach, North Wake County Baseball Association (1996-date)
Coach, North Wake County Basketball Association (2002-date)
Coach, Salvation Army Basketball (1998-2002)
Duke University Alumni Association (1987-date)
Sorin Society, University of Notre Dame (2000-date)
University of Notre Dame Alumni Association (1984-date)
Notre Dame Club of Eastern North Carolina (1992-date)
- Vice President (1996-2000)

North Hills Swim Club (1993-2000)
North Ridge Country Club (2000-date)
Knights of Columbus (1997-date)

These organizations do not discriminate 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.

RESPONSE:

Double Jeopardy, False Claims, and United States v. Halper, 20 Pub. Cont. L.J. 56 (1990)

Tinker Revisited: Fraser v. Bethel School District and Regulation of Speech in the Public Schools, 1985 Duke L.J. 1164

Maupin Taylor & Ellis – November 2002 – Employment Law Seminar – Age Discrimination in Employment and Older Workers' Protection Acts

Maupin Taylor & Ellis - March 1999 - Employment Law Seminar - Age Discrimination in Employment and Older Workers' Protection Acts

Maupin Taylor & Ellis - March 1999 - Employment Law Seminar - Contingent Workforce Legal Risks (Temporaries, Part-Timers, Independent Contractors)

Maupin Taylor & Ellis - October 1998 - Construction Law Seminar - Employment Agreements

Maupin Taylor & Ellis - September 1998 - Employment Law Seminar - Age Discrimination in Employment and Older Workers' Protection Acts

Maupin Taylor & Ellis - May 1998 - Employment Law Seminar - Wage & Hour

Maupin Taylor & Ellis - May 1998 - Employment Law Seminar - Legal Risks Arising from a Contingent Workforce

Personnel Law Update Seminar - October 1996 - Temps, Contractors, and Telecommuters: An Analysis of the Legal Risks

Lorman Employment Law Seminar - August 1996 - Compliance Under State and Federal Wage & Hour Laws

North Carolina Bar Foundation Employment Litigation Seminar - May 1995 - Damages in Employment Discrimination Cases

Maupin Taylor & Ellis - March 1995 - Agri-Business Conference - The Agricultural Exemptions under the FLSA

Changing Employee Benefits, Campbell Law Observer (Nov. 1995)

Healthcare Fraud and the Civil False Claims Act, Campbell Law Observer (Sept. 1995)

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.

RESPONSE:

None

15. **Health**: Describe the present state of your health and provide the date of your last physical examination.

RESPONSE:

Excellent; 3/18/02

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.

RESPONSE:

Not applicable

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.

RESPONSE:

None.

(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.

RESPONSE:

I have not held a position or played a role in a political campaign. I have, however, provided legal services to certain campaigns as a member of the law firm of Maupin Taylor & Ellis, P.A. Specifically, our law firm acted as counsel to the Forbes for President campaign in 1996 in connection with Mr. Forbes' efforts to get on the North Carolina Republican primary ballot. Additionally, our law firm acted as counsel to Mayor Paul Coble of Raleigh in connection with a recount following his election as Mayor in Raleigh in 1999 and as counsel to Fred Heineman in connection with a recount following his election to Congress in 1994. Our firm also acted as counsel to Mr. Bobby Hall in connection with a recount for a North Carolina House race following the 1996 election to the North Carolina General Assembly.

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;

RESPONSE:

Following graduation from the Duke University School of Law in May 1987, I served as a law clerk for the Honorable J. Clifford Wallace. Judge Wallace is a member of the U.S. Court of Appeals for the Ninth Circuit. His chambers are in San Diego, California. I served as one of Judge Wallace's law clerks from August 1987 through August 1988.

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

RESPONSE:

I have never practiced alone.

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

RESPONSE:

Maupin Taylor & Ellis, P.A., 3200 Beechleaf Ct., Suite 500, Raleigh, North Carolina 27604, October 1992 to date

- Associate, 1992-97
- Shareholder & Director, 1998-date
- Member of Executive Committee, 1998-date

Norman Adrian Wiggins School of Law, Campbell University, Buies Creek, North Carolina 27506; Adjunct Professor of Employment Law, August 1997 to December 2001.

- Taught employment law to second and third-year law students during each fall semester since 1997

Office of the Air Force General Counsel, SAF/GCP, Suite 4D980, Pentagon, Washington, D.C., October 1988 to September 1992

- Sole attorney entering active duty in 1988 selected to fulfill undergraduate ROTC scholarship commitment as an attorney in the U.S. Air Force General Counsel's Honors Program
- Counsel, Air Force Debarment & Suspension Review Board
- Trial counsel in bid protests at the General Services Board of Contract Appeals and the General Accounting Office
- Captain, U.S. Air Force Reserve 1992-2000; Honorable Discharge 2000

Law Clerk, Honorable J. Clifford Wallace, United States Court of Appeals for the Ninth Circuit, San Diego, California, August 1987 to August 1988

(2) (1) Describe the general character of your law practice and indicate by date if and when its character has changed over the years.

RESPONSE:

Following my clerkship, I fulfilled a military commitment arising from my undergraduate ROTC scholarship. I was the sole attorney entering active duty in the U.S. Air Force in 1988 selected to serve as a member of the Air Force General Counsel's Honors Program. In connection with the Honors Program, I was assigned to the Pentagon for my four-year commitment. I reported to Mr. John Janecek, the Assistant General Counsel

(Acquisition) within the General Counsel's Office. Mr. Janecek reported to the Air Force General Counsel.

While on active duty in the Honors Program, I served as trial counsel in bid protest lawsuits at both the General Accounting Office ("GAO") and the General Services Board of Contract Appeals ("GSBCA"). In both the GAO and GSBCA, defense contractors could sue the Air Force and allege violations of various procurement statutes and regulations. The GSBCA litigation essentially was conducted pursuant to the Federal Rules of Civil Procedure, although discovery was expedited. A federal administrative law judge presided at the trial of such suits. The GAO proceedings were not conducted pursuant to the Federal Rules of Civil Procedure. A GAO hearing examiner presided at GAO protest proceedings. Each side, however, could present its case through documents and witnesses.

Additionally, while I was in the Honors Program, I served as counsel to the Air Force Debarment and Suspension Review Board, the Air Force Contract Adjustment Board, and agency counsel in connection with numerous civil False Claims Act cases. The Air Force Debarment and Suspension Review Board reviewed the "responsibility" of government contractor and whether such contractors were sufficiently trustworthy to contract with the Air Force. The Air Force Contract Adjustment Board acted pursuant to Public Law 85-804, which gives certain extraordinary powers to the Department of Defense in connection with the procurement of certain items in emergencies. Finally, in 1986, Congress substantially revised the civil False Claims Act. As a result of those revisions, numerous civil False Claims Act cases were filed. I served as agency counsel in connection with cases involving the Air Force and coordinated with the U.S. Department of Justice on those cases.

After leaving active duty in September 1992, I moved back to North Carolina and joined Maupin Taylor & Ellis, P.A. At Maupin Taylor & Ellis, P.A., I have engaged in a wide-variety of litigation. The cases included insurance defense litigation, FELA litigation, insurance coverage litigation, government contract litigation, commercial litigation, and employment litigation. Maupin Taylor & Ellis, P.A.'s address is 3200 Beechleaf Court, Suite 500, Raleigh, North Carolina 27604.

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

RESPONSE:

Over time, my practice has primarily become one related to employment litigation and employment counseling. I have litigated cases on behalf of numerous clients in connection with a multitude of lawsuits arising in the employment context. The lawsuits have included defending allegations of breach of contract, wrongful discharge, FLSA violations, FMLA violations, wage and hour violations, race discrimination, age discrimination, sex discrimination, disability discrimination, and retaliation.

My practice also has involved representing clients in connection with responding to EEOC charges and investigations by the OFCCP, the U.S. Department of Labor under the FLSA, and the North Carolina Department of Labor under the North Carolina Wage & Hour Act.

I have also represented individuals and companies in connection with the preparation and review of employment contracts (including covenants not to compete and confidentiality agreements), employment handbooks, and employee training in order to ensure compliance with federal, state, and local employment laws. Typical former clients involve small, medium, and large businesses. I have also represented individuals, including individuals who are pursuing employment-related claims against their former employers.

My government contract practice has included litigation and counseling on government contracting matters. It also has included the representation of clients involved in grand jury investigations.

Finally, I have litigated voting rights and election law cases.

(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.

RESPONSE:

Since joining Maupin Taylor & Ellis, P.A. in 1992, I have appeared in court frequently. During my tenure in the Air Force General Counsel's Office, I also frequently appeared in bid protest cases at the General Services Board of Contract Appeals and at the General Accounting Office.

(2) Indicate the percentage of these appearances in

RESPONSE:

(1) federal courts: 60%
(2) state courts of record: 30%
(3) other courts: 10%

(3) Indicate the percentage of these appearances in:

RESPONSE:

(1) civil proceedings: 99%
(2) criminal proceedings: 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.

RESPONSE:

Fourteen. I was sole counsel in one trial. I was co-counsel in twelve trials. I was associate counsel in one trial. (These numbers do not include cases in which we obtained summary judgment for a client.)

(5) Indicate the percentage of these trials that were decided by a jury.

RESPONSE:

14% (2 of 14)

(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.

RESPONSE:

I have appeared in the U.S. Supreme Court on two occasions. I was second chair for the intervenors in *Shaw v. Hunt*, 517 U.S. 899 (1996). In *Shaw*, the U.S. Supreme Court held that North Carolina's congressional redistricting plan violated the Equal Protection Clause. I did not orally argue the case in the U.S. Supreme Court. I have attached copies of the opening brief and the reply brief that we filed on behalf of the intervenors in the U.S. Supreme Court in *Shaw*.

I also recently appeared in *Stephenson v. Bartlett*, 535 U.S. ___ (2002) (Rehnquist, C.J., in Chambers). In *Stephenson*, Chief Justice Rehnquist denied an application for a stay of the North Carolina Supreme Court's decision invalidating North Carolina's 2001 state legislative redistricting plan under the North Carolina Constitution. I have attached copies of the brief that we filed in opposition to the State's application for a stay.

(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.

RESPONSE:

The principal pro bono client for whom I have done work is Our Lady of Lourdes School. The school has had a variety of issues that have arisen through the years. These issues

have included the removal of certain parking-related signs to assist with a safer traffic flow during carpool. This project necessitated a detailed presentation to the Raleigh City Council. I also have assisted the school in connection with certain employment-related issues, including the retention of a new principal. Finally, I served the school as the President of the Home & School Association (i.e. PTA) from 1996-98.

I also have assisted, on a pro bono basis, a variety of individuals with questions about employment-related matters.

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.

RESPONSE:

1. *Stephenson v. Bartlett.* This case is currently being litigated. It is a case of first impression in North Carolina. My partner Thomas Farr and I represent five voters who contend that the 2001 redistricting plan for the North Carolina Senate and House violate the North Carolina Constitution. Essentially, plaintiffs alleged that the North Carolina General Assembly violated the North Carolina Constitution by dividing too many counties in violation of the North Carolina Constitution. Plaintiffs advocated a "harmonized" interpretation of the North Carolina Constitution. Under that interpretation, plaintiffs argue that the Voting Rights Act is incorporated into the North Carolina Constitution. Thus, the North Carolina General Assembly must divide counties in order to comply with the Voting Rights Act or other applicable federal law. After complying with federal law, however, plaintiffs take the position that the North Carolina Constitution limits the power of the North Carolina General Assembly to divide counties for other reasons, such as political gerrymandering or incumbency protection.

The case was filed in November 2001 in Johnston County Superior Court. The North Carolina Attorney General ("NCAG") removed the case to federal court.

The case was then remanded to state court by the U.S. District Court Judge Malcolm Howard. *See Stephenson v. Bartlett*, 180 F. Supp.2d 779 (E.D.N.C. 2001). The NCAG appealed to the Fourth Circuit. The NCAG moved for a stay of the remand order in the District Court and the Fourth Circuit. We opposed both motions. The District Court and the Fourth Circuit denied each motion for a stay.

While the federal litigation proceeded concerning the issue of a stay, we litigated the case on an expedited basis in state court. We obtained summary judgment on count two of the complaint on February 15, 2002. On February 20, 2002, the court held a remedy hearing. At the conclusion of the hearing, the court enjoined the use of the 2001 redistricting plans. The court then stayed the effect of its injunction pending an appeal.

We then sought and obtained an expedited appeal directly to the North Carolina Supreme Court. We also moved to dismiss the State's appeal of the District Court's remand order in the Fourth Circuit.

The North Carolina Supreme Court granted the motion for an expedited appeal. Pending the resolution of the appeal to the North Carolina Supreme Court, the Supreme Court enjoined the May 2002 Senate and House primaries.

Oral argument took place on April 4, 2002, in the North Carolina Supreme Court. On April 30, 2002, the North Carolina Supreme Court affirmed the entry of judgment for plaintiffs and remanded the matter with instructions. *See Stephenson v. Bartlett*, No. 94PA02, slip op. (N.C. April 30, 2002).

The State then filed an emergency application for a stay with Chief Judge Rehnquist. We filed an opposition. On May 17, 2002, the Chief Justice denied the application for a stay.

On May 16, 2002, the Fourth Circuit granted plaintiffs' motion to dismiss the State's appeal of the December 20, 2002, remand order. On May 17, 2002, the General Assembly enacted revised redistricting plans.

On May 22 and 23, 2002, we represented the plaintiffs in a remedy trial in Johnston County Superior Court. We contended that the General Assembly's revised redistricting plans failed to adhere to *Stephenson*.

On May 31, 2002, the Superior Court held that the General Assembly's 2002 redistricting plan violated the North Carolina Constitution as interpreted in *Stephenson*.

On June 2, 2002, the defendants petitioned the North Carolina Supreme Court for a Writ of Supersedeas and a temporary stay of the Superior Court's May 31 order.

Plaintiffs filed an opposition. On June 4, 2002, the North Carolina Supreme Court denied the petition and motion.

The Superior Court submitted the revised redistricting plans to the USDOJ for preclearance. Notwithstanding the pendency of the expedited USDOJ preclearance proceedings, the North Carolina State Board of Elections ("NCSBOE") instituted an action on June 13, 2002, in the United States District Court for the District of Columbia ("D.C. District Court") pursuant to Section 5 of the VRA. Ostensibly, the NCSBOE sought preclearance of the Superior Court's remedial redistricting plan and the *Stephenson* opinion. However, on the following day, two of the *Stephenson* defendants moved to intervene as defendants in the D.C. District Court action. In their intervention papers, these defendants opposed the preclearance of the Superior Court's interim remedial plans, opposed the preclearance of the interpretation of the North Carolina Constitution in *Stephenson*, and sought an injunction mandating the use of the redistricting plans that the North Carolina Supreme Court had declared unconstitutional.

On June 17, 2002, the *Stephenson* plaintiffs moved to intervene in the D.C. District Court action. On June 25, 2002, the D.C. District Court granted intervenor status to the *Stephenson* plaintiffs and held a hearing on the defendants' emergency motion for an injunction. On June 27, 2002, the D.C. District Court denied the motion for injunctive relief.

On July 12, 2002, the USDOJ issued a letter withdrawing its 1981 objection to the 1968 amendments to the North Carolina Constitution, and preclearing both the *Stephenson* decision, as well as the Superior Court's May 31, 2002, orders and interim plans.

On August 2, 2002, the D.C. District Court dismissed *NCSBOE v. United States.*

Stephenson II is currently pending in the North Carolina Supreme Court. This appeal concerns the Superior Court's May 2002 redistricting plans. Briefs are due in mid-January 2003.

My co-counsel and partner, Thomas Farr, and I handled this case on behalf of the plaintiffs. During the course of this case, I argued numerous motions, including the motion to remand, the motion for a preliminary injunction, the motion for summary judgment, and motions during the remedy proceedings. I also substantially prepared most of the briefs filed in all of the various State and federal courts in which we have litigated this case.

Opposing counsel is Mr. Edwin Speas and Ms. Tiare Smiley of the North Carolina Attorney General's Office, 114 W. Edenton Street, Raleigh, North Carolina 27602. Ms. Smiley's phone number is (919) 716-6916.

2. *Shaw v. Hunt*, 517 U.S. 899 (1996). In *Shaw*, we represented a group of voters who intervened to challenge North Carolina's congressional redistricting plan as an unconstitutional racial gerrymander. The U.S. Supreme Court held that the North Carolina's congressional redistricting plan violated the Equal Protection Clause.

   My involvement in this case arose while the case was on appeal to the U.S. Supreme Court. Mr. Thomas Farr of our firm was counsel of record. I was second chair and helped to prepare substantial portions of the opening brief and the reply brief that we filed in the Supreme Court on behalf of the intervenors.

   After the Supreme Court's June 1996 decision, the case was remanded to the three-judge court. We represented the intervenors in connection with the July 1996 remedy hearing. At the end of the remedy hearing, the court held that the General Assembly had until April 1997 to revise the redistricting plan to comply with *Shaw*. The General Assembly revised the plan in 1997. At that point, our role in the case ended, other than litigation concerning an attorney's fee award. *See Shaw v. Hunt*, 154 F.3d 161 (4th Cir. 1998).

   Different plaintiffs represented by Mr. Robinson Everett continued to litigate concerning the revised congressional districts. *See Hunt v. Cromartie*, 532 U.S. 234 (2001); *Hunt v. Cromartie*, 526 U.S. 541 (1999). I was not involved in that litigation.

   Opposing counsel was Mr. Edwin Speas of the North Carolina Attorney General's Office. His address is 114 W. Edenton Street, Raleigh, North Carolina 27602. Mr. Speas' phone number is (919) 716-6402.

3. *Rodger v. Electronic Data Sys. Corp.*, No. 93-664-CIV-5-D, slip op. (E.D.N.C. Mar. 17, 1995). In this case, I represented a group of plaintiffs challenging their failure to receive certain retirement benefits and wages. Three plaintiffs also alleged age discrimination. The case involved discovery disputes (*Rodger v. Electronic Data Sys. Corp.*, 155 F.R.D. 537 (E.D.N.C. 1994)) and a successful motion for class certification on the claim for retirement benefits. *See Rodger v. Electronic Data Sys. Corp.*, 160 F.R.D. 532 (E.D.N.C. 1995). I took and defended approximately fifteen depositions in this case. I also substantially prepared the briefs concerning the discovery disputes, the summary judgment motion, and the motion for class certification. Although the trial court ultimately concluded that the claim for retirement benefits was preempted by ERISA, the court denied summary judgment on the wage and hour claims, the ADEA claims, and the fraud claims. A confidential settlement was reached just prior to trial in March 1995.

I worked on the case with James A. Roberts, III and Thomas Farr of our firm. Judge Franklin Dupree of the U.S. District Court for the Eastern District of North Carolina presided. Opposing counsel was Mr. Brian B. Smith of Electronic Data Systems. Mr. Smith has since left Electronic Data Systems. His current address is 370 East Maple Road, 4th Floor, Birmingham, Michigan 48009. His telephone number is (248) 644-8910.

4. *Land v. Aeroglide*, No. 5:98-CV-437-H(2), slip op. (E.D.N.C. May 13, 1999). In *Land*, I represented an employer who allegedly violated the ADA and FLMA in connection with the termination of an employee. I deposed the plaintiff and defended the depositions of approximately five company witnesses. I then prepared the defendant's summary judgment brief and reply brief. The district court granted summary judgment to the defendant after concluding that the definition of "son" under the FMLA for a "son" over age 18 required a cross-reference to the definition of disability under the ADA.

   Judge Malcolm Howard of the U.S. District Court for the Eastern District of North Carolina presided. Opposing counsel was Mr. John McClain. Mr. McClain's address is 327 Hillsborough Street, Raleigh, North Carolina 27602. His phone number is (919) 856-3940.

5. *Mitchell v. Bandag*, No. 5:98-CV-540-BR, slip op. (E.D.N.C. Oct. 6, 1999). In this case, I defended a company accused by two former employees of state law wrongful constructive discharge claims and race discrimination claims under Title VII and Section 1981. Judge W. Earl Britt of the U.S. District Court for the Eastern District of North Carolina presided. Initially, the court granted defendant's motion to dismiss a portion of plaintiffs' state law wrongful constructive discharge claims and dismissed one of the plaintiffs' wrongful discharge claims under Title VII and Section 1981. *See Mitchell v. Bandag, Inc.*, 147 F. Supp.2d 395 (E.D.N.C. 1998). I prepared the briefs in support of the partial motion to dismiss. I then took the depositions of the two plaintiffs and defended the depositions of approximately ten company witnesses. After the close of discovery, defendant moved for summary judgment. I prepared the summary judgment brief and the reply brief. The district court granted defendant's motion for summary judgment as to the plaintiffs' remaining Title VII race discrimination and Section 1981 claims.

   Opposing counsel was Ms. Martha A. Geer. Ms. Geer's address is 200 W. Morgan Street, Raleigh, North Carolina 27601. Her phone number is (919) 755-1812.

6. *Harkins v. Johnny F. Smith Truck and Dragline Service, Inc.*, No. 4:98-CV-160-H3 (E.D.N.C. Feb. 16, 2000). Judge Malcolm Howard of the U.S. District Court for the Eastern District of North Carolina presided at the trial of this action. The case was a bench trial. My partner John Mabe and I represented the defendant

company. Approximately twelve witnesses testified at trial. We divided the witnesses in half for purposes of conducting witness examinations. This case involved alleged breach of contract by defendant in connection with certain hurricane recovery work. Plaintiff claimed that defendant had breached a contract to share certain profits on certain jobs. Plaintiff sought $600,000.00. I delivered the closing argument. At the conclusion of the trial, the court rejected plaintiff's claims and entered judgment for defendant.

Opposing counsel was Mr. Charles C. Henderson, Post Office Box 459, Trenton, North Carolina 28585. Mr. Henderson's phone number is (252) 448-1900.

7. *Coffin v. CC Air, Inc.*, No. 95-CVS-05524 (Durham County Superior Court 1998). Superior Court Judge Abraham Jones presided in this matter. This case involved an aviation accident in which a small commercial airliner crashed while landing in West Virginia. My partner Tom Alexander and I represented the defendant airline. Shortly before trial, the defendant stipulated to negligence. The trial was on the issue of damages in connection with injuries sustained by one passenger. The case involved conflicting medical evidence and conflicting evidence associated with the plaintiff's damages. Approximately fifteen witnesses testified. As we had done during discovery, we divided the witnesses in half for conducting witness examinations. Plaintiff's attorney requested approximately $6 million from the jury. I delivered the closing argument. After a three-week trial (including approximately one week for jury selection), the jury awarded the plaintiff $1.5 million in damages. This amount was below plaintiff's lowest settlement demand and above defendant's highest settlement offer.

Opposing counsel was Mr. Richard Watson. Mr. Watson's address is 21-F Brightleaf Square, 905 West Main Street, Post Office Box 3600, Durham, North Carolina 27702. His phone number is (919) 682-9691.

8. *Graves v. Triad Aviation*, No. 94 CVS 8177 (Cumberland County Superior Court 1996). In this case, Superior Court Judge Osmond Smith presided. We represented an aircraft maintenance company and its chief mechanic in a wrongful death action. Plaintiff alleged that the defendants were negligent in connection with the performance of certain repairs on an aircraft. This wrongful death action involved two fatalities and conflicting expert testimony in connection with the cause of the accident and damages. I tried this case with my partner Tom Alexander. Approximately sixteen witnesses testified, and we divided the witnesses in half for purposes of witness examination. I delivered the closing argument. After a two-week trial in Cumberland County Superior Court, the jury rejected the plaintiff's request for over $1 million in damages and returned a complete defense verdict on behalf of the airline maintenance company and its chief mechanic.

Opposing counsel was Mr. Robert O. Jenkins. Mr. Jenkins' address is 116 N. West Street, Suite 200, Raleigh, North Carolina 27603. His phone number is (919) 755-3993.

9. *In re Appeal of Freedom, NY, Inc.*, 1996 WL242320 (ASBCA), 96-2 BCA ¶ 28, 328 (ASBCA 1996). In this case, I represented a minority-owned contractor in litigation at the Armed Services Board of Contract Appeals ("ASBCA"). The contractor had received a contract with the Defense Logistics Agency ("DLA") to prepare certain meals-ready-to-eat. The contractor spent substantial sums in renovating production facilities in an impoverished area in New York City. DLA ultimately terminated the contract for default. We served as associate counsel at trial with Mr. Robert MacGill of Barnes & Thornburg of Indianapolis. Because Mr. MacGill had engaged in extensive discovery in prior litigation involving Freedom and DLA, he conducted the witness examinations at the trial. Following the trial, I wrote a lengthy and detailed post-trial brief. The brief was well over 100 pages long and detailed why the contract termination was improper. The ASBCA agreed and converted the termination for default into a termination for convenience and permitted the contractor to then pursue a breach of contract action against DLA. My co-counsel in the case was Hugh Overholt. Mr. Overholt's current address is 100 College Court, New Bern, North Carolina 28563-0867. His phone number is (252) 672-5462. Mr. MacGill's current address is 11 South Meridian Street, Indianapolis, Indiana 46204. His phone number is (317) 236-1313.

   Opposing counsel was Ms. Kathleen Hallam of the Defense Logistics Agency in Philadelphia, Pennsylvania. Her address is 2800 South 20th St., Philadelphia, Pennsylvania 19101. Her phone number is (215) 737-2647.

10. *Electronic Sys. Assoc., Inc. v. United States*, 895 F.2d 1398 (Fed. Cir. 1990). In this case, I represented the Air Force in connection with a bid protest filed by Electronic Sys. Assoc., Inc. The protestor alleged that the Air Force had violated certain procurement statutes and regulations in connection with the rejection of a bid by the protestor to supply certain products that would be used in the Strategic Defense Initiative. I took the depositions of the three company witnesses and defended the deposition of two Air Force witnesses. I then represented the Air Force at the General Services Board of Contract Appeals ("GSBCA"). The GSBCA agreed with the Air Force's position that the Warner Amendment to the Brooks Act barred the GSBCA from exercising jurisdiction over the protestor's claim and dismissed the case. The contractor then appealed to the U.S. Court of Appeals for the Federal Circuit. I substantially wrote the opening brief and reply brief that the U.S. Department of Justice filed in the Federal Circuit. The Federal Circuit affirmed the dismissal of the protest.

Opposing counsel was James H. Roberts, III. Mr. Roberts' address is 1501 M Street, N.W., Suite 700, Washington, D.C. 20005. His phone number is (202) 463-4300.

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.

RESPONSE:

No

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.

RESPONSE:

No

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.

RESPONSE:

I do not anticipate any potential conflicts of interest. I would plan not to hear cases involving my former law firm for an appropriate period of time in order to ensure that there is not an appearance of a conflict of interest. To the extent that a potential conflict of interest arises, I will seek guidance from the appropriate ethics official and the Chief Judge of the U.S. District Court concerning such matters, and follow the guidance of the Code of Conduct for U.S. Judges.

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.

RESPONSE:

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.

RESPONSE:

See copies of financial disclosure report required by Ethics in Government Act of 1978.

25. **Statement of Net Worth**: Complete and attach the financial net worth statement in detail. Add schedules as called for.

RESPONSE:

See attached

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?

RESPONSE:

There is not a selection commission in North Carolina.

(2) Describe your experience in the judicial selection process, including the circumstances leading to your nomination and the interviews in which you participated.

RESPONSE:

I was interviewed by the White House Counsel's Office on February 22, 2002. On March 5, 2002, the White House Counsel's Office advised me that the Department of Justice would be sending some paperwork to complete as part of the assessment of a possible nomination. On March 25, 2002, the FBI interviewed me. On May 13, 2002, an attorney in the Office of Legal Policy interviewed me. On May 22, 2002, President Bush nominated me. The Senate did not act on my nomination in 2002, and it was returned. President Bush nominated me again in January 2003.

(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.

ATTORNEYS AT LAW
HIGHWOODS TOWER ONE
SUITE 500
3200 BEECHLEAF COURT
RALEIGH, NORTH CAROLINA
27604-1064
TELEPHONE 919.981.4000
TELEFAX 919.981.4300

MAILING ADDRESS
POST OFFICE DRAWER 19764
RALEIGH, NORTH CAROLINA
27619-9764

LANDFALL PARK NORTH
1985 EASTWOOD ROAD, SUITE 200
WILMINGTON, NORTH CAROLINA
28403
TELEPHONE 910.256.5135
TELEFAX 910.256.6451

WWW.MAUPINTAYLOR.COM
James C. Dever, III

Maupin Taylor & Ellis P.A.

480 BETA BUILDING
HEADQUARTERS PARK
2222 CHAPEL HILL-NELSON HWY.
DURHAM, NORTH CAROLINA
27713
TELEPHONE 919.361.4900
TELEFAX 919.361.2262

MAILING ADDRESS
POST OFFICE BOX 13646
RESEARCH TRIANGLE PARK
NORTH CAROLINA
27709-3646

WRITER'S DIRECT DIAL NUMBER
(919) 981-4078

jdever@maupintaylor.com

January 3, 2003

Honorable Orrin Hatch
Chairman, Committee on the Judiciary
U.S. Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

I have enclosed an updated Questionnaire for the Committee. Please contact me if you have any questions.

Very truly yours,

James C. Dever, III

Enclosure

cc: Honorable Patrick J. Leahy (w/encl.)

Update to Questionnaire -- January 2005

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

RESPONSE: James Columcille Dever, III

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

RESPONSE:
(Office)
United States District Court
Eastern District of North Carolina
310 New Bern Ave
Room 624
Raleigh, NC 27601

(Residence)
Raleigh, NC

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.

RESPONSE:

February 9, 2004 - date: United States Magistrate Judge
United States District Court
Eastern District of North Carolina

October 1992 - February 8, 2004: Maupin Taylor, P.A.
Raleigh, NC 27604
- Shareholder and Director, 1998-2004
- Member, Executive Committee, 1998-2003
- Associate, 1992-1997

August 2003 - December 2003 and August 2004 - December 2004: Campbell University, Norman Adrian Wiggins School of Law, Buies Creek, NC 27506; Adjunct Professor of Employment Law during each fall semester 1997 - 2001, 2003, and 2004.

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.

RESPONSE:

North Carolina Bar (1987).

District of Columbia Bar (1990 - 2004). I elected to resign from the District of Columbia Bar after becoming a United States Magistrate Judge on the United States District Court for the Eastern District of North Carolina. Given my position on the bench in North Carolina, I did not see any need or reason to continue to be a member of the District of Columbia Bar. Originally, I joined the District of Columbia Bar in 1990 while on active duty in the Air Force. I was then serving as an attorney at the Pentagon. In light of my resignation, the District of Columbia Bar placed me on the "resigned list" as of September 27, 2004.

U.S. District Court for the Eastern District of North Carolina (1994)
U.S. District Court for the Middle District of North Carolina (1994)
U.S. District Court for the Western District of North Carolina (1994)
U.S. Court of Appeals for the Fourth Circuit (1994)
Supreme Court of the United States of America (1995)

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.

RESPONSE:

February 9, 2004 - date: United States Magistrate Judge, United States District Court, Eastern District of North Carolina. A bipartisan merit selection panel recommended me for this judgeship. The judges on the United States District Court for the Eastern District of North Carolina selected me. Although my nomination to be a United States District Court Judge on this court was pending at the time that I became a U.S. Magistrate Judge (and has been since May 22, 2002), I accepted the court's appointment. I began my service on February 9, 2004. The appointment did not impact my then-pending nomination to the District Court.

The jurisdiction of the United States District Court for the Eastern District of North Carolina is the same jurisdiction applicable to every other United States District Court.

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.

RESPONSE:

(1) Citations for the ten most significant opinions you have written:

United States v. Delatos, No. 5:03-CR-317-1-FL(1), Memorandum and Recommendation (E.D.N.C. June 9, 2004)(denying motion for a Franks hearing and a motion to suppress based on an alleged warrantless search), adopted, (E.D.N.C. Aug. 10, 2004).

United States v. Valero, No. 5:04-CR-235-1BO(1), Memorandum and Recommendation (E.D.N.C. Nov. 19, 2004)(denying motion to suppress an illegal alien's presence in the United States, including her identity, all records obtained as a result of her identity, and all statements arising from her search and seizure), adopted, (E.D.N.C. Jan. 19, 2005).

United States v. Livingston, No. 5:04-CR-253-2BO(1), Memorandum and Recommendation (E.D.N.C. Dec. 6, 2004)(denying motion to suppress arising out of a vehicle search that followed a high-speed car chase).

United States v. Midgette, No. 4:04-CR-54-1-FL(1), Memorandum and Recommendation (E.D.N.C. Dec. 7, 2004)(denying motion to suppress filed by a probationer contesting the search of his vehicle and residence), adopted, (E.D.N.C. Jan. 26, 2005).

Staton v. Nucor Steel Hertford, No. 4:04-CV-47-FL(1), Order (E.D.N.C. June 21, 2004) (granting plaintiff's request to enter defendant's plant to conduct an inspection pursuant to Fed. R. Civ. P. 34).

Goodwyn v. Siemens Dematic Corp., No. 2:03-CV-43-BO(1), Order (E.D.N.C. July 21, 2004)(granting plaintiff's motion to file a second amended complaint pursuant to Fed. R. Civ. P. 15(a) and 16).

Crumell v. United States, No. 5:01-CR-297-1H(3), Order (E.D.N.C. Aug. 11, 2004)(granting the government's motion to compel production of an attorney's file in a 28 U.S.C. § 2255 action; the attorney represented a defendant in a criminal case; the defendant pleaded guilty, but later accused the attorney of ineffective assistance of counsel; the government sought the attorney's file in order to respond to the defendant's claim of ineffective assistance of counsel).

Moore v. New Hanover County Govt., No. 7:03-CV-195-DEV, Order (E.D.N.C. Aug. 13, 2004)(granting defendants' motions to dismiss and motion for summary judgment; plaintiff sued the New Hanover County Human Relations Commission and other related defendants for allegedly failing to properly investigate and resolve his Title VII claims against his former employer).

Wilmington Shipping Co. v. UTi Worldwide, Inc., No. 7:04-CV-71-FL(1), Order (E.D.N.C. Oct. 12, 2004)(analyzing the Federal Arbitration Act and granting plaintiff's motion to stay the action until the parties engaged in arbitration).

Blue v. EquiCredit Corp. of Am., No. 7:04-CV-80-FL(3), Memorandum and Recommendation (E.D.N.C. Dec. 27, 2004)(granting plaintiffs' motion to remand their action under the North Carolina Predatory Home Lending Act to state court; the defendants had removed the action and asserted that the complete preemption doctrine applied).

(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.

RESPONSE:

None.

(3) citations for significant opinions on federal of 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.

RESPONSE:

United States v. Delatos, No. 5:03-CR-317-1-FL(1), Memorandum and Recommendation (E.D.N.C. June 9, 2004)(denying motion for a Franks hearing and a motion to suppress based on an alleged warrantless search), adopted, (E.D.N.C. Aug. 10, 2004).

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There are no appellate court rulings on the opinions.

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.)

RESPONSE:

I previously described my background as a litigator and the ten most significant litigated matters. Since I left private practice in February 2004, I have focused on my work as a United States Magistrate Judge in the Eastern District of North Carolina. As a United States Magistrate Judge, I have handled a wide variety of civil and criminal matters. In addition, as I have done since 1997, I have continued to teach employment law at Campbell University as an adjunct law professor.

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.

RESPONSE:

I continue to have money invested in the Maupin Taylor, P.A. profit sharing plan (i.e., retirement plan). I have no arrangements for future compensation from any entity.

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.

RESPONSE:

I do not anticipate any potential conflicts of interest. Since becoming a United States Magistrate Judge, I have recused myself from all cases involving my former law firm, the law firm where two of my former law partners now practice, and Campbell University.

To the extent a potential conflict of interest arises, I will seek guidance from the appropriate ethics official and the Chief Judge of my court concerning such matters. I will follow the Code of Conduct for the U.S. Judges and applicable statutes.

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.

RESPONSE:

Since 1997, I have served as an Adjunct Professor of Employment Law at Campbell University's law school. I teach the class in the fall semester. Before teaching in 2004, I obtained the approval of the Chief Judge of the United States Court of Appeals for the Fourth Circuit. This is the process that must be followed when a federal judge seeks to teach as an adjunct law professor. If I teach again in future years, I will follow the same process.

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.)

RESPONSE:

See copies of financial disclosure reports required by the Ethics in Government Act of 1978.

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

RESPONSE:

See attached.

AO-10 Rev. 1/2004	**FINANCIAL DISCLOSURE REPORT** Calendar Year 2004	**Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)**

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Dever, James C	U.S. District Court, EDNC	2/14/2005
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) District Judge - Nominee	5. ReportType (check appropriate type) (•) Nomination, Date 2/14/2005 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/2003 to 2/14/2005
7. Chambers or Office Address U.S. District Court 310 New Bern Ave., Room 624 Raleigh, NC 27601	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.	Shareholder/Director	Maupin Taylor, P.A. (law firm)
2.	Adjunct Law Professor	Campbell University, N.A. Wiggins School of Law
3.	Director	North Wake County Baseball Association
4.		

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

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	2004	Agreement to teach as an adjunct law professor at Campbell University
2.	2004	Maupin Taylor, P.A. Profit Sharing Plan
3.	2003	Maupin Taylor, P.A. Profit Sharing Plan
4.	2003	Agreement to teach as an adjunct law professor at Campbell University

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Dever, James C	2/14/2005

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

A. Filer's Non-Investment Income

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

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2004	Maupin Taylor, P.A.	17,708
2.	2004	Campbell University	6,500
3.	2003	Maupin Taylor, P.A.	150,000
4.	2003	Campbell University	6,500

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

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

	DATE	SOURCE AND TYPE
1.		

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

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

☐ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	Exempt	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Dever, James C	Date of Report 2/14/2005

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

☐ NONE - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		

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

☑ NONE - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.			

FINANCIAL DISCLOSURE REPORT
Page 1 of 2

Name of Person Reporting	Date of Report
Dever, James C	2/14/2005

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

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
1. Maupin Taylor, P.A. Profit Sharing Plan	A	Div.	M	T	Exempt				
2. - Money Market Fund	A	Int.	K	T					
3. - AFIBX Fundamental Invs. Inc. - B	A	Div.	K	T					
4. - BFABX Bond Fund of Am. - B	A	Div.	K	T					
5. - IHCAX Hartford Cap Apprec Fund - B	A	Div.	K	T					
6. - NYVBX Davis NY Venture - B	A	Div.	K	T					
7. - OGLBX Oppenheimer GLBL FD - B	A	Div.	K	T					
8. - PVTBX Putnam Vista FD - B	A	Div.	J	T					
9. - TEDBX Mutual Sec FD Discover - B	A	Div.	J	T					
10. - MBAGX MFS Aggressive GR Allo - B	A	Div.	K	T					
11. Northwestern Mutual Life Policy	A	Div.	K	T					
12. - Index 500 Stock	A	Div.	J	T					
13. - Aggressive Growth Stock	A	Div.	J	T					
14. - Index 400 Stock	A	Div.	J	T					
15. - Small Cap Growth Stock	A	Div.	J	T					
16. - T Rowe Small Cap Value	A	Div.	J	T					
17. - Cap Guard Domestic Eq	A	Div.	J	T					
18. Northwestern Mutual Life Policy	A	Div.	K	T					

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

FINANCIAL DISCLOSURE REPORT
Page 2 of 2

Name of Person Reporting	Date of Report
Dever, James C	2/14/2005

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

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
19. - Index 500 Stock	A	Div.	J	T					
20. - Aggressive Growth Stock	A	Div.	J	T					
21. - Index 400 Stock	A	Div.	J	T					
22. - Small Cap Growth Stock	A	Div.	J	T					
23. - T Rowe Small Cap Value	A	Div.	J	T					
24. - Cap Guard Domestic	A	Div.	J	T					
25. RBC Centura Bank Account	A	Interest	L	T					

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Dever, James C	2/14/2005

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

In February 2004, I became a United States Magistrate Judge. My non-investment income for 2004 and 2005 includes my federal salary.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Dever, James C	2/14/2005

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 James Dever Date 2/14/05

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

FINANCIAL STATEMENT

NET WORTH (1/7/05)

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.	63,	000.	00	Notes payable to banks - secured			
U.S. Government securities-add schedule.				Notes payable to banks - unsecured			
Listed securities - add schedule	233,	570.	00	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 and other liens payable	361,	000.	00
Real estate owned - add schedule	515,	000.	00	Other debts - itemize:			
Real estate mortgages receivable				Home Equity Line	26,	000.	00
Autos and other personal property	80,	000.	00				
Cash value-life insurance	36,	132.	00				
Other assets itemize:							
				Total liabilities	387,	000.	00
				Net worth	540,	702.	00
Total Assets	927,	702.	00	Total liabilities and net worth	927,	702.	00
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	No.		
On leases or contracts				Are you defendant in any suits or legal actions?	No.		
Legal Claims				Have you even taken bankruptcy?	No.		
Provision for Federal Income Tax							
Other special debt							

James C. Dever, III

January 7, 2005

"Listed Securities - Schedule"

	Quantity	Price	Value
Cash/Cash Equivalents: Money Market Fund			$ 22,573.
Mutual Funds:			
Fundamental Invs Inc -B	1,402.303	$31.26	$ 43,836.
Bond Fund of Amer CL B	1,815.639	$13.60	$ 24,693.
Hartford Cap Apprec FD-B	1,480.743	$30.63	$ 45,355.
MFS Aggressive GR Allo B	2,026.523	$12.92	$ 26,183.
Davis N Y Venture CL B	1,123.789	$28.97	$ 32,556.
Oppenheimer GLBL FD CL B	288,314	$55.27	$ 15,935.
Putnam Vista FD CL B SHS	1,525.424	$ 8.02	$ 12,234.
Mutual Ser FD Discover B	442,780	$23.05	$ 10,206.
Total Mutual Funds	---- ---- ----	---- ---- ----	$210,998.00
Portfolio Total	---- ---- ----	---- ---- ----	$233,570.00

"Real Estate - Schedule"

			Value
Residence, Raleigh, NC	---- ---- ----	---- ---- ----	$515, 000.00

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.

RESPONSE:

The primary pro bono client for whom I did work while in private practice was Our Lady of Lourdes School. The school had a variety of legal issues that arose during my years in private practice in Raleigh. These issues included certain parking and traffic related issues to assure a safer traffic flow during car pool. This project necessitated a detailed presentation to the Raleigh City Council and numerous follow-up meetings with Raleigh city officials, including the mayor. I also assisted the school with employment-related issues, including a principal search. In addition, I served as the President of the Home & School Association (i.e., the PTA) from 1996-98.

While in private practice, I assisted a variety of individuals on a pro bono basis with employment-related matters. Further, since 1996, I have been very active as a youth sports coach in basketball, football, and baseball. The teams that I have coached have included the disadvantaged. Finally, I served on active duty in the United States Air Force from 1988-92 and as a member of the Air Force's Individual Ready Reserve from 1992-2000.

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?

RESPONSE:

I am not a member, and have not been a member, of any such organization.

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

RESPONSE:

(1) No. There is not a selection commission in North Carolina to recommend candidates for nomination to the federal courts. There was, however, a bi-partisan merit selection committee that recommended me to serve as a United States Magistrate Judge. I have served as a U.S. Magistrate Judge since February 2004.

(2) 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).

RESPONSE:

In 2002, a member of Senator Helms' staff contacted me about being considered for nomination, and I forwarded a resume to Senator Helms' office. Thereafter, I was interviewed by attorneys in the White House Counsel's Office, an FBI agent, and an attorney in the U.S. Department of Justice Legal Policy Office. On May 22, 2002, President Bush nominated me. President Bush renominated me in January 2003. I subsequently met with Senator Dole and Senator Burr. President Bush again renominated me in 2005.

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.

RESPONSE:

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.

RESPONSE:

A federal judge must remember that judge's role in our country's system of government. In fulfilling that role, the judge must address the dispute at issue between the parties to the litigation without ignoring or usurping the role of Congress, the Executive, or other levels of government. Of course, in fulfilling his or her role, a judge must adhere to the court's jurisdictional limits. If jurisdiction exists, the court must address the claims, defenses, and requests for relief.

AFFIDAVIT

I, James C. Dever, III, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

2/14/05
(DATE)

(NAME)

(NOTARY)

Senator GRAHAM. Wise choice by both of you I think.

Mr. Conrad, could you tell us how your experience as U.S. Attorney has prepared you for the job?

Mr. CONRAD. Yes, sir, thank you for that opportunity. I have been a U.S. Attorney for 3 years and an Assistant U.S. Attorney for 15 years before that. Preceding my time in the U.S. Attorney's Office I was a private practicing attorney engaged in litigation both civil and criminal

I have had an opportunity to participate in the civil and criminal justice system in the Western District of North Carolina, and that participation has given me a great respect for the necessity of justice for every litigant in the courts of the United States. And the President nominating me and my opportunity to be here at a confirmation hearing with the hope and possible expectation of presiding over civil and criminal trials is a great blessing. I look forward to it.

Senator GRAHAM. If you could try to describe to a fifth grade civics class what a Federal judge's job is, what would you tell them?

Mr. CONRAD. I think his job is to administer justice, both in the criminal and civil context. I might make a sports analogy and say a judge's job is to call balls and strikes, not to play on one team or the other, but to be the neutral arbiter of disputes in the courts. And I think a judge ought to conduct that job with a measure of humility, seeing it as an opportunity to serve justice and not as a personal position of prestige. And I think I would tell them that the judge—a very important component of a judge's job is to treat fairly both the parties that come before them as well as their attorneys.

Senator GRAHAM. Thank you.

Judge Dever, how long have you been a magistrate?

Judge DEVER. A little over a year, Senator.

Senator GRAHAM. How has that prepared you for the task at hand?

Judge DEVER. Well, Senator, thank you for that question. It has prepared me in having moved, as Mr. Conrad spoke about, from the role of an advocate to the role of an impartial arbiter, and as a Federal Magistrate Judge I've handled cases, both civil cases and criminal cases, which many of which will be very similar to the cases that if I'm fortunate enough to be confirmed will come before the District Court. And it has been a very helpful experience, and an enjoyable experience to be in public service in that role.

Senator GRAHAM. From your time as magistrate have you seen any mistakes or common practices that you would like to change if you got to be a judge yourself, Federal Judge?

Judge DEVER. I wouldn't say mistakes as such, Senator, but I think one of the things that I've certainly tried to do and would hope to continue to do is to be respectful of the role of the judge within the courtroom, and be respectful of the parties and the litigants. I think it's very important for a judge to remember that it may be his or her tenth matter of the day, but to that person before them, those litigants, it's the most important case in the world, and a judge needs to treat it that way. And I've certainly tried to do that, and if I'm fortunate enough to be confirmed, will try to continue to do that.

Senator GRAHAM. Both of your resumes for the job are very impressive. You have a lot of good life experiences that prepared you well for the role ahead. I think I speak on behalf of many members of this Committee, hopefully the entire Committee, that the job you are about to take on is very important. It is a way to serve the public. Wearing the robe, to me, is a awesome responsibility and I am looking for people who can wear it humbly, because with a stroke of a pen you can affect people's lives in a dramatic fashion. And it is a lifetime appointment, and you have lived, both of you, lives worthy of the robe, and your Senators spoke well of you, and your families should be proud.

I look forward to voting for you on the floor. I hope that comes sooner rather than later. With that said, the hearing will stand adjourned, and any matters can be submitted. We will leave the record open until 6:00 p.m. on March the 10th.

To your families, thank you. Safe travels back home. Good luck in your future endeavors. Thank you both.

Judge DEVER. Thank you.

Mr. CONRAD. Thank you.

[Whereupon, at 4:25 p.m., the Committee was adjourned.]

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

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Responses of Judge Terrence W. Boyle
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Richard J. Durbin

1. In the case of United States v. State of North Carolina, you rejected a consent decree that had been freely agreed to by the U.S. Department of Justice and the State of North Carolina to remedy a pattern and practice of sex discrimination against female correction officers in the State's department of corrections. The 4th Circuit reversed your decision and concluded that you abused your discretion.

In your opinion in this case, you expressed substantial criticism of the Justice Department's evidence of discrimination. Among many other pieces of evidence, the Justice Department noted that North Carolina had the smallest percentage of female correctional officers of any state in the country. Here is what you said about that evidence:

> **"Our form of government presumes that people in different states will act differently. Nothing is more offensive to the idea of federalism than the notion that the federal government will punish a state for having a non-conforming culture – for being different than the other states. North Carolina cannot be presumed to have violated federal law because statistics tend to show its population follows patterns different from those found elsewhere. Quite the contrary, federal law owes its existence to North Carolina's absolute right to turn out differently than the other forty-nine states."**

Judge Boyle, your opinion reads like a states' rights manifesto from the 1950s and before. What explanation can you provide to assure women and other groups historically discriminated against, that you will properly balance federal interests with state interests if you are confirmed to the 4th Circuit?

RESPONSE:

I am committed to the full and effective enforcement of federal law, and, without question, will continue to apply the federal civil rights laws, including those dealing with issues of job discrimination and fairness and equality to employees and individuals in the workplace. Federal law in this area is the supreme law of the land, and pursuant to the Fourteenth Amendment and similar remedial sources in federal law, it applies to the states when appropriate and to other employers in the economy. I believe that a review of my entire record demonstrates that I treat all litigants who appear before me equally and apply the law without regard to the identity of the parties.

2. In the 2002 case Ellis v. State of North Carolina, the 4th Circuit reversed your district court decision and held that you erroneously ruled that states were exempt from suit under Title VII under the 11th Amendment doctrine of sovereign immunity. Your decision was disturbing, because no other federal court has held that states are immune from suit under

Title VII, the nation's premier employment discrimination law.

At your hearing, you testified that the 4th Circuit was mistaken in its ruling. You testified that your district court opinion had held that states were immune to suit under state tort claims, not Title VII claims. You testified that you were "shocked" when you read the 4th Circuit opinion and that "as soon as I saw that opinion come back, I said, my gosh, in my sleep I know that Title VII applies to the State."

In light of the strong reaction you had after reading the 4th Circuit reversal of your opinion, I assume you took steps to try and assure the 4th Circuit – and the legal community – that your opinion had been mischaracterized and should be officially corrected. What steps did you take along these lines?

RESPONSE:

As a trial judge, I am bound by the principle of "the law of the case," and when the case is returned to me from a reviewing court, I must follow the instructions and outcome determined by the reviewing court until such time as there is a subsequent ruling. There is no methodology for a trial judge to do other than obey the orders of a senior court. Of course, the parties are at liberty to make motions and otherwise take steps to examine the rulings of both the trial and the reviewing court. After the Ellis case was returned to the district court, I followed the accepted practice of scheduling further proceedings in the case. There was some period of time during which counsel for the plaintiff was allowed to withdraw and substitute counsel entered the case, all within the control of the plaintiff. Before the court was called upon to make any further legal rulings or to determine any further legal challenge, the case was resolved by the entry of a voluntary dismissal with prejudice by the parties without involvement of the court.

3. At your hearing, you also attempted to clarify the nature of your district court opinion in Ellis. Senator Kennedy asked why you determined in your opinion that "the State and the DHHS, an agency of the state, are entitled to sovereign immunity, pursuant to the Eleventh Amendment to the United States Constitution." You explained that this line of your opinion only applied to the state tort claims brought against the state and DHHS. You testified: "Only with respect to the three State tort claims. The first claim there was no subject matter jurisdiction over because they had failed to make an administrative complaint."

A. Please explain what you meant by the term "first claim." If by "first claim" you meant the Title VII claim, please explain exactly why there was no subject matter jurisdiction under Title VII. Please identify the exact language in your district court opinion indicating that there was a lack of subject matter jurisdiction for the Title VII claim over the State of North Carolina and the DHHS. Please also identify the exact language in your district court opinion indicating your rationale for this determination.

RESPONSE:

In Ellis, the Plaintiff's complaint consisted of four claims for relief–one federal law claim and three state law claims. The Plaintiff styled the federal law claim, "Discriminatory Discharge." While the Plaintiff did not refer to "Title VII" explicitly, under the notice pleading standard, her complaint was sufficient to put the Defendants on notice that she was filing under Title VII of the Civil Rights Act of 1964.

The Court lacked subject matter jurisdiction to hear Plaintiff's Title VII claim because Plaintiff had not exhausted state remedies before filing her charge with the EEOC. Under Fourth Circuit precedent, an employee, in addition to obtaining a Right-to-Sue Letter from the EEOC, must first exhaust available state remedies where that state has legislation in place that prohibits the discrimination prohibited by Title VII. See Davis v. North Carolina Dept. of Correction, 48 F.3d 134 (4th Cir. 1995). The Davis Court recognized that North Carolina had such legislation in place. See N.C. Gen. Stat. § 126-16. North Carolina provided procedural mechanisms to allow a state employee who complained of discrimination in violation of Section 126-16 to obtain a final agency decision from the State Personnel Commission. See N.C. Gen. Stat. § 123-36. The plaintiff in Ellis never obtained that ruling, and accordingly, the district court lacked subject matter over the claim. *See* 48 F.3d at 137. Because the defendants' filed their Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1), the issue of the court's subject matter jurisdiction is discussed throughout the Order.

B. Please explain what you meant when you testified at your hearing that the Ellis plaintiff lacked subject matter jurisdiction because she "failed to make an administrative complaint." If you were referring to the plaintiff's EEOC complaint, what basis do you have for your statement? The plaintiff clearly and properly made an administrative complaint to the EEOC against the State of North Carolina and the DHHS, as evidenced by the EEOC's issuance of its right-to-sue letter. Had she failed to make a proper administrative complaint, no such letter would have been issued.

RESPONSE:

Thank you for the opportunity to clarify my response. As I explained in my answer to Question 3(A), Title VII, in requiring the exhaustion of state and local remedies before bringing a Title VII claim in federal court, requires two things of a would-be plaintiff: exhaustion of any like-purpose state remedies and notification of the EEOC. In the Ellis case, while the plaintiff had gone to the EEOC as required by the Act, she had not taken advantage of N.C. Gen. Stat. § 123-36, which creates a procedural mechanism for state employees to challenge discrimination in the workplace–a statutory mechanism that the Fourth Circuit has recognized protects rights identical to Title VII and must be exhausted pursuant to 42 U.S.C. § 2000e-5(b) before a district court may maintain subject matter jurisdiction over a Title VII claim. The EEOC's transmittal of the plaintiff's charge to the N.C. Office of Administrative Hearings, Civil Rights Division, for "processing" does not satisfy that requirement. In this case, even though the EEOC charge mentions the applicable statutes, the dual filing box was not checked, and the state discriminatory charges were never processed. So, while

the plaintiff had obtained the necessary Right-to-Sue Letter, she had not obtained a final agency decision pursuant to Section 123-36.

4. You were the district court judge in the Cromartie v. Hunt case – one of the most significant voting rights cases of the modern era. During the course of this litigation, you were reversed twice by the Supreme Court. In the first case, in a unanimous decision written by Justice Clarence Thomas, the Supreme Court reversed you on the grounds that you granted a summary judgment victory to the white plaintiffs at a stage of the litigation where there was a material factual dispute. The Supreme Court held that it was "inappropriate" for you to grant summary judgment. Judge Boyle, why did you issue summary judgment to the white voters in the first Cromartie case when there was a material dispute of fact?

RESPONSE:

The Cromartie v. Hunt case, was heard by a three-judge court composed of Judge Sam Ervin, III, as circuit judge, and Judge Voorhees and I as district judges. The case involved a challenge to the First and Twelfth Congressional Districts under the redistricting plan then in force from the State of North Carolina. This plan had been adopted in the 1997 General Assembly, after the earlier plan adopted following the 1990 census had been held to be unconstitutional by the Supreme Court. The Supreme Court had earlier taken up the constitutionality of the Twelfth District in Shaw v. Reno and Shaw v. Reno II. In each of these cases, the Supreme Court held that the North Carolina Legislature, in establishing the Twelfth District, had violated constitutional principles of equal protection and had created a district that was not narrowly tailored. After ordering the state to remedy this violation, a new congressional redistricting plan was adopted, and that plan was challenged in the case of Cromartie v. Hunt. I had not been a member of the earlier two three-judge courts. They were composed of Judge Phillips as circuit judge and Judges Britt and Voorhees as district judges.

When Cromartie v. Hunt came before the three-judge court in 1998, we were bound by the Supreme Court authority in the first two Shaw v. Reno cases. Based on that authority, it was the ruling of the majority of the court that the state's effort to redistrict was ineffective to cure the constitutional infirmity which the Supreme Court had ordered the state to correct in Shaw v. Reno II. By the time a decision was made in April 1998 in Cromartie v. Hunt I, this issue of the Twelfth Congressional District had been in litigation for years and had been to the Supreme Court twice. The parties and the three-judge court all understood at the hearing stage that the facts were not in dispute, and the issues were of a legal nature and could be decided on that basis. After the court entered an order requiring the state legislature to correct the redistricting plan for the 1998 election, the state moved for a stay, which was denied by a majority of the Supreme Court, thereby affirming the effectiveness of the redistricting order from the three-judge court. Later, after the 1998 elections were held under the new plan, the Supreme Court entered its decision returning the case to the three-judge court for a trial. The three-judge court made every effort to follow the then understood Supreme Court authority. Once the Supreme Court returned the case, the three-judge court proceeded in further obedience to the Supreme Court's ruling.

5. Judge Boyle, you appear to have a reputation for dismissing civil rights cases before allowing discovery to proceed. It's not just the Cromartie case. The NAACP strongly opposes your nomination. In a letter of opposition we received last week, the NAACP stated: "Judge Boyle has a common practice of dismissing race cases even before the summary judgment stage, not even permitting evidence to be developed." The NAACP mentioned two cases as examples of this: McCauley v. City of Jacksonville, which was reversed by the 4th Circuit, and Erik v. Causby.

C. Would you please discuss these two cases and address the NAACP's concern?

RESPONSE:

I appreciate the opportunity to address the issue of motions brought under Federal Rule of Civil Procedure 12(b)(6). The rule provides a mechanism by which parties can move to have a complaint dismissed for failure to state a claim upon which relief can be granted. The rule plays an important role as a gatekeeper in federal civil practice, particularly in light of the increasing filings in federal courts. Via motion by a defendant, a court can test the legal sufficiency of the complaint. Where the complaint lacks a basis in law, it should be dismissed. However, where a claim has been properly stated, the matter is always permitted to go forward. The proper analysis to be used is to consider whether, even if all the allegations made by the plaintiff are true, there is not a legal remedy for those allegations. It is my responsibility as a district court judge to dismiss a case if a party brings a 12(b)(6) motion and the plaintiff has not stated a claim for which relief could be granted.

With respect to the specific cases you mention, McCauley v. City of Jacksonville involved a complaint filed by a real estate developer seeking to build a high-density residential development within the city of Jacksonville, North Carolina. After several actions taken by the city that prevented the plaintiff from moving forward with his construction, he filed suit in United States District Court. He alleged, among other things, that the actions of the city officials in imposing a stop order, denying sewer connections, and re-zoning were impermissibly based on the likelihood that the development would accommodate low and medium income residents, a portion of which might include minority persons. I granted the defendant's 12(b)(6) motion to dismiss based on my determination that the plaintiff's complaint did not state claims for which the federal court could grant relief. The Fourth Circuit disagreed and remanded the case.

After initial discovery in McCauley, I granted the defendant's motion for summary judgment, and the Fourth Circuit affirmed. I found no evidence to support the plaintiff's claims that his procedural due process rights were violated or that he was denied equal protection. I found that the city of Jacksonville had demonstrated that there was a significant sewage problem and that it had a legitimate non-discriminatory reason for imposing limits on the sewers. The city made a determination that the sewer system to which the plaintiff hoped to attach his high-density residential development could not handle near the number of individual units the plaintiff sought to build.

In Erik V. v. Causby, the plaintiffs were seeking a preliminary injunction. My denial of their request for a preliminary injunction in no way prevented their suit from moving forward.

D. In the Causby case, you reportedly remarked at a court hearing that "[t]here is no such thing as discrimination without intent. Can you please provide the context for your statement?

RESPONSE:

The only account that I am familiar with is the written opinion in that case. Nowhere in the opinion in Erik V. v. Causby, a copy of which is attached, did I say "[t]here is no such thing as discrimination without intent." What is relevant and what was said at page ten is "while litigants under Title VI need only show the disparate impact of the challenged policy, Guardians Assoc. v. Civil Service Comm., 463 U.S. 582, 103 S.Ct. 3221, 77 L. Ed.2d. 866 (1983), these plaintiffs have failed to make a prima facie showing that minorities suffer more harshly than others under Policy 842."

E. What is your judicial philosophy regarding disparate impact cases, which permit a showing of unlawful discrimination without a showing of intent?

RESPONSE:

In Griggs, the Supreme Court held that Title VII prohibits not only overt discrimination, but also practices that are facially neutral but discriminatory in operation. Congress subsequently codified the disparate impact theory in Title VII by permitting challenges to employment practice or practices that cause a disparate impact on the basis of race, religion, national origin, or sex. As a judge on the district court, I apply the law and precedent in this area and will continue to do so.

F. Have you ever granted summary judgment to a plaintiff in a civil rights case?

RESPONSE:

Yes.

G. Please list any such cases and briefly summarize them.

RESPONSE:

In the case of United States v. Quality Built Construction, 4:00-CV-194-BO, I granted summary judgment in favor of the United States as to the defendants' liability for failure to design and construct a housing complex that complied with the applicable regulations to make it sufficiently accessible to persons with disabilities.

H. Can you give me two examples of rulings in cases before you where you demonstrated sensitivity to the less fortunate or less powerful?

RESPONSE:

Please see attached list.

6. Judge Boyle, many leading civil rights organizations in the United States have opposed your nomination: the Leadership Committee on Civil Rights, the NAACP national chapter and its North Carolina chapter, and the National Urban League. You are also one of just four nominees opposed by the National Bar Association–the oldest and largest association of African American and minority attorneys in the nation. What specific evidence or decisions can you point to that would demonstrate to these organizations–and to this Committee–that you would interpret federal civil rights laws with an open mind?

RESPONSE:

I am committed to enforcing and applying the federal civil rights laws in a fair and positive manner. I would submit that my work and service as a federal judge are consistent with this commitment.

7. In the case of Beach v. Wake County Public School System, you dismissed a claim under the Age Discrimination in Employment Act on the grounds that it was not timely filed. The 4th Circuit reversed you and noted that under clear 4th Circuit precedent, Johnson v. Silvers, you should have given the plaintiff the opportunity "to particularize his complaint" by including the right-to-sue letter he received from the Equal Employment Opportunity Commission. Please explain why you did not follow Johnson v. Silvers and give the Beach plaintiff the opportunity to particularize his complaint and have his claim heard on the merits?

RESPONSE:

The plaintiff in Beach moved to proceed in forma pauperis, thereby avoiding the filing fee for his action. Under these circumstances, the court was obligated to conduct a frivolity review pursuant to 28 U.S.C. § 1915(d). The plaintiff alleged that he had applied for a teaching position with the Wake County Public Schools in August 1989 and that the school system did not hire him for that position. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–34 (amended 1978), specifically provides that no civil action may be filed by an aggrieved party until 60 days after a charge has been filed with the Equal Employment Opportunity Commission (EEOC), and a charge of age discrimination must be filed within the EEOC within 180 days after the alleged unlawful practice occurred. 29 U.S.C. § 626(d). Only after the EEOC dismisses or terminates the proceedings may the aggrieved party file a civil action in district court.

The plaintiff's complaint alleged actions by the Wake County School System over approximately nine years prior to the complaint–outside the time requirements for filing an action under the ADEA. The plaintiff made no showing of compliance with the jurisdictional and tolling requirements for bringing a suit. The court of appeals acknowledge that the plaintiff did not include either proof of the charge before the EEOC or a Right-to-Sue letter in his

complaint. However, the court of appeals set out that in the plaintiff's informal brief in the court of appeal, he included a Right-to-Sue letter. The plaintiff never made any motion in the trial court to particularize his complaint to include his Right-to-Sue letter under Johnson v. Silvers; nor did he ever present to the trial court any showing prior to his appeal of a claim with the EEOC or a Right-to-Sue letter. The fact that the plaintiff, on his own initiative and for the first time, presented a reference to a Right-to-Sue letter in the court of appeals was beyond my knowledge or control in the trial court.

8. In the case Williams v. Avnet, you granted summary judgment for the employer, finding that the plaintiff–who had suffered neck and back injuries in a car accident–was not disabled for purposes of the Americans with Disabilities Act (ADA). You ruled that her injury was not a "substantial limitation" and that working was not a "major life activity."

Although the 4th Circuit affirmed your decision, they strongly criticized your application of the ADA. The 4th Circuit wrote:

"The district court erred in two respects in analyzing whether Williams had established that she was disabled for purposes of the ADA. First, the court erred in failing even to address Williams' asserted lifting limitation. Secondly, and perhaps more fundamentally, it erred in suggesting that working is *not* a major life activity... The district court improperly described the regulatory language discussing working as a major life activity as 'superfluous' and thus declared that '[w]hile some courts might entertain claims under the 'major life activity' of 'working,' this Court does not.' In fact, work is a major life activity.... In determining whether the failure to accommodate Williams was reasonable, the district court deferred almost entirely to Channel Master's judgement. The court held, as a matter of law, that if a proposed accommodation was not 'obviously reasonable,' or its reasonableness 'is a matter of some serious dispute, courts should defer to the employer's business expertise.' The employer's point of view should define 'reasonableness,' the district court explained, because otherwise the determination of what is reasonable would 'authorize the reviewing court to engage in a subjective, legislative exercise.' This approach is misguided. Courts are often asked to define reasonableness in various contexts; the standard of 'reasonableness' is empty if 'reasonable' means only 'the employer's opinion.' The district court's approach is particularly inappropriate in the summary judgment context, where a court must view evidence in the light most favorable to the non-moving party." [citations omitted]

A. Judge Boyle, please respond to these statements made by the 4th Circuit and discuss whether you agree or disagree with its analysis.

RESPONSE:

In the Fourth Circuit's Williams opinion, the court stated, as you point out, that "[i]n fact, working is a major life activity." It drew support for this proposition from three circuit court opinions and 29 C.F.R. § 1630.2(j)(3). See Williams v. Channel Master, 101 F.3d 346, 349 (4th

Cir. 1996). I accept and will apply that precedent.

I would note, however, that after the circuit court addressed the district court's consideration of "working" as a major life activity, the Supreme Court later discussed this at considerable length in Sutton v. United Airlines, Inc., 527 U.S. 489, 492–93 (1999). Almost three years later, in the Sutton opinion, the Supreme Court stated that, "there may be some conceptual difficulty in defining 'major life activity' to include work," see Sutton, 119 S.Ct. at 2151, because of the very conceptual difficulties that were discussed in the Williams district court opinion.

B. Please provide examples of any ADA case in which you have ruled in favor of a plaintiff on summary judgment or at trial. Please also provide the names of any cases in which you ruled that an employer failed to make a reasonable accommodation to a disabled employee.

RESPONSE:

I ruled in favor of a plaintiff on summary judgment grounds in United States v. Quality Built, which I refer to in my answer to question 5(e).

C. What specific evidence or decisions can you point to that would demonstrate to the disability community–and to this Committee–that you would interpret the ADA with an open mind and not with a pro-employer bias?

RESPONSE:

I can assure the Committee that I have absolutely no agenda in any case I hear. I have never considered myself pre-disposed to any parties before me. As for cases which indicate my judicial approach, I would refer you to the attached list of cases.

9. In the case of Edwards v. Goldsboro, you dismissed a First Amendment case brought by a police officer who was suspended and demoted for teaching an off-duty gun safety course. The officer, Sergeant Kenneth Edwards, wanted to earn some extra money in his off-duty hours in order to help support his elderly mother. He also wanted to express his personal views on and advocacy of gun safety. You dismissed Sergeant Edwards' case before giving him a chance to amend his complaint, take discovery, or prove his claim. The 4th Circuit said you abused your discretion.

Judge Boyle, your nomination has generated opposition from eight different law enforcement and emergency service associations–including the North Carolina Police Benevolent Association, the Professional Fire Fighters and Paramedics of North Carolina, and the North Carolina Troopers Association. Here is what the Executive Director of the North Carolina Police Benevolent Association said about you:

"Our officers have appeared before Judge Boyle as parties and witnesses. We know Judge Boyle and his long judicial record. Our members have personally suffered from Judge Boyle's repeated legal errors. His rulings have severely harmed our members, their

families, the law enforcement profession and the public."

Judge Boyle, what specific evidence or decisions can you point to that would demonstrate to these organizations–and to this Committee–that you would treat law enforcement officers and emergency service employees fairly?

RESPONSE:

In my 21 years on the bench, it has been my pleasure to work closely with members of the law enforcement community where appropriate. I believe this relationship has been fruitful and productive. In the Edwards case, I was faced with a question of the plaintiff's protections under the First Amendment. I believe my decision was focused on the relationships of public officials to the protections afforded to speech under the First Amendment, and I do not feel this decision reflects in any way on the service of law enforcement or emergency service employees. I can assure that I will continue to treat law enforcement and emergency service employees with the equality and fairness all litigants deserve in the courts of the United States.

10. President Bush has said that he looks for "strict constructionists" when nominating judges. Do you consider yourself a "strict constructionist"? Please explain why or why not.

RESPONSE:

I do not subscribe to labels for judges and particularly not for myself as a judge. My commitment and my service as a judge is to be committed to the law and to take each and every case and the people involved in it, treating that case with attention and care, understanding the facts that are involved and doing my best to apply the law that is appropriate in the case. That is my own goal–to deliver a just result based on the facts and law in every case.

Attachment 1

1) Parker v. York, No. 5:01-HC-736-BO (granting the writ).

2) Thebaud v. Jarvis, No. 5:97-CT-463-BO (involving a Section 1983 suit challenging the conditions of confinement at North Carolina's Women's Prison).

3) Taylor v. Freeman, No. 5:93-CT-255, vacated by 34 F.3d 266 (4th Cir. 1994) (class action involving the conditions of confinement at North Carolina's Morrison Youth Institution).

4) Coleman v. Allsbrook, No. 5:89-CT-705 (involving a plaintiff seeking injunctive relief to remedy the conditions of confinement at North Carolina's Odom Correctional Center).

5) Rouse v. Beck, No. 5:04-CT-04 (staying an execution).

6) Perkins v. Beck, No. 5:04-CT-643 (staying an execution).

7) Atkins v. McCombs, No. 2:02-CV-33 (allowing an employment discrimination suit to go forward).

8) Bulluck v. Radabaugh, No. 5:02-CV-619 (allowing a suit against a police department to go forward).

9) Hucks v. Scott, No. 5:02-HC-765 (granting the writ).

10) Woodard v. Mercer, No. 5:91-CT-190 (involving the conditions of confinement at the Wilson County, North Carolina jail).

Responses of Judge Terrence W. Boyle
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Russell D. Feingold

1. In Beaumont v. FEC, you issued a decision holding that certain non-profit organizations had a First Amendment right to contribute directly to political campaigns. You argued that the government had no compelling interest in preventing corporate-funded non-profits from donating to political campaigns. Corporations are banned from funneling donations to politicians through charities because of the threat that corporations will use their massive economic power to influence our political process. Your decision said the group in Beaumont was no threat to the process "in light of its non-profit, ideological nature." But even ideological groups can serve as conduits for corporate influence when they accept money from corporations, as the group in Beaumont did.

The Supreme Court reversed you in a 7-2 decision, saying that upholding your opinion would require overturning the entire system of values underlying our campaign finance law.

(a) Do you disagree with the Supreme Court cases upholding regulation of corporate contributions?

RESPONSE:
No.

(b) Do you understand how your opinion in the Beaumont case raises questions about your commitment to apply Supreme Court precedent with which you disagree?

RESPONSE:
I am fully committed to applying Supreme Court precedent and authority. I attempted to apply faithfully the Supreme Court decision in FEC v. Massachusetts Citizens for Life, Inc., where the Court held that Section 441(b) of the Federal Election Campaign Act was unconstitutional as applied to the defendant. 479 U.S. 238 (1986). The Supreme Court held that the not-for-profit corporation at issue in Beaumont did not meet the criteria outlined in Massachusetts Citizens for Life. I will apply the Supreme Court's holding should this issue come before me in the future.

(c) What assurances can you give the Committee that, if confirmed to the Fourth Circuit, you would uphold and apply our nation's campaign finance laws? In light

of your failure to do so in the Beaumont case, why should this committee believe that you will do so?

RESPONSE:

I can assure the Committee that I will uphold and apply all federal law, including the nation's campaign finance laws, not only on the circuit court if confirmed, but as a district judge. I believe that my record as a whole demonstrates that I apply the law to the facts in each case before me.

2. On two occasions you decided that North Carolina's Twelfth Congressional District, drawn to have a population that was less than 50% African-American, violated the Constitution as a race-based gerrymander. The Supreme Court rejected both decisions.

In your first decision, you granted summary judgment for the individuals challenging the district before either party had conducted discovery and without an evidentiary hearing. Justice Thomas, writing for a unanimous court, reversed, finding that you had prematurely decided the case despite the existence of factual disputes, namely whether the primary motivation for the district was racial or political.

After a trial on remand, you again found the Twelfth District unconstitutional. This time, the Supreme Court found that you committed "clear error" by attributing the state's district-drawing to predominantly racial, rather than political, considerations. The majority held that your determination that this was a race-based district was based in large part on the same evidence it had previously found insufficient in its first review of the case.

(a) In your experience, is it unusual for the Supreme Court to reverse a lower court decision based on "clear error"?

RESPONSE:

In the case referred to in this question, I was a member of a three-judge district court panel. Ultimately the panel presided over a factual trial, and the court made findings of fact. The Supreme Court directly reviewed the three-judge court's findings of fact. The Supreme Court's standard of review in this case was "clearly erroneous." I am not aware of the number of cases the Court reviews under this standard or how often it reverses based on this standard.

(b) Your decisions in this case have been criticized as attempting to mold the

facts of the case to fit a predetermined outcome. Do you agree? Do you think it is appropriate for a judge to engage in outcome-driven analysis?

RESPONSE:

Respectfully, I do not agree that there was any predetermined outcome. Certainly, I do not believe that any judge in a case should engage in a pre-judgment of the facts, and the three-judge court did not do that in the case in question.

Cromartie v. Hunt, was heard by a three-judge court composed of Judge Sam Ervin, III, as circuit judge, and Judge Voorhees and me as district judges. The case involved a challenge to the First and Twelfth Congressional Districts under the redistricting plan then in force from the State of North Carolina. This plan had been adopted in the 1997 General Assembly, after the earlier plan adopted following the 1990 census had been held to be unconstitutional by the Supreme Court. The Supreme Court had earlier taken up the constitutionality of District Twelve in Shaw v. Reno and Shaw v. Reno II. In Shaw I, the Supreme Court held that the plaintiffs could survive a motion to dismiss for failure to state a claim and could challenge the North Carolina redistricting plan (including District Twelve) as violative of the Equal Protection Clause. In Shaw II, the Supreme Court held that the North Carolina Legislature, in establishing District Twelve, had violated constitutional principles of equal protection by creating a district that was not narrowly tailored. After ordering the state to remedy this violation, a new congressional redistricting plan was adopted, and that plan was challenged in the case of Cromartie v. Hunt. I had not been a member of the earlier two three-judge courts.

When Cromartie v. Hunt came before the three-judge court in 1998, we were bound by the Supreme Court authority in the first two Shaw v. Reno cases. Based on that authority, it was the ruling of the majority of the court that the state's effort to redistrict was ineffective to cure the constitutional infirmity which the Supreme Court had ordered the state to correct in Shaw v. Reno II. By the time a decision was made in April 1998 in Cromartie v. Hunt I, this issue of the Twelfth Congressional District had been in litigation for years and had been to the Supreme Court twice. The three-judge court made every effort to follow the then understood Supreme Court authority, and once the Supreme Court overruled that outcome, the case proceeded in further obedience to the Supreme Court's ruling.

(c) At the nominations hearing, you said that the challenge to the Twelfth District succeeded because it "had a more attenuated geographic composition" than another district at issue in the litigation. In its first opinion, the Supreme Court rejected as insufficient that argument and much of the remaining evidence you then relied upon in your second decision. Do you still believe your decisions in this case

were correct?

RESPONSE:

All of the judges on the three-judge court did their best to hear the evidence, consider the proof, and apply the law. The three-judge court did look to the Supreme Court's guidance in its opinion in Cromartie I. There, the Court addressed only whether the evidence was sufficient under the summary judgment standard. The Court stated:

> While appellee's evidence might allow the District Court to find that the State acted with an impermissible racial motivation, despite the State's explanation as supported by the Peterson affidavit, it does not require that the court do so. All that can be said on the record before us is that motivation was in dispute. Reasonable inferences from the undisputed facts can be drawn in favor of a racial motivation finding or in favor of a political motivation finding.

Cromartie I, at 552. Ultimately, after reviewing the findings of fact of the three-judge court in Cromartie II, the Supreme Court disagreed. I abide by and respect that ruling.

(d) How do you respond to criticism that you disregarded specific Supreme Court direction in your second decision?

RESPONSE:

The second decision was a trial at which the three-judge court heard evidence as finders of fact. We were bound by the rule of decision that came from the Supreme Court in both the first and second Shaw v. Reno cases as well as the earlier ruling in Cromartie. I believe that all of the members of the court did their best to apply Supreme Court authority in that case. As noted in Response to 2(c), the Supreme Court disagreed with the factual findings of the three-judge court, and I abide by and respect that decision.

(e) Please explain why this Committee should not be concerned about your apparent willingness to disregard the Supreme Court?

RESPONSE:

I can assure the Committee that I am bound by the rulings of the Supreme Court, respect them, and will apply them as the law of the land.

3. **In United States v. North Carolina, the United States sued North Carolina for discrimination against women applying for positions in the state's correctional facilities.**

In late 1995, the parties came to you with an agreement to settle the discrimination claim. As you know, such settlements are virtually always accepted. Instead, you found a lack of subject matter jurisdiction, even though the plain language of Title VII, and Supreme Court case law interpreting that plain language, established such jurisdiction. You asserted that the government had not provided evidence of particular intentional discriminatory practice, despite two decades of Supreme Court precedent providing that disparate impact cases brought under Title VII did not require such proof.

You then criticized the federal government for attempting to force North Carolina to adhere to a national standard of equal opportunity. You stated that "[i]t is most emphatically not the purpose of federal law to impose uniformity of cultural outcome upon the individual states." You were reversed by the Court of Appeals, which held that your refusal to enter the consent decree constituted an abuse of discretion. It remanded the case to you with instructions enter the consent decree.

(a) Do you believe the federal government unfairly imposes a uniform culture on the states when it requires them to treat women equally?

RESPONSE:

I appreciate this opportunity to address the United States v. North Carolina case. To clarify, I found that the trial court did have subject matter jurisdiction over the enforcement case and did have authority to enter the consent decree. In an initial opinion, I questioned the court's subject matter jurisdiction and asked the government to show cause why it did have jurisdiction. Ultimately, I did not hold that the government had to demonstrate evidence of a particular intentional discriminatory practice. I recognize that the Supreme Court has held that a plaintiff must demonstrate only that an employer's facially neutral standards operate in a significantly discriminatory pattern to establish a prima facie case of disparate impact sex discrimination. See Dothard v. Rawlinson, 433 U.S. 321 (1977).

With respect to the statement in your question, my statements were made as a critique of the ability of statistical data to fully capture all of the factors attendant to a disparate impact discrimination claim. I clearly recognize, however, that the Supreme Court has held that statistical evidence can be used in disparate impact cases. Id. There is no question that Title VII is Constitutional and entitled to full and fair enforcement when applicable.

(b) When this case was filed, North Carolina had the smallest percentage of women employed in state correctional facilities of any state in the country, and there is no

evidence the state was attempting to remedy that situation. In that instance, do you believe the federal government has an obligation to ensure that women are given a fair opportunity to apply for employment?

RESPONSE:

I believe that the federal government has the obligation, within its means, to enforce all federal laws, including those that deal with discrimination and equality in employment.

(c) Please explain why you initially prevented two willing parties from settling their dispute.

RESPONSE:

The parties were requesting that the court join in the settlement and enter a mandatory injunction with remedial proceedings that were to go on for some time. My involvement at that stage was to request the parties to present the court with a showing that would support the court's injunction. The parties were always entitled to settle the matter without court participation and well understood that entitlement.

4. In that same case you developed another theory that would have made it harder to sue state governments that discriminate. United States v. North Carolina was a disparate impact claim. You wrote that the federal government must have a "reasonable belief" that a state agency had "intended to unlawfully discriminate" before it can invoke federal court jurisdiction in a disparate impact claim. Our civil rights law says that policies that discriminate by effect are unlawful, even where it can't be proven that the discrimination is intentional. Your test would have dramatically weakened protections against employment discrimination.

Can you understand why victims of discrimination appearing before you in an appeal might be worried about your ability to fairly and impartially apply the law in their case? What can you point to, other than your statements at the hearing, that would alleviate that concern?

RESPONSE:

I can assure the members of the Committee that I have always done and will continue to do my best to decide cases based solely on my reading and understanding of the applicable facts and law presented. Where the Fourth Circuit has disagreed with my legal reasoning, I have dutifully complied with the letter and spirit of the appellate court's ruling. I recognize the use of disparate impact analysis as a means to set forth a case of discrimination. It was first recognized by the Griggs Court and later codified. It

is the law of the land. I believe that my record as a whole demonstrates that I treat all litigants before me equally and judge each case on its own merits.

5. Over 43 million Americans have one or more physical or mental disabilities. Historically, society has tended to isolate these individuals, and discrimination against these individuals persists. Unlike individuals discriminated against because of race, sex or creed, individuals who experienced discrimination because of a disability often had no legal recourse to address this discrimination until Congress passed the Americans with Disabilities Act.

In Pierce v King, you dismissed a case brought by a prison inmate who challenged the prison's failure to make reasonable accommodations for his disability to enable him to participate in the prison work program. You found that the ADA did not apply, and questioned its constitutionality more generally. You wrote that "[a]lthough framed in terms of addressing discrimination, the Act's operative remedial provisions demand not equal treatment, but special treatment tailored to the claimed disability." Census data, national polls, and other studies have documented that people with disabilities, as a group, are severely disadvantaged in our society, and suffer from a variety of forms of discrimination.

(a) Do you disagree with the ADA's purpose of eliminating discrimination against individuals with disabilities by providing civil rights protections like those provided to individuals based on race, sex, national origin, and religion?

RESPONSE:

While I addressed the application of the ADA in a case before me, I have never questioned the purpose of the ADA. It exists to ensure that all Americans, regardless of their physical abilities, are afforded equal access in this country.

(b) You stated in the Pierce v. King decision that the ADA is "unlike traditional anti-discrimination laws" in that it "demands entitlement in order to achieve its goals." This, you claim, the Fourteenth Amendment cannot authorize. Please explain that statement.

RESPONSE:

The ADA by its terms requires, *inter alia*, "reasonable accommodation" for those who are physically or mentally disabled. Congress has deemed such an accommodation as necessary to achieve the goal of the ADA–ensuring that those who have physical or mental disabilities are not denied full participation in our society. The ADA differs from other civil rights legislation somewhat in that it not only requires persons to refrain from

acting in a certain manner, e.g., treating someone differently on the basis of his or her physical condition, but also something more. It requires that a covered entity must take those steps that are considered "reasonable" to ensure that a disabled person can fully participate in our society. The Supreme Court has recognized precedent applying the ADA to the states in certain contexts, and I will apply that precedent.

(c) In the same decision you stated that the ADA "has little to do with promoting the 'equal protection of the laws.'" Do you still believe that is the case?

RESPONSE:

The ADA ensures full participation in society by Americans, regardless of their relative physical or mental abilities.

(d) In that case you also stated: "It is apparently an open question whether individuals must be compensated for the property demanded of them by the [Americans with Disabilities Act] as accommodations to serve the act's public purpose." Do you contend that an accommodation provided for an individual with a disability is a taking?

RESPONSE:

The footnote to which you refer simply noted that the issue was an open question. As a district court judge, therefore, it would be inappropriate for me to address this.

6. In Williams v. Avnet, a manual punch press operator who sustained permanent injuries in an automobile accident brought suit. When she requested the accommodation of a forklift to assist her in doing her job, or be reassigned to another position, she was terminated. You granted summary judgment for the employer. In reviewing your decision in this case, the Fourth Circuit affirmed on other grounds but explicitly rejected several aspects of your analysis.

(a) You felt that the requested accommodation was not reasonable and wrote that in the ADA accommodation context, the standard of reasonableness "is grounded in deference to an employer's expert business decision flowing from a presumption that people behave in an economically rational manner, and an understanding that the requirement of reason is a requirement of economic rationality." But as the Fourth Circuit explained, courts in ADA cases are supposed to evaluate what an objectively reasonable employer would do. You suggested a subjective, rather than an objective, standard. How would you now evaluate the reasonableness of an employer's decision in this context?

RESPONSE:

The Fourth Circuit has set forth the applicable standard. Accordingly, I would use an objectively reasonable employer standard.

(b) To state a claim under the ADA, a plaintiff must first demonstrate that she has a disability, meaning a physical or mental impairment that substantially limits a major life activity. The plaintiff in Williams claimed that her ability to work was impaired. In dismissing her claim, you disregarded as superfluous the ADA regulations that list "working" as a major life activity, and wrote that "while some courts might entertain claims under the 'major life activity' of 'working,' this court does not." The Fourth Circuit repeatedly held, both before and after the Williams case, that working is a major life activity and found that you made a fundamental error in suggesting otherwise. Do you still contend that working is not a major life activity? Why did you disregard clear Fourth Circuit precedent?

RESPONSE:

In the Fourth Circuit, it is clearly established that "working" is a major life activity. See Rohan v. Networks Presentations, LLC, 375 F.3d 266 (4th Cir. 2004). However, the discussion in the district court's opinion in Williams highlights the difficult legal questions in this area of the law that led to the Supreme Court's extended discussion of the question three years after Williams in Sutton v. United Airlines, 119 S.Ct. 2139, 2151–52 (1999).

(c) You stated at the hearing that the Fourth Circuit "correctly overruled" your decision in this case. Please explain which aspects of your decision you believe were correctly overruled. Are there any other decisions you have made that you feel, in retrospect, were also not correct?

RESPONSE:

While this issue was not the controlling issue in the case, as indicated by the Fourth Circuit, it considered "working" to be major life activity. The Fourth Circuit cited two Fourth Circuit cases that it believed were on point. Thus, assuming the precedent relied upon by the Fourth Circuit in Williams, including the EEOC interpretive guidelines that consider "working" to be a major life activity, is correct, the Williams district court opinion was "correctly overruled."

However, three years after the Fourth Circuit's opinion in Williams, the Supreme Court noted that "there may be some conceptual difficulty in defining 'major life activity' to include work." Sutton v. United Airlines, 119 S.Ct. 2139, 2151 (1999). In fact, the Supreme Court's analysis echoed the Williams trial court discussion, in that each

recognizes both the inherent difficulty of considering "working" to be a major life activity, see 119 S.Ct. at 2151, and the absence of a statutory mandate for the EEOC to define "disability." See 119 S.Ct. at 2145.

(d) The Fourth Circuit, although it affirmed on other grounds, sharply criticized your reasoning in this decision, and you acknowledged that you were "correctly overruled" in this case. Yet this case is not listed in your answer to Question 15, Part 2, of the Judiciary Committee questionnaire, which asks to you "list judgments affirmed with significant criticism of substantive or procedural rulings." Please explain why this case is absent from your answers to this year's questionnaire. Do you believe that the court's criticism for disregarding federal regulations and appellate court precedent was not significant?

RESPONSE:

Thank you for the opportunity to clarify my response to the questionnaire. I did not include this case in answering Question 15, Part 2 because I was affirmed and I believed the actual holding of the case to lack significant criticism. The criticism about which you have asked appeared to be dicta that did not affect the Fourth Circuit's ultimate analysis of my judgment. I have always been as forthright as possible with the Committee. My efforts in answering the questionnaire were borne out of candor and honesty and not from any ill-conceived effort to hedge my responses. In addition, the concurrence of Judge Williams in the case indicated that the critical language was dicta and not necessary to the court's affirmance. See Williams, 101 F.3d at 350 (Williams, C.J., concurring).

7. **You have issued a number of decisions converting a motion to dismiss to a motion for summary judgment, often resulting in reversal by the Fourth Circuit. Some examples include: United States v. Wilson, Lomas v. Red Storm Entertainment, and Abdussamadi v. Vandiford. In fact, in Abdussamadi, the Fourth Circuit cited the same controlling precedent on this issue that it previously had cited in Wilson.**

(a) Why did you disregard the Fourth Circuit's reversal of your Wilson decision in your later decisions?

RESPONSE:

These cases involve a procedural issue over when it is appropriate to convert a motion to dismiss to a motion for summary judgment. Initially, I had applied a different standard for "reasonable" as it is used in the final portion of Fed. R. Civ. P. 12(b)'s text.

The Fourth Circuit disagreed. Based on the Fourth Circuit's opinions on the issue, the rule is now clearly established and will be applied as the law of this circuit.

(b) This is not the only area where the Fourth Circuit has had to repeatedly reverse your decisions for errors that it had previously addressed in other cases. How do you explain this?

RESPONSE:

There have been a few occasions when I applied the incorrect standard, and I acknowledge those mistakes. I approach all cases on my docket with no preconceived decision. I attempt to analyze the case with the most current Fourth Circuit law applied to my understanding of each case's facts. Whenever I am reversed, I do my best to learn from the differing interpretation of the law and apply that interpretation as I go forward.

8. In response to Question 15 of the 2005 Judiciary Committee questionnaire, which asked you to list your 10 most significant opinions, you listed two cases that were not listed in your answers to the 2003 questionnaire. Those cases are Gibbs v. Babbitt, decided in 2000, and Smith v. Reagan, decided in 1987. Both of these decisions predate your answers to the 2003 questionnaire.

(a) What has changed to make these cases, one almost 20 years old, significant?

RESPONSE:

Nothing changed with respect to these two cases. What is "most significant" is a matter of interpretation and a judgment that I can make only subjectively. When considering the question again, it was my opinion that these cases were worth noting.

(b) Please explain why you added these cases to your answer this year, when they were absent from the answers you submitted to a number of previous questionnaires.

RESPONSE:

As stated in my response to Question 8(a) above, I believe that it is a matter of opinion as to what is "most significant." Every case is important, and it was simply a matter of including some additional cases for the Committee's use.

9. Your 2003 Judiciary Committee questionnaire lists 142 cases in response to Question 15, Part 2, which asks for citations of all opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. Your current questionnaire lists 68 cases, a

significant decrease. When asked about this reduction during your hearing last week, you stated that these cases were removed because they were affirmed without criticism. Senator Leahy's staff found that you reported less than one half of the 150 reversals, partial reversals, or affirmances with criticism that they found, including United States v. Barry, where the Fourth Circuit found your departure constituted plain error, and United States v. Tanner, where the Fourth Circuit found that you abused your discretion. You told the committee, in an addendum to your questionnaire, that you did not include these cases because a number of them did not include significant criticism of a substantive or procedural ruling, but based on these examples that explanation seems incorrect.

Why did you leave out cases that were affirmed but nonetheless the subject of criticism on substantive or procedural grounds? Do you disagree that "plain error" and "abuse of discretion" are substantial criticisms? Do you plan to supplement your answer to Question 15, Part 2?

RESPONSE:

I appreciate this opportunity to clarify the reasons for updating my Questionnaire. Let me assure that it was at all times my understanding that my original Questionnaire continued to be part of my record with the Committee. As my nomination has been pending I have provided periodic updates to my Senate questionnaire, which I first submitted after my nomination. The Committee always has had the larger list of cases that I initially included in response to Question 15(2). As I stated in an addendum submitted to the Committee, while my nomination has been pending, it became apparent to me that the answer to this question on my original Questionnaire was being misunderstood or otherwise creating the impression that all of the cited cases were "reversed," which is not accurate.

The terms "plain error" and "abuse of discretion" are standards of review that a reviewing court uses depending upon the circumstance of a particular case. The fact that these terms are used in the opinion identifies the standard of review that has to be satisfied in order to not affirm the lower court's ruling and so it was my understanding that these terms alone did not rise to the level of substantial criticism.

10. Have you or has anyone acting on your behalf with your knowledge solicited letters of recommendation for this judgeship from attorneys who have a pending case before you or have had a case before you in the past?

RESPONSE:

I have made no effort to solicit support or comment on behalf of my nomination.

Responses of Judge Terrence W. Boyle
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Dianne Feinstein

QUESTION 1: You have a very high rate of reversal by the Fourth Circuit Court of Appeals. According to one report, your decisions have been reversed more than 150 times, and by a Circuit Court that is generally seen as conservative in its rulings. This means that approximately 12% of your decisions were reversed upon appeal. By comparison, cases appealed to the U.S. Courts of Appeal were reversed at an average of only 9.7% per year in the comparable years for which data is available, with a rate of only 7.5% for the Fourth Circuit. How do you account for such a high rate of reversal?

RESPONSE:

I began hearing cases as a district judge in May of 1984. For approximately 21 years, I have heard and decided a wide variety of criminal and civil cases; thousands of civil cases and thousands of criminal cases. Some of those are appealed. Somewhere between 1,000 and 2,000 cases have been brought to a higher court for consideration. I've tried to report specifically on the number of cases that have been actually reversed, and the number of cases that have received some treatment other than reversal and were not affirmed in their entirety. I believe a careful review of the actual case experience of my decisions in a reviewing court will show that the reversal rate is within the norm for active trial judges hearing a wide range of cases, and is not in any way out of line with the federal trial bench at large.

QUESTION 2: One important difference between serving as a District Court Judge and serving as a Court of Appeals judge is the level of review applied to your decisions. District Judge's decisions are regularly reviewed by the Circuit. But Circuit decisions are rarely reviewed by the Supreme Court. Can you explain why, given your record as a District Court judge, I should not be concerned that as a Court of Appeals judge your errors in law will continue, but be unreviewed by a court of appeals.

RESPONSE:

I have made a diligent effort as a district judge to understand the facts and apply the law in every case over which I have presided, and I would continue to do so if I am called upon to sit on the court of appeals. I have actually had the opportunity on a number of occasions to sit with the court of appeals, starting in February 1985 through, most recently as December 2000. At each of those terms, I sat on panels, heard oral argument, and participated in the decision of argued cases. I have written a number of assigned opinions for the court, written a number of per curiam opinions, and have participated in the decision of every case in which I was on the panel. My experience over these many years sitting with the court of appeals has prepared me for service on that court, and my performance throughout this service as a visiting judge on the court of appeals has always been met with encouragement and support by the members of that court. Consequently, I believe I am able to faithfully discharge the duties of a circuit judge.

QUESTION 3: In at least two cases, Brown v. North Carolina Division of Motor Vehicles and Pierce v. King, you found that the American with Disabilities Act was, at least in part, unconstitutional. Can you explain your reasoning? Do you still believe this Act to be unconstitutional?

RESPONSE:

The Americans with Disabilities Act is federal legislation enacted by Congress and signed by the President to deal with the very real and important issues involving fairness to all Americans regardless of their challenges and limitations. There is no dispute that Congress was within its constitutional authority to create the Americans with Disabilities Act, and that it is a valid, positive, and enforceable federal law.

In the case of Brown v. North Carolina Division of Motor Vehicles, the state, defending an action brought against it, raised as a defense its constitutional right under the Eleventh Amendment to be immune from suit in federal court by citizens based on the state's sovereign immunity claim. The Supreme Court has consistently held that Congress cannot abrogate state sovereign immunity from suit other than by exercising its remedial power under Section 5 of the Fourteenth Amendment. Section 5 abrogation was not available on these grounds, and the Constitution required that Eleventh Amendment sovereign immunity be accepted as a bar to suit. This does not mean that Congress could not reach the state on other forms of relief, such as injunctive relief. It simply meant that the state had not lost its immunity for suit by citizens for damages in federal court. The Supreme Court agreed with the analysis set forth in Brown in its decision in University of Alabama v. Garrett, 531 U.S. 356 (2001).

The opinion in Pierce v. King was written without the benefit of precedent from the Fourth Circuit or Supreme Court. At the time the Pierce case was decided, the Fourth Circuit had expressed skepticism regarding the issue of whether state prisoners had standing under the ADA. After reviewing that opinion and the opinions of other district courts, I came to the same conclusion. The opinion did not, however, come to the conclusion that any portion of the ADA was unconstitutional. The Fourth Circuit affirmed my opinion in Pierce. Ultimately, two years after my opinion, the Supreme Court held that Title II of the ADA applied to inmates in state prisons. Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998). I will certainly apply this precedent.

QUESTION 4: Also in Brown v. North Carolina, you wrote "Nothing is more offensive to the idea of federalism than the notion that the federal government will punish a state for having a non-conforming culture – for being different than the other states. . . It is most emphatically *not* the purpose of federal law to impose a uniformity of cultural outcome upon the individual states." This was a case involving employment discrimination against women at a prison. Is it your view that a state's "non-conforming culture" should trump federal employment discrimination laws? Should state cultures trump other federal laws?

RESPONSE:

I believe that the reference in Question 4 to "Brown v. North Carolina" is, in fact, meant to be a reference to United States v. North Carolina, and with all due respect, I will respond to the question as it relates to United States v. North Carolina. There is no question that federal employment discrimination laws are the law of the land and are entitled to full and fair enforcement. I appreciate the opportunity to clarify that the reference cited above was made as a critique of the ability of statistical data to fully capture all of the factors attendant to a disparate impact discrimination claim. At the same time, I certainly recognize that the Supreme Court has ruled that the use of statistical evidence in disparate impact cases is appropriate. Dothard v. Rawlinson, 433 U.S. 321 (1977).

QUESTION 5: You have been reversed numerous times in criminal cases. Often, it seems that you get aspects of criminal procedure wrong, and your errors are then corrected by the Court of Appeals. Quoting from a report on your nomination prepared by the Alliance for Justice, they found that you had been reversed for:

- **Mistakes made during the impaneling of the jury;**
- **Improperly imposing consecutive sentences and departing upward, to the statutory maximum, from the sentences prescribed by the Federal Sentencing Guidelines;**
- **Failing to address a defendant's objections to a pre-sentencing report,**
- **Failing to advise a defendant of the mandatory minimum and maximum sentences before accepting a guilty plea;**
- **Failing to advise a defendant of his right to appeal at sentencing;**
- **Improperly effectively amending an indictment for improperly giving a sentencing enhancement when the Guidelines.**

Can you explain this record? Do believe the Court of Appeals was wrong in reversing you in this, and in similar, cases?

RESPONSE:

As a district judge for over twenty years, I have presided over thousands of criminal cases, thousands of felony cases, and, likewise, thousands of misdemeanor cases. I handled all stages of criminal proceedings, including initial proceedings, detention hearings, Rule 11 guilty pleas, with and without plea agreements, sentencings, and criminal jury trials. This platform of experience has given me a wide exposure to all areas of the substantive and procedural criminal law. I hope that this has prepared me to carefully apply the law and to be attentive to the rights of criminal defendants, as well as the rights of victims and the public in the criminal justice process. I hope and believe that a thorough examination of my record handling criminal cases and of the people who have appeared before me, both representing defendants and representing the government, including witnesses and parties to criminal cases, victims and defendants, will show that I am sensitive to their rights and to the law. I have complete respect for the power and authority of a reviewing court examining the result in a trial court, and I have always done my best to faithfully follow the rule of law in each case and to follow any outcome or instruction mandated by a reviewing court.

QUESTION 6: You have served on the bench for 20 years, and yet have published fewer than 400 opinions. But you have made thousands of critical decisions as a judge. You seemed to have published an unusually small number of opinions. Why is that?

RESPONSE:

All of the cases that I hear are matters of public record. When a decision is made by the judge which affects the outcome of the case, that becomes a part of the official court file. It is maintained in the Office of the Clerk of United States District Court and is open and available to the people involved in the case and the public at large in every instance.

In most criminal cases, the only judgment is the official form judgment in which an adjudication is made of either guilty or not guilty. This does not involve any particularized writing or comment by the judge. Many civil opinions are reported to the bar and public by private outlets who decide on their own which cases they choose to include in their reporter service. I have always tried to follow the practice of publishing either when requested to do so by the bar, or, in certain instances, if the case involved either a novel or new question of law or matter of public interest that warranted publication at that time. Generally, cases that involved an application of settled law or facts that did not require a novel application would not call for publication.

QUESTION 7: Can you tell us your philosophy on how to decide when a decision should be published—and thus subject to public and academic criticism—and when it should remain unpublished.

RESPONSE:

I do not subscribe to a fixed rule or "philosophy" on the publication of decisions in private reporter systems. Sometimes, a case will be published at the request of the lawyers or some other request after the case has been decided. I do not as a general practice send opinions to the private proprietary reporter system, West Publishing. There are a wide variety of self-directed publications that pick up opinions on a regular basis and publish them. I think this is a good means of distributing them to the public, the bar, and academic interests. In North Carolina, there is the North Carolina Lawyer's Weekly that regularly publishes my civil opinions. There are other reporter outlets such as Employment Law, Environmental Law, Procedural Law, and Immigration Law that I believe, on their own initiative, publish opinions. My opinions have appeared in these publications. As I indicated in response to question 6, all of my opinions are a matter of public record. They are available on the court's internal docketing and reporting electronic systems, and I have no personal interest in something remaining "unpublished."

QUESTION 8: In U.S. v. North Carolina Department of Motor Vehicles, a case involving application of the American with Disabilities Act, you reached the conclusion that while the leading Supreme Court Case on the matter (Griggs v. Duke Power) would ordinarily be controlling, in your opinion "the Supreme Court has overruled *Griggs sub silentio*" (in silence). I am interested in your view of this

unusual concept—that Supreme Court precedent can be overruled "in silence." Can you explain what you mean by this view of how to apply Supreme Court precedent? Do you believe that there are any other Supreme Court decisions which have been "overruled sub silentio," and if so, what are they?

RESPONSE:

I believe the reference in this question to "U. S. v. North Carolina Department of Motor Vehicles" and the further reference to the "Americans with Disabilities Act" is misplaced. If I understand the question, the case that is being referenced is United States v. North Carolina, and this case is a Title VII action brought by the United States involving the employment of women as prison guards in male prisons.

I appreciate this opportunity to clarify the statement in my opinion in United States v. North Carolina. The Griggs Court recognized the use of disparate impact analysis as a means to set forth a case of discrimination under Title VII. Congress subsequently codified that portion of the ruling. As I stated in my opinion, the Supreme Court itself has limited its holding in Griggs through its own subsequent opinions. I am not aware of any cases in which the Supreme Court has spoken that could be overruled, other than by a later or further pronouncement from the Supreme Court with respect to the case law.

I believe that Supreme Court authority is binding on the lower courts and that the Supreme Court has the authority in our constitutional system to apply the Constitution and to effectively determine what the supreme law of the land is. Supreme Court authority is binding and enforceable unless and until the Supreme Court reapplies or revisits the issue involved and formulates a further rule of decision. I recognize the binding authority of the Supreme Court in interpreting and applying the Constitution, and I am committed to faithful obedience to that rule.

Responses of Judge Terrence W. Boyle
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Edward M. Kennedy

Unpublished Opinions

1. During the hearing on your nomination, I asked whether you had any objection to providing your unpublished opinions to the staffs of Senators on the Judiciary Committee. You responded that these opinions are a matter of public record, and that you "would be more than happy to work with the Committee" to provide them. I appreciate your cooperation, and ask that you forward, or request the clerk of your court to forward, all of your unpublished opinions to the Committee as soon as possible.

RESPONSE:

As I indicated to you at my hearing, I would be happy to work with the Committee on any request for unpublished opinions, a number of which already have been provided, including those that were responsive to the Questionnaire. I have been informed by the Justice Department that they have been in contact with the Chairman's staff regarding this request.

Employment Discrimination

1. During your hearing, you testified that the Fourth Circuit was incorrect to reverse your decision in Ellis v. North Carolina, and that it must have mis-read your opinion. Specifically, you testified:

> **"I looked at the case file and my opinion in that. The plaintiff, represented by counsel, brought a Title VII claim and three State tort law claims. In the Title VII claim, the employee failed to file a claim with the administrative agency or with the EEOC, and consequently we had no subject matter jurisdiction. The 11th Amendment defense only applied to the State tort claims. And, of course, the States are exempt in Federal court from State tort claims. And it was on that basis that I wrote my district court opinion which was appealed to the Fourth Circuit."**

a. Ms. Betty Ellis, the plaintiff in the Ellis case, filed a complaint with the Equal Employment Opportunity Commission (EEOC), identifying North Carolina and the Department of Health and Human Services (DHHS) as respondents in her claim of discrimination under Title VII. The EEOC referred her complaint to the Department of Justice, which issued Ms. Ellis a notice of right to sue on June 8, 2001. That notice has been reviewed by my staff. Do you now acknowledge that you were mistaken when you testified that "the employee failed to file a claim with the administrative agency or with the EEOC, and consequently we had no subject matter jurisdiction?" If so, please explain how you could be mistaken in such a basic fact in this case. If not, please explain in detail why not. In addition, please provide a copy of all the pleadings or other documents from the case file that you believe indicate that Ms. Ellis' Title VII claims were not properly before

the Court.

RESPONSE:

I appreciate the opportunity to expand on my remarks at the hearing. In Ellis, the plaintiff's complaint consisted of four claims for relief–one federal and three state law claims. The plaintiff styled the federal law claim, "Discriminatory Discharge." While the plaintiff did not refer to Title VII explicitly, under the notice pleading standard, her complaint was sufficient to put the defendants on notice that she was filing under Title VII of the Civil Rights Act of 1964.

The court lacked subject matter jurisdiction to hear the plaintiff's Title VII claim because the plaintiff had not exhausted state remedies before filing her charge with the EEOC. Under Fourth Circuit precedent, an employee, in addition to obtaining a Right-to-Sue Letter from the EEOC, must first exhaust available state remedies where that state has legislation in place that prohibits the discrimination prohibited by Title VII. See Davis v. North Carolina Dept. of Correction, 48 F.3d 134 (4th Cir. 1995). The Davis Court recognized that North Carolina had such legislation in place. See N.C. Gen. Stat. § 126-16. North Carolina provided procedural mechanisms to allow a state employee who complained of discrimination in violation of Section 126-16 to obtain a final agency decision from the State Personnel Commission. See N.C. Gen. Stat. § 123-36. The plaintiff in Ellis never obtained that ruling, and accordingly, the District Court lacked subject matter jurisdiction over the claim. See 48 F.3d at 137. Because the defendants filed their Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1), the issue of the court's subject matter jurisdiction is discussed throughout the Order.

b. In your Order of Dismissal, you write that "Dorothea Dix," Facility Services" and the "Health and Human Services," which you defined as "separate and apart from DHHS," were not listed in Ellis's EEOC complaint and therefore the Court lacks subject matter jurisdiction over these parties. Yet you made no such ruling for the claims against DHHS or the State. Instead, you dismissed all of Ms. Ellis's claims against the State and DHHS on the grounds they were "entitled to sovereign immunity pursuant to the Eleventh Amendment to the United States Constitution." Your order created no exception to that immunity for the Title VII claim. In addition, the Fourth Circuit ruled that the Title VII claim could proceed against the State. The Title VII claim against the State then remanded to your court. If there had been no subject matter jurisdiction over the Title VII claim, would you not have ruled that none exists and dismissed the case on that basis? Yet, the docket sheet in the case shows that the Title VII claim continued until the case settled this year. Please explain in detail why you did not dismiss the Title VII claim on remand if you believed you lacked jurisdiction over it. In addition, please provide any documents from the case file that you believe show that the Fourth Circuit erred in ruling that you had dismissed Ms. Ellis' Title VII claims based on Eleventh Amendment immunity.

RESPONSE:

At the outset, let me say that I have attached copies of the plaintiff's complaint and the defendants' answer from this case. I am also including the defendant's memorandum in support

of their motion for summary judgment, which I hope will be helpful. Please note that the parties settled the case before the plaintiff filed a response to the defendant's motion for summary judgment.

As a trial judge, I am bound by the principle of "the law of the case," and when the case is returned to me from a reviewing court, I must follow the instructions and outcome determined by the reviewing court until such time as there is a subsequent ruling. There is no methodology for a trial judge to do other than obey the orders of a senior court. Of course, the parties are at liberty to make motions and otherwise take steps to examine the rulings of both the trial and the reviewing court. After the Ellis case was returned to the district court, I followed the accepted practice of scheduling further proceedings in the case. There was some period of time during which counsel for the plaintiff was allowed to withdraw and substitute counsel entered the case, all within the control of the plaintiff. Before the court was called upon to make any further legal rulings, to determine any further legal challenge, or to reconcile its opinion with that of the Fourth Circuit, the case was resolved by the entry of a voluntary dismissal with prejudice by the parties without involvement of the court. In sum, I never had occasion to revisit the Fourth Circuit's treatment of Ellis.

c. Were you mistaken when you testified that the Fourth Circuit was in error, and that there were no Title VII claims against the state in the case? If so, do you agree that the Fourth Circuit was correct in holding that you dismissed the Title VII claim on grounds of sovereign immunity in direct contradiction of the Supreme Court's 1976 clear holding in Fitzpatrick v. Bitzer? Please explain how, after twenty years on a court that considers several Title VII claims each year, you could possibly have dismissed a Title VII claim on the grounds that the State was immune from suit?

RESPONSE:

I did not dismiss the Ellis plaintiff's Title VII claim on sovereign immunity grounds. Instead, the Title VII claim was dismissed for lack of subject matter jurisdiction, pursuant to a Fed. R. Civ. P. 12(b)(1) motion, because the plaintiff had not properly availed herself of the North Carolina remedy already provided. Consequently, the district court was unable to hear the claim.

2. During your hearing, you testified about your decision in United States v. North Carolina, and you acknowledged that the issue before you in that case was whether or not to enter the consent decree between the Justice Department and the state of North Carolina to resolve a complaint of systemic discrimination against women. In that opinion you wrote that "[n]othing is more offensive to the idea of federalism than the notion that the Federal Government will punish a State for having a non-conforming culture, for being different than other States," although that view was irrelevant to the issue in the case. However, you testified that you now agree that a cultural defense to discrimination by any state would violate the most basic principles of equality enshrined in the Constitution and federal statutes.

Please explain why you included your views on "cultural" explanations for gender discrimination in your opinion in that case. Do you still believe it was appropriate

to do so?

RESPONSE:

Thank you for the opportunity to expand on my comments at the hearing. I would like to make clear to you, and the members of the Committee, that I believe there is no defense to unlawful discrimination, cultural or otherwise. In fact, when a valid complaint is brought, it is the role of the court to ensure that unlawful discrimination is not allowed to continue. My comments in United States v. North Carolina were not intended to suggest there is a "cultural defense" to discrimination claims. Rather, my statements were made as a critique of the ability of statistical data to fully capture all of the factors attendant to a disparate-impact discrimination claim. In other words, I was applying the rationale used by the Supreme Court in Craig v. Boren, 429 U.S. 190 (1976), to my case.

3. At your hearing, I asked you to explain why you stated in United States v. North Carolina, that the 1991 amendments to Title VII required specific intent of discrimination in all Title VII cases. As I noted during the hearing, the opposite is true - the 1991 Civil Rights Act codified the disparate impact standard of proof in Title VII cases, to make clear that proof of intent is not required in those cases. During the hearing, you admitted that under Title VII, "proof of disparate impact is not required," yet your decision in that case stated the opposite in great detail. Please explain how you could have made such a clear misstatement of the law?

RESPONSE:

I appreciate the opportunity to clarify my testimony. At the outset, let me note that I may have misspoken in response to your question at the hearing. When you asked about "discriminatory intent" I responded by making a statement about "disparate impact." I agree that discriminatory intent my be inferred from evidence of disparate impact in all Title VII cases. Let me also clarify that the opinion to which you refer was preliminary, subject to an order to show cause as to why the court had subject matter jurisdiction over the dispute. After additional briefing, I did hold that the court had subject matter jurisdiction. My opinion on the consent decree ultimately was not based on a disparate impact analysis.

4. You ruled in another case, Eric v. Causby, involving regulations implementing Title VI, that "There is no such thing as discrimination without intent." However, disparate impact analysis has been recognized in the context of Title VI as well as Title VII. Do you still think there is no such thing as discrimination without intent under Title VI?

RESPONSE:

Nowhere in the opinion in Erik V. v. Causby, a copy of which is attached, did I say "[t]here is no such thing as discrimination without intent." What is relevant and what was said at page ten is "while litigants under Title VI need only show the disparate impact of the challenged policy, Guardians Assoc. v. Civil Service Comm., 463 U.S. 582, 103 S.Ct. 3221, 77 L. Ed.2d 866 (1983), these plaintiffs have failed to make a prima facie showing that minorities suffer more harshly than others under Policy 842."

5. After you ruled that you lacked jurisdiction over the United States' consent decree in United States v. North Carolina, you wrote another opinion holding that you had jurisdiction over the case, but that you nonetheless would not enter the decree. Why did you choose to publish the first opinion, but not the second opinion correcting some of your original errors? What criteria do you use to determine which of your opinions will be published?

RESPONSE:

I do not specifically recall why some of the orders may have been published and others not published in this case. I do not have a fixed rule or criteria determining when an opinion is published.

Americans with Disabilities Act

1. In Brown v. North Carolina Division of Motor Vehicles, you ruled that Title II of the Americans with Disabilities Act ("ADA"), which seeks to remedy discrimination against persons with disabilities by government entities in the operation of public services, is not valid legislation under the Fourteenth Amendment. You stated in Brown that "Congress is outside of its Enforcement Clause authority in attempting to abrogate North Carolina's sovereign immunity with the ADA." Yet the Supreme Court held in Tennessee v. Lane that Title II is "unquestionably" valid legislation under the Fourteenth Amendment, at least as applied to cases involving access to courts and judicial services. In Lane, the Supreme Court also recognized that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."

During your hearing, you testified that you believed your decision in Brown "ends up being the law right now." Do you acknowledge that your decision in Brown conflicts with the Supreme Court opinion in Lane, and that Congress acted within its authority in passing the ADA? If not, please explain.

RESPONSE:

With all respect and deference, my opinion in Brown v. North Carolina Division of Motor Vehicles does not conflict with the Supreme Court's opinion in Tennessee v. Lane. In Brown, I held that the Eleventh Amendment bars private money damages actions for state violations of Title II of the ADA in a suit based solely on equal protection principles. Indeed, my analysis was adopted by the Supreme Court in Board of Trustees of Univ. of Ala. v. Garrett, where the Court held the Eleventh Amendment bars private money damages actions for state violations of Title I of the ADA, which prohibits employment discrimination against the disabled, in a suit based on equal protection principles. In contrast, the suit in Lane was not based entirely on equal protection principles, but instead implicated the fundamental right of access to the courts. In upholding the validity of Title II in such cases, the Court specifically left open the question whether Title II is a valid exercise of Congress' Section 5 power in other contexts.

2. At your hearing, I asked about your statements in Pierce v. King and Brown v. North Carolina Division of Motor Vehicles, in which you held that the ADA was different from other federal anti-discrimination laws because it demands "special treatment" for people with disabilities, whereas you state Title VII, for example, only demands "equal treatment." In Pierce you wrote that "[u]nlike traditional anti-discrimination laws, the ADA demands entitlement to achieve its goals. This the Fourteenth Amendment cannot authorize." As noted above, the Supreme Court rejected these views in Tennessee v. Lane. Please explain why you consider giving workers reasonable work-place accommodations to allow them to keep their jobs, or requiring a public courthouse to be wheelchair accessible so that no party before the court would need to crawl up the courthouse steps, to be "special treatment"? After reading the Lane decision, do you still stand by your decisions in Pierce and Brown?

RESPONSE:

The Supreme Court's opinion in Tennessee v. Lane applied the Due Process Clause of the Fourteenth Amendment to afford access to the courts and access to the criminal justice process to persons recognized under the ADA. The Supreme Court held that Section 5 of the Fourteenth Amendment provided a means for abrogating Eleventh Amendment immunity under these circumstances.

Unlike Tennessee v. Lane, the Brown case addresses an Equal Protection claim. Hence, there is no conflict between these cases. The ruling in Tennessee, while important, does not speak with finality to the rule in Brown. Likewise, Pierce v. King was a case grounded in a broad claim that could be placed only in Title I of the ADA because of the employment context. The ruling in Tennessee v. Lane does not speak to that issue.

3. In Pierce v. King, a prisoner sought accommodations that would have allowed him to participate in a work assignment for which inmates could receive "good time credit against the length of their sentence." You granted the defendants summary judgment, holding that the Commerce Clause did not give Congress authority to apply the ADA to state prisons because state prisons do not have a "substantial effect" on interstate commerce. You also claimed that the ADA could not be applied to state prisons because the ADA addresses employment issues and prisoners are not employees.

The Supreme Court vacated and remanded this holding in light of its unanimous opinion in the case of Pennsylvania Department of Corrections v. Yeskey, which held that "the plain text of Title II of the ADA unambiguously extends to state prison inmates." Although the Yesky case was decided after your opinion in Pierce, can you explain how you came to the conclusion that Title II of the ADA does not extend to state prison inmates when a 9-0 Supreme Court held that it clearly does?

RESPONSE:

The opinion of the Supreme Court was based solely on the statutory language and did not address other constitutional issues. Specifically, the Supreme Court in Yeskey did not address whether the application of the ADA to state prisons is valid under the Commerce Clause or

Section 5 of the Fourteenth Amendment because those arguments were not raised in the courts below. In contrast, in Pierce, a case of first impression in the Fourth Circuit, the Commerce Clause and Section 5 of the Fourteenth Amendment arguments were made before the trial court. It was therefore incumbent upon me to address them.

Voting Rights

1. I was troubled by your decision in Cannon v. North Carolina State Board of Education. In that case, white residents objected to the school board plan combining the City of Durham and Durham County, which created several minority voting districts. The case was assigned to another judge, but you issued a temporary restraining order blocking elections to the school board under the plan. You said that the white plaintiffs' "likelihood of success on the merits is exceptionally strong." You made that decision without even holding a hearing.

The judge originally assigned to the case, Judge Britt, later held a hearing and rejected your analysis. He found that the white plaintiffs had not even produced enough evidence to raise a factual dispute about their claims. The Fourth Circuit Court of Appeals agreed with Judge Britt's decision.

a. Blocking an election is an extraordinary remedy in any situation. It's troubling that you were so quick to grant the plaintiffs' request to halt the election with so little support. Why didn't you at least hold a hearing before taking the drastic step of enjoining the election?

RESPONSE:

Thank you for this question, Senator. I did not enjoin the election in the Cannon case. In the last paragraph of the opinion you have quoted from I stated "this Court will defer a present ruling on the motion for a temporary restraining order.". I did so because it appeared to me that the parties would be able to hold a hearing before Judge Britt.

b. Please explain in detail the basis on which you concluded that the plaintiffs' "likelihood of success on the merits is exceptionally strong." How could you reach this determination without holding a hearing to examine the facts?

RESPONSE:

In the Fourth Circuit, a district court must consider the following standards in any case involving a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied (2) the likelihood of harm to the defendant if the requested relief is granted (3) the likelihood the plaintiff will succeed on the merits, and (4) the public interest. The Fourth Circuit has also held that the "balance of harms" analysis should precede the likelihood of success on the merits. If the balance of harms tips in favor of the plaintiff, then he or she does not have to provide as much evidence of likelihood of success on the merits. Conversely, if the balance of hardships tips in favor of the defendant, then the plaintiff will have to make a strong showing of likelihood of success on the merits.

In conducting the balance of harms analysis in Cannon, I catalogued these legal standards in my opinion. I found that the balance of harms in that case favored the plaintiffs. I then stated "If the balance of hardships favors plaintiffs, their likelihood of success on the merits is exceptionally strong." In saying this, I was merely restating the standards of proof laid out by the Fourth Circuit. As I noted above, however, I did not grant the temporary restraining order.

2. The Senate questionnaire for judicial nominees asks for a list of all opinions in which a nominee has been reversed on appeal. In your 2003 Senate Questionnaire, your description of the Supreme Court's reversal of your second decision in Cromartie v. Hunt appears openly defiant of the Court. You wrote, "a majority of the Supreme Court substituted its determination of the facts and decided that based on the evidence, politics rather than race, was the predominate factor used by the state . . . ." [2003 Questionnaire, at 12]

As you know, it would be improper for the Supreme Court to "substitute its determination of the facts" for those of the district court. As I read the case, the Supreme Court ruled that you got the law wrong when you analyzed the facts - but it didn't substitute its factual determination for yours.

a. Do you believe that the Supreme Court acted improperly in the Cromartie case? If so, please explain your basis for that view. Please explain why you characterized the Supreme Court's second reversal of your decision as you did.

RESPONSE:

My description of the Supreme Court's decision in Cromartie was not intended to be critical. I do not believe that the Supreme Court acted improperly in deciding the Cromartie case. As the Court itself explained, "the issue in this case is evidentiary. We must determine whether there is adequate support for the District Court's key findings...." I am bound by the Supreme Court's decision and fully accept and recognize that.

b. Do you now accept that you misinterpreted the law in both your decisions in the Cromartie case reversed by the Supreme Court?

RESPONSE:

The members of the panel did our best to understand the facts and apply the law in that case. The majority opinion, which I wrote, was overruled by the Supreme Court, and I accept the Court's ruling.

Responses of Judge Terrence W. Boyle
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Follow-Up Questions of Senator Edward M. Kennedy

Unpublished Opinions

1. As you know, it is my desire to review all of your unpublished opinions in connection with your nomination. In order to expedite the process, as a first step, I ask that you provide the following immediately:

a. A list of your unpublished opinions and brief description of their subject matter;
b. All unpublished opinions that are available in electronic form;
c. All of your unpublished opinions that any appellate court has criticized, reversed, or upheld on other grounds, including all opinions listed as "reversals" in any of your Senate questionnaires and all opinions that you reviewed in responding to that questionnaire; and
d. All cases alleging statutory or constitutional claims for violations of civil rights.

When you have provided this first group of information, I ask that you then provide any remaining unpublished opinions.

RESPONSE:

In response to a request from Chairman Specter, I have provided the Committee with unpublished opinions.

Employment Discrimination

1. You have testified that the Fourth Circuit mis-interpreted your order in Ellis v. North Carolina when it ruled that you erroneously held that states are immune from employment discrimination suits under Title VII. You stated that you were shocked that the court of appeals misread your opinion. You testified that you did not dismiss the case because you believed that the state was immune from Title VII suits, but only because the plaintiff, Betty Ellis, "failed to file a claim with the administrative agency or with the [Equal Employment Opportunity Commission.]" In your answers to written questions, you acknowledged that Ms. Ellis actually did file a charge of discrimination with the EEOC, but stated that you lacked jurisdiction because she failed to also file a charge of discrimination with the proper state agency.

You three-page order dismissing all of the claims in Ellis did not mention plaintiff's failure to exhaust administrative remedies. The only statement in that order explaining why you dismissed the Title VII claims against the state and the North Carolina Department of Health and Human Services (DHHS) is as follows:

> **[T]he State and the DHHS, an agency of the State, are entitled to sovereign immunity pursuant to the Eleventh Amendment to the United States Constitution...**

Because the state has not waived such immunity, and because the DHHS performs necessary governmental functions, Ellis' claims against the State and the DHHS must be dismissed.

Given that this is the only explanation for your dismissal of the Title VII claims against the state and the state agency, do you agree that it was understandable for the Fourth Circuit to conclude that you dismissed these Title VII claims on sovereign immunity grounds? If not, please explain why not and identify any portions of your order or the record that would have identified this issue for the court of appeals.

RESPONSE:

At the time that I entered an order dismissing the plaintiff's claims on Rule 12(b)(1) subject matter jurisdiction grounds, I had before me the unopposed motion to dismiss and the unopposed brief in support of it, outlining and explaining the defendants' request for dismissal. The briefing made clear that the Title VII claim was subject to dismissal for failure of the plaintiff to exhaust. Further, the state substantive law claims were subject to an Eleventh Amendment defense by the state. I understood this to be the basis on which I was allowing the Rule 12(b)(1) motion. I cannot say whether the record that I examined was examined by the Fourth Circuit on appeal. The fact that the appeal was decided without oral argument may have prevented an opportunity for understanding this simple but important element of the case. With hindsight, I could have put in the opinion a categorical statement that the Eleventh Amendment dismissal specifically addressed only the state substantive law claims for which it was relevant.

2. In asking you to dismiss the Title VII claims in Ellis, the defendants filed a memorandum of law stating that Ms. Ellis filed a charge of discrimination with the EEOC that referenced state anti-discrimination law, and the EEOC referred her charge to thte North Carolina Office of Administrative Hearings for processing. The defendants argued that this referral did not cure the defect caused by Ms. Ellis' failure to file a charge directly with the proper state agency. In your answers to written questions, you have stated that under the Fourth Circuit's opinion in Davis v. North Carolina Department of Correction, the defendant was correct. Davis held that "where . . . a complainant steadfastly maintains that he has brought only a Title VII claim, and the state referral agency unequivocally addresses only that claim, proceedings under state law have not commenced for purposes of" Title VII. According to the defendant's factual description of the case, Davis woudl appear to differ from Ellis because, unlike the Davis plaintiff, Ms. Ellis allegedly referenced state law as well as Title VII in her complaint. Whether or not this difference is decisive, under Davis, the question of whether Ms. Ellis exhausted administrative remedies clearly depends on complex factual issues.

a. Please describe in detail how you obtained the facts necessary to determine that the defendants had accurately described the circumstances regarding Ms. Ellis' failure to exhaust administrative remedies? Aside from the defendants' motion to dismiss, did any documents in the case establish that Ms. Ellis had failed to exhaust state remedies? If so, please provide these materials and explain how they informed your reasoning in the case. If not, please explain why you did not seek additional

confirmation of the defendant's allegations.

RESPONSE:

The circumstances of the case were outlined by the defense in great detail in their briefing supporting their motion to dismiss. The plaintiff did not in any way challenge or object to the forecast of evidence presented by the defendants in support of their motion. The party opposing a motion has the duty to come forward with evidence and argument to dispute the contentions of the moving party, which in this case, the plaintiff failed to do.

b. To give the parties a clear explanation of legal decisions, and to facilitate appellate review, in cases involving multiple claims, trial court decisions usually address each claim separately. Given the complexity of the issue regarding exhaustion of remedies in this case, why did you make no mention of it in your order dismissing the case? Do you agree that you should have separately addressed that issue in your opinion, so that the parties would know the basis for your decision, and so the Fourth Circuit could consider the matter on appeal?

RESPONSE:

The unopposed motion to dismiss filed by the defense makes clear that there were multiple grounds under Federal Rule of Civil Procedure 12 for the dismissal of all of the claims and parties. The plaintiff made no filing in opposition to the motion. The order addressed the claims and their grounds for dismissal collectively and in summary fashion based on the arguments made in the defendants' motion to dismiss. The order corresponds to these multiple grounds for dismissal and summarizes the facts set forth in the dismissal brief. I understand that the record from the trial court would be available to an appellate court before it reached a decision on that trial court's opinion. The motion to dismiss and memorandum of law supporting it demonstrate that the court's order was consistent with a correct application of the rules of law as presented by the defense and without opposition from the plaintiff. I am not aware of whether the appellate court reviewed the record along with the order.

3. As part of the Committee's review of your nomination, you were asked to summarize appellate opinions in which your decisions had been reversed. In describing the Fourth Circuit's reversal of your decision in Ellis, you made no mention of the serious mistake you say the Fourth Circuit made in that case. Given that requiring a trial court to review claims over which it lacks jurisdiction is a very grave error, and that this case reflects on an important aspect of your decision-making, why didn't you bring this error to the Committee's attention?

RESPONSE:

The question to which you refer does not ask for critical comments on the decisions of the reviewing court.

Americans with Disabilities

1. In my previous written questions to you, I asked why you believe that ADA requirements for reasonable accommodations give persons with disabilities "special treatment" rather than equal opportunity and access. Although you generally addressed a related question regarding Tennessee v. Lane, you did not answer this question. Please explain in detail why you think the ADA impermissibly provides "special treatment" to the disabled.

RESPONSE:

I do not believe that the ADA impermissibly provides special treatment to the disabled. I am committed to applying all laws that are constitutional, including the ADA, which provides equal opportunity and access for the disabled.

Responses of Judge Terrence W. Boyle
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Patrick Leahy

1. As I explained at your hearing, I was surprised to see that when you sent the Committee an updated questionnaire a few weeks ago, you reported fewer than half of the over 142 reversals, partial reversals or affirmances with criticism you had reported in 2001 and 2003, and only a third of the 150 we have found. At your hearing you said, "I didn't include those that appeared to be cases of not significant comment on the law or procedure." I'm attaching a list of the 82 cases that you left out that I believe are still responsive to question 15(2) of the questionnaire. Please tell me specifically for each case listed why you think what the appellate court writes is not either a reversal or an affirmance with significant criticism of your substantive or procedural rulings. If your answer for a particular case is that the Fourth Circuit "vacated," "remanded with instructions," or used some other term of art to order you to correct some error, please tell me why you believe it should not be included in response to a question that is asking you to report cases in which you made a legal error (including errors of legal procedure).

RESPONSE:

I appreciate the opportunity to clarify my response to Question 15(2) of the Questionnaire. As I noted in the addendum that I submitted to the Committee regarding the response to this question, while my nomination was pending, it became apparent to me that my initial response was misunderstood. It was not the case that all of the cases I cited were reversed. With the understanding that the Committee has my original Questionnaire, and all subsequent updates, I attempted to separate those cases that were reversed and to list separately those that were reversed and remanded and had other adverse disposition. It was at all times my understanding that my original Questionnaire continued to be part of my record with the Committee and that I had periodically provided updates to that Questionnaire.

With respect to each case, a careful reading of the question, when compared to the case, revealed there was not significant precedential value, in my opinion. While the cases are not straight affirmances, they did not in my opinion present a substantial criticism of the substance or procedure in the trial court's ruling. And the statement by the appellate court of the standard of review in an opinion is simply that, and is not, standing alone, a substantial criticism, in my opinion.

Sentencing Issues:

U.S. v. Garrison, 81 F.3d 152 (1996) (Remanded to address objections to the sentencing guidelines)

U.S. v. Myers, 66 F.3d 1364 (1995) (Upward sentencing departure vacated and remanded for re-sentencing)

U.S. v. Smith, 62 F.3d 641 (1995) (Remand to resentence without obstruction of justice

enhancement)

U.S. v. Harrison, 37 F.3d 133 (1994) (Remanded for re-sentencing under guidelines)

U.S. v. Ortega, 28 F.3d 1211 (1994) (Motion to reduce sentence denied in trial court. Remanded by Court of Appeals to modify sentence based on change in sentencing guidelines)

U.S. v. Livingston, 21 F.3d 426 (1994) (Bank robbery conviction affirmed. Remanded for re-sentencing under guidelines without enhancement. District court had enhanced sentence on the basis of an improper recommendation in the pre-sentence report)

U.S. v. Gary, 18 F.3d 1123 (1994) (Remanded for re-sentencing to modify upward departure)

U.S. v. Lanza-Chan, 985 F.2d 554 (1993) (Remanded for re-sentencing)

U.S. v. Midgett, 972 F.3d 64 (1992) (Remanded for re-sentencing)

U.S. v. Talbott, 902 F.2d 1129 (1990) (Remanded for re-sentencing and reapplication of the guidelines with respect to multiple-count convictions and career criminal status.)

U.S. v. Barry, 50 Fed. Appx. 133 (2002) (Court needed to give notice of intent to upwardly depart prior to doing so)

U.S. v. Anderson, 48 Fed. Appx. 450 (2002) (Court imposed a sentence of 20 years. Court of Appeals determined that Apprendi did not apply to the case, and that defendant could be sentenced for up to 30 years)

U.S. v. Phalan, 39 Fed. Appx. 6 (2002) (Remanded for re-sentencing)

U.S. v. Williams, 25 Fed. Appx. 175 (2002) (Remanded for re-sentencing because the district court applied both the misrepresentation and abuse of trust adjustments to defendant's sentence.)

U.S. v. Anderson, 215 F.3d 1321 (2000) (Sentencing enhancement for a subsequent state drug conviction vacated.)

U.S. v. Genao, 213 F.3d 633 (2000) (Remanded to adjust sentence for prior conviction under sentencing guidelines)

U.S. v. Talley, 202 F.3d 262 (1999) (Remanded for additional fact-finding on relevant conduct under sentencing guidelines)

U.S. v. Brown, 181 F.3d 92 (1999) (Remand for re-sentencing of criminal defendant in order to enforce terms of plea agreement against government.)

U.S. v. Oechsle, 100 F.3d 951 (1996) (Jury conviction in attempted murder case affirmed. Remanded to resentence following upward departure from guidelines)

U.S. v. Normil, 129 F.3d 1261 (1997) (remanded for re-sentencing)

U.S. v. King, 119 F.3d 290 (1997) (remanded for re-sentencing)

Procedural Issues:

U.S. v. Vick, 164 F.3d 627 (1998) (Habeas petition remanded for factual determination of date when it was delivered to prison officials)

U.S. v. Williams, 175 F.3d 1018 (1999) (Habeas petition remanded for notice to petitioner of summary judgment review)

U.S. v. Sherrill, 33 Fed. Appx. 90 (2002) (Case remanded so that district court could make a factual finding of whether excusable neglect or good cause warranted an extension of the sixty-day appeal period.)

U.S. v. Privott, 31 Fed. Appx. 294 (2002) (Court of Appeals remanded to the trial court to take evidence as to whether or not defendant had made a request for an appeal. At that hearing, the defendant again admitted that he had not requested his lawyer to appeal and that he had affirmatively waived his rights to appeal.)

U.S. v. Swann, 21 Fed. Appx. 138 (2001) (District court failed to give defendant notice that plaintiff's motion for judgment on the pleadings was actually a motion for summary judgment.)

U.S. v. Robards, 1 Fed. Appx. 110 (2001) (Same issue as Privott)

U.S. v. Kearney, 217 F.3d 842 (2000) (Dismissal of habeas claim vacated because district court incorrectly used the wrong date as the date when the conviction became final.)

Whiting v. Ski's Auto World Paint and Body Shop, Inc., 194 F.3d 1307 (1999) (One of plaintiff's claims was remanded for consideration of timeliness)

U.S. v. Vick, 191 F.3d 449 (1999) (Habeas petition held to be timely filed. Remanded for review on the merits)

Abdussamadi v. Vandiford, 187 F.3d 628 (1999) (Habeas petition remanded because petitioner not given notice and opportunity to respond to summary judgment)

Harley v. Warren County Dept of Soc. Serv., 172 F.3d 863 (1999) (Remanded to reconsider *pro se* parties' late filing of right to sue letter in Title VII cases)

U.S. v. Marshburn, 166. F.3d 335 (1998) (Habeas petition held not to be time-barred when it was dated within one year of the enactment of AEDPA)

Tucker v. Cheran, 45 F.3d 427 (1994) (District court denied Tucker's motion for leave to file a complaint, pursuant to a pre-filing injunction that had been entered in the district. Court of Appeals held in prior case that pre-filing injunction did not apply. Remanded for review)

Tucker v. Grimes, 23 F.3d 403 (1994) (District court denied Tucker's motion for leave to file a complaint, pursuant to a pre-filing injunction that had been entered in the district. Court of Appeals held in prior case that pre-filing injunction did not apply. Remanded for review)
Tucker v. Seiber, 17 F.3d 1434 (1994) (District court denied Tucker's motion for leave to file a complaint, pursuant to a pre-filing injunction that had been entered in the district. Court of Appeals in prior case that pre-filing injunction did not apply. Remanded for review)

U.S. v. Parker, 103 F.3d 122 (1996) (Habeas petition dismissed in district court as moot because prisoner was released on his own recognizance pending resolution of his appeal. Court of Appeals found that prisoner was still in custody even though he was released, and therefore, his habeas motion was ripe for adjudication)

U.S. v. Talbott, 92 F.3d 1184 (1996) (District court denied habeas claim. Remanded for reinstatement of appellate rights because prisoner had not been informed of his appellate rights at re-sentencing)

U.S. v. Kautz, 46 F.3d 1128 (1995) (Habeas petition remanded to compute time under joint federal and state statutes)

U.S. v. Hubbard, 162 F.3d 1157 (1998) (Habeas petition held not to be time-barred under AEDPA because the government did not make a particularized showing that it was prejudiced by the delay in filing)

Bullard v. Chavis, 153 F.3d 719 (1998) (Habeas petition held not subject to new requirements of AEDPA when petition was filed before effective date of AEDPA)

U.S. v. Williams, 110 F.3d 62 (1997) (Dismissal of habeas case while case on direct appeal held premature)

Canady v. Crestar Mortgage Co., 109 F.3d 969 (1997) (Remanded to assess interest in claims by junior lien holder)

Civil Cases:

Godon v. North Carolina Crime Control & Public Safety, 238 F.3d 412 (2000) (Section 1983

claim remanded to allow claims against individual defendants. Affirmed as to state defendants.)

Ward v. Allied Van Lines, Inc., 231 F.3d 135 (2000) (District court denied partial setoff on claim based on prior settlement. Setoff was allowed by Court of Appeals.)

Cline v. Binder, 187 F.3d 628 (1999) (Remanded to consider state law claims)

Beach v. Wake County Public School System, 176 F.3d 475 (1999) (Plaintiff failed to provide right-to-sure letter to district court. In his informal brief to the Court of Appeals, the plaintiff produced his right-to-sure letter for the first time. Case was remanded for further proceedings.)

Lambert v. Williams, 168 F.3d 482 (1998) (One section 1983 claim was not barred by *res judicata* because it was not ripe when the action was commenced)

Hayes v. Grimmer, 103 F.3d 117 (1996) (Summary judgment of prisoner's claim remanded because district court failed to consider responses to magistrate's recommendation)

Pierce v. Jones, 73 F.3d 358 (1996) (Remanded to review objections by plaintiff to magistrate's summary judgment recommendation)

Rowell v. G.E. Credit Corp., 932 F.2d 963 (1991) (Court of appeals remanded for further enunciation of the reasons for the amount of Rule 11 sanction awarded)

Stevens v. Lawyers Mutual, 789 F.2d 1056 (1986) (Court of Appeals held that the imposition of sanctions against plaintiff's counsel as being inappropriate under an objective standard test of the reasonableness of the plaintiff's claims)

Criminal Cases:

U.S. v. Tanner, 43 Fed. Appx. 724 (2002) (Habeas petition remanded for further consideration of petitioner's claims.)

U.S. v. Privott, 10 Fed. Appx. 49 (2001) (Remanded because district court failed to make factual findings as to the reasoning behind the denial of petitioner's habeas petition)

U.S. v. Adams, 19 Fed. Appx. 33 (2001) (Conviction for criminal infringement of a copyright upheld. Restitution and foreclosure of benefits vacated.)

U.S. v. Anderson, 238 F.3d 415 (2000) (Certificate of appealability allowed on claims that Brady material was not provided. A reasonable jurist could find it debatable whether the prosecution failed to disclose impeachment evidence.)

Cottle v. Bell, 229 F.3d 1142 (2000) (Frivolity determination on prisoner claim held not

duplicative of prior claim.)

U.S. v. Nagy, 201 F.3d 438 (2000) (District court denied inmate's motion to discontinue medication on the basis of collateral estoppel. Fourth Circuit held that prior hearing on this issue did not serve as a bar because the core issues were not identical.)

U.S. v. Alston, 91 F.3d 134 (1996) (Habeas petition remanded to review ineffective assistance of counsel claim where counsel failed to appeal and object to pre-sentence report as instructed by the defendant)

Clemonts v. West, 86 F.3d 1149 (1996) (Frivolity determination in prisoner case vacated and remanded for further review)

U.S. v. Alexander, 50 F.3d 8 (1995) (Guilty plea withdrawn on appeal remanding drug conviction for further proceedings)

Fuller v. White, 46 F.3d 1123 (1995) (Dismissal of excessive force claims affirmed. One defendant remanded for further factual development)

U.S. v. Wittek, 16 F.3d 414 (1994) (Bribery conviction set aside on the basis that lay testimony had been improperly admitted)

U.S. v. Coppins, 953 F.2d 86 (1991) (Misdemeanor assault conviction appealed. Vacated on ruling that multiple charges needed to be aggregated for jury trial entitlement)

U.S. v. Williams, 934 F.2d 320 (1991) (Case was remanded for answer by the government on petitioner's double jeopardy clause claims arising from his conviction for both bank robbery and possession of stolen funds)

Rogers v. Lee, 922 F.2d 836 (1991) (Habeas petition remanded for consideration of Batson claims in state court)

U.S. v. Arrington, 153 F.3d 722 (1998) (Habeas petition remanded for review in light of the Supreme Court's Bailey opinion to determine whether the firearm enhancement under 18 U.S.C. 924(c) applies)

U.S. v. Floris, 155 F.3d 562 (1998) (Habeas petition remanded to determine whether ineffective assistance of counsel applied when the appellate counsel failed to challenge the district court's failure to inform the defendant of the appropriate term of supervised release)

U.S. v. Wilson, 135 F.3d 291 (1998) (Remanded defendant's drug conviction for retrial based on improper closing argument by U.S. Attorney)

U.S. v. Corbett, 133 F.3d 917 (1998) (Remanded for further factual findings on restitution)

Williams v. Baloch, 133 F.3d 920 (1997) (Case was remanded to district court for determination of inmate's residence for diversity jurisdiction purposes.)

Not written at time of 2003 questionnaire:

Federal Election Commission v. Beaumont, 123 S.Ct. 2200 (2003)
U.S. v. Johnson, 79 Fed. Appx. 611 (2003)
U.S. v. Bivens, 85 Fed. Appx. 945 (2004)
Moore v. Bennette, 97 Fed. Appx. 405 (2004)
U.S. v. Gonzalez, 97 Fed. Appx. 447 (2004)
Gutierrez Depineres v. Scott, 101 Fed. Appx. 402 (2004)
U.S. v. McCrae, 103 Fed. Appx. 505 (2004)
U.S. v. Hawkins, 104 Fed. Appx. 321 (2004)
U.S. v. Ruffin, 2004 WL 2810175 (2004)
In re Matthews, 2005 WL 159610 (2005)
Cortez v. U.S., 82 Fed. Appx. 315 (2003)

2. At your hearing there was some discussion of your reversal rate, and the difference between the sorts of cases counted by the Administrative Office of the U.S. Courts (AO) as "reversed" and the sorts of cases that are responsive to question 15(2) on the Senate Judiciary Committee questionnaire. I know that difference affects whether we can say that under the AO's standards you have reversal rate of 12.5% or 7.6%. But, putting that question aside, I still think the number of times you have been other than affirmed is quite high for a district court judge. In fact, you have the highest number of those cases per year by far than any federal district court judge President Bush has nominated for elevation to an appellate court. At your hearing you said, "I really can't give you any sort of justification about the reversals. The reversals are there and I will just have to address those." Please address your high number of reversals now. Do you take any responsibility for making so many errors of law over the years?

RESPONSE:

I have done my best as a trial judge to take each and every case that I hear, whether it is on a record or in open court during a trial or hearing, and examine the facts as they are presented in the case and then address the law as I understand it and as it is presented to me by the parties. Each case is unique and separate. The facts are different in every case. I have made a sincere effort to decide each case on the facts and law as these were presented in the case and to fairly administer justice. I certainly take responsibility for every decision I have made over the past 20 years that I have served as a trial judge. I believe that the reversal rate is within the norm for active trial judges hearing a wide range of cases, and is not in any way out of line with the federal trial bench at large.

3. At your hearing I asked you about a case called United States v. Privott, 31 Fed. Appx. 294 (4th Cir. 2002). You said you knew about the case and would be glad to explain it to me, but unfortunately we ran out of time before you got to talk about it. I cited it as an example of a case you had not included in your most recent questionnaire under question 15(2), and asked you to explain why not. This was among the many cases I think should have been included because the court says that you rejected a claim ineffective assistance of counsel, and that your, "finding was erroneous . . . under this court's decision in United States v. Peak, 992 F.2d 39, 42 (4th Cir. 1993)." Can you explain why a case where the Fourth Circuit vacated your ruling and remanded with instructions for you to confirm your ruling to a then nine year-old precedent was left out of your answer?

RESPONSE:

The Privott case involved a person charged with drug trafficking who pled guilty at a Rule 11 proceeding, entered into a formal plea agreement with the government, and affirmatively waived both his right to appeal and his right to contest the conviction in post-conviction proceedings. The defendant was later sentenced and acknowledged that his appellate rights had been intentionally waived. The case was affirmed on appeal. Later, the defendant attempted to claim that he had asked his lawyer to appeal. This claim was not only time-barred but barred by his waiver of appeal. The Court of Appeals decided that the matter should be revisited by the trial court to take evidence as to whether or not he had made a request for an appeal. That hearing was held, and at that hearing, the defendant again admitted that he had not requested his lawyer to appeal and that he had affirmatively waived his rights to appeal.

4. I also asked you about U.S. v. Barry, 50 Fed. Appx. 133 (4th Cir. 2002), where the Fourth Circuit wrote that, "the Court's departure constitutes error that was plain...;" U.S. v. Tanner, 43 Fed. Appx. 724 (4th Cir. 2002), where the appellate court criticized you and held that, "the district court abused its discretion. . .;" U. S. v. Sherrill, 33 Fed. Appx. 90 (4th Cir. 2002), where the appellate judges remanded the case because you failed to make factual findings in accordance with clear precedent; and U.S. v. Phalan, 39 Fed. Appx. 6 (4th Cir. 2002), where the defendant's sentence was vacated because the sentence exceeded the federal statutory maximum, a clear error of law. You didn't get an opportunity to address any of these cases at the hearing either. Can you please explain why these cases were not included in your list under question 15(2)?

RESPONSE:

United States v. Barry was a sentencing after a jury conviction in a car jacking case. At sentencing, the defendant was put on notice of the possibility for an upward departure, to which he did not object. Further, he did not object to proceeding with a sentencing hearing. On appeal, the Court of Appeals held that the sentencing should have been continued to a later time in order to provide more notice. Rehearing was held, and the defendant was sentenced. The comment on "plain error" was a standard of review The Fourth Circuit treated it as an unpublished, per curiam opinion.

In the case of United States v. Tanner, the defendant was convicted and sentenced in the district court, and his conviction and sentence were affirmed by the Court of Appeals. However, while the appeal was pending, the defendant filed an undenominated "motion to correct the sentence", which he could not do in the trial court. The district court construed that as a motion for habeas relief under 28 U.S.C. § 2255 and denied it. He later filed a successive habeas petition under Section 2255 which was dismissed as successive and, therefore, not having jurisdiction in the trial court. He later moved under Rule 60(b) to reconsider the dismissal of the successive Section 2255 motion. That ruling is the subject of the appeal. Without commenting on the merits of the case, the Court of Appeals returned it to the trial court to determine whether there was procedural bar to a second or successive habeas motion. This case was not included because it had no precedential effect, and the Court of Appeals noted that U.S. v. Emmanuel, 288 F.3d 644 (4th Cir. 2002) was not available to the court at the time of its decision in Tanner.

In United States v. Sherrill, the defendant, after being convicted and sentenced, made a habeas petition under 28 U.S.C. § 2255, which was denied and he then requested reconsideration. He later allowed the time for appeal to expire, which is 60 days. He made a notice of appeal on the 87th day and moved for an extension of time. The Court of Appeals remanded the case only on the issue of whether his late filing was excusable during the 30 day post-deadline time period for an extension and asked the court to make a finding of fact as to whether there was any excusable neglect. This case was not included because it had no precedential effect.

In United States v. Phalan, the defendant was convicted of indecent exposure by willfully exposing his private parts in a public place, the national seashore, to a person of the opposite sex. He was sentenced to a $75.00 fine, community service, and two years of probation. At sentencing, the court was advised by the government that the probationary term could be two years, later, on appeal, the government recognized that only one year of probation could be allowed since this was an assimilated crime from the North Carolina General Statutes. The case was sent back for re-sentencing to reduce probation from two years to one year. The case was not of precedential significance and was not included in the answer to question 15(2).

5. When I look at another question from the questionnaire which asks you to list "significant opinions on federal or state constitutional issues," I see you have left cases off of that list as well. In 2001 and 2003 you listed nine cases, including some of the most controversial in your career. In the most recent version, you list only five cases, and only one of those was included on the previous list. For example, the first two times around you listed the case of Cromartie v. Hunt, 34 F. Supp. 2d 1029 (E.D.N.C. 1998), a case about a significant federal constitutional issue - voting rights -- in which the Supreme Court reversed you twice, one time by a vote of 9-0. The most recent questionnaire response leaves that out. (A) Why did you omit so many constitutional cases this time around? (B) Why in particular did you think Cromartie v. Hunt was no longer a significant opinion about a constitutional issue?

RESPONSE:

Over the course of my service as a district judge, I have had the occasion to rule on a number of cases with constitutional issues involved, and I thought that a wider selection of cases would be appropriate in subsequent responses to this question. Cromartie v. Hunt was included in previous questionnaires, and I therefore expected that the Committee was already aware of the case.

6. Question 16 on the questionnaire asks you to list any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. In 1984, when you were nominated for you district court seat you listed many more public offices than in 2001, 2003 or 2005. In 1984 you listed a number of partisan political offices you held, but not in the later versions. Why did you leave those out?

RESPONSE:

As I understand question 16, it refers to "public offices," and since May 1984, I have been a district judge and not held any other public office. Those political activities ante-dated my judicial service and were not governmental offices and were therefore not responsive to the question.

7. In every version of your questionnaire responses you listed your membership on the board of directors of an organization called the "Educational Foundation, Inc.," which is a sort of booster club for some of the athletic teams at the University of North Carolina. Only it turns out that was an error, and you weren't on the board of that organization. But you were a founding board member of something called the "Educational Support Foundation, Inc.," which was a partisan political group whose activities, including during your time on its board, were the subject of a investigation by the Federal Election Commission and were found to violate federal election law. The main complaint was that a political marketing firm owned entirely by the Educational Support Foundation was making illegal campaign contributions to political candidates and political organizations. Please tell us what you know about the Educational Support Foundation, its founding, its ownership of Jefferson Marketing, your activities as a Board Member, and its improper campaign activities and your involvement in any improper activities.

RESPONSE:

I am listed as a director of "Educational Support Foundation" during a six month period in 1983. I had nothing to do with its founding or activities. I resigned from that entity prior to being nominated to the District Court in 1984 and have no contact with or information regarding it.

8. When I asked you to explain the significant opposition to your confirmation by Southern and national police organizations, you replied that you "think that the comments by these PBA organizations all arise out of a single case in which a police officer was working part-

time at night and was disciplined." In fact, one of the leading opponents to your nomination, the North Carolina Police Benevolent Association, lists seven cases other than Edwards v. City of Goldsboro, 178 F.3d 231 (Kirby v. Elizabeth City, No. 2:01-CV-46-B03; Gravitte v. N.C. Division of Motor Vehicles, No. 5:00-CV-845-B02; Godon v. N.C. Dept. of Crime Control, 141 F.3d 1158 (4th Cir. 1998); Burns v. Brinkley, 933 F. Supp. 528 (E.D. N.C. 1996); U.S. v. North Carolina, 180 F.3d 574 (4th Cir. 1999); Morrash v. Strobel, 842 F.2d 64 (4th Cir. 1987); and Piver v. Pender Board of Education, 835 F.2d 1076 (4th Cir. 1987)), as evidence of their belief that you have committed "repeated legal errors," and that your "rulings have severely harmed our members, their families, the law enforcement profession and the public." Given that their opposition is based on a pattern, not just one case about which some officers may have disagreed with you, how do you explain the opposition of so many police organizations, groups which are not known for their opposition to President Bush's judicial nominees?

RESPONSE:

I appreciate the opportunity to address these cases and the issue. I believe that a fair examination of the record demonstrates that I apply the law to the best of my ability in all cases that come before me. With respect to several of the cases you reference, I was affirmed unanimously by the Fourth Circuit in Kirby v. Elizabeth City and Gravitte v. North Carolina Division of Motor Vehicles. In Morrash v. Strobel, I wrote the opinion for a unanimous Fourth Circuit Court of Appeals panel. In Burns v. Brinkley, no appeal of my decision was taken. In each of the cases cited I applied the law to the facts without regard to the identities of the parties.

9. In the case of Piver v. Pender County Board of Education, 835 F.2d 1075 (4th Cir. 1987), you ruled against a high school teacher who was retaliated against for voicing his support for tenure for the principal at his school. He was reassigned by the Board of Education to a school 40 miles from his home, and then given the chance to regain his original teaching assignment as long as he signed a statement pledging support for the new principal and the Board of Education. You ruled that his speech was not a matter of public concern, and was not protected by the First Amendment. The Fourth Circuit criticized your reasoning and reversed you, showing quite clearly that Supreme Court and Circuit Court precedent held that the teacher's speech was exactly the sort the should receive constitutional protection.

A few years later in Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999), you made a similar ruling, finding that a police officer who suspended for teaching a class on firearm safety had not stated a claim for the infringement of his free speech rights because his speech was not on a matter of public concern. The Fourth Circuit reversed you here as well, and on the same grounds. They found that this officer was prohibited from exercising his rights to free speech simply because his supervisor made a policy based on his personal political disagreements with a state law that required firearm safety classes for those carrying concealed weapons.

In Godon v. North Carolina, 141 F.3d 1158 (4th Cir. 1998), you did it again. In that case, an employee of a state-run boot camp for young people sued the state, saying she was fired for complaining about discriminatory treatment of the female and black young people at the boot camp. You were reversed twice by the appellate court for dismissing her First Amendment free speech claims. You seemed pretty anxious to throw her lawsuit out, and the circuit court criticized the standard you used to rule that her case could not go forward. Just as in the other two cases, you said the things she was complaining about were not matters of public concern.

Why is this a point of law that you keep getting wrong? And why are you reluctant to let public employees, including police officers, speak their minds?

RESPONSE:

As you note, all of the cases you reference involve public employees. The Fourth Circuit has held that the government, in its capacity as an employer, has greater authority to restrict the speech of its employees than it has to restrict the speech of citizens in its capacity as a sovereign. See Urofsky v. Gilmore, 216 F.3d 401, 406 (4th Cir. 2000). The applicable test is whether the speech addresses a matter of public concern and is a question of law for the court. The Supreme Court and the appellate courts have consistently held that the line between public and private speech is a case-specific issue. Where that line is imprecise and where there is a substantial proffer of evidence that the speech is private rather than public, the trial court has the obligation to make difficult decisions applying the law.

10. You ruled in the case of Pierce v. King, 918 F. Supp. 932 (E.D.N.C. 1996), aff'd, 131 F.3d 136 (4th Cir. 1997), vacated by 525 U.S. 802 (1998), that the Americans with Disabilities Act did not apply to State prisons. This position was later rejected in a different case by a unanimous Supreme Court, which found that the plain language of the ADA made it applicable in this context. In your opinion, you wrote that you "very much doubt[ed]" whether the rights vindicated by the ADA were "rooted in the Fourteenth Amendment." You went on to compare the ADA unfavorably to Title VII of the Civil Rights Act, and other civil rights laws, and to write that the Act's provisions "demand not equal treatment, but special treatment." (A) Do you still believe that the ADA is a statute demanding not equality but "special" rights for disabled Americans? (B) Do you believe that employers should be entitled to Takings Clause compensation for accommodations they make under the ADA, which you went out of your way in this opinion to suggest was an open question?

RESPONSE:

The ADA demands equality of access for those who are disabled, it is the law of the land, and I do my best in every case to apply it properly.

Employers have the affirmative obligation under the ADA to make reasonable accommodations for their employees who are protected under the Act. In acknowledging that, at

that time, no court in the Circuit had addressed the relationship between the affirmative obligations placed on employers by the Act and the Takings Clause of the Fifth Amendment, I had no need to develop the opinion on that issue. Because the issue has not been raised subsequently by any party before me, I have never had occasion to reconsider it.

11. In the case of Williams v. Avnet, 910 F. Supp. 1124 (E.D.N.C. 1995), you granted summary judgment for a defendant in an Americans with Disabilities Act case who had refused to reassign plaintiff, who suffered injuries in an accident that prevented her from performing her old job, to one of several vacancies with her employer. In your ruling, you wrote that "[i]f the proposed accommodation is not obviously reasonable, or if the reasonableness of the proposed accommodation is a matter of some serious dispute, *courts should defer to employer's business expertise.*" You also wrote that an accommodation that would force other employees "even simply [to] change their routines" would be "clearly unreasonable as a matter of law," and rejected the specific examples of reasonable accommodation that were listed in the text of the ADA, finding that they had no force of law. Although the Fourth Circuit upheld your decision, it found that you had thoroughly misinterpreted the ADA. It said that your evaluation of "reasonable accommodation" was "misguided," and found that the standard of reasonableness cannot possibly include only the employer's opinion, and that your analysis concluding the opposite was "particularly inappropriate in the summary judgment context." The Fourth Circuit panel also criticized you for dismissing the language of the ADA itself. (A) Do you still believe that the ADA should be interpreted to allow for only those accommodations that are in accord with employers' "business expertise?" (B) Combined with your ruling in Pierce v. King, in which you characterized the ADA as demanding "special treatment" for the disabled, this Committee could easily draw the conclusion that you are hostile to the Americans with Disabilities Act, which passed the Congress by overwhelming majorities and was signed into law by a strongly supportive President George H.W. Bush. Would we be wrong to draw that conclusion?

RESPONSE:

I appreciate this opportunity to address my rulings. I do not believe that my opinion ever indicated that the ADA should be interpreted solely to allow for "only those accommodations" that are in accord with employers' "business expertise." As the Fourth Circuit held, the determination of reasonableness in this context is an objective standard. Williams at 350.

As a judge, I am not hostile to any laws or statutes. My job is to apply the law and not make policy.

12. In answer to Senator Kennedy's questions about the hostility you have displayed toward equal rights for persons with disabilities, you said, "I am committed to enforcing the rights of the disabled and the rights of the Americans with Disabilities Act." How can you reassure the Senate that you are not just speaking in platitudes like these when you

answer our questions about the ADA, and that the gratuitous negative statements you go out of your way to make about the ADA do not reflect the way you would rule on an ADA case?

RESPONSE:

I have been sincere in all of my responses to the Committee and I am committed to enforcing all laws that are constitutional, including the Americans with Disabilities Act. All of my rulings are based on the facts and the law in the individual case. I recently presided over a case brought by the United States Department of Justice against the operators of a commercial residential real estate property in order to enforce the rights of the disabled to fair access to housing, U.S. v. Quality Built. I ruled in favor of the government. A copy of the case is provided.

13. In Cromartie v. Hunt, (Cromartie I), 34 F. Supp. 2d 1029 (E.D.N.C. 1998), rev'd, 526 U.S. 541 (1999), (Cromartie II), 133 F. Supp. 2d 407 (E.D.N.C. 2000), rev'd, 532 U.S. 234 (2001), you ruled twice in favor of white voters who challenged North Carolina's 1997 redistricting as violating the Equal Protection Clause by drawing boundaries based on race. Both times, you were reversed by the Supreme Court, unanimously on one occasion. I am concerned in these cases both by your haste and by your failure to take direction from the Supreme Court. In your first ruling, you granted summary judgment before any discovery occurred and over the dissent of Judge Sam Ervin. Justice Thomas, writing for a unanimous Court, found that there were disputed factual issues concerning the North Carolina General Assembly's motivation that prevented the entering of summary judgment. (A) Do you agree that your decision to grant summary judgment was premature? (B) Why did you believe that white plaintiffs' claims of discrimination were so obviously valid that no evidence could persuade you otherwise?

RESPONSE:

The Supreme Court deemed summary judgment inappropriate, and I abide by and respect that decision. Under Fed. R. Civ. P. 56, the standard for summary judgment requires that, in order for a motion for summary judgment to be granted, there exist no genuine issue of material fact and the moving party be entitled to a judgment as a matter of law. In the case you have asked about, it was not that the three-judge court believed "no evidence could persuade [it] otherwise." Rather, the three-judge court's reading of the facts and the law in the case convinced it that there simply was not a material issue of fact. Both the majority and dissent agreed that summary judgment was appropriate. That being the three judge-court's interpretation, the majority found that the moving party was entitled to a judgment as a matter of law.

When the case was remanded to you, you again authored a 2-1 decision that found in favor of the white plaintiffs after discovery and a trial. Justice Breyer, writing for the Supreme Court majority reversing your decision, argued that you based your determination largely on the same findings that the Court had found insufficient to support summary judgment, and that much of the additional evidence Judge Boyle had cited was "precisely the kind of

evidence that we said was inadequate the last time this case was before us." (C) Do you agree with Justice Breyer's characterization that you relied on evidence that the Supreme Court had already said was inadequate?

RESPONSE:

The Supreme Court is always the final arbiter of lower court opinions. The three-judge court came to a decision with which a majority of the Supreme Court, in an opinion by Justice Breyer, disagreed. Its opinion controls and is the law of the land.

14. In U.S. v. North Carolina, 180 F.3d 574 (4th Cir. 1999), you refused to approve a settlement between the Justice Department and North Carolina that required the state to recruit and hire female applicants for correctional facilities and to compensate women who had suffered from past discrimination. Initially, you ordered the U.S. to show cause that you even had subject matter jurisdiction over the dispute, meanwhile encouraging North Carolina to withdraw from the settlement. Although you eventually found that you had jurisdiction, you refused to approve the settlement because the state had taken your advice and sought to withdraw from it. You were reversed on appeal. In the course of the proceedings, you expressed skepticism about the use of statistics to show gender discrimination, arguing that they might simply show a difference in "culture" among the states. (A) Do you believe that there is a culture in the states of the Fourth Circuit that explains away facially discriminatory data suggesting gender discrimination? (B) How would you define that culture? (C) Is racial discrimination the sort of "cultural difference" among states that you think the federal government ought to keep out of?

RESPONSE:

It was never my intention to suggest that "culture" could explain away facially discriminatory data suggesting gender discrimination. Rather, the discussion points out that there are many factors that bear on a relevant labor market and outlines in detail the differences that are manifest in different states dealing with different labor pools. This case and the ruling do not address racial discrimination. Discrimination on the basis of race is abhorrent and unconstitutional.

15. The tone of your opinion in U.S. v. North Carolina is quite derisive of the plaintiffs and of the entire idea of anti-discrimination law. You drop at least one sarcastic footnote, and as I noted above, imply that perhaps it is alright for North Carolina to maintain a "culture" that discriminates against women in hiring for certain jobs. Wasn't this attitude the reason that the plaintiffs had to ask the Fourth Circuit to take you off of the case on remand? I know you pointed to the court's decision to allow you to continue with the case, but isn't the fact that they even had to address this issue indicative of how poisoned the atmosphere in this case had become because of your extraordinary refusal to enter the consent decree?

RESPONSE:

I could not speculate as to the reasons why the plaintiffs requested reassignment of the case from the Court of Appeals. I ruled against the defendants in their motions to dismiss and for summary judgment and had no pre-disposition about the outcome or fairness in the case.

16. In your opinion in the case of Carr v. Woolworth, 883 F. Supp. 10 (E.D.N.C. 1992), you ruled against a plaintiff charging employment discrimination. You wrote, "It is therefore difficult to assume, as a matter of common human experience, that a bigoted employer would refuse to hire a minority for the manager's position, but would be willing to have a minority as assistant manager." (A) Do you still believe that as a matter of common human experience, to be relied upon in judicial decisions, employers who are willing to hire minorities in low-level positions are similarly willing to hire minorities for management positions? (B) On what human experience do you base this view?

RESPONSE:

I appreciate this opportunity to clarify my ruling in the Carr v. Woolworth case. I did rule in favor of the plaintiff and against the employer on the Title VII retaliatory discharge claim and only ruled in favor of the employer on the Title VII and Section 1981 hiring claims.

I believe that the statement, in its full context, demonstrates that I was referring to Fourth Circuit precedent. It is a reference to the case of Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991) and Donohue & Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 Stan. L. Rev. 983, 1017 (1991). The full quote from my opinion is:

> The court notes further that plaintiff faces a particularly difficult challenge in proving unlawful motive here, as she accuses the same person who chose her for the assistant manager's position with discrimination against her in filling the manager's post. See Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991) (strong inference that discrimination was not determining factor in discharge when same individual both hired and fired plaintiff). Although the positions carried different titles and slightly different salaries, the duties and responsibilities of manager and assistant manager were essentially the same. It is therefore difficult to assume, as a matter of common human experience, that a bigoted employer would refuse to hire a minority for the manager's position, but would be willing to have a minority as assistant manager. See generally Donohue & Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 Stan. L. Rev. 983, 1017 (1991) (discriminatory motive difficult to prove where same individual who hired plaintiff responsible for challenged action).

883 F.Supp. at 15. A copy of the entire opinion is attached for your review. This case was affirmed on appeal.

17. Senator Kennedy asked you about your reversals (or affirmances with criticism) in criminal cases. Your answer sounded polite and well-rehearsed, but you didn't really answer the question about why you were reversed more than once on the same point of law. Why didn't you heed the appellate court when it reversed you the first time? Did you disagree with them and want to defy them? Or did you simply forget about the reversal and miss the precedent?

RESPONSE:

I have handled a large number of criminal cases in my service as a district judge; thousands of cases in which a defendant pled guilty and was sentenced; and several hundred or more criminal trials. In every case, I have been committed to paying close attention to the facts, to considering the rights of the accussed, the rights of victims and witnesses, and to applying the law fairly and evenhandedly, including fairness and compassion in sentencing. Whenever there has been a reversal in the Court of Appeals, I have done my best to follow their instructions and bring the case to a conclusion in later proceedings.

18. In recent days the Committee has received some letters from attorneys who regularly appear in front of you in the Eastern District of North Carolina, including an Assistant United States Attorney who wrote on Department of Justice letterhead and an attorney who recently won a large favorable judgment from you and three days after he wrote his letter filed a motion in a case still pending in your courtroom. (A) Please describe any contact you have had with the authors of these letters (Jonathan D. Sasser, William A. Webb, R. Daniel Boyce, Felice McConnell Corpening, Debra Carroll Graves, Gale M. Adams). (B) Did you have any direct or indirect role in soliciting these letters, including but not limited to identifying certain attorneys who could be approached by others to write on your behalf? (C) Did you know that these letters were being written to the Senate, and in at least one case, copied to a political appointee in the Office of Legal Policy at the Department of Justice? (D) Will you commit to recuse yourself from here forward in any case in which any of these attorneys come before you in court, including any that are currently assigned to you?

RESPONSE:

I have not directly or indirectly solicited letters to the Committee or support on behalf of my nomination. I have been careful not to engage in any self promotion involving this nomination. I did not know that letters were being written on my behalf and did not know of copies to the Department of Justice. Occasionally, people have written on my behalf on their own initiative and sent me copies of letters. Aside from Mr. Boyce, who sent me a copy of his letter to the Committee only after it was sent to the Committee, I do not believe that any of the persons named in this question have done that. There are a number of people from my hometown who tell me that they support me and say that they may have written letters. I have remained completely apart from this and am not involved in any campaign regarding letter writing.

As I have done since my appointment to the Federal bench, I will follow the Rules of

Professional Responsibility and Judicial Ethics with regard to recusal.

Attachment 1

U.S. v. Barry, 50 Fed. Appx. 133 (2002)
U.S. v. Anderson, 48 Fed. Appx. 450 (2002)
U.S. v. Tanner, 43 Fed. Appx. 724 (2002)
U.S. v. Sherrill, 33 Fed. Appx. 90 (2002)
U.S. v. Phalan, 39 Fed. Appx. 6 (2002)

U.S. v. Privott, 31 Fed. Appx. 294 (2002)
U.S. v. Williams, 25 Fed. Appx. 175 (2002)
U.S. v. Swann, 21 Fed. Appx. 138 (2001)
U.S. v. Adams, 19 Fed. Appx. 33 (2001)
U.S. Robards, 1 Fed. Appx. 110 (2001)
U.S. v. Anderson, 238 F.3d 415 (2000)
Godon v. North Carolina Crime Control & Public Safety, 238 F.3d 412 (2000)
Ward v. Allied Van Lines, Inc., 231 F.3d 135 (2000)
Cottle v. Bell, 229 F. 3d 1142 (2000)
U.S. v. Kearney, 217 F.3d 842 (2000)
U.S. v. Anderson, 215 F.3d 1321 (2000)
U.S. v. Genao, 213 F.3d 633 (2000)
U.S. v. Talley, 202 F.3d 262 (1999)
U.S. v. Nagy, 201 F.3d 438 (2000)
Whiting v. Ski's Auto World Paint and Body Shop, Inc., 194 F.3d 1307 (1999)
U.S. v. Vick, 191 F.3d 449 (1999)
Abdussamadi v. Vandiford, 187 F.3d 628 (1999)
Cline v. Binder, 187 F.3d 628 (1999)
U.S. v. Brown, 181 F.3d 92 (1999)
Beach v. Wake County Public School System, 176 F.3d 475 (1999)
U.S. v. Williams, 175 F.3d 1018 (1999)
Harley v. Warren County Dept. of Soc. Serv., 172 F.3d 863 (1999)
Lambert v. Williams, 168 F.3d 482 (1998)
U.S. v. Marshburn, 166 f.3d 335 (1998)
U.S. v. Vick, 164 F.3d 627 (1998)
U.S. v. Hubbard, 162 F.3d 1157
Bullard v. Chavis, 153 F.3d 719 (1998)
U.S. v. Arrington, 153 F.3d 722 (1998)
U.S. v. Floris, 155 F.3d 562 (1998)
U.S. v. Wilson, 135 F.3d 291 (1998)
U.S. v. Corbett, 133 F.3d 917 (1998)
Williams v. Baloch, 133 F.3d 920 (1997)
U.S. v. Normil, 129 F.3d 1261 (1997)
U.S. v. King, 119 F. 3d 290 (1997)
U.S. v. Williams, 110 f.3d 62 (1997)

Canady v. Crestar Mortgage Co., 109 F. 3d 969 (1997)
U.S. v. Parker, 103 F.3d 122 (1996)
Hayes v. Grimmer, 103 F.3d 117 (1996)
U.S. v. Oeschsle, 100 F.3d 951 (1996)
U.S. v. Talbott, 92 F.3d 1184 (1996)
U.S. v. Alston, 91 F.3d 134 (1996)
Clemonts v. West, 86 F.3d 1149 (1996).

U.S. v. Garrison, 81 F.3d 152 (1996)
Pierce v. Jones, 73 F.3d 358 (1996)
U.S. v. Myers, 66 F.3d 1364 (1995)
U.S. v. Smith, 62 F.3d 641 (1995)
U.S. v. Alexander, 50 F.3d 8 (1995)
Fuller v. White, 46 F.3d 1123 (1995)
U.S. v. Kautz, 46 F.3d 1128 (1995)
Tucker v. Cheran, 45 F.3d 427 (1994)
U.S. v. Harrison, 37 F.3d 133 (1994)
U.S. v. Ortega, 28 F.3d 1211 (1994)
Tucker v. Grimes, 23 F.3d 403 (1994)
U.S. v. Livingston, 21 F.3d 426 (1994)
Tucker v. Seiber, 17 F.3d 1434 (1994)
U.S. v. Gary, 18 F.3d 1123 (1994)
U.S. v. Wittek, 16 F.3d 414 (1994)
U.S. v. Lanza-Chan, 985 F.2d 554 (1993)
U.S. v. Midgett, 972 F.3d 64 (1992)
U.S. v. Coppins, 953 F.2d 86 (1991)
U.S. v. Williams, 934 F.2d 320 (1991)
Rowell v. G.E. Credit Corp., 932 F.2d 963 (1991)
Rogers v. Lee, 922 F.2d 836 (19911)
U.S. v. Talbott, 902 F.2d 112 (1990)
Stevens v. Lawyers Mutual, 789 F.2d 1056 (1986)
Federal Election Commission v. Beaumont, 123 S.Ct. 2200 (2003)
U.S. v. Johnson, 79 Fed. Appx. 611 (2003)
U.S. v. Bivens, 85 Fed. Appx. 945 (2004)
Moore v. Bennette, 97 Fed. Appx. 405 (2004)
U.S. v. Gonzales, 97 Fed. Appx. 447 (2004)
Gutierrez Depineres v. Scott, 101 Fed. Appx. 402 (2004)
U.S. v. McCrae, 103 Fed. Appx. 505 (2004)
U.S. v. Hawkins, 104 Fed. Appx. 321 (2004)
U.S. v. Ruffin, 2004 WL 2810175 (2004)
In re Matthews, 2005 WL 159610 (2005)
Cortez v. U.S., 82 Fed. Appx. 315 (2003)

MAYER
BROWN
ROWE
& MAW

March 15, 2005

Mayer, Brown, Rowe & Maw LLP
214 North Tryon Street
Suite 3900
Charlotte, North Carolina 28202-2137

Main Tel (704) 444-3500
Main Fax (704) 377-2033
www.mayerbrownrowe.com

Robert J. Conrad, Jr.
Direct Tel (704) 444-3519
Direct Fax (704) 377-2033
rconrad@mayerbrownrowe.com

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Judicial Nomination of Robert J. Conrad, Jr. for the Western District of North Carolina

Dear Chairman Specter:

I am attaching responses to written questions submitted by Senators Patrick J. Leahy, Russell D. Feingold and Dianne Feinstein.

Sincerely,

Robert J. Conrad, Jr.

Responses of Robert James Conrad, Jr.,
Nominee to the U.S. District Court for the Western District of North Carolina
to the Written Questions of Senator Patrick J. Leahy

1. You wrote an article for the Catholic Dossier entitled "Habitually Wrong" in which you attacked Sister Helen Prejean and her Pulitzer Prize-nominated book, Dead Man Walking. As you know, Dead Man Walking describes the last days of death row inmate Patrick Sonnier, and is an impassioned moral indictment of capital punishment. In your article, you called Sister Prejean a "Church-hating nun," and dismissed the book as "liberal drivel." You also wrote, "The ACLU, Amnesty International, and other like minded organizations are [the author's] guiding lights." These sound like intemperate statements from someone who may well be called upon to rule in death penalty cases where the ACLU, Amnesty International, and other like minded organizations, are involved. How can we be assured that you would rule fairly in cases like these?

Response: I agree with the notion that temperance, fairness and even-handedness are quintessential characteristics a judge should have. I believe that my record as an Assistant U.S. Attorney and U.S. Attorney demonstrates that I have enforced the law impartially without regard to the parties involved.

I respect and admire Sister Helen for her work with death row inmates. She treats them with dignity and compassion. The article I wrote was critical of Sister Helen's attitude toward the priest and others who disagreed with her. I have thought many times since I wrote that essay that it lacked charity, and as such, that it suffered from the same defect I was criticizing.

As U.S. Attorney, I worked with defense attorneys and other prosecutors to improve the quality of representation for capital defendants. This included speaking at bar sponsored legal education seminars, and providing early and complete discovery in capital cases. I know first hand the difficult job and weighty responsibility criminal defense attorneys have in representing capital defendants. I have worked diligently to ensure fairness in the process.

In addition, it is my understanding that two lawyers who litigated against me in capital cases, George Laughrun, Jim Cooney, wrote to the Committee in support of my nomination

2. As you are no doubt aware, many people's only interaction with the Federal government is in our nation's courtrooms. Accordingly, it is very important that federal officials treat all people with patience and dignity. 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

Response: An important component of justice is the humble exercise of the authority given. I believe that a judge's duty is to serve. That attitude of service should extend to

parties, lawyers, victims, their families and loved ones, court personnel, juries and anyone who has contact with the court. If confirmed, I would strive to treat everyone fairly, with dignity, in the service of justice. A judge who seeks justice, loves mercy and presides humbly will inspire public confidence in the Courts.

Responses of Robert James Conrad, Jr.,
Nominee to the U.S. District Court for the Western District of North Carolina
to the Written Questions of Senator Dianne Feinstein

QUESTION: I have some concerns about a newspaper article you wrote in *The Charlotte Observer* on June 14, 1988. The title of the article is "Planned Parenthood A Radical, Pro-Abortion Fringe Group." In the article, you wrote the following:

- "The evidence shows Planned Parenthood, not its opponents, as the fringe organization."
- "PP-Charlotte is the most aggressive and radical pro-abortion lobbyist in North Carolina"
- "Planned Parenthood knowingly kills unborn babies, not fetuses, as a method of 'post-conception' contraception, and to them that's OK."

Mr. Conrad, what do you think that parties to judicial proceedings will think about your fairness as a judge, if you are confirmed, in light of these comments? What will Planned Parenthood think if it is involved in a case before you? What will groups that represent other women's interests think? Can you be fair to them? How can we be sure?

Response: I believe that my dedication to the impartial enforcement and application of the law has been demonstrated through my 15 years of working as an Assistant United States Attorney and United States Attorney. As an Assistant U.S. Attorney, and later as U.S. Attorney, among other matters, I supervised investigations and vigorously prosecuted acts of violence against reproductive health clinics. These efforts were successful, leading at least on one occasion to the imposition of an active jail sentence for a defendant who shot into an unoccupied clinic.

From January, 1998 to June, 2003, I played an important strategic role among senior administration officials in deciding on an effective investigative and prosecutive strategy for pursuing the case against Eric Robert Rudolph. I personally visited the All Women's Health Clinic in Birmingham, Alabama and witnessed the horror perpetrated there by the remote detonation of a bomb which tragically killed an off duty police officer and severely disfigured a Clinic employee. I also handled the Initial Appearance of Mr. Rudolph in federal court. In these and other cases, I vigorously pursued the rights of those who had their civil or constitutional rights imperiled.

QUESTION: Do you still agree with your comments from that 1988 article?

Response: I appreciate the opportunity to clarify the op-ed cited. In the context of having served on an Adolescent Health Task Force (approximately 18 years ago), I wrote concerning a local county commission funding dispute. The views expressed in that article pertained to that dispute, long since resolved. Since that time, I have had no involvement with that issue or any of the groups involved. I have had no occasion to study or form views about Planned Parenthood in the past 15 years.

QUESTION: Are there other women's rights or civil rights groups that you think are "radical" or "fringe"?

Response: No.

QUESTION: What do you think about the constitutional right to privacy?

Response: The Supreme Court has held that the Constitution guarantees a right to privacy. It so held in Griswold v. Connecticut, 381 U.S. 479 (1965) and has subsequently affirmed its holding in cases including Eisenstadt v. Baird, 405 U.S. 438 (1972), Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood v. Casey, 505 U.S. 833 (1992).

QUESTION: Do you accept the constitutionality of *Roe v. Wade* and *Planned Parenthood v. Casey*?

Response: Yes.

QUESTION: Do you think that the Supreme Court decided *Roe* and *Casey* correctly? Would you have decided them differently?

Response: If confirmed as a district court judge, my duty would be to faithfully apply the precedents of the Supreme Court including Roe v. Wade and Planned Parenthood v. Casey. I would do so. It would be inappropriate for me as a nominee to question applicable Supreme Court precedent.

Responses of Robert James Conrad, Jr.,
Nominee to the U.S. District Court for the Western District of North Carolina
to the Written Questions of Senator Russell D. Feingold

1. Mr. Conrad, in a letter to the *Catholic Dossier*, printed in its January-February 1999 issue, you expressed strong disagreement with Sister Helen Prejean, an opponent of the death penalty and the author of the book *Dead Man Walking*. Her book chronicles her experience with the prison ministry she began in 1981 and her relationship with Patrick Sonnier, the convicted killer of two teenagers, sentenced to die in the electric chair of Louisiana's Angola State Prison. Upon his request, Sister Helen repeatedly visited him as his spiritual adviser. In your piece you passionately denounce Sister Helen for her anti-death penalty views, and express support for capital punishment.

(a) At the hearing you stated that a federal judge's job is "treat fairly both the parties that come before them." Given your comments concerning Sister Helen Prejean and capital punishment, can you understand why a criminal defendant or death row inmate might think that you would be more likely to rule against them? What can you point to in your record, other than your personal assurances, indicating that as a federal judge you will fairly and evenhandedly consider cases where the death penalty is sought, including habeas corpus claims where state inmates are challenging their convictions or sentences?

Response: I respect and admire Sister Helen for her work with death row inmates. She treats them with dignity and compassion. The article I wrote was critical of Sister Helen's attitude toward the priest and others who disagreed with her. I have thought many times since I wrote that essay that it lacked charity, and as such, that it suffered from the same defect I was criticizing.

As U.S. Attorney, I worked with defense attorneys and other prosecutors to improve the quality of representation for capital defendants. This included speaking at bar sponsored legal education seminars, and providing early and complete discovery in capital cases. I know first hand the difficult job and weighty responsibility criminal defense attorneys have in representing capital defendants. I have worked diligently to ensure fairness in the process.

In addition, it is my understanding that two lawyers who litigated against me in capital cases, George Laughrun, Jim Cooney, wrote to the Committee in support of my nomination

(b) Can you be fair to an inmate who is being assisted and counseled by Sister Helen or someone working with her?

Response: Yes.

(c) Can you understand why counsel in such a case might seek your recusal? Will you promise to recuse yourself in any case in which Sister Helen Prejean or someone working with her is involved in assisting or counseling the defendant or habeas petitioner?

Response: If confirmed, I would adhere to all applicable statutes and rules regarding recusal, including 28 U.S.C. 455.

2. In a 1988 Charlotte Observer opinion piece, you called Planned Parenthood "an extreme ideologic [*sic*] group that promotes a radical abortion agenda."

(a) Is that still your belief?

Response: I appreciate the opportunity to clarify the op-ed cited. In the context of having served on an Adolescent Health Task Force (approximately 18 years ago), I wrote concerning a local county commission funding dispute. The views expressed in that article pertained to that dispute, long since resolved. Since that time, I have had no involvement with that issue or any of the groups involved. I have had no occasion to study or form views about Planned Parenthood in the past 15 years.

(b) Can you understand why Planned Parenthood, its affiliates, and other pro-choice organizations would question your ability to be fair, objective, and unbiased should they come before you as a litigant? What assurances can you provide the Committee and such organizations that you would be able to impartially hear their cases?

Response: As an Assistant U.S. Attorney, and later as U.S. Attorney, I supervised investigations and vigorously prosecuted acts of violence against reproductive health clinics. These efforts were successful, including on one occasion the imposition of an active jail sentence for a defendant who shot into an unoccupied clinic.

From January, 1998 to June, 2003, I played an important strategic role among senior administration officials in deciding on an effective investigative and prosecutive strategy for pursuing the case against Eric Robert Rudolph. I personally visited the All Women's Health Clinic in Birmingham, Alabama and witnessed the horror perpetrated there by the detonation of a bomb that tragically killed an off duty police officer and severely disfigured a clinic employee. I also handled the Initial Appearance of Mr. Rudolph in federal court. In these and other cases, I vigorously pursued the rights of those who had their civil or constitutional rights imperiled.

(c) What in your record can you point to that would suggest to the Committee and to potential pro-choice litigants that they should believe your assurances that you will be fair and impartial?

Response: I believe that my record as an Assistant U. S. Attorney and U. S. Attorney, as described in response to 2(b), demonstrates that I have enforced the law without regard to the parties involved.

James C. Dever, III
Terry Sanford Federal Building
310 New Bern Avenue, Room 624
Raleigh, North Carolina 27601
(919) 645-6570

March 14, 2005

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

Re: Responses to Questions

Dear Mr. Chairman:

Following the March 3, 2005 hearing, I received three questions from Senator Leahy. I have enclosed my responses to those questions.

Very truly yours,

James C. Dever, III

cc: The Honorable Patrick Leahy (w/encls.)

Responses of James Columcille Dever, III
Nominee to the U.S. District Court for the Eastern District of North Carolina
to the Written Questions from Senator Leahy

1. **Mr. Dever, you have had a civil litigation practice for the past ten years. Most recently, your practice has concentrated on employment litigation and employment counseling, where you indicate that you regularly advise and defend companies charged with wrongful discharge, Fair Labor Standards Act violations, Family and Medical Leave Act violations, wage and hour violations, and race, age, sex, and disability discrimination. What assurances can you give the Committee that, as a judge, you will be fair procedurally and substantively to plaintiffs who bring claims against corporate interests?**

RESPONSE: I am no longer in private practice and have served as a full-time United States Magistrate Judge for the Eastern District of North Carolina since February 9, 2004. During these thirteen months as a judge, I have demonstrated that I am fair procedurally and substantively to plaintiffs who have brought claims against corporate interests. See, e.g., Blue v. EquiCredit Corp. of Am., No. 7:04-CV-80-FL(3), Memorandum and Recommendation (E.D.N.C. Dec. 27, 2004) (granting plaintiffs' motion to remand their action under North Carolina Predatory Home Lending Act to state court; the defendants had removed the action and asserted that the complete preemption doctrine applied), adopted, (E.D.N.C. Mar. 2, 2005); Goodwyn v. Siemens Dematic Corp., No. 2:03-CV-43-BO(1), Order (E.D.N.C. July 21, 2004) (granting plaintiff's motion to file a second amended complaint in a personal injury action pursuant to Fed. R. Civ. P. 15(a) and 16); Staton v. Nucor Steel Hertford, No. 4:04-CV-47-FL(1), Order (E.D.N.C. June 21, 2004) (granting plaintiff's request to enter defendant's plant in a wrongful discharge and FMLA action to conduct an inspection pursuant to Fed. R. Civ. P. 34). Whether I have ruled for or against a plaintiff, my rulings have been grounded in controlling precedent.

In addition, while in private practice, I represented both plaintiff-employees and defendant-employers in employment litigation. For example, I have listed among my ten most significant litigated matters Rodger v. Electronic Data Sys. Corp., No. 5:93-CV-664, slip op. (E.D.N.C. Mar. 17, 1995). In that case, I represented a class of plaintiffs challenging their failure to receive certain retirement benefits and wages. Three individual plaintiffs also alleged age discrimination, violations of the wage and hour laws, and fraud. The case involved discovery disputes (Rodger v. Electronic Data Sys. Corp., 155 F.R.D. 537 (E.D.N.C. 1994)) and a successful motion for class certification on the claim for retirement benefits. See Rodger v. Electronic Data Sys. Corp., 160 F.R.D. 532 (E.D.N.C. 1995). Although the district court ultimately concluded that the claim for retirement benefits was preempted by ERISA, the court denied summary judgment on the wage and hour claims, the ADEA claims, and the fraud claims. A confidential settlement was reached just prior to trial in March 1995.

My experience in private practice and my experience as an adjunct professor of employment law have given me a balanced perspective on employment law issues. I am familiar with binding Supreme Court and Fourth Circuit precedent in this area of law and apply it in all cases. I am acutely aware of the importance of this nation's civil rights law. As a judge, I have been and will continue to be fair to all parties who appear before me.

2. Mr. Dever, you have filed briefs before the Supreme Court of the United States on two occasions. In both cases, you represented Republicans challenging state legislative redistricting plans designed to comply with the Voting Rights Act of 1965, and you successfully argued that the plans violated state and/or federal constitutional provisions. How do we know you will be fair if you are called upon to hear such a redistricting case?

RESPONSE: I believe that my service as a United States Magistrate Judge over the past thirteen months demonstrates my impartiality in all cases. As a judge, I have left the role of being an advocate. The rule of law is now my only "client."

I recognize that judges must consider cases impartially, objectively, and conscientiously, and I have done so. I assure the Committee that, if confirmed, the identity of a plaintiff or defendant in any litigation (whether a redistricting case or not) would have no bearing on my performance as a judge.

3. Mr. Dever, you have worked as an attorney in the Air Force General Counsel's Honors Program at the Pentagon, as a civil litigator in private practice for ten years, and most recently as a Magistrate Judge. However, it appears that you have had limited experience handling criminal matters, and you advise the Committee that only 1% of your court appearances have involved criminal matters. Please describe your criminal work, and tell the Committee whether and how your legal experience has prepared you to adjudicate the range of complex criminal cases that are brought before federal district courts. If you are confirmed, how will you get up to speed and prepare yourself for this new responsibility?

RESPONSE: The criminal work that I did while an Air Force attorney and while in private practice involved federal grand jury matters where the client sought to resolve liability issues under federal criminal law and the civil False Claim Act. These cases involved complex legal and factual issues and were resolved by plea agreements and simultaneous civil settlement agreements. These agreements arose after lengthy federal grand jury investigations and prolonged negotiations. This experience, both as a government attorney and a private attorney, has given me a balanced perspective on federal criminal matters.

Since becoming a United States Magistrate Judge in February 2004, I have presided over 158 detention hearings involving the Bail Reform Act of 1984, 199 initial appearances, numerous motions to suppress and criminal discovery disputes in felony matters, and 60 federal misdemeanor cases. In addition, I regularly have reviewed search warrant applications

As a Magistrate Judge I have diligently researched the law and applied the law to the facts. The legal issues have included the application of federal criminal statutes, the Federal Rules of Evidence, the Federal Rules of Criminal Procedure, Supreme Court precedent, and Fourth Circuit precedent. If confirmed, I would continue to study the range of criminal issues that come before the district court and diligently apply that law to cases before me.

SUBMISSIONS FOR THE RECORD

Gale M. Adams
407 Hilliard Dr.
Fayetteville, NC 28311
Home: (910) 822-4578

March 1, 2005

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

Dear Chairman Specter:

It is indeed an honor and a privilege for me to highly recommend Judge Terrence Boyle to the Fourth Circuit Court of Appeals. I do so without any reservation or qualification. Judge Boyle is ideally suited for the position based on his uncompromising integrity, his keen intellect and his unwavering commitment to justice for all who appear before him.

I am an African American attorney who has appeared before Judge Boyle numerous times for the past thirteen years in my capacity as an Assistant Federal Public Defender. I have never, at any time, felt that I was treated any differently because of my race, nor have I ever felt that Judge Boyle treated my clients any differently because of the color of their skin. Clearly, his perspective is shaped by the client's record, by the facts of the case and by his assessment of the client's potential for rehabilitation.

I have studied Judge Boyle's approach to many cases and have come to deeply admire and respect him, mainly because of his treatment of defendants who appear before him. Unlike other judges, Judge Boyle spends time conversing with the client in an obvious effort to appropriately fashion a sentence for the case that is before him I always tell my clients that when they appear before Judge Boyle, they need to be prepared to talk to him candidly about their case, their actions and their past. I tell them that it does no good to try to shoot him a line because he has the most uncanny ability to see right through any attempt at deception or minimizing. And, I tell them he will challenge them on any mis-characterization, not in an attempt to belittle or embarrass them, but more in an attempt to fashion an appropriate sentence for the facts and circumstances before him and, also in an attempt to foster some introspection on their part.

I can also tell that Judge Boyle takes seriously the power that he has as a judge. He struggles to make sure that he properly uses his discretion to effect an appropriate sentence. His lofty goal is to ensure that the punishment fits the crime. One can tell after appearing before him that his approach to the case and to the defendant is tempered and fair. He seemingly tries to avoid a mechanical, ritualistic approach to sentencing and attempts to humanize defendants through his interaction with them. As best I can tell, his personal philosophy appears to be justice tempered with mercy. He seems to recognize that when he puts on that robe and takes the bench, in just a few short phrases, he has the ability to shape, not only the future of the person appearing before him, but also their family. He does not take that power lightly.

In addition, Judge Boyle is extremely bright and insightful. Sometimes much to your dismay, he can take an argument and unravel it or attack it from some perspective that you never even considered. He can sit there and listen to an argument being presented for the first time and quickly grasp its concept and then craft profound, thought-provoking questions. After a thoughtful, in depth analysis, he then pronounces a resolution that is just and well reasoned.

Finally, on a more personal note, I recently had the opportunity to engage Judge Boyle in conversation. He knows that I have four children, one of whom is graduating this year. He asked me where my daughter wanted to attend school and I told him Spelman College, an historically Black college. He then proceeded to rattle off obscure facts about its beginnings and its history. I simply listened in amazement at his depth of knowledge about a school I did not realize he knew anything about. I did not even know the information he was reciting. I did my homework and found that all he had said was accurate. I must say that I was thoroughly impressed and encouraged by his voluntary exposure and study of another's accomplishments, thoughts, and ideals. Such varied exposure has obviously served to broaden his viewpoint and to produce a more well-rounded jurist.

In sum, Judge Boyle is a wonderful judge. He would bring great credit to the bench with his insight and perspective. I truly believe that in his case, our loss is your gain. Again, I enthusiastically endorse his nomination to the Fourth Circuit Court of Appeals.

If you have any questions or need additional information, do not hesitate to contact me.

Sincerely,

Gale M. Adams

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

ALABAMA
POLICE BENEVOLENT ASSOCIATION, INC.
125 South Ripley Street, Suite 1
Montgomery, Alabama 36104
(334) 834-6622 • 1-800-323-2096
FAX: (334) 834-9800

Via Facsimile to (202) 224-3149, (202) 731-0221 and U.S. mail

The Honorable Jeff Sessions
United States Senator
335 Russell Senate Office Building
Washington, D.C. 20510-0104

Re: Opposition to Nomination of Terrence Boyle to Fourth Circuit Court of Appeals

Dear Senator Sessions:

We are writing in connection with our opposition to a pending judicial nomination. The President previously nominated District Judge Terrence Boyle of North Carolina to serve on the U. S. Court of Appeals for the Fourth Circuit.

Our Association is very familiar with Judge Boyle, particularly his decisions and philosophy regarding law enforcement cases. Because of his record, our Association strongly opposes his nomination to the Fourth Circuit. There are many other much more qualified candidates from North Carolina who have respected the law enforcement profession.

Our Association has supported numerous other recent judicial nominations including those in North Carolina. However, the nomination of Judge Boyle is a departure from tradition Consequently, we vehemently oppose the nomination of Judge Boyle.

We would greatly appreciate your consideration of our views on this nomination. Please call or otherwise communicate with any questions. Thank you very much for your consideration and we look forward to seeing you soon.

Sincerely,

Donald R. Scott, President
Alabama PBA

SOUTH CAROLINA
POLICE BENEVOLENT ASSOCIATION, INC.
A Division of Southern States Police Benevolent Association,
1900 Brannan Road
McDonough, Georgia 30253-4310
(770) 389-5391 • 1-800-233-3506
FAX: (770) 389-4572

January 24, 2005

The Honorable Arlen Specter, Chair
Committee on the Judiciary
United States Senate
711 Hart Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy, Ranking Member
Committee on the Judiciary
United States Senate
433 Russell Building
Washington, D.C. 20510

Re: *Nomination of Terrence Boyle to Fourth Circuit Court of Appeals*

Dear Senators Specter and Leahy:

Our Association is a division of the Southern States Police Benevolent Association. We work to promote and improve law enforcement and to protect the law enforcement profession from harm.

We are familiar with the judicial record of Judge Terrence Boyle of North Carolina including his well known record of judicial treatment of law enforcement officers.

Because of Judge Boyle's judicial record, he is not qualified for a promotion to the Fourth Circuit Court of Appeals. His judicial philosophy and decisions have been very harmful to the law enforcement profession.

We therefore respectfully urge you to oppose Judge Boyle's confirmation. We would appreciate your sharing our position with the Judiciary Committee and your colleagues.

Thank you for your consideration of this urgent matter and thank you for your service to the United States Senate.

Sincerely,

President, South Carolina Division
Southern States Police Benevolent Association

The Voice of Law Enforcement Officers

BOYCE & ISLEY, PLLC
ATTORNEYS AT LAW
LAWYERS WEEKLY BUILDING, SUITE 100
POST OFFICE BOX 1990
RALEIGH, NORTH CAROLINA 27602-1990

G. Eugene Boyce
R. Daniel Boyce
Philip R. Isley
Laura Boyce Isley

107 Fayetteville Street Mall
Raleigh, North Carolina 27601

Telephone: (919) 833-7373
Facsimile: (919) 833-7536

February 28, 2005

(VIA FACSIMILE 202-224-9102 AND UNITED STATES MAIL)

The Honorable Arlen Specter
United States Senator
Chairman, Committee on the Judiciary
711 Hart Building
Washington, DC 20510

Re: The Honorable Terrence W. Boyle

Dear Senator Specter,

I am writing this letter on behalf of the former Chief Judge of the Eastern District of North Carolina, the Honorable Judge Terrence W. Boyle. As I am sure you are aware, Judge Boyle has served with dignity since 1984, which was the year I began practicing law. I have appeared before Judge Boyle for over 20 years both as an Assistant U.S. Attorney for the Eastern District of North Carolina (while serving on both the Presidential Drug Enforcement Task Force and the White Collar Crime Section) and as a criminal defense attorney. I have also handled numerous federal civil cases before Judge Boyle as counsel on both the plaintiff's side and the defense side. As a North Carolina State Bar Board Certified Specialist in State and Federal Criminal Law, I have appeared before numerous state and federal judges throughout North Carolina and in other states. Accordingly, I believe I am qualified to address a number of issues regarding Judge Boyle's qualifications both in what I have observed and as compared to other judges.

I am writing this letter because I only recently learned that a number of national organizations are attempted to portray Judge Boyle as someone he is not. I find it offensive that national organizations, represented by individuals who have never even practiced before Judge Boyle, are attempting to portray Judge Boyle as biased or unqualified in any manner. To the contrary, Judge Boyle has served this District with honor and integrity. As a federal prosecutor, Judge Boyle held me to the highest standards. He insisted that I present my case with a full and complete knowledge of both the facts and the law. He would not accept anything less from any

Government attorney. For defense attorneys, his expectations were equally high. However, at no time during over 20 years that I have practiced before Judge Boyle have I ever seen him act unfairly toward an attorney or a defendant. In fact, many of my colleagues have repeatedly expressed how fair Judge Boyle has been to defendants regardless of a defendant's race, color, or gender.

Judge Boyle has been neutral in every single criminal case that I have handled, whether it be on the prosecution side or the defense side. Moreover, as a spectator while waiting for my case to be called, I have observed Judge Boyle handle numerous cases. I have never seen Judge Boyle show any bias for or against any defendant or the Government, for that matter. He attempts to uphold the law and apply the law to the facts of each particular case. At the same time, he has shown compassion where it is deserved.

I also have an extensive civil practice, and I have had a number of cases both as plaintiff's counsel and as defense counsel representing individuals as well as corporations and businesses. Judge Boyle has never shown any unfair tendency in those cases. His opinions have always been well thought out and well reasoned. Although from time to time he has ruled against me, his rulings have always been legally sound. Even if I disagreed with the ruling, I could never complain that he did not give me a full opportunity to be heard and explain my position.

After ten years of private practice and 21 years on the federal district court bench, Judge Boyle possesses the necessary legal (and life) experiences to serve as an appellate judge and with the wisdom and experience, he has gained as a federal district court judge, he is an ideal candidate for the Fourth Circuit Court of Appeals. My good friend, Jim Craven, who is on the opposite end of the political spectrum from Judge Boyle, recently commented how unfair it would be for Judge Boyle not to be elevated to the Fourth Circuit Court of Appeals. I agree with Jim. Judge Boyle is an experienced, fair, and unbiased jurist.

I am willing to personally pay my expenses to attend any hearings to testify under oath on Judge Boyle's behalf. Otherwise, please allow this letter to serve as my unconditional recommendation and support for Judge Boyle's nomination to the 4th Circuit Court of Appeals.

Sincerely yours,

BOYCE & ISLEY, PLLC

R. Daniel Boyce

RDB/mw
cc: The Honorable Elizabeth Dole
The Honorable Richard Burr
[letters/2/28/05 sen aspector]

Statement of the Honorable Richard Burr
Hearing on Judicial Nominees
March 3, 2005

Mr. Chairman, and Members of the Judiciary Committee, it is with tremendous pride that I have the opportunity to join Senator Dole in introducing three distinguished North Carolinians nominated to judgeships by President Bush. Today is a good day for North Carolina.

The gentlemen in question, Judge Terrence **Boyle**, Magistrate Judge James **Dever**, and former US Attorney Robert **Conrad**, have all served their State and Nation admirably.

There are 15 circuit court judgeships in the 4th Circuit, and only one of these is occupied by a North Carolina judge. Our neighbor states to the north and south within the circuit both have four circuit judges. North Carolina is chronically underrepresented – or not represented at all – at the circuit court level. A great deal of this can, of course, be attributed to the political nature of the debate surrounding nominations to the 4th Circuit. That time is past. The people of Eastern North Carolina and, indeed, all North Carolinians, deserve another voice on the 4th Circuit.

Judge **Boyle**, currently serving as District Court Judge for the Eastern District of North Carolina, has been nominated by the President to serve on the 4th Circuit Court of Appeals. The American Bar Association has unanimously rated Judge **Boyle** as "well-qualified" and has stated he would make an outstanding appellate judge.

He has served as a district court judge for 21 years, and has served in that position longer than 93% of the sitting, active federal district court judges. He has presided over more than 12,000 cases, covering every possible kind of federal, criminal, and civil trial. Time to time, he has been assigned to hear cases in the Western District of North Carolina and the Eastern District of Virginia, hearing criminal cases in both. He also has experience at the appellate level, serving as a visiting judge on occasion from 1985-2000. During that time, he participated in oral argument of more than 200 cases and wrote opinions in more than 50 cases in that court.

I urge the Committee to move the nomination of Judge **Boyle** forward.

The Committee also has before it two nominees to North Carolina district courts. Even a Wake Forest grad like me is pleased to endorse them, despite the time they spent at ACC rivals like Duke, Clemson, and the University of Virginia. But I will look past their academic choices – even with March Madness bearing down on us here in Washington, DC – since they have accounted for themselves so well since leaving school.

Duke Law graduate Jim **Dever**, nominated by the President to the Eastern District, is currently serving the district as a magistrate judge. The seat to which he has been nominated has been vacant since December 7, 1997 – more than seven years. The Administrative Office of the Courts has classified the vacancy as a "judicial emergency" since 1999.

Statement of the Honorable Richard Burr
Hearing on Judicial Nominees
March 3, 2005

The Eastern District of North Carolina includes 44 of the State's 100 counties, and extends from Wake County – Raleigh – to the coast. The civil and criminal caseloads in the district continue to increase, and will continue to expand as a result of numerous initiatives launched by the US Attorney.

Clemson and UVA law grad Bob **Conrad**, nominated by the President to the Western District, is currently in private practice in Charlotte. He served as US Attorney for the district from 2001 until last year, and served as Assistant US Attorney for the district for eleven years, from 1989-2000. The Western District faces its own challenges, where there are currently two judicial vacancies, including one created by the untimely passing of Judge McKnight.

This time of year is doubly important to Bob, who played on the Clemson basketball team that advanced to the Elite Eight of the NCAA tournament in 1980. I remind the Committee that he did this while earning Academic All-ACC selection.

This Committee, and the Senate, has before it three well qualified candidates, and I proudly give them my support.

Thank you, Mr. Chairman.

ebruary 11, 2005

he Honorable Diane Feinstein
lart Building, Room #331
IS Senate
Vashington, D.C. 20510

:E: **Opposition to the Appointment of Terrence Boyle Nomination**

)ear Senator Feinstein,

)ver 140,000 people with disabilities in California live more independently, due to the ssistance of 27 non-profits, which are represented by the California Foundation for ıdependent Living Centers (CFILC). **We are writing to strongly urge you to vote no on the omination of Terrence Boyle to the Fourth Circuit Court of Appeals.**

lr. Boyle's record of legal decisions on the Americans with Disabilities Act is a direct attack on ıe civil rights of people with disabilities. CFILC opposes any limitations on our civil rights in ny of the Circuit Courts of Appeals for fear they will become precedents across the country.

lr. Boyle has consistently ruled that the Americans with Disabilities Act, is, in effect, nconstitutional. Many of his rulings are based on radical interpretations of disability rights ıws, which are often completely inconsistent with basic disability law and interpretations found ı other courts and government enforcement agencies.

:enator Feinstein, **we respectfully request a no vote on the Boyle nomination** so that the isability community is not relegated back to the dark ages of the early 20 th Century. The ,mericans with Disabilities Act is, slowly but surely, increasing access to our community, ducation, jobs and a better life. Terrance Boyle, through his legal interpretations, is working to top that access.

:incerely,

lary Ann Jones, Chair
:alifornia Foundation for Independent Living Centers

Boyle's Record on the Americans With Disabilities Act

- Congress had no authority to make Title II of the ADA applicable to the states. (*Brown v. North Carolina Division of Motor Vehicles, 1997*)
- He opined that individuals with disabilities were a "discrete and insular minority,' thus Congress had overstepped its power in applying the ADA to states. This opinion led him to conclude that the ADA did not treat people equally but " seeks to single out the disabled for special, advantageous treatment." (*Brown v. North Carolina Division of Motor Vehicles, 1997*)

- Boyle decided that prisoners with disabilities did not need to make prison work programs accessible to prisoners with disabilities, thus allowing them to earn credits to reduce the length of sentences. (*Pierce v. King, 1996*)
- Boyle has consistently ruled that the ADA "demands" entitlement to achieve its goals, which the Fourteenth Amendment cannot authorize.
- Boyle has limited the right to Reasonable Accommodations. (*Willams v. Channel Master Satellite Systems, 1996*)
- The Fourth Circuit Court was troubled (as all of us were) by Boyle's suggestion that work is not a "major life activity."
- Boyle has ruled to allow the courts unlimited access to all medical records of plaintiffs filing under the ADA. While most courts understand that access to such information should be limited to relevant and necessary facts, Boyle would have all medical records opened for discussion. (*Butler v. Burroughs Wellcome, Inc. 1996*)

Californria Foundation for Independent Living Centers, Inc.
1029 J Street, Ste. 120, Sacramento, CA 95814

RETURN TO INDEX

Mark T. Calloway
3936 Cambridge Hill Lane
Charlotte, NC 28270
Ph. 704.844.8604 (H)
704.444.1089 (O)
mcalloway@alston.com

October 24, 2003

The Honorable Orrin G. Hatch
United States Senate
104 Hart Office Building
Washington, D.C. 20510

Re: *Robert J. Conrad, Jr.*

Dear Senator Hatch:

I am writing in support of President Bush's nomination of Bob Conrad for one of the federal district court judgeships in the Western District of North Carolina. I had the pleasure of working with Bob when I served as the United States Attorney for the Western District during the Clinton administration.

During the time that I served as United States Attorney, Bob served as my Criminal Chief. During those seven years, I got the opportunity to work closely with Bob and watch his star rise within the Department of Justice both during the Reno, and the Ashcroft administrations. While Bob and I come from different political parties, and have political and philosophical differences, we set those differences aside and worked together to do justice. Bob is well respected by prosecutors and defense attorneys alike. I have no hesitation in recommending that you pass favorably upon Bob's nomination.

Bob is a dedicated public servant, and a loving husband to his wife and a devoted father to his five children. Bob possesses the qualities necessary to make a very good federal judge. He is even-tempered, and treats other lawyers and litigants with respect. In the courtroom he demonstrates the kind of professionalism you would expect out of a prosecutor, and I know of no reason why he would not continue to do the same as a federal judge. He is hard working, and seeks to make his decisions based on the facts and the law.

In sum, I highly recommend that the United States Senate confirm the nomination of Robert J. Conrad, Jr. as a United States District Judge. If you or your staff have any questions, please do not hesitate to give me a call. My direct line is (704) 444-1089.

Sincerely,

Mark T. Calloway

MTC/rcm

ATTORNEYS AT LAW
HIGHWOODS TOWER ONE
SUITE 500
3200 BEECHLEAF COURT
RALEIGH, NORTH CAROLINA
27604-1064
TELEPHONE 919.981.4000
TELEFAX 919.981.4300

MAILING ADDRESS
POST OFFICE DRAWER 19764
RALEIGH, NORTH CAROLINA
27619-9764

LANDFALL PARK NORTH
1985 EASTWOOD ROAD, SUITE 200
WILMINGTON, NORTH CAROLINA
28403
TELEPHONE 910.256.5135
TELEFAX 910.256.6451

WWW.MAUPINTAYLOR.COM

REUBEN G. CLARK, III

Maupin Taylor & Ellis P.A.

480 BETA BUILDING
HEADQUARTERS PARK
2222 CHAPEL HILL-NELSON HWY.
DURHAM, NORTH CAROLINA
27713
TELEPHONE 919.361.4900
TELEFAX 919.361.2262

MAILING ADDRESS
POST OFFICE BOX 13646
RESEARCH TRIANGLE PARK
NORTH CAROLINA
27709-3646

WRITER'S DIRECT DIAL NUMBER

919/981-4064

rclark@maupintaylor.com

October 16, 2002

The Honorable John R. Edwards
United States Senate
225 Dirksen Senate Office Building
Washington, D.C. 20510-3201

Dear Senator Edwards:

I write this letter requesting your consideration of Mr. James C. Dever for appointment to the bench of the U. S. District Court for the Eastern District of North Carolina.

I have known and worked with Jim Dever as a colleague at Maupin Taylor & Ellis for the past ten years. I believe him to be a lawyer of utmost integrity and skill. Of the numerous attorneys that I have encountered both in legal services and private practice, he is among the most qualified to serve on the federal bench. Apart from his demonstrated legal skills, he has a wonderful temperament which will serve him very well as a judge. While I would regret his departure from this firm if Jim is appointed, he would provide exceptional service to the State of North Carolina and the country.

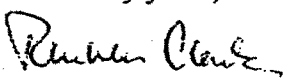
While I am not a political person, and rarely write letters of this kind, I am obliged to do so in this instance. In his seeking to serve as a federal judge, Jim has a purity of motivation which, I believe, is similar to your own. Importantly, his nomination presents the opportunity to make a quality appointment to the federal bench. I am sure that you will give the matter your utmost consideration. If you or your staff are interested in my further thoughts on the matter, please contact me.

Beverley and I will continue to extend our active support, and appreciate your good work in Washington for the State of North Carolina and the nation.

RALEIGH\353618_1

With best personal regards, I am

Sincerely yours,



Reuben Clark

ATTORNEYS AT LAW

RALEIGH OFFICE
3200 BEECHLEAF COURT
SUITE 500
RALEIGH, NC 27604-1064
TELEPHONE 919 981 4000
TELEFAX 919 981 4899

MAILING ADDRESS
POST OFFICE BOX 19764
RALEIGH, NC 27619-9764

WWW.MAUPINTAYLOR.COM

Maupin Taylor P.A.

RTP OFFICE
4301 BETA BUILDING
HEADQUARTERS PARK
3200 CHAPEL HILL-NELSON
DURHAM, NC 27713
TELEPHONE 919 [illegible]
TELEFAX 919 [illegible]

MAILING ADDRESS
POST OFFICE BOX [illegible]
RESEARCH TRIANGLE PARK, NC
27709-[illegible]

WILHINGTON OFFICE
LANDFALL PARK NORTH
1885 EASTWOOD ROAD, NC [illegible]
WILMINGTON, NC 28403
TELEPHONE 910.[illegible]

919/981-4064

rclark@maupintaylor.com

REUBEN G. CLARK, III

May 20, 2003

The Honorable John R. Edwards
United States Senate
225 Dirksen Senate Office Building
Washington, D.C. 20510-3201

Dear Senator Edwards:

I am writing again to request your consideration of, and prompt action on, the nomination of Mr. James C. Dever for appointment to the bench of the United States District Court for the Eastern District of North Carolina. A copy of my prior letter to you is enclosed. Your response to that letter was much appreciated.

It is my understanding that the current vacancy of the U.S. District Court for the Eastern District of North Carolina in Raleigh is the longest standing vacancy for the federal district court bench in the nation, and exceeds five (5) years in duration. While I no way attribute that unacceptable condition to you, I would hope that in Mr. Dever's case, his nomination would be acted upon as promptly as possible. I have known "idealogues" on the left and right. Jim is neither. Rather his nomination represents an opportunity to appoint a most qualified attorney to serve on the federal bench. Given the increasing politicalization of Federal Court nominations, the opportunity to appoint someone like Mr. Dever is one that must be acted upon if the goal is to maintain a strong judiciary (which I see as the foremost goal). I would hope that his nomination would not again lapse and that you act now to advance his nomination by returning the blue slip to the Senate Judiciary Committee.

While I have had the opportunity to observe Jim in a number of different contexts, in my view, one recent episode distinguishes him. Our firm has grown over the years and as it has expanded, now reflects a number of different views and voices. It is far less political, and as a consequence, has emerged as one of the better firms in North Carolina in terms of providing quality legal services to a number of different kinds of clients. While there was a recent exodus of certain firm members with strong Republican party affiliation, Jim did not join that group possibly to his professional detriment. He continues to be one of the most productive partners in the firm, and as a member of the firm's management committee, has provided exemplary leadership. He has remained loyal to the firm, and I respect him for that.

I very much enjoyed seeing you at the reception at Joyce Fitzpatrick's and Jay Stewart's home earlier this month. Beverley and I have been following your campaign with interest. It is clear that the campaign is building momentum and that with impressive energy, you are undertaking it both pragmatically, in terms of effective fundraising and honorably, in terms of how you have engaged the debate.

With best personal regards, I am

Sincerely yours,

Reuben Clark

Reuben Clark

Coalition for a Fair and Independent Judiciary

February 23, 2005

The Honorable Arlen Specter
Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Specter and Leahy:

On behalf of the undersigned civil rights, human rights, women's rights, and labor organizations, we write to express our deep concern about the level of review about to be undertaken by the Senate Judiciary Committee regarding the nomination of Terrence Boyle to the Court of Appeals for the Fourth Circuit.

Judge Boyle's hearing before the Senate Judiciary Committee is scheduled to take place in less than one week. However, Judge Boyle has a vast number of unpublished opinions from his time as a district court judge that have not been produced to the Judiciary Committee. We are gravely concerned that, without the benefit of a review of all of the opinions reflecting Judge Boyle's decision-making, the Senate's ability to fully discharge its Constitutional obligation of "advice and consent" on this nomination will be severely curtailed. We urge the Committee to postpone its proceedings on the nomination until these unpublished opinions have been obtained and reviewed.

On the publicly available record, Judge Boyle's tenure on the district court reveals a sustained hostility to civil rights claimants appearing before him. On numerous occasions, he has dismissed claims of discrimination based on race, gender, disability, or age. Additionally, Judge Boyle has been reversed by the Fourth Circuit – often characterized as the most conservative appellate court in the country – in more than 150 cases. In many instances, the Fourth Circuit found that Judge Boyle misapplied, misinterpreted, or simply ignored controlling Fourth Circuit or Supreme Court precedent.[1] For these and other reasons, many of the undersigned organizations are opposed to his elevation. Given the criticism of Judge Boyle's record, it is imperative that his full record be made available to the Senate and to those persons with an interest in the nomination.

Federal judges retain a great deal of discretion as to whether to publish a particular ruling. Unpublished opinions have just as much legal impact as published opinions on the parties involved in particular cases. Summary judgment opinions, for example, are dispositive rulings which result in the dismissal of a case. The Court must explain in writing its reasons for granting summary judgment before trial. These opinions

[1] Judge Boyle's unpublished opinions, on which these reversals are based, have not all been produced to the Judiciary Committee.

can provide insight into a nominee's views of federal laws and their application. They are no less revealing about a nominee's judicial philosophy and decision-making process than published opinions. In a 2002 editorial, the *New York Times* called for a full accounting of a judicial nominee's past rulings: "Cases that do not result in a formal opinion can be just as important in evaluating a judge's record as ones that do."[2]

It is clear that Judge Boyle has thousands of unpublished opinions. Judge Boyle has been on the United States District Court for the Eastern District of North Carolina for more than twenty years. In his latest Judiciary Committee Questionnaire, dated January 2003, Judge Boyle estimates that he has decided approximately 11,000 to 12,000 cases on the district court. However, a review of the official and unofficial legal reporters including the Federal Supplement, LEXIS, WESTLAW, and others reveals fewer than 400 published opinions.[3] That means that, as of two years ago, Judge Boyle had more than 10,500 unpublished opinions.

Unquestionably, Judge Boyle's civil rights record has not been fully disclosed. For example, Judge Boyle has fewer than thirty published opinions relating to employment discrimination. Over the course of twenty years, Judge Boyle likely has presided over hundreds of cases in this area. Accordingly, there are likely dozens if not hundreds of dispositive rulings, such as orders granting motions to dismiss and motions for summary judgment, which have not been published. Judge Boyle would have necessarily explained his reasoning for granting dismissals and summary judgments in these written opinions. In addition, Judge Boyle served as a federal judge for several years prior to the passage of the Civil Rights Act of 1991. During this period, plaintiffs were not provided jury trials under Title VII of the Civil Rights Act of 1964. Therefore, even if a case proceeded beyond summary judgment to a trial, Judge Boyle – rather than a jury – would have ruled on the merits of such claims. Accordingly, Judge Boyle should have bench opinions that have not been published.

Precedent exists from the first term of the Bush Administration for disclosing unpublished opinions of nominees whose civil rights records were particularly troubling. Both Charles Pickering and Dennis Shedd were federal district court judges whom President Bush nominated to appellate courts, the Fifth and Fourth Circuits respectively. Both nominees had numerous published opinions that raised serious concerns about their treatment of civil rights cases coming before them. In both instances, the nominees were asked by the Senate Judiciary Committee to produce their civil rights opinions that were not published in any legal reporter. In both instances, the nominees complied and produced their unpublished opinions. The Judiciary Committee also requested and received the unpublished California state court of appeals opinions of Janice Rogers Brown, who was nominated to the DC Circuit.

Production of Judge Boyle's unpublished opinions simply must occur if Judge Boyle's record on civil rights and other issues can be thoroughly explored by the entire Senate in its review of the nomination. Supporters of Judge Boyle should not be permitted to "cherry pick" selected opinions from his record of unpublished opinions in order to highlight portions of his record in an attempt to portray Judge Boyle in a positive light. Only with full disclosure of the entire record can all parties have a full and fair debate on the merits of Judge Boyle's nomination.

The refusal to produce Judge Boyle's unpublished opinions appears to be the continuation of an ongoing pattern by this Administration of refusing to disclose fully the records of its judicial and executive nominees. Perhaps the most glaring example is the Administration's failure to produce, during the Senate's consideration of Ninth Circuit nominee Jay Bybee, any of the non-public memoranda Bybee wrote while heading the Justice Department's Office of Legal Counsel. If the Administration had produced the

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[2] Editorial, "The Secret History of Judges," *The New York Times*, July 28, 2002.

[3] Judge Boyle also indicates that he has participated in nearly 200 cases while sitting by designation on the Fourth Circuit. Only approximately 100 cases of these are published.

documents requested by Senators, the documents would have included a 2002 memorandum that provided legal advice on the use of force during interrogations conducted abroad, concluding that U.S. interrogators could inflict physical pain up to that which accompanies "serious physical injury such as death or organ failure," and that U.S. anti-torture laws could be overridden by the president under his commander-in-chief power. The memorandum became public only after the Senate had confirmed Judge Bybee to a lifetime appointment to the appellate court.

There are other examples of this Administration's failure to disclose the complete records of nominees. During the Senate's consideration of Miguel Estrada's nomination to the D.C. Circuit, the Administration refused to produce portions of Mr. Estrada's legal record which would have revealed the level of his commitment to continued vigorous enforcement of critical constitutional and statutory rights in the area of civil rights and civil liberties. More recently, the Administration, despite repeated requests, refused to provide the Senate with numerous documents that would have revealed the role of Attorney General Alberto R. Gonzales in the shaping of United States policies relating to the definition, and use, of torture.

We strongly believe that the Senate cannot meet its Constitutional obligations to review the nomination of Judge Boyle without full disclosure and review of the entirety of Judge Boyle's record on the district court bench. We urge the Judiciary Committee to take steps to complete the record on this nominee. In the absence of a complete record, there is simply no way that either the Judiciary Committee or the full Senate can adequately fulfill their "advice and consent" responsibilities on Judge Boyle's nomination for a lifetime appointment to the appellate court.

Thank you.

Sincerely,
AFL-CIO
Alliance for Justice
Americans for Democratic Action
American Association of People with Disabilities
American Federation of State, County and Municipal Employees (AFSCME)
Bazelon Center for Mental Health Law
Feminist Majority
Human Rights Campaign
Leadership Conference on Civil Rights
NAACP Legal Defense & Educational Fund, Inc.
NARAL Pro-Choice America
National Abortion Federation
National Employment Lawyers Association
National Organization for Women
National Partnership for Women & Families
National Senior Citizens Law Center
National Urban League
National Women's Law Center
People For the American Way
Service Employees International Union
Sierra Club
YWCA USA

Very truly yours,

Robert Bernstein
Executive Director
Bazelon Center for Mental
Health Law

Andrew Imparato
President and CEO
American Association of
People with Disabilities

CBC
109th Congress

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Congressional Black Caucus
of the United States Congress

2236 Rayburn Building • Washington, DC 20515 • (202) 226-9776 • fax (202) 225-1512
www.congressionalblackcaucus.net

March 3, 2005

The Honorable Arlen Specter
Chairman, Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member, Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter and Ranking Member Leahy:

We are writing on behalf of the Congressional Black Caucus to express our unequivocal opposition to the confirmation of Judge Terrence W. Boyle to the Fourth Circuit Court of Appeals. We are appalled that a federal judge with his documented record of repeatedly defying the precedents of the U.S. Supreme Court and the Fourth Circuit Court of Appeals would even be considered for promotion to the circuit court. For the 43 African Americans in the Congress, Judge Boyle's elevation would be particularly unacceptable. His rulings show this judge to be especially determined to defy both the civil rights statutes enacted by the Congress and the court rulings on which they are based.

What is most remarkable are the number and range of cases that bear out Judge Boyle's undisguised bias against civil rights, criminal justice, and disability statutes and case law. For example, as the Congressional Black Caucus begins its efforts to reauthorize the Voting Rights Act of 1965, the Senate is considering Judge Boyle, a judge whom the Supreme Court has had to overrule twice to get compliance with the Act. Judge Boyle's own circuit has overruled him in more than 150 cases, often for plain error and even for abuse of discretion. On dozens of civil rights and criminal justice cases of first priority to African Americans, Judge Boyle has shown a hostile determination to disregard settled law.

We have studied Judge Boyle's rulings and are particularly distressed that in his 21 years on the district court bench, he has shown repeated resistance to higher court guidance requiring him to follow the law.

This resistance alone means that Judge Boyle has not met the core qualification for promotion to the Fourth Circuit Court of Appeals. Because so many of these cases involve critical matters of civil rights protection, we would find his approval by the Committee and confirmation by the Senate deplorable. We strongly recommend that Judge Boyle be disapproved.

Sincerely,

Melvin L. Watt
Chair, CBC

Eleanor Holmes Norton
Chair, CBC Judicial Nominations Taskforce

WOMBLE CARLYLE SANDRIDGE & RICE
A PROFESSIONAL LIMITED LIABILITY COMPANY

One Wachovia Center
Suite 3500
301 South College Street
Charlotte, NC 28202-9917

Telephone: (704) 331-4900
Fax: (704) 331-4955
Web site: www.wcsr.com

James P. Cooney III
Direct Dial: 704-331-4980
Direct Fax: 704-338-7838
E-mail: jcooney@wcsr.com

October 1, 2003

Chairman Senator Orrin Hatch
104 Hart Office Building
United States Senate
Washington, D.C. 20510

Re: Nomination of Robert Conrad to District Court Judge,
Western District of North Carolina

Dear Senator Hatch:

I am writing this letter in support of U.S. Attorney Robert Conrad's nomination to the Federal Bench for the Western District of North Carolina. It is my understanding that your office is still considering Mr. Conrad's nomination and qualifications.

I have known Mr. Conrad for more than twenty years. Mr. Conrad and I attended the University of Virginia Law School together and since I have been in private practice, I have had the chance to litigate against him both as a civil attorney and as an Assistant United States Attorney. He is a trial lawyer of the highest caliber. His ethics and his integrity are beyond reproach. No matter what the outcome of our cases was, I knew that he had treated me fairly.

I believe that Mr. Conrad would be an excellent appointment to the Federal Judiciary. His integrity and commitment to the highest ethical standards tell me that he would be a fair and impartial judge. His experience as a trial lawyer leads me to believe he would also be the type of judge who would permit the attorneys to try the case, and for the truth to emerge during the course of that trial.

I hope you will favorably consider Mr. Conrad's nomination to the Federal Bench. If you or any member of your office have any questions about my experience with Mr. Conrad, I hope you will not hesitate to contact me.

Sincerely,

James P. Cooney III

JPCIII:bts

bcc: Robert Conrad, Esq.

State of North Carolina
Roy Cooper
Attorney General

October 20, 2003

The Hon. Orrin G. Hatch, Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Bldg.
Washington, DC 20510

RE: Robert J. Conrad, Jr. Nominee for Federal District Court Judge

Dear Chairman Hatch:

I am writing to give my recommendation to Bob Conrad for the important position of Federal District Court Judge.

As soon as I took office as North Carolina Attorney General in January, 2001, Bob and I immediately began a cooperative effort to fight crime and insure security for the citizens of North Carolina. We worked closely together on a joint investigation in western North Carolina. We undertook significant anti-terrorism efforts and a number of crime-fighting initiatives including the battles against domestic violence and identity theft.

Bob is a straight shooter. We are from different political parties, but I believe he is a student of the law and his decisions are not affected by partisan politics. I believe that he has the insight, the judicial temperament and the desire to adhere to the law necessary to be confirmed as a Federal District Court Judge.

If you have any questions, please do not hesitate to call.

With kind regards, I am

Very truly yours,

Roy Cooper

RAC/sm

Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602-0629
Phone: (919) 716-6400 Fax: (919) 716-0803

U. S. Department of Justice

United States Attorney
Eastern District of North Carolina

Terry Sanford Federal Building
310 New Bern Avenue
Suite 800
Raleigh, North Carolina 27601-1461

Telephone (919) 856-4530
Criminal FAX (919) 856-4487
Civil FAX (919) 856-4821
www.usdoj.gov/usao/nce

February 28, 2005

VIA FACSIMILE

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: United States District Judge Terrence W. Boyle

Dear Mr. Chairman:

Please accept this letter of recommendation on behalf of United States District Judge Terrence W. Boyle. I am an Assistant United States Attorney for the Eastern District of North Carolina and have had the pleasure of practicing criminal law before Judge Boyle for almost seven years. During those seven years, I have appeared before Judge Boyle for many trials, sentencing hearings, plea hearings, and various motions hearings, and am quite familiar with his judicial decorum. I frequently notice that Judge Boyle is neither an advocate for the government nor the defendant, but is a true advocate of justice. His decisions, both oral and written, possess fairness and equity.

Judge Boyle's years of judicial experience and knowledge of the law more than adequately qualify him for a judicial appointment to the Fourth Circuit Court of Appeals, and I highly recommend him for such position. If I can be of further assistance, please do not hesitate to contact me at (919) 856-4582.

Sincerely,

Felice McConnell Corpening

Felice McConnell Corpening
Assistant United States Attorney

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

Kristi L. Remington
Office of Legal Policy

Patterson | Harkavy LLP

ATTORNEYS AT LAW

Raleigh • Chapel Hill • Greensboro

Leto Copeley
Burton Craige
Ann E. Groninger
Jonathan R. Harkavy
Valerie A. Johnson
Michael G. Okun
Henry N. Patterson, Jr.

Of counsel
Melinda Lawrence
Nahomi Harkavy

Reply to Raleigh:
BURTON CRAIGE
bcraige@pathlaw.com

January 4, 2005

Honorable Patrick Leahy
433 Russell Senate Office Building
Washington, Dc 20510

Re: James C. Dever, III; Nominee for District Court Judge, Eastern District of North Carolina

Dear Senator Leahy:

I am enclosing copies of my letters to Senator Dole and Senator Burr supporting the nomination of James C. Dever, III as District Court Judge for the Eastern District of North Carolina.

I have served as president of the North Carolina Academy of Trial Lawyers and the ACLU of North Carolina. As a life-long Democrat, I am deeply committed to protecting civil rights and civil liberties. I appreciate the work that you and other senators have done in reviewing the qualifications of President Bush's nominees to the federal bench, and opposing those whose commitment to a political agenda outweighs their fidelity to the Constitution.

Mr. Dever has superb qualifications to serve as a federal judge and deserves unanimous bipartisan support. I hope that Democrats and Republicans will endorse his prompt confirmation.

Thank you for your consideration.

Sincerely yours,

Burton Craige

Burton Craige

BC/mmcb
Enclosures

JAMES B. CRAVEN III
JOSEPH H. CRAVEN
ATTORNEYS AT LAW

CYNTHIA C. KEITH
LEGAL ASSISTANT

LIBERTY MARKET BUILDING
349 WEST MAIN STREET
P.O. BOX 1366
DURHAM, NC 27702
(919) 688-8295
FAX (919) 688-7832

June 9, 2003

Hon. Orrin Hatch
Senator from Utah
United States Senate
Washington, DC 20510

Re: Terrence W. Boyle

Dear Senator:

Bu way of introduction, I am an unreconstructed New Deal, Fair Deal, New Frontier, Great Society, bleeding heart, tax and spend liberal Democrat who voted for Bill Clinton twice, to say nothing of George McGovern and Michael Dukakis. At age 10, I wrote President Eisenhower, asking him to spare the Rosenbergs. I am also 60 years old and a life member of the American Law Institute. In 1974-1975, I taught your colleague Johnny Edwards in my Contracts class at the UNC-Chapel Hill Law School.

Having said all that, I think it is outrageous that having first been nominated, I believe 12 years ago, Terry Boyle has yet to have a confirmation hearing. Over the years I have appeared before him dozens of times, in civil and criminal cases alike. He is exceptionally bright, exceptionally compassionate, and exceptionally hard working and productive. What else counts?

If you can get him a hearing, I sure would love to testify in his behalf. Please let me know.

Lest you be too put off by the first paragraph above, I do have Republican genes too. My great great great grandfather, Tod Robinson Caldwell, was a Lincoln Republican from Burke County and the first Republican Governor of North Carolina. My grandmother always explained though that he could only have been elected during Reconstruction, with the black and carpetbag vote.

Please do what you can for Terry Boyle. Many thanks.

Very truly yours,

James B. Craven III

JBCIII/df
Cc: Hon. Terrence W. Boyle

United States Senators · North Carolina
ELIZABETH DOLE &
RICHARD BURR

Senators Dole, Burr Express Support of North Carolina Judicial Nominees

FOR IMMEDIATE RELEASE
Thursday, March 3, 2005

CONTACT: Lindsay Taylor (Dole)
(202) 224-7905
Doug Heye (Burr)
(202) 224-3154

Washington, DC – U.S. Senators Elizabeth Dole and Richard Burr today testified before the United States Senate Committee on the Judiciary in support of the three judicial nominees from North Carolina. Their testimony comes one week after Dole and Burr both signed their respective "blue slips," moving the nominations forward in the confirmation process.

The nominees include Terrence W. Boyle to be U.S. Circuit Judge for the Fourth Circuit, Robert J. Conrad to be U.S. District Judge for the Western District of North Carolina, and James C. Dever, III to be U.S. District Judge for the Eastern District of North Carolina. The nominations were sent to the Senate by President Bush on February 14.

All three North Carolina judicial nominees were nominated in the last Congress, though none received a hearing.

"Today's hearing is long overdue," said Senator Dole. "Our federal bench has been without the service of these able judges for far too long. All three North Carolina nominees come with impeccable credentials, and it is my privilege to support all three of them. It is my fervent hope the full Senate will move expeditiously on these nominations and that senators will refrain from partisan political maneuvers."

"Today is a good day for North Carolina," said Burr. "Today's hearing – something denied to all three nominees in the past – is an important step to move the nominations forward in the confirmation process. I urge the Judiciary Committee to approve Judge Boyle, Magistrate Dever and former U.S. Attorney Conrad so their nominations may have an up or down vote on the Senate floor."

For more information, please visit www.dole.senate.gov or www.burr.senate.gov.

# # #

Duke University
School of Law
Box 90360
Durham, North Carolina
27708-0360

Robinson O. Everett
Professor of Law

Telephone (919) 613-7047
Facsimile (919) 668-0995

June 25, 2002

Senator Orrin G. Hatch (R-UT)
433 SHOB
Washington, D.C. 20510-4502

Re: Nomination of James C. Dever III

Dear Senator Hatch:

For your information I am enclosing a copy of a letter I have written to Senator John Edwards in strong support of the nomination of James C. Dever III to become a district judge for the Eastern District of North Carolina.

I hope that you will support Jim Dever and help assure that his nomination is promptly considered by the Senate Judiciary Committee.

Sincerely,

Robinson O. Everett
Professor of Law

enclosure/dk

Duke University
School of Law
Box 90360
Durham, North Carolina
27708-0360

Robinson O. Everett
Professor of Law

Telephone (919) 613-7047
Facsimile (919) 668-0995

June 25, 2002

Senator John Edwards
225 SDOB
Washington, DC 20510-3201

Dear Senator Edwards:

I understand that President Bush has nominated James C. Dever III of Raleigh to fill a long—vacant district judgeship in the Eastern District of North Carolina. My extensive acquaintance with Jim Dever convinces me that he would render outstanding service as a federal district judge; and so I write to urge you to support the nomination and to seek a hearing thereon by the Judiciary Committee as soon as possible.

I came to know Jim while he was a law student at Duke Law School where I have taught for more than forty-five years. I considered him to be a splendid student; and also I was impressed by his fine service as Editor-in-Chief of the Duke Law Journal. After graduation, Jim clerked for a federal circuit judge in California, but thereafter our paths crossed again in Washington, where he served on active duty in the Honors Program of the Office of the General Counsel of the Air Force and I was Chief Judge of the Court of Military Appeals. From all I heard he did very well in his service at the Pentagon.

In 1992 Jim decided to return to North Carolina where he joined the law firm of Maupin Taylor & Ellis. I have had frequent contacts with him since that time and, indeed, have participated in litigation in which he was counsel for some of the parties. My observation of his work in that context led me quickly to the conclusion that Jim understands the trial process and is well prepared to be a trial judge.

From my own service of more than a decade as the chief judge of a federal appellate court I believe I gained some understanding of what it takes to make a good judge. Jim Dever has all the requisite qualities; and in my view he will be a superb jurist if his nomination is confirmed. Accordingly, I urge you to take any action that may be available to you to help assure that he is confirmed in the near future as a federal trial judge.

With best wishes, I am

Sincerely,



Robinson O. Everett
Professor of Law

:dk

Copies to: Senator Patrick J. Leahy
Chair, Senate Judiciary Committee

Senator Orrin G. Hatch
Senate Judiciary Committee

Duke University
School of Law
Box 90360
Durham, North Carolina
27708-0360

Robinson O. Everett
Professor of Law

Telephone (919) 613-7047
Facsimile (919) 668-0995

April 21, 2003

Senator Orrin G. Hatch (R-UT)
Chairman
U.S. Senate Judiciary Committee
104 Hart Office Building
Washington, D.C. 20510-4502

Re: Nomination of Terrence Boyle

Dear Chairman Hatch:

I have become deeply concerned about the continuing failure of the Judiciary Committee to schedule a hearing on the nomination of Judge Terrence Boyle of North Carolina to serve on the Fourth Circuit Court of Appeals. I am especially troubled also, because I believe Judge Boyle to be highly qualified to serve as an appellate judge and because I cannot fathom the rationale for the delay.

My own personal experience with Judge Boyle has included appearing before him in some redistricting litigation which extended over five years. Judge Boyle served on a three-judge panel which carefully examined the contentions of the plaintiffs, whom I represented. We were attacking two Congressional districts which we claimed to have been drawn with a predominant racial motives; and although all three judges rejected our arguments as to one district, a two-judge majority, of which Judge Boyle was one, agreed with us that the Twelfth District was predominantly racial in motive and that this tainted the redistricting plan.

I understand that Senator Edwards has expressed concern because twice on direct appeal during this litigation the Supreme Court reversed the panel that had decided in favor of my clients. However, I believe this circumstance should carry no weight in considering Judge Boyle's nomination. On two earlier redistricting appeals during the decade of North Carolina redistricting litigation another three-judge panel— which decided by divided vote against the plaintiffs and in favor of the State— were reversed by five-to-four votes of the Supreme Court. Moreover, in overturning the findings and decision of Judge Boyle's panel after a trial had occurred, the Supreme Court's decision was rendered by a five-to-four vote; and the outcome

may be explained in part by a shift of position on the part of Justice O'Connor. Certainly I perceived no indication during this litigation that Judge Boyle lacked excellent judicial skills. Incidentally, if corroboration of my view is needed, it can be found in my recent article, *Redistricting in North Carolina: A Personal Perspective*, 79 North Carolina Law Review 1301 (2001).

On two other occasions during the 1990's I was involved in litigation decided by Judge Boyle. In one case he ruled for our side and in the other against us. Regardless of the outcome, I felt that in each instance Judge Boyle had performed well as a judge and had provided a fair consideration of the issues involved..

Finally, let me note that from 1980 to 1990 I served as Chief Judge of a federal court of appeals — namely, the U.S. Court of Military Appeals (later renamed the Court of Appeals for the Armed Forces). During that period I acquired a much greater understanding of the responsibilities of an appellate judge and of the qualities that assure success in performing those responsibilities. On the basis of my own judicial experience and my analysis of Judge Boyle's temperament and judicial skills, I am convinced that he is a fine nominee to serve on the Fourth Circuit and I would willingly testify to that effect if a hearing were held. Even more important — and regardless of the outcome of any nomination hearing as to Judge Boyle — I am convinced that the integrity of the judicial selection process and the maintenance of public confidence in that process require that a hearing take place promptly.

Respectfully,

Robinson O. Everett
Professor of Law

/dk

Copies to: Senator John Edwards
Senator Elizabeth Dole
Presidential Counsel Alberto Gonzalez

Urban League
OF CENTRAL CAROLINAS, INC.

"Promoting economic self-sufficiency among African-American families and racial inclusion in our communities."

October 3, 2003

Chairman Orrin Hatch
104 Hart Office Building
United States Senate
Washington, DC 20510

Dear Chairman Hatch:

As you are aware, Robert Conrad has been nominated for U. S. District Court Judge in Charlotte. I would like to go on record in offering my support and endorsement of Bob for this position

I have known Bob and his family for the past 8 years. He has knack of relating to people from all walks of life. For example, when appointed U.S. Attorney, my husband and I were invited to a party in his behalf. We were of the impression that we would be in the company of many of the people with whom he worked, and others in the legal profession. When we arrived we were very surprised by the very diverse group, both from a racial and socio-economic status that had been invited. When I informed Bob of my surprise at the group assembled, he told me he wanted to invite people that were important to him.

In all of my encounters with Bob, he has impressed me as being an unassuming man with great compassion. Bob is dedicated to his family, and he and his wife Ann are raising their children to be respectful and responsible adults.

Bob was my son's AAU coach and continues to be a mentor to him. Given his very busy work and family schedule, Bob still finds the time to keep tabs on him.

Senator Hatch, I trust you will give serious consideration and support to Bob Conrad for District Court Judge. He possesses the qualities of intellect, character and compassion that would be required of a fair judge. I have no doubt that he will serve the people of this state in a fair and equitable manner.

Sincerely,

Madine H. Gaile
President/CEO

Urban League of Central Carolinas, Inc.
740 West Fifth Street (28202)
P.O. Box 34686
Charlotte, NC 28234-4686
704.373.2256
Fax: 704.373.2262
www.urbanleaguecc.org

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Home School Legal Defense Assoc.
Independent Women's Forum
Individual Rights Foundation
Judicial Watch
Kansas Conservative Union
Landmark Legal Foundation
Law Enforcement Alliance of America
Lincoln Legal Foundation
Memory of Victims Everywhere
Michigan Family Forum
Minnesota Family Council
National Association of Evangelicals
National Coalition for Restoration of the Black Family
National Family Legal Foundation
National Law Center for Children and Families
National Legal Foundation
National Legal and Policy Center
National Parents' Commission
National Rifle Association/ILA
National Tax Limitation Committee
New Yorkers for Constitutional Freedoms
Oklahoma Family Policy Council
Organized Victims of Violent Crime
Pennsylvania Landowners Association
Pro-Life Action League
Southeastern Legal Foundation
Students for America
Traditional Public Policy Foundation
Traditional Values Coalition
United Seniors Association
Business and Industrial Council

May 8, 2002

The Honorable Patrick J. Leahy, Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

We represent more than a million Americans deeply concerned about the vacancy crisis in the federal judiciary. As the first anniversary of President Bush's initial nominations to the federal judiciary approaches, we urge you to end the delays and allow a hearing and a vote for the eight nominees who have been waiting nearly a year for you to act.

Miguel Estrada, John Roberts, Terry Boyle, Priscilla Owen, Jeffrey Sutton, Deborah Cook, Michael McConnell, and Dennis Shedd were each nominated on May 9, 2001. Your months of delay since then have been disappointing given your public commitment to treat judicial nominees fairly.

On the day President Bush announced their nominations, you praised his choices saying: "Had I not been encouraged, I would not have been here today. I will continue to work with the President." Yet now, one year later, you have allowed the Senate to act on only three from that original group, leaving these eight men and women waiting. We urge you to work with the President as you said you would and allow these nominees a hearing and a vote.

Several times during 2000, you supported then-Gov. Bush's call for the Senate to act quickly on nominations. In October, you said: "I have said on the floor, although we are different parties, I have agreed with Gov. George Bush, who has said that in the Senate a nominee ought to get a vote, up or down, within 60 days." These eight long-standing nominees have been waiting 364 days for you to give them a hearing and an up or down vote.

When there were 50 vacancies on the federal bench, you spoke of "a judicial vacancy crisis" that was "plaguing so many federal courts." There are nearly 90 empty judgeships today, and while the vacancy rate has remained at 100 or higher during seven of your 11 months in charge of the Judiciary Committee, you have not acted to fill these eight vacancies, half of which have been designated judicial emergencies.

In a letter to President Bush on March 16 of last year, you and Senator Charles Schumer referred to the American Bar Association's evaluation of nominees as "the gold standard by which judicial candidates are judged." Under that standard, all of these nominees have been deemed either qualified or well-qualified for judgeships on the U.S. Court of Appeals, yet your committee has not held a single hearing to review their qualifications, temperament, commitment to upholding the law.

In fact, these are well-respected attorneys and sitting judges with stellar credentials who will make excellent additions to the federal judiciary. They deserve a hearing before your committee, and they deserve an up or down vote before the Senate.

Senator Leahy, you have spoken of a need to end the vacancy crisis. You have said that nominees should receive a vote within 60 days. You have recognized the ABA rating as "the gold standard." Any you announced that you were "encouraged" by these nominations while committing yourself to work with the President.

In all these things, Senator, you have set forth a standard for fairness – but after nearly a year of delays, it is not fair to keep these eight nominees waiting any longer. We therefore urge you to apply your own fairness standard to the May 9 nominees, lift the blockade, and allow these men and women the opportunity to be confirmed.

Sincerely,

Adirondack Solidarity Alliance
Alabama Policy Institute
American Association of Christian Schools
American Center for Law & Justice
American Conservative Union
American Council on Economic Security
American Council for Immigration Reform
American Decency Association
American Family Association of Arkansas
American Family Association of New York
American Family Defense Coalition

American Freedom Crusade
American Policy Center
American Pro-Constitutional Association
American Renewal
American Reformation Project
American Values
Association of New Jersey Rifle and Pistol Clubs
California Public Policy Foundation
Campaign for Working Families
Capitol Hill Prayer Alert
Catholic Citizens of Illinois
CatholicVote.org
Center for Reclaiming America
Christian Coalition of America
Christian Coalition of California
Christian Coalition of Georgia
Christian Coalition of Maine
Citizens for Excellence in Education
Coalitions for America
Coalition on Urban Renewal & Education
Concerned Women for America
Concerned Women for America of Virginia
Connecticut Association of Christian Schools
Conservative Victory Committee
Coral Ridge Ministries
Council for America
Eagle Forum
Eagle Forum of Alabama
Eagle Forum of Arkansas
Eagle Forum of Indiana
Eagle Forum of Massachusetts
Eagle Forum of Rhode Island
Evergreen Freedom Foundation
Family Policy Network
Family Research Council
Florida Eagle Forum
Free Congress Foundation
Freedom Alliance
Frontiers of Freedom
Georgia Sport Shooting Association
Government is Not God – PAC
Gun Owners' Action League
Gun Owners of America
Human Life Alliance
Illinois Citizens for Life
Illinois Right to Life Committee
Iowa Right to Life
Independent Women's Forum

Judicial Watch
Kansas Taxpayers Network
Life Issues Institute
Ludwig von Mises Institute
Maine Right to Life Committee
Maryland Taxpayers Association
Massachusetts Family Institute
Mississippi Policy Institute
National Abstinence Clearinghouse
National Federation of American Hungarians
National Legal Foundation
National Taxpayers Limitation Committee
New Jersey Christian Coalition
New Jersey Policy Council
New Yorkers for Constitutional Freedoms
New York Eagle Forum
Oklahomans for Children and Families
Oklahoma Family Policy Council
Ohio Conservative Alliance
Old Dominion Association of Christian Schools
Organized Victims of Violent Crime
Parents for Control
People Advancing Christian Education
Project 21
Republicans United for Tax Relief
Republican Women of Whatcom County
Restore America
60 Plus Association
Smith Center – California State University
Teen-Aid
Tennessee Christian Coalition
Tennessee Eagle Forum
Texas Justice Foundation
The Center for Arizona Policy
The Christian Alert Network
The Family Foundation of Kentucky
The National Center for Home Education
The National Center for Public Policy Research
The Southeastern Legal Foundation
Tradition, Family, Property
Traditional Values Coalition
United Seniors Association
U.S. Business and Industry Council
Utah Eagle Forum
Watchdogs Against Government Abuse

Sep-30-2003 01:02pm From-DA OFFICE 704-347-7111 T-785 P.001/001 F-282

State of North Carolina
General Court of Justice
Twenty-sixth Prosecutorial District
MECKLENBURG COUNTY

PETER S. GILCHRIST, III
DISTRICT ATTORNEY

MECKLENBURG COUNTY COURTHOUSE
700 EAST TRADE STREET, 2ND FLOOR
CHARLOTTE, NC 28202-3016
TELEPHONE: (704) 347-7891
FAX: (704) 333-5246

September 30, 2003

Senator Orrin Hatch
104 Hart Office Building
United States Senate
Washington, DC 20510

Re: Robert J. Conrad, Jr.

Dear Senator Hatch:

It is my privilege to urge an early confirmation for Robert J. Conrad, Jr., to the Senate for appointment to the United States District Court for the Western District of North Carolina.

I have known Mr. Conrad since he joined the United States Attorney's Office in 1989. We have had the opportunity to work closely since March 2001 when he became Acting and later United States Attorney. I have found him to be thoughtful, committed and diligent in the performance of his duties. He has shown a spirit of cooperation with the District Attorney's Office of the 26th Prosecutorial District that has been unusual in my 28 years in this office. We have determined that there are a number of common problems we face, and he has worked jointly with us to seek solutions that are workable for both offices.

His achievements and record amply demonstrate he has the intellect and ability to be an excellent addition to the bench.

I commend his appointment and ask that you assist him.

Very sincerely,

Peter S. Gilchrist, III
District Attorney

PSG/ebj

150 Fayetteville Street Mall
Suite 450
Raleigh, N.C. 27601

February 28, 2005

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

FACSIMILE: (202) 228-1698

Dear Mr. Chairman:

I am writing to express my unequivocal support for the nomination of United States District Judge Terrence W. Boyle to the United States Court of Appeals for the Fourth Circuit. During the past six years, I have appeared before Judge Boyle on countless occasions on behalf of indigent criminal defendants in the Eastern District of North Carolina. The vast majority of my clients are of African American descent, as am I. I can say without hesitation that Judge Boyle has shown no inclination whatsoever to judge my clients according to their racial or ethnic background. Simply stated, from my observations and experience before Judge Boyle, race is not an issue.

My clients overwhelmingly plead guilty in federal court. Consequently, my initial goal as a defense attorney at sentencing, is to have the judge see my client, notwithstanding his criminal conduct, as a person. In that regard, there is no effort to be made when appearing before Judge Boyle. Judge Boyle often engages those being sentenced in a dialog to better assess their sense of remorse, level of contrition and general honesty. In these colloquies, Judge Boyle demonstrates a level of diligence and compassion that is unsurpassed in this district. The Fourth Circuit's gain, truly, will be our loss.

Sincerely,

Debra Carroll Graves

DEBRA CARROLL GRAVES
Attorney at Law

DCG

Holmes P. Harden
326 Forsyth Street
Raleigh, North Carolina 27609

June 23, 2003

VIA FACSIMILE (202) 228-1374
AND UNITED STATES MAIL

The Honorable John R. Edwards
United States Senate
225 Dirksen Senate Office Building
Washington, DC 20510-3201

Dear Senator Edwards:

I write to encourage you to advance the nomination of Mr. James C. Dever for appointment to the United States District Court for the Eastern District of North Carolina. I write as a member of the Bar who is interested in a strong judiciary, as a colleague of Mr. Dever who has insight into his skill, integrity and temperament and as a Democrat and constituent who is concerned about the increasing polarization and politicization of our legal culture.

A former Editor in Chief of the Duke Law Journal, a Ninth Circuit Court clerk, an adjunct law professor at Campbell University and an experienced practitioner, Mr. Dever possesses exemplary legal skills and is imminently qualified to serve on the federal bench.

Mr. Dever has been my law partner at Maupin Taylor, P.A. for eleven (11) years. He has been a member of the Board of Directors of the firm of over sixty (60) lawyers for a number of those years. In that position, he has been open-minded and exercised great judgment on a host of issues. He has used these same skills as a legal practitioner. I expect that he is someone who, as a judge, would be a mediator and facilitator, not a dictator. He would be a judge who listens to litigants rather than lecturing them. He would value collegiality in the courtroom and consensus within our legal culture.

It has been my experience that Mr. Dever treats people and their points of view with consummate respect. He recognizes the legitimacy of opposing positions and is a warm friend of his legal adversaries outside of court. He is not a political reactionary or ideologue. I seriously doubt that

he would personalize any legal issue and am confident that every litigant and lawyer, regardless of political philosophy, would receive a fair hearing before him. No one would leave his courtroom feeling disenfranchised or abandoned by our legal system.

Mr. Dever would welcome the opportunity to speak with you or your staff about his qualifications. I understand from your staff that it is not your policy to meet with judicial nominees, but I hope that you will make an exception in this case.

Please give Mr. Dever every consideration and return the blue slip for this quality nominee.

Sincerely,

Holmes P. Harden

cc: Stephanie Jones (via facsimile)
Ed Turlington



HUMAN
RIGHTS
CAMPAIGN

March 1, 2005

Dear Senate Judiciary Committee Member:

On behalf of our almost 600,000 members, the Human Rights Campaign stands with our allies in the civil rights and disability rights communities in opposition to the nomination of Judge Terrence W. Boyle to the U.S. Court of Appeals for the Fourth Circuit. After careful review and consideration of Judge Boyle's judicial record in the Eastern District of North Carolina, we are concerned that Judge Boyle would not adequately enforce legal protections for lesbian, gay, bisexual, and transgender ("LGBT") Americans. We share the concerns of our allies in the civil rights community regarding Judge Boyle's stances on employment discrimination, the Americans with Disabilities Act ("ADA"), and voting rights, and we write to express our particular concerns to Judge Boyle's nomination on the basis of his potential impact on LGBT rights.

HRC believes that a judge should have a distinguished record and make decisions fairly and with an open mind. However, Judge Boyle has been reversed on appeal over 150 times and at a rate far in excess of most judges. It is impossible to know the full extent of his record since thousands of his opinions are unpublished. It is clear that numerous reversals result from Judge Boyle's clear misinterpretation of the law or his failure to follow precedent. For example, Judge Boyle ignored binding Supreme Court precedent in a Title VII employment discrimination suit when he placed the right of the state to discriminate over that of the individual to be free from discrimination.[1] In another case, the Fourth Circuit overturned Judge Boyle, commenting: "The district court relied on [a Fourth Circuit case] as supporting its conclusion . . . . This conclusion is contrary to congressional direction and is in no way required by our [prior] decision."[2] Judge Boyle's decisions on federalism issues are frequently at odds with established precedent and canons of statutory interpretation, and could undermine the enforcement of civil rights protections.

In addition, Judge Boyle is prone to granting summary judgment or dismissal requests, especially in civil rights cases, thus denying litigants a full and fair opportunity to have their day in court. We are concerned that this record demonstrates hostility to civil rights claims. If Judge Boyle is elevated to

[1] See Ellis v. North Carolina, No. 02-1428, 2002 U.S. App. LEXIS 23717 (4th Cir. Oct. 28, 2002) (citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)) (reversing Judge Boyle on appeal because his granting a motion to dismiss a Title VII case on the basis of the Eleventh Amendment was contrary to precedent).

[2] See Williams v. Channel Master Satellite Sys., 101 F.3d 346, 350 n.4 (4th Cir. 1996) (discussing Judge Boyle's inappropriate reasoning in an ADA case).

the appellate level, litigants in the Fourth Circuit will not be as well protected from his errors because of the low number of cases that the Supreme Court hears each year.

An appellate court judge should have a demonstrated commitment to full equality under the law for all Americans. However, HRC is concerned that Judge Boyle's record demonstrates a hostility to minority rights. Judge Boyle has ruled against the interests of minorities on issues ranging from employment discrimination,[3] voting rights,[4] and the ADA.[5] Judge Boyle's opinions raise strong questions about his ability to distinguish intolerance and discrimination from rational state action. For example, Judge Boyle vacated a settlement order in a Title VII sex discrimination case, *an order that the state as defendant had previously agreed to*, finding that the court did not have subject matter jurisdiction because there was insufficient proof of discrimination to indicate that a federal law had been violated.[6] The Fourth Circuit court disagreed and criticized Judge Boyle for improperly invalidating the settlement agreement, noting: "The district court did not expressly consider the factors set forth in [Supreme Court and Fourth Circuit opinions] despite having conducted a fairness hearing during which it heard testimony that would have allowed it to reach a reasoned decision concerning the fairness and adequacy of the settlement agreement."[7]

Judge Boyle's many rulings against legal protections for people with disabilities are of particular concern to HRC because of the disproportionate effect of HIV and AIDS on LGBT communities. The judge has consistently attempted to limit the reach of the ADA, opining that Congress had no power to apply the ADA to state facilities under either the Commerce Clause or the Fourteenth Amendment,[8] and that an employer should be allowed to determine the meaning of "reasonable" accommodations.[9] The judge's willingness to exempt states from ADA provisions could have an impact on people living with HIV and AIDS. In addition, the Judge has granted broad discovery powers to defendants in ADA cases by ruling that plaintiffs "waive all privileges and privacy interests relating to their claim by virtue of filing the complaint."[10] Invasion of individual privacy rights in ADA cases could make LGBT litigants less willing to come forward with ADA claims because their private life and medical history become fair game for the defense.

The totality of Judge Boyle's record raises grave concerns, and serious doubts, about his nomination. In light of his judicial record, HRC believes that as an appellate court judge, Judge Boyle would not fulfill his responsibility to enforce anti-discrimination laws. The Fourth Circuit often decides important cases and controversies addressing critical questions of American democracy and liberty, including equal protection, equality in employment, a woman's right to choose, the right to vote, and the right to be free of state-imposed religious views. The addition of Judge Boyle to that bench

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[3] See, e.g., United States v. North Carolina, 914 F. Supp. 1257 (E.D.N.C. 1996) (refusing to implement an agreement which settled a gender employment discrimination suit), rev'd, 180 F.3d 574 (4th Cir. 1999).
[4] See, e.g., Cromartie v. Hunt, 133 F. Supp. 2d 407 (E.D.N.C. 2000) (holding that a voter redistricting plan violated the Equal Protection Clause), rev'd sub nom. Easley v. Cromartie, 532 U.S. 234 (2001).
[5] See, e.g., Butler v. Burroughs Wellcome, Inc., 920 F. Supp. 90 (E.D.N.C. 1996) (ruling that questions about a woman's sex life were appropriate because, in an ADA case, "a plaintiff's medical history is relevant in its entirety").
[6] United States v. North Carolina, 914 F. Supp. 1257 (E.D.N.C. 1996), rev'd, 180 F.3d 574 (4th Cir. 1999).
[7] United States v. North Carolina, 180 F.3d 574, 582 n.5 (4th Cir. 1999).
[8] See Pierce v. King, 918 F. Supp. 932 (E.D.N.C. 1996) (denying a cause of action under the ADA to an inmate who requested accommodations in order to be able to perform a work assignment), vacated, 525 U.S. 802 (1998).
[9] See Williams v. Avnet, Inc., 910 F. Supp. 1124 (E.D.N.C. 1995) (granting summary judgment to an employer where the employer fired an employee who required workplace accommodations following an automobile accident), aff'd on narrower grounds sub nom. Williams v. Channel Master Satellite Sys., 101 F.3d 346 (4th Cir. 1996).
[10] Butler v. Burroughs Wellcome, Inc., 920 F. Supp. 90, 92 (E.D.N.C. 1996).

would endanger those fundamental rights, and expose litigants to the risk that their cases will not be decided in accordance with established constitutional and legal principles.

For all of these reasons, we urge you to oppose the nomination of Judge Terrence W. Boyle to the United States Court of Appeals for the Fourth Circuit. Thank you for considering our views. If you have any questions or need more information, please contact Praveen Fernandes on our staff at 202.216.1559.

Sincerely,

David M. Smith
Vice President, Policy & Strategy

Christopher R. Labonte
Legislative Director

Indiana Association
of Urban League
Executives

Affiliated with the
National Urban League

Fort Wayne Urban League, President Dr. A.V. Fleming

Urban League of Madison County,Inc, President William Raymore

Urban League of Northwest Indiana, Inc, President Eloise Gentry

Indianapolis Urban League, Interim President Joe Slash

Urban League of South Bend, President Audrey Jones-Spencer

April 30, 2003

The Honorable Richard Lugar
United States Senate
Washington, D.C. 20510

Dear Senator Lugar:

On behalf of the Indiana Association of Urban League Executives, I am writing to urge your opposition to the pending nomination of Judge Terence Boyle to the Fourth Circuit Court of Appeals. We are deeply concerned and are aware of Judge Boyle's record on many issues that surround civil rights and his out right unwillingness to follow the law in many cases throughout his career. The court, to which Judge Boyle has been nominated in fact, has overturned many of his decisions. Even the Supreme Court in a 9-0 decision, overturned his decision on voting rights, *Hunt vs. Cromartie*, 526 U.S. 541 (1999).

Judge Boyle was also one of the first judges in the country to hold that Congress lacks the power to protect individuals from disability discrimination at the hands of State governments. *Brown vs. North Carolina Division of Motor Vehicles*, 987 F. Supp. 431 (E.D.N.C. 1997).

The Fourth Circuit Court of Appeals has more African-Americans living within its boundaries than any other Circuit Court in the country. Adding another activist judge to this court would be detrimental for many of the African-American constituents that reside within this court's jurisdiction. The Indiana Association of Urban League Executives strongly urges that you oppose this nomination.

Respectfully,

A.V. Fleming

Dr. A.V. Fleming
President/CEO of the Fort Wayne Urban League

cc: Representative Gregory W. Porter, Chairman
Indiana Black Legislative Caucus

227 East Washington Blvd, Fort Wayne, IN 46802
(260) 424-6126 (Office) (260) 422-1626 (Fax)

JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW
Civil Rights and Human Dignity

BOARD OF TRUSTEES
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Sally Zinman
California Network of Mental Health Clients
HONORARY TRUSTEE
Miriam Bazelon Knox
Washington DC
EXECUTIVE DIRECTOR
Robert Bernstein, PhD
Affiliations listed for information only

February 23, 2005

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
711 Hart Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Senate Judiciary Committee
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senators Hatch and Leahy:

We write as the Executive Director of the Judge David L. Bazelon Center for Mental Health Law and the President and CEO of the American Association of People with Disabilities (AAPD) to express our grave concerns about the nomination of Terrence Boyle to serve as a federal judge on the Fourth Circuit Court of Appeals. The Bazelon Center is a national nonprofit organization that advocates for the rights of individuals with mental disabilities through litigation, policy advocacy, education and training. AAPD is the nation's largest cross-disability organization, with over 80,000 members.

As a judge in the Eastern District of North Carolina, Terrence Boyle has a long record of issuing rulings that drastically limit Congress's power to pass needed civil rights laws and make it difficult or impossible to enforce these laws against states. Judge Boyle has been consistently dismissive of Congress's authority to pass civil rights laws. He has held that Congress had no Fourteenth Amendment or Commerce Clause power to enact portions of the Americans with Disabilities Act (ADA). Additionally, he has interpreted the ADA in ways that are blatantly inconsistent with Congress's intent. Judge Boyle's reasoning in many disability rights cases has been rejected by the Fourth Circuit or the Supreme Court, as detailed below.

We are concerned that Judge Boyle's cramped interpretations of Congress's authority and Congress's statutory language would have even more far-reaching impact if he were confirmed as a federal appeals court judge.

Below are highlights from Terrence Boyle's record on the civil rights of individuals with disabilities:

Congress' Power to Enact the ADA

■ Judge Boyle ruled that Congress had no authority under the Fourteenth Amendment to make Title II of the Americans with Disabilities Act (ADA) applicable to the states. In *Brown v. North Carolina Division of Motor Vehicles*, 987 F. Supp. 451 (E.D.N.C. 1997), individuals with disabilities challenged the fee imposed for handicapped parking placards. Boyle held that states could not be sued under Title II of the ADA because Congress failed to abrogate their sovereign immunity. This conclusion was later rejected by the Supreme Court.[1]

Boyle concluded that Congress had improperly tried to change the constitutional standard for evaluating discrimination against individuals with disabilities by finding that individuals with disabilities were a "discrete and insular minority." *Id.* at 457-58. Based on that, Boyle found that Congress had exceeded its power in applying the ADA to the states. *Id.* at 458.

Boyle also ruled that the ADA is not remedial legislation in the same sense as other anti-discrimination statutes because it does not treat people equally but instead "seeks to single out the disabled for special, advantageous treatment." His decision asserted that the ADA demands entitlement, which "has little to do with promoting the 'equal protection of the laws.'" *Id.* Therefore, he held, the ADA – or at least Title II – was not proper legislation under Congress's Fourteenth Amendment power. *Id.* at 459. The Fourth Circuit affirmed Boyle's decision, but on much narrower ground.[2]

■ Boyle also held in a case involving state prisons that the ADA was not valid Fourteenth Amendment legislation. In one of the earliest decisions to deny individuals the right to enforce the ADA by applying federalism principles, he wrote:

> Although Congress invoked the power to enforce the Fourteenth Amendment in passing the ADA, it is unclear what Fourteenth Amendment right, if any, is vindicated by the Act. The Fourteenth

[1] In *Tennessee v. Lane*, 124 S.Ct. 1978 (2004), the Supreme Court recognized that "Congress enacted Title II against a backdrop of pervasive unequal treatment [of people with disabilities] in the administration of state services and programs, including systematic deprivations of fundamental rights," and held that Congress had validly abrogated immunity in the area of access to the courts. *Id.* at 1989, 1988-94. The Court held that the analysis of whether Title II is valid Fourteenth Amendment legislation must be limited to the particular application at issue.

[2] The Fourth Circuit ruled that only the regulation prohibiting surcharges for reasonable accommodations was not justified as Fourteenth Amendment legislation based on the record presented to the court. *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), *cert. denied*, 531 U.S. 1190 (2001).

> Amendment has traditionally been understood as protecting individuals from state action that would infringe upon individual liberties. The ADA, however, creates positive rights to entitlement against other individuals and state governments... Although framed in terms of addressing discrimination, the Act's operative remedial provisions demand not equal treatment, but special treatment tailored to the claimed disability. In this respect, the ADA differs radically from traditional anti-discrimination laws, such as Title VII, which seek only a state of affairs where individuals are treated in a neutral manner without regard to race, sex, age, etc. Unlike traditional anti-discrimination laws, the ADA *demands* entitlement in order to achieve its goals.. This the Fourteenth Amendment cannot authorize.

Pierce v. King, 918 F. Supp. 932, 940 (E.D.N.C. 1996) (emphasis in original). In contrast to Judge Boyle's characterization, the Supreme Court has recognized that the ADA's requirement of reasonable accommodations to neutral rules and policies is necessary in order to provide equal treatment to people with disabilities.[3]

■ Boyle also ruled that Congress had no authority under the Commerce Clause to apply the ADA to state prisons. In *Pierce v. King*, he dismissed claims brought by a state prison inmate challenging the prison's failure to make reasonable accommodations for his disability that would enable him to participate in a prison work program. 918 F. Supp. at 932. The program would have allowed the plaintiff to earn credits to reduce the length of his sentence.

Boyle found that the ADA did not create a cause of action for state inmates "displeased with their prison work assignments." *Id.* at 938. He also ruled that the direct effects of states' use of prison labor on interstate commerce were "wholly insubstantial within the context of our nation's federalist traditions, to legitimate application of labor laws such as the ADA to state prisons." *Id.* at 940. Boyle's ruling appears to be one of only two published decisions where a federal court invalidated part of the ADA as outside of Congress's Commerce power.[4]

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[3] *See Tennessee v. Lane*, 124 S.Ct. at 1993 (Congress recognized "that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion . . ."); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) ("The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy.").

[4] The ruling was affirmed by the Fourth Circuit based on different reasoning, 131 F.3d 136 (4th Cir. 1997), and was later vacated and remanded by the Supreme Court after a holding in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998) that the ADA applies to state prisons.

The Right to Reasonable Accommodation

■ Judge Boyle's view of the right to reasonable accommodations under the ADA and Section 504 is contrary to the statute, regulations, and black letter disability law. In *Williams v. Avnet, Inc.*, 910 F. Supp. 1124 (E.D.N.C. 1995), Boyle refused to let an ADA employment lawsuit proceed. The suit was brought by a manual punch press operator who sustained permanent injuries in a car accident. She was limited in lifting heavy objects and in heavy pushing and pulling. Upon her return to work, the woman requested the accommodation of a forklift to assist her in doing her job, or alternatively to be reassigned to another position in accordance with the employer's policies. Instead, the employer terminated her.

Boyle held that the requested accommodations were not reasonable. He ruled that reasonableness must be determined from the employer's point of view, and courts should not second-guess an employer's decision about whether an accommodation is reasonable unless the accommodation is "obviously reasonable" or there is no serious dispute about its reasonableness. *Id.* at 1133-34.

Boyle added that the ADA does not require any accommodation that is "substantial." *Id.* at 1134. He also said it would be unreasonable to require another employee to assist the plaintiff, even if the assistance was only required for 15 minutes a day. *Id.* at 1134-35. Finally, despite Congress's explicit provision in the ADA that reassignment to a vacant position is an example of a reasonable accommodation, Boyle ruled that it would be unreasonable for the employer to reassign the plaintiff to another position, even if its own policies required it to do so. *Id.* at 1135.

Boyle's statements about the ADA's reasonable accommodation requirement are completely inconsistent with basic ADA law, and his analysis was severely criticized by the Fourth Circuit. While the Fourth Circuit ultimately affirmed the decision, the court observed that Boyle's analysis of the law was misguided and wrong on a number of grounds, including his determination that reasonableness is a subjective rather than an objective analysis, his refusal to consider types of accommodations that Congress "obviously" considered reasonable, and his suggestion that working is not a "major life activity." *Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346, 350 (4th Cir. 1996). The Fourth Circuit found Boyle's deference to the employer's opinion "particularly inappropriate in the summary judgment context, where a court must view evidence in the light most favorable to the non-moving party." *Id.*

Medical Privacy

■ In *Butler v. Burroughs Wellcome, Inc.*, 920 F. Supp. 90 (E.D.N.C. 1996), an employee brought a claim under the ADA alleging failure to reasonably accommodate her psychiatric disorder. The plaintiff alleged a history of physical and sexual abuse by relatives. She was diagnosed with "post traumatic stress disorder and severe depression, which led her to have problems dealing with men." *Id.* at 91. During her deposition, the plaintiff objected to a question relating to her sex life and indicated she did not want to discuss any aspect of her

marriage. *Id.* at 91. She moved for a protective order on the basis that the line of questioning was in bad faith, intended to embarrass her, and irrelevant. *Id.* at 91-92.

Boyle denied her motion and ruled that in an ADA case, "a plaintiff's medical history is relevant in its entirety." *Id.* at 92. He wrote that it would be impossible to answer basic questions about whether a plaintiff was foreclosed from similar employment due to a disability, whether a plaintiff was qualified, or what accommodations were required "without full and complete access to the plaintiff's medical records." *Id.* Boyle's ruling is inconsistent with most courts' efforts to limit access to medical records to those relevant or necessary to determine the questions at hand. His ruling would subject ADA plaintiffs to unfettered invasions of their privacy.

Fair Housing

■ Boyle issued a disturbing ruling in a disability case involving group homes, *Oxford House v. City of Raleigh*, 1999 U.S. Dist. LEXIS 3705 (E.D.N.C. Jan. 26, 1999). The City of Raleigh had adopted a spacing requirement that limited the number of "Supportive Housing Residences" in a particular geographic area. Individuals with disabilities moved into Oxford House, only to find that the group home was located too near a transitional home for people with mental disabilities. The city refused to waive the spacing requirement. Oxford House filed a complaint asking the court to declare that the ordinance violated the Fair Housing Act, the ADA and the Constitution. The City then filed a "counterclaim," asking the judge to declare that the ordinance was legal. Oxford House failed to answer the counterclaim, and a default judgment was entered.

Oxford House then asked the judge to vacate the default judgment, which may be done for "good cause shown" under the federal rules. Boyle denied the request on the ground that Oxford House did not present a meritorious defense because the zoning rules – rules that restrict the number of group homes for individuals with disabilities in each area – do not discriminate *against* those protected by the ADA but discriminate *in favor* of such individuals. *Id.* at 8. Simultaneously, Boyle ruled for the city on the pleadings. The tenants of Oxford House were forced to move immediately as a result of the ruling.

We feel that it is of the utmost importance that appointees to the federal appeals courts be individuals who can fairly balance the interests of individuals, states, and the federal government, and who respect Congress's authority to act pursuant to its constitutional powers to help vulnerable citizens who need protection. Terrence Boyle's record demonstrates that he does not meet these requirements.

from the office of

Senator Edward M. Kennedy

of Massachusetts

****FACT SHEET ATTACHED****
FOR IMMEDIATE RELEASE **CONTACT: Laura Capps / Melissa Wagoner**
March 3, 2005 (202) 224-2633

STATEMENT BY SENATOR KENNEDY ON THE NOMINATION OF TERRENCE BOYLE TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

As with all nominations for life-time positions on the federal courts our Committee has a clear responsibility to review Judge Boyle's record on the federal district court.

As you know, Mr. Boyle, your record raises a number of serious concerns. There are real questions about whether you abused your power on the district court by wrongly dismissing plaintiffs' claims without giving them a fair chance to make their case or have their day in court. You've been reversed on appeal far more than any other district judge in the Fourth Circuit. Too often those reversals have come because you made the same mistake more than once.

More troubling still is the fact that you seem to have been reversed most often and made the most serious legal errors in the cases that matter most to average citizens. Again and again, the Fourth Circuit has ruled that you improperly dismissed cases on important individual rights, such as the right to free speech, free association, and the right to be free from discrimination.

You've repeatedly tried to strike down important parts of the Americans with Disabilities Act. You mis-applied or mis-interpreted other landmark civil rights laws, including the Voting Rights Act and Title VII of the Civil Rights Act of 1964. In numerous cases, the Fourth Circuit has ruled that you abused your discretion and refused to follow the law.

In the Voting Rights Act case, Cromartie v. Hunt, the Supreme Court ruled unanimously, in an opinion by Justice Thomas, that you failed to follow the basic legal standard on summary judgment motions, and that you were wrong to decide, without even having a trial, that a Congressional district with a significant African American population necessarily resulted from an improper racial gerrymander. It's rare for any judge's decision to be unanimously reversed by the Supreme Court in a civil rights case, or any other

case. Yet the Supreme Court later reversed you for a second time, in the same case, for failing to follow the law.

These are very important concerns, and you'll have an opportunity to respond.

We must make absolutely certain that persons selected for life-time appointments to the federal courts will not abuse their power by failing to follow the law. We need judges who come to the federal bench with an open-mind and a commitment to fairness for all Americans, not judges who believe they're above the law. Your record raises real questions about these basic issues.

The vast majority of your decisions are unpublished, and have not been provided to the Committee. There's no way to tell whether the problems found so far are just the tip of a very large iceberg. The American people have a right to know how you have treated parties who appear in your court, and how you have ruled in those unpublished opinions, before we act on your nomination to a life-time position on the appellate court.

Because of the obvious questions already raised, the Committee has a special responsibility to review the entire record to assess your qualifications and judicial philosophy. I hope we'll have the opportunity to review all your opinions. I look forward to this hearing and to your responses to these serious concerns.

###

TERRENCE BOYLE
Nominee to the U.S. Court of Appeals for the Fourth Circuit

Terrence Boyle is a graduate of Brown University (B.A., 1967) and American University's law school (J.D., 1970). He served as counsel on the Subcommittee on Housing, Committee on Banking and Currency, in the U.S. House of Representatives from 1970 to 1973, and then as Legislative Assistant to Senator Jesse Helms (1973). He worked in private practice until his appointment to the U.S. District Court for the Eastern District of North Carolina in 1984.

Boyle's nomination is widely opposed by North Carolina Law enforcement officials, civil rights organizations, and many others. The North Carolina Police Benevolent Association, the North Carolina Troopers Association, and the Professional Firefighters and Paramedics of North Carolina oppose Boyle's nomination because of his many legal errors in cases affecting their members. This nomination is also opposed by the National Association of Police Organizations and the Southern States Police Benevolent Association, as well as a broad coalition of organizations dedicated to protecting civil rights, workers' rights, the environment, and the rights of the disabled.

Judge Boyle's decisions have been repeatedly reversed for "plain error" and "abuse of discretion." He has been reversed by the conservative Fourth Circuit over 150 times, more than any other district court judge in the Fourth Circuit.

Because the Supreme Court reviews only a few cases each year, the Fourth Circuit is

often the court of last resort for persons who bring federal claims in North Carolina, South Carolina, Virginia, West Virginia, and Maryland.

Terrence Boyle's confirmation would be devastating to civil and individual rights in the Fourth Circuit. The Fourth Circuit is an important court for federal civil rights, and it has more African Americans living within its boundaries than any other federal circuit court in the country. Boyle has repeatedly misinterpreted civil rights laws in order to dismiss claims brought by victims of discrimination and to reduce protections for minorities. He has repeatedly misinterpreted laws protecting other important individual rights:

Voting Rights: Terrence Boyle is so extreme on voting rights that he was reversed by the U.S. Supreme Court, 9-0, in an opinion by Justice Clarence Thomas, Cromartie v. Hunt. The Supreme Court later reversed him again in the same case.

Free Speech: Boyle has improperly dismissed First Amendment claims by law enforcement officers and other public servants.

Race and Gender Discrimination: Boyle has often used a mistaken theory of States' rights to limit civil rights protections. In Ellis v. State of North Carolina, the Fourth Circuit ruled that Boyle violated Supreme Court precedent when he ruled that Title VII of the 1964 Civil Rights Act does not apply to job discrimination by the States. Boyle has also dismissed numerous cases involving gender discrimination, sexual harassment and retaliation.

Rights of the Disabled: Boyle has repeatedly ruled to weaken protections for the disabled under the Americans with Disabilities Act.

GOODMAN, CARR, LAUGHRUN, LEVINE & MURRAY, P.A.

ATTORNEYS AT LAW

MICHAEL P. CARR
GEORGE V. LAUGHRUN, II*
MILES S. LEVINE
R. ANDREW MURRAY

* BOARD CERTIFIED SPECIALIST IN CRIMINAL LAW

SUITE 602 CAMERON BROWN BUILDING
301 SOUTH McDOWELL STREET
CHARLOTTE, NORTH CAROLINA 28204

ARTHUR GOODMAN, JR.
(1926 - 2003)

TELEPHONE
704-372-2770
FACSIMILE
704-372-6337

September 30, 2003

Senator Orrin Hatch
Chairman, Judiciary Committee
104 Hart Office Building
United States Senate
Washington, D.C. 20510

Re: Robert Conrad

Dear Senator Hatch,

I am writing this letter on behalf of a nomination for the United States District Court for the Western District of North Carolina Bench, that being now, United States Attorney Robert J. Conrad.

I have had the privilege of knowing Bob personally and professionally for over 15 years and the Senate could not confirm a more qualified candidate for the federal bench.

I have tried numerous cases with Bob over the years and he truly represents what a judicial official should be. He is fair, impartial and has a sense of doing what is right without regard to the consequences. Professionally, he is an outstanding trial lawyer and runs an outstanding office in the Western District of North Carolina. Having seen Bob try cases ranging from bank fraud and bank robberies to death penalty cases, he is committed to justice and that is what a federal judge should embody.

On a personal note, there is no more moral person that Bob Conrad. He is committed to his family and even has taken time out from his busy schedule to coach basketball for the past several years. Bob could have made a tremendous amount of money in private practice but chose to go the route of government service and he should be rewarded with an appointment to the federal bench.

I am not sure what Bob's political views are and quite frankly, I don't care. A federal judge

should be above the political process and although, unfortunately, the Senate must confirm his nomination in a political arena, Bob has tried to distant himself from the politcal world in the administration of justice. This is the way it should be.

Finally, I have been admitted to practice law in North Carolina since August 23, 1980. I was a former State prosecutor for over 2 years and since 1982, I have been engaged in the practice of criminal defense in the Western District of North Carolina and elsewhere through the state. Approximately 2 years ago, I decided to stop handling federal cases due to the rise of the sentencing guidelines and what I perceive as a lack of discretion given prosecutors and federal judges. My support of Bob is not in hopes of gaining any favor if I would appear before him as I am not taking federal cases and can not see myself taking federal cases in the future. My support of him is based upon the fact that the federal bench needs individuals like Bob Conrad and it would be a travesty of justice not to confirm his nomination.

Please feel free to contact me should you need any further information.

Very truly yours,



George V. Laughrun, II

Leadership Conference on Civil Rights

Phone: 202-466-3311
Fax: 202-466-3435
www.civilrights.org

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February 23, 2005

The Honorable Arlen Specter
Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Specter and Leahy:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest and most diverse civil and human rights coalition, we write in opposition to the confirmation of Terrence Boyle to the U.S. Court of Appeals for the Fourth Circuit.

Judge Boyle's elevation would be devastating to civil rights jurisprudence within the Fourth Circuit and beyond. The Fourth Circuit is virtually the court of last resort for persons residing within North Carolina, South Carolina, Virginia, West Virginia, and Maryland. The circuit has more African-Americans living within its boundaries than any other circuit in the country and has one of the fastest growing Latino populations. Judge Boyle's record reflects a deep and abiding hostility to civil rights cases based on race, gender, disability, and age. His avid support of states' rights principles threatens the millions of Fourth Circuit residents who may need to rely upon federal civil rights laws for protection against discrimination.

Judge Boyle's twenty-year record on the district court indicates that he would move the Fourth Circuit only further to the philosophical right if he is confirmed. The Fourth Circuit is already an extremely conservative court on civil rights and Constitutional issues. The Circuit has been reversed by this Supreme Court for too narrowly construing civil rights laws, and has issued numerous opinions hostile to affirmative action, women's rights, fair employment, and voting rights.

Judge Boyle has been reversed by the Fourth Circuit in more than 150 cases, a remarkable number in and of itself. However, in dozens of these cases concerning civil rights and criminal justice, Judge Boyle has been reversed for failing to follow precedent or for too narrowly construing the Constitution or federal laws protecting individual rights and liberties. Given the Fourth Circuit's extremely conservative reputation, the nature and number of these reversals is truly extraordinary.

Terrence Boyle is a protege of former Senator Jesse Helms. Boyle was appointed to the federal district court by President Reagan in 1984, at the behest of Senator Helms. In 1991, President George H.W. Bush nominated Judge Boyle to the Fourth Circuit, but the nomination lapsed. In 2001, while Helms was still in the Senate, President George W. Bush renominated Judge Boyle to the Fourth Circuit.

No longer a Senator, Jesse Helms should not be awarded a living legacy on this circuit. Throughout the Clinton administration, Jesse Helms "stood in the courthouse door," blocking the desegregation of the Fourth Circuit, the last all-white circuit court in the country. By failing to give the approval that was required of home-state Senators, then-Senator Helms prevented Senate consideration of two African-American nominees from North Carolina, federal judge James Beaty and state appellate judge James Wynn. Helms held up Judge Beaty's nomination for four years by failing to give his approval, and the nomination finally lapsed. In 1999, President Clinton nominated Judge Wynn, but Helms refused his approval, and the Wynn nomination lapsed as well. Only after President Clinton bypassed the Senate by giving Roger Gregory from Virginia a recess appointment in 2000 was the Fourth Circuit finally integrated.

Throughout his stand against Beaty, Wynn and others, Jesse Helms argued that the Fourth Circuit "did not need any more judges." In 1999, he even introduced legislation (S. 570) to abolish two of the fifteen judgeships. In 2000, with ten judges on the Court, Jesse Helms was still of the view that the Fourth Circuit did not need additional judges.[1] A few months later, however, the new Bush administration nominated Helms' protege, Terrence Boyle, to the court. With three additional judges now on the Fourth Circuit since 2001, the Senate plans to proceed with the Boyle nomination.

In his twenty years on the bench, Judge Boyle has promoted "states' rights" at the expense of federal authority to protect civil rights. For example, in *Ellis v. State of North Carolina,* Judge Boyle invoked a state's sovereign immunity to rule that an African American could not sue her state employer under Title VII of the Civil Rights Act of 1964.[2] A panel of the Fourth Circuit – including conservative jurist Michael Luttig – ruled that Judge Boyle was wrong to dismiss the case in view of the Supreme Court's 1976 holding that Congress specifically abrogated state immunity when enacting Title VII. Had Judge Boyle's ruling been allowed to stand, it would have conflicted with clearly established precedent, and would have allowed state agencies to blatantly violate one of the most significant federal anti-discrimination laws on the books. Perhaps mindful of the consequence of his error, Judge Boyle has sought to distance himself from his ruling in his Senate Judiciary Committee Questionnaire concerning his appellate

[1] "Robb, Warner Team Up to Get Judge's Nomination Back on Track," *Washington Times*, Sept. 28, 2000; *Washington Times*, Dec. 30, 2000.
[2] 50 Fed.Appx. 180, 2002 WL 31546000 (4th Cir. 2002).

nomination. In his answers, he refuses to acknowledge that the legal issue on appeal was whether sovereign immunity protected states from Title VII claims, and notes only that the Fourth Circuit "commented" (rather than ruled) on the applicable law.[3]

Judge Boyle relied on states' rights principles in refusing to approve a settlement in *United States v. State of North Carolina*.[4] This case involved widespread gender discrimination in employment throughout North Carolina's prisons, a complaint first investigated and found valid by the U.S. Justice Department under President George H.W. Bush. Judge Boyle ruled he had no jurisdiction, stating that "a federal court should be circumspect before it would take custody of large segments of a state's sovereign functions." Judge Boyle went so far as to criticize the Justice Department for attempting to force North Carolina to comply with national standards of equal opportunity that contradicted the state's "culture." After inviting the State to withdraw its consent to the settlement (which it did), Judge Boyle then refused to approve the settlement on that ground. Writing for a panel of the Fourth Circuit, Chief Judge William Wilkins reversed Judge Boyle for an abuse of discretion in refusing to approve the settlement.[5]

If confirmed, Judge Boyle will undoubtedly join, if not lead, the Fourth Circuit in what former Chief Judge J. Harvie Wilkinson called its "revival of Constitutional limitations that were there all along but have been greatly neglected for a very long time – the extent of federal power vis-a-vis the states."[6] During Judge Boyle's district court confirmation hearing in 1984, Senator Helms assured Judiciary Committee Chairman Strom Thurmond that Terrence Boyle "wholeheartedly shares [his] deeply held views" on the "proper role of the federal judiciary in our system of government."[7] At that same hearing, Judiciary Chairman Strom Thurmond asked Boyle about guidelines for judges in determining the "propriety of federal judiciary intervention in the state affairs." Nominee Boyle replied that federal courts are of "limited jurisdiction. They must recognize that the states are the reservoir of general jurisdiction and sovereignty."

Judge Boyle has also frequently demonstrated hostility toward the Americans with Disabilities Act (ADA), and has taken several opportunities to find that Congress exceeded its powers in making the ADA applicable to states. In *Pierce v. King*, a decision reversed by the Supreme Court, Judge Boyle argued that Congress had no authority to apply the ADA to the states, stating that because the ADA seeks what he labeled "special treatment" for people with disabilities, rather than mere "equal treatment," the Fourteenth Amendment provides no authority to Congress to enact that vital law as applied to the states.[8]

Judge Boyle's civil rights jurisprudence in other areas is equally troubling. He has shown disdain for the widely accepted method of proving discrimination known as "disparate impact," which allows discrimination to be shown where neutral practices adversely impact a class of persons protected under civil rights laws. In the North Carolina prison employment case, Judge Boyle wrote that "[t]he concept of 'unintentional discrimination' is logically impossible," and

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[3]Answers to Senate Judiciary Committee Questionnaire, Jan. 7, 2003.
[4]914 F. Supp. 1257 (E.D.N.C. 1996).
[5]*United States v. North Carolina*, 180 F.3d 574 (4th Cir. 1999).
[6]"An Appeals Court that Always Veers to the Right," *The New York Times*, 5/24/99.
[7]Confirmation Hearing, April 11, 1984, Senate Judiciary Committee, S.Hrg. 98-372 PT. 3.
[8]918 F.Supp. 932 (E.D.N.C. 1996), *aff'd*, 131 F.3d 136 (4th Cir 1997), *rev'd*, 525 U.S. 802 (1998).

found that the Supreme Court had overruled *sub silentio* the seminal case allowing for such proof.[9] In a case that challenged the impact of high-stakes testing policies on minority schoolchildren, *Eric v. Causby*, Judge Boyle denied the students' motion for a preliminary injunction. At the hearing, Judge Boyle stated: "[t]here is no such thing as discrimination without intent."[10].

Judge Boyle has also defied precedent in the area of voting rights. In *Cromartie v. Hunt*,[11] white voters claimed the State legislature was improperly racially motivated in drawing North Carolina's 12th Congressional District. Before discovery or any evidentiary hearing, Judge Boyle issued an opinion for a three-judge panel granting summary judgment for the white voters. The Supreme Court unanimously reversed it in an opinion written by Justice Clarence Thomas. After a trial on remand, Boyle's panel again found that the district was unconstitutional, relying almost exclusively on language and reasoning used in his first opinion that was specifically rejected by the Supreme Court. The Supreme Court reversed again, holding that the evidence Judge Boyle relied upon was "precisely the kind of evidence we said was inadequate the last time this case was before us."

In a host of other civil rights areas, Judge Boyle has been reversed by the conservative Fourth Circuit for dismissing cases. For example, in *Whiting v. Ski's Auto World*,[12] Judge Boyle dismissed an employment discrimination case on both procedural and substantive grounds. The Fourth Circuit reversed on both counts, finding that the plaintiff had established a *prima facie* case of race discrimination regarding his promotion claim. In *McCauley v. City of Jacksonville*, Judge Boyle dismissed a housing developer's fair housing complaint that his proposed development was blocked for racial reasons. The Fourth Circuit reinstated the case, finding that the developer broadly alleged that he would have supplied low-income, racially integrated housing, and that actions to prevent it denied housing opportunities on the basis of race.[13] In *Franks v. Ross*, Judge Boyle was reversed for rejecting an environmental racism case that challenged the siting of a landfill in an African-American area.[14] In *Rogers v. Lee*, the Fourth Circuit reversed Judge Boyle for not applying a seminal Supreme Court case retroactively to the criminal defendant's claim of racially discriminatory jury selection.[15]

In addition to Judge Boyle's hostility to civil rights, the severity of his legal errors should disqualify him from elevation to the Fourth Circuit. The Fourth Circuit has repeatedly reversed Judge Boyle's decisions because of "plain error" and other fundamental legal mistakes. "Plain error" is a term used to describe not a harmless or justifiable mistake, but rather one that clearly contradicts the law, compromises the rights of parties, or involves a serious lapse of judgment. Such errors call into doubt Judge Boyle's qualifications to serve at the appellate level.

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[9]914 F. Supp. 1257, 1265 (E.D.N.C. 1996).
[10]977 F.Supp. 384 (E.D.N.C. 1997); "Judge Hints That He Won't Stop Johnston Policy," *Charlotte News Observer*, Aug. 19, 1997.
[11]34 F. Supp 2d 1029 (E.D.N.C. 1998), *rev'd* 526 U.S. 541 (1999); 133 F. Supp. 2d 407 (E.D.N.C. 2000), *rev'd sub nom Easley v. Cormartie*, 532 U.S. 234 (2001).
[12]1999 WL 753997 (4th Cir. Sept. 23, 1999).
[13]1987 WL 44775 (4th Cir. Sept. 8, 1987).
[14]313 F.3d 184 (4th Cir. 2002).
[15]1991 WL 1817 (4th Cir. 1991).

In *U.S. v. Adams*, a case involving videocassette piracy, Judge Boyle committed "plain error" twice in the same case.[16] First, he ordered the defendant to pay restitution, even though the illegal videocassettes were seized before any were sold. The Fourth Circuit ruled that his decision was plain error, finding restitution improper when a copyright infringer made no profit and the victims suffered no loss in their copyrights' values. Judge Boyle committed plain error again by finding the defendant ineligible for federal benefits. The Fourth Circuit reversed, explaining that foreclosure of federal benefits is only applicable to certain drug offenses, noting that the statute itself is entitled.

Judge Boyle's decisions show a highly disturbing hostility towards civil rights laws, and a "states' rights" jurisprudence that can only be described as extremist. Further, as noted by the unusually high rate and egregious nature of his reversed decisions, Judge Boyle's record shows a blatant disregard for precedent and raises serious questions about his abilities as a jurist. For these reasons, we strongly urge the Committee to reject his confirmation.

Thank you for your consideration. If you have any questions, please feel free to contact Rob Randhava, LCCR policy analyst, at 202-466-6058, or Nancy Zirkin, LCCR deputy director, at 202-263-2880.

Sincerely,

Wade Henderson
Executive Director

Nancy Zirkin
Deputy Director

[16] 2001 U.S. App. LEXIS 14572 (4th Cir. 2001).



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Advocacy Letter - *Leadership Conference on Civil Rights*

The Nomination of Terrence Boyle

February 23, 2005

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Leadership Conference on Civil Rights

The Honorable Arlen Specter
Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Specter and Leahy:

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No longer a Senator, Jesse Helms should not be awarded a living legacy on this circuit. Throughout the Clinton administration, Jesse Helms "stood in the courthouse door," blocking the desegregation of the Fourth Circuit, the last all-white circuit court in the country. By failing to give the approval that was required of home-state Senators, then-Senator Helms prevented Senate consideration of two African-American nominees from North Carolina, federal judge James Beaty and state appellate judge James Wynn. Helms held up Judge Beaty's nomination for four years by failing to give his approval, and the nomination finally lapsed. In 1999, President Clinton nominated Judge Wynn, but Helms refused his approval, and the Wynn nomination lapsed as well. Only after President Clinton bypassed the Senate by giving Roger Gregory from Virginia a recess appointment in 2000 was the Fourth Circuit finally integrated.

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If confirmed, Judge Boyle will undoubtedly join, if not lead, the Fourth Circuit in what former Chief Judge J. Harvie Wilkinson called its "revival of Constitutional limitations that were there all along but have been greatly neglected for a very long time - the extent of federal power vis-a-vis the states." During Judge Boyle's district court confirmation hearing in 1984, Senator Helms assured Judiciary Committee Chairman Strom Thurmond that Terrence Boyle "wholeheartedly shares [his] deeply held views" on the "proper role of the federal judiciary in our system of government." At that same hearing, Judiciary Chairman Strom Thurmond asked Boyle about guidelines for judges in determining the "propriety of federal judiciary intervention in the state affairs." Nominee Boyle replied that federal courts are of "limited jurisdiction. They must recognize that the states are the reservoir of general jurisdiction and sovereignty."

Judge Boyle has also frequently demonstrated hostility toward the Americans with

Disabilities Act (ADA), and has taken several opportunities to find that Congress exceeded its powers in making the ADA applicable to states. In *Pierce v. King*, a decision reversed by the Supreme Court, Judge Boyle argued that Congress had no authority to apply the ADA to the states, stating that because the ADA seeks what he labeled "special treatment" for people with disabilities, rather than mere "equal treatment," the Fourteenth Amendment provides no authority to Congress to enact that vital law as applied to the states.

Judge Boyle's civil rights jurisprudence in other areas is equally troubling. He has shown disdain for the widely accepted method of proving discrimination known as "disparate impact," which allows discrimination to be shown where neutral practices adversely impact a class of persons protected under civil rights laws. In the North Carolina prison employment case, Judge Boyle wrote that "[t]he concept of 'unintentional discrimination' is logically impossible," and found that the Supreme Court had overruled *sub silentio* the seminal case allowing for such proof. In a case that challenged the impact of high-stakes testing policies on minority schoolchildren, *Eric v. Causby*, Judge Boyle denied the students' motion for a preliminary injunction. At the hearing, Judge Boyle stated: "[t]here is no such thing as discrimination without intent."

Judge Boyle has also defied precedent in the area of voting rights. In *Cromartie v. Hunt*, white voters claimed the State legislature was improperly racially motivated in drawing North Carolina's 12th Congressional District. Before discovery or any evidentiary hearing, Judge Boyle issued an opinion for a three-judge panel granting summary judgment for the white voters. The Supreme Court unanimously reversed it in an opinion written by Justice Clarence Thomas. After a trial on remand, Boyle's panel again found that the district was unconstitutional, relying almost exclusively on language and reasoning used in his first opinion that was specifically rejected by the Supreme Court. The Supreme Court reversed again, holding that the evidence Judge Boyle relied upon was "precisely the kind of evidence we said was inadequate the last time this case was before us."

In a host of other civil rights areas, Judge Boyle has been reversed by the conservative Fourth Circuit for dismissing cases. For example, in *Whiting v. Ski's Auto World*, Judge Boyle dismissed an employment discrimination case on both procedural and substantive grounds. The Fourth Circuit reversed on both counts, finding that the plaintiff had established a *prima facie* case of race discrimination regarding his promotion claim. In *McCauley v. City of Jacksonville*, Judge Boyle dismissed a housing developer's fair housing complaint that his proposed development was blocked for racial reasons. The Fourth Circuit reinstated the case, finding that the developer broadly alleged that he would have supplied low-income, racially integrated housing, and that actions to prevent it denied housing opportunities on the basis of race. In *Franks v. Ross*, Judge Boyle was reversed for rejecting an environmental racism case that challenged the siting of a landfill in an African-American area. In *Rogers v. Lee*, the Fourth Circuit reversed Judge Boyle for not applying a seminal Supreme Court case retroactively to the criminal defendant's claim of racially discriminatory jury selection.

In addition to Judge Boyle's hostility to civil rights, the severity of his legal errors should disqualify him from elevation to the Fourth Circuit. The Fourth Circuit has repeatedly reversed Judge Boyle's decisions because of "plain error" and other fundamental legal mistakes. "Plain error" is a term used to describe not a harmless or justifiable mistake, but rather one that clearly contradicts the law, compromises the rights of parties, or involves a serious lapse of judgment. Such errors call into doubt Judge Boyle's qualifications to serve at the appellate level.

In *U.S. v. Adams*, a case involving videocassette piracy, Judge Boyle committed "plain error" twice in the same case. First, he ordered the defendant to pay restitution, even though the illegal videocassettes were seized before any were sold. The Fourth Circuit ruled that his decision was plain error, finding restitution improper when a copyright infringer made no profit and the victims suffered no loss in their copyrights' values. Judge Boyle committed plain error again by finding the defendant ineligible for federal benefits. The Fourth Circuit reversed, explaining that foreclosure of federal benefits is only applicable to certain drug offenses, noting that the statute itself is entitled.

Judge Boyle's decisions show a highly disturbing hostility towards civil rights laws, and a

"states' rights" jurisprudence that can only be described as extremist. Further, as noted by the unusually high rate and egregious nature of his reversed decisions, Judge Boyle's record shows a blatant disregard for precedent and raises serious questions about his abilities as a jurist. For these reasons, we strongly urge the Committee to reject his confirmation.

Thank you for your consideration. If you have any questions, please feel free to contact Rob Randhava, LCCR policy analyst, at 202-466-6058, or Nancy Zirkin, LCCR deputy director, at 202-263-2880.

Sincerely,

Wade Henderson
Executive Director

Nancy Zirkin
Deputy Director

1. "Robb, Warner Team Up to Get Judge's Nomination Back on Track," *Washington Times*, Sept. 28, 2000; *Washington Times*, Dec. 30, 2000.
2. 50 Fed.Appx. 180, 2002 WL 31546000 (4th Cir. 2002).
3. Answers to Senate Judiciary Committee Questionnaire, Jan. 7, 2003.
4. 914 F. Supp. 1257 (E.D.N.C. 1996).
5. *United States v. North Carolina*, 180 F.3d 574 (4th Cir. 1999).
6. "An Appeals Court that Always Veers to the Right," *The New York Times*, 5/24/99.
7. Confirmation Hearing, April 11, 1984, Senate Judiciary Committee, S.Hrg, 98-372 PT. 3.
8. 918 F.Supp. 932 (E.D.N.C. 1996), *aff'd*, 131 F.3d 136 (4th Cir 1997), *rev'd*, 525 U.S. 802 (1998).
9. 914 F. Supp. 1257, 1265 (E.D.N.C. 1996).
10. 977 F.Supp. 384 (E.D.N.C. 1997); "Judge Hints That He Won't Stop Johnston Policy," Charlotte News Observer, Aug. 19, 1997.
11. 34 F. Supp 2d 1029 (E.D.N.C. 1998), *rev'd* 526 U.S. 541 (1999); 133 F. Supp. 2d 407 (E.D.N.C. 2000), *rev'd* sub nom *Easley v. Cormartie*, 532 U.S. 234 (2001).
12. 1999 WL 753997 (4th Cir. Sept. 23, 1999).
13. 1987 WL 44775 (4th Cir. Sept. 8, 1987).
14. 313 F.3d 184 (4th Cir. 2002).
15. 1991 WL 1817 (4th Cir. 1991).
16. 2001 U.S. App. LEXIS 14572 (4th Cir. 2001).

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Statement Of Senator Patrick Leahy
Hearing Before The Judiciary Committee
On The Nomination Of Judge Terrence Boyle
March 3, 2005

The Committee meets today for its second controversial nominations hearing in three days to consider a circuit court nomination that comes to us laden with questions and opposition and concern. Chairman Specter is holding this hearing today on the renomination of Judge Terrence Boyle to the U.S. Court of Appeals for the Fourth Circuit.

During the last four years the Republican majority bent or broke virtually every previous practice and rule to try to force through this President's divisive judicial nominees in a bid to transform the federal bench into an arm of the Republican Party. In contrast, the prior Republican leadership assiduously respected every Republican objection to President Clinton's moderate judicial nominees and prevented more than 60 from being considered, blocking them with pocket filibusters. Judge Boyle has the distinction of being so controversial that his was the only circuit court nomination of President Bush on which the former Republican leadership balked at a hearing.

Unlike the many anonymous Republican holds and pocket filibusters that kept scores of President Clinton's qualified judicial nominees from moving forward, Senator Edwards' opposition to the elevation of Judge Boyle to the Fourth Circuit was not kept secret. His reasons for openly opposing Judge Boyle remain as compelling today as they were when he resolutely represented the people of North Carolina on this Committee and in the Senate. He wrote to Senator Hatch in 2003:

> As a North Carolina Senator, I am very familiar with this record. Judge Boyle's decisions have been reversed or vacated more than one hundred times. Two of these rulings were by the United States Supreme Court, one by a unanimous vote. Judge Boyle's record on civil rights is particularly troubling. In numerous cases he has inaccurately interpreted the law in a way that undercuts basic civil rights protections.

The history of filling vacancies on the Fourth Circuit has been a difficult one these last several years. Senator Helms blocked numerous qualified nominees from North Carolina and even from Virginia. Republicans would not cooperate in elevating any of the outstanding African-American nominees to the Fourth Circuit throughout President Clinton's two terms. Senator Edwards was mindful of that. He worked hard to find a way and due to his extraordinary efforts, he succeeded in having Judge Allyson Duncan appointed to the Fourth Circuit to fill one of the many seats from North Carolina that Republicans had intentionally kept vacant.

I also want to commend Senator Warner for his efforts and Senator Allen for his help in getting Judge Roger Gregory of Virginia confirmed to a lifetime appointment to the Fourth Circuit, the first African American to serve on that circuit. Judge Gregory

had been nominated by President Clinton, but the Republican majority refused to consider his nomination and, instead, relied upon Senator Helms' objection. Senator Warner and Senator Robb both supported his nomination, and Senator Allen did as well during his campaign and after his election to the Senate. They deserve great credit for Judge Gregory becoming the first African American to be confirmed to a lifetime appointment to the Fourth Circuit. I know this nomination well. I chaired this Committee when Judge Gregory was finally given a hearing and when the Senate confirmed him in 2001.

During my 17 months as Chairman, we were able to break through the logjam on the Fourth Circuit that Republicans had constructed. The Senate confirmed two nominees of President Bush to the Fourth Circuit: Roger Gregory of Virginia, and Dennis Shedd of South Carolina. It was when Democrats were in the Senate majority that we broke that pattern of Republican obstruction. In addition to Judge Gregory, I proceeded with the controversial nomination of Judge Shedd. He, too, was given a hearing, Committee consideration and Senate consideration and, although he was a divisive nominee with an uneven record, he was confirmed by the Senate. That effort at reconciliation, as with all of our Democratic efforts, was not reciprocated. Instead, Republicans chose to excoriate me for the timing of the process.

Democratic action stands in stark contrast to the way the Republican Senate obstructed President Clinton's nominees to this circuit, when six circuit court nominees were blocked by Republicans. Judge James Beaty did not get a hearing or a vote from the Judiciary Committee in 1995, 1996, 1997 or 1998. Judge James Wynn did not get a hearing or a vote in 1995 or 1996. Judge James Wynn did not get a hearing or a vote in 1999, 2000, or the beginning of 2001. Judge Roger Gregory did not get a hearing or a vote in 2000 or the beginning of 2001, when he was a Clinton nominee. Neither Judge Andre Davis nor Elizabeth Gibson got hearings or votes in 2000. Not one of these six circuit court nominees ever got a hearing or a vote in this Committee when the Republican majority stalled so many outstanding, qualified judicial nominees during the last six years of the Clinton Administration.

Others may recite partisan talking points seeking to rewrite Senate history on its treatment of judicial nominations, but these are the facts and the background that bring us to today's consideration of Judge Boyle's nomination. I hope we will not have to endure the erroneous claim that Judge Boyle has been denied a hearing for 14 years. Those who make the charge know full well that Republicans have been in charge of this Committee for the most recent years, and for a majority of those 14 years no nomination was pending for this controversial nominee.

Judge Boyle was nominated to the Fourth Circuit at the end of 1991, when the White House of President George H.W. Bush was refusing to give Senators access to nominees' FBI files, as Chairman Biden noted at the time. The process was restored in the spring of 1992. Despite the obstruction of the process by the Republican White House, the Senate confirmed 66 judicial nominees in 1992, including 11 circuit court nominees. A Democratic Senate majority proceeded in that presidential election year, when the

Thurmond Rule was traditionally used by Republicans to shut down the confirmation process, to confirm more judicial nominees than the Republican Senate majority confirmed in any one of the six years it was responsible for reviewing President Clinton's judicial nominees. Any time the Senate confirms that many judges in a year it is working at an exceptionally fast pace. I know. When I chaired the Committee and the Senate confirmed 72 judges in 2002 and 100 in 17 months, we worked exceptionally hard. Chairman Biden did an exceptional job and acted in an extraordinarily bipartisan way. His efforts were not reciprocated when Republicans assumed control of the process and could have worked more cooperatively with a Democratic President.

In the early 1990s the Senate was working hard to fill judicial vacancies and to fill the scores of additional judgeships recently created. Under the Thurmond Rule, which was honored by Republicans until last year, only uncontroversial nominees or nominees with bipartisan consent were considered and confirmed in presidential election years. Judge Boyle was hardly uncontroversial. He was not among the historically high 66 judges confirmed in 1992. As *The Los Angeles Times* reported: "[D]uring his last months in office, the senior Bush nominated Judge Terrence Boyle, a protégé of Sen. Jesse Helms (R-N.C.), to the U.S. 4th Circuit Court of Appeals. But his nomination never got a hearing. In retaliation, (Senator) Helms vetoed all of Clinton's nominees from North Carolina to the 4th Circuit, including three African Americans." The Republican Chairman of the Judiciary Committee respected Senator Helms' objections to African Americans Judge Beaty and Judge Wynn as well as federal Bankruptcy Judge J. Rich Leonard of Raleigh, a former federal magistrate and clerk of court for the Eastern District of North Carolina, even though their records were beyond reproach.

Despite these actions by Senator Helms and by Senate Republicans, despite the change in position by Republicans, who used to argue that the D.C. Circuit and the Fourth Circuit and the Sixth Circuit did not need more judges when a Democratic President was doing the nominating, Democrats have worked with President Bush to confirm nominees to these vacancies, some of which were deliberately maintained for years by Republican obstruction. Democrats worked to break the Republican logjam of confirmations to the Fourth Circuit, the Sixth Circuit and the D.C. Circuit. The caseload of the Fourth Circuit is almost the same now as it was when it had five vacancies and Chief Judge J. Harvie Wilkinson opined against adding more judges to his court. Thanks to Democrats' bipartisan cooperation on President Bush's nominees to the Fourth Circuit, the court now has more judges than it did then.

President Bush spoke eloquently about the fundamental requirements of a democratic society when he met recently with President Putin of Russia. He acknowledged that we rely on the sharing of power, on checks and balances, on an independent court system, on the protection of minority rights, and on safeguarding human rights and human dignity. I agree with him. He recently promised the American people in a radio address that he would serve all Americans and would "work to promote the unity of our great nation." I commend that thought and hope that he will work to fulfill that promise. His renomination of controversial judicial

nominees is inconsistent with that promise and undercuts the fundamentals that protect our democracy.

At the outset of this Congress, the Senate Democratic Leader reached out to the President, as I have for the last four years, and urged him to work with us on lifetime judicial appointments. Just this week, Senator Salazar wrote to the President urging him to work with us to find common ground and consensus nominees. He offered President Bush some wise counsel noting that "the decision to re-nominate these individuals will undoubtedly create the animosity and divisiveness between the President and the Unites States Senate as an institution that is not helpful to our Nation and will sidetrack our collective efforts to work on other crucial matters."

The confrontational approach of this Administration is unnecessary and unwise. Senate Republicans' insistence that this President be given carte blanche in his efforts to pack the federal courts and that the Senate become a rubber stamp and give up its distinctive protection of minority rights is shortsighted at best. It is most unfortunate that this White House persists in its single-minded effort to pack the federal courts. It is unfortunate that the Senate Republican leadership is acting as an arm of the Administration rather than on behalf of the Senate and providing the checks and balances on which our democracy and our freedoms depend.

That brings us to this difficult hearing on controversial nominations. Over the last several days we have heard from opponents of Judge Boyle's nomination that include groups and citizens from North Carolina concerned about his record on the District Court, and by people who have followed his career or been affected by his rulings. I have a numbers of letters from groups of police officers, for example -- many, from North Carolina -- who are emphatically opposed to Judge Boyle's confirmation to the Fourth Circuit. There is a letter from the North Carolina Police Benevolent Association, the North Carolina Troopers' Association, Police Benevolent Associations from South Carolina, Virginia and Alabama, the National Association of Police Organizations, and the Professional Fire Fighters and Paramedics of North Carolina. These are not the typical opponents of judicial nominees. They have come forward to oppose this nomination.

In addition, there is deep opposition from those interested in civil rights, disability rights, women's rights, the environment and many other issues. This home state opposition is something this Committee needs to consider. It signals to me that there may be serious problems with this nomination.

#####

BLANCHARD, JENKINS, MILLER & LEWIS, P. A.
LAWYERS

ROBERT O. JENKINS
PHILIP R. MILLER, III
E. HARDY LEWIS

CHARLES F. BLANCHARD
OF COUNSEL

116 N. WEST STREET
SUITE 200
RALEIGH, NORTH CAROLINA 27603

TELEPHONE (919) 755-3993
FACSIMILE (919) 755-3994

19 August 2002

VIA TELECOPIER:(202) 228-1374 & U.S. MAIL
Senator John Edwards
United States Senate
225 Dirksen Office Bldg.
Washington, DC 20510

Re: Nomination of James C. Dever, III to United States District Court, E.D.N.C.

Dear John:

I'm writing to express my strong support of Jim Dever, who has been nominated to be a trial judge in the Eastern District of North Carolina. Jim has a surpassing intellect and a Trojan work ethic, but these are not the primary reasons I am enthusiastic about his nomination. Jim has a rarer quality that in my opinion is sorely lacking at every level of the federal judiciary, and that is empathy. By empathy I mean more than just to say that he has been there, as a lawyer in the federal courts, working his tail off for his clients. That is certainly true, but much more important is the aspect of empathy not related to experience. This is the goodness, the decency, at the empathetic person's core. I know Jim to have these attributes, and this is why I think he will be a great judge.

I have known Jim since just after I came to Raleigh to practice with you and the rest of Tharrington, Smith and Hargrove in the early 1990s. I think the occasion of our meeting had something to do with the fact that we are both alumni of Notre Dame. It pretty quickly became apparent that our Notre Dame connection might be the only thing we had in common. I've never been circumspect about the fact that my political views lie somewhere between Thurgood Marshall and Eugene Debs, while Jim is decidedly at the other end of the spectrum. That never mattered to Jim, and over the ensuing years I was able to spend some time with him at forums and lectures on political issues to which he graciously invited me. That's where I came to know that he's just an excellent guy.

Jim's being politically conservative doesn't bother me a bit, inasmuch as it relates to his fulfilling his duties as a judge. Jim is also conservative in the very best sense of that word; in his devotion to his family, his respect for tradition, and in his general manner. I hesitate to say he has a "judicial bearing," because I don't think Jim takes himself as seriously as that phrase implies. He is unpretentious and dignified at the same time, perhaps in a way reminiscent of Judge Dupree.

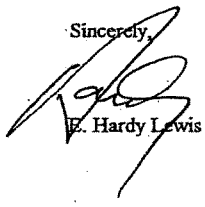
All that having been said about his personality, Jim's resume confirms that he is well-qualified to serve. He graduated with high honors from both Notre Dame and Duke Law School. He was the editor-in-chief of the Duke Law Journal. When he began fulfilling his ROTC scholarship in 1988, he was the only Air Force attorney entering active service that year selected to serve in the Air Force General Counsel's Honors Program at the Pentagon. Before leaving the military to go into private practice in 1992, Jim was awarded the Meritorious Service Medal.

Jim came to Raleigh in 1992 and joined Maupin Taylor, where he has been involved in trial work, with a concentration in labor law. He's got an AV Martindale Hubbell rating, and is listed in the Best Lawyers in America. He's also been president of the PTA at his children's school, and has coached their little league baseball and basketball teams.

When I found out that he'd been nominated, I made contact with Jim to ask him whether my writing in support of him would help or hurt. I told him I'd like to see him on the bench because he's one of us. He knows what lawyers go through, and will respect hard work and thorough preparation, rather than dismissing it or ridiculing it. He took my thought one step further. The lawyers deserve respect, he said, but even more, the parties deserve it. If a person is sitting there with a case in federal district court, he said, the probability is very high that this is one of the most, if not the most, important thing that will ever happen to them. It is those people who deserve attention, respect, and, ultimately, evenhanded justice. I am confident Jim Dever will bring these things to the people of the Eastern District.

I very much appreciate your consideration of this long letter of support. As always, thank you for the excellent work you do for the people of North Carolina. I look forward to seeing you when you're in town on Wednesday.

Sincerely,



E. Hardy Lewis



March 2, 2005

Dear Senator:

On behalf of NARAL Pro-Choice America, I am writing to express our concern about the nomination of Terrence Boyle to the United States Court of Appeals for the Fourth Circuit. At his upcoming hearing, I urge you to fully explore his views of the right to privacy and the right to choose safe and legal abortion. We must receive firm assurance that he will not use a lifetime appointment to eviscerate the right to choose through narrow judicial interpretations of the governing standard. If Judge Boyle does not provide this assurance, his nomination must be rejected.

Circuit court judges wield enormous power and discretion in vindicating women's rights, including the right to privacy, reproductive rights, and other basic civil and constitutional rights. Unfortunately, our research shows that judges appointed by anti-choice presidents are very likely to use this discretion to restrict the constitutional right to choose. In fact, circuit court judges appointed by anti-choice presidents are four times more likely than other judges to cast anti-choice votes in reproductive rights cases. The burden should fall to Judge Boyle to demonstrate that he will uphold the constitutional rights to privacy and choice.

Although Judge Boyle has not, to our knowledge, issued a decision in a reproductive rights case, many of his decisions as a district court judge raise grave concerns.

Boyle has issued numerous opinions indicating an extremely narrow view of individual rights. In several of these opinions, he has misinterpreted the law in such a way as to circumvent basic rights protections for African-Americans, disabled people, and women. Boyle's dangerously narrow view of individual rights, including women's rights, may indicate that he does not favor right to choose.

Boyle has been reversed twice by the United States Supreme Court for decisions favoring white plaintiffs in legislative redistricting cases – one of these reversals was a unanimous opinion written by Justice Clarence Thomas. Contrary to Supreme Court precedent, he has also found that, in making the standards of the Americans with Disabilities Act (ADA) applicable to the states, Congress exceeded its authority.

Among his most troubling decisions is *United States v. North Carolina*, in which the United States sued North Carolina for discriminating against women employed as

correctional officers at men's prisons. Boyle refused to approve an agreed-upon settlement in the case and was subsequently reversed by the Fourth Circuit. He harshly criticized efforts by the United States to protect women from employment discrimination committed by North Carolina, finding it "offensive" that the United States would "punish" a state for having a "non-conforming culture."

As in *United States v. North Carolina* and his ADA case law, Boyle's hostility toward individual rights claims is often couched in the language of "states' rights" or federalism. In his opinions, Boyle has made clear his strong beliefs in the limits of the federal government to take action to protect a state's citizens from discrimination committed by the state. Such a judge may be unlikely to believe the federal constitution forbids states from imposing restrictions on abortion.

The public is currently in the dark as to Terrence Boyle's positions on issues related to reproductive rights. It is the duty of the Senate Judiciary Committee to seek assurances from every nominee that he or she will not roll back the constitutional freedoms that Americans have long enjoyed.

I urge you to attend the Senate Judiciary Committee hearing on Judge Boyle's nomination this week and question Judge Boyle on his positions regarding the right to privacy and the right to choose. Judge Boyle must provide the committee with his unequivocal assurance that he understands and supports the constitutional right to choose as stated in *Roe v. Wade*. If Judge Boyle cannot provide such assurance, his nomination must be rejected.

Sincerely,

Nancy Keenan
President

WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
1156 15TH STREET, N.W. • SUITE 915 • WASHINGTON, D.C. 20005 • Phone (202) 463-2940
Fax (202) 463-2953 • E-Mail: washingtonbureau@naacpnet.org • Web Address: www.naacp.org

March 1, 2005

Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

RE: NAACP'S OPPOSITION TO THE NOMINATION OF JUDGE TERRENCE W. BOYLE TO THE FOURTH CIRCUIT COURT OF APPEALS

Dear Senators:

On behalf of the National Association for the Advancement of Colored People (NAACP), our nation's oldest and largest civil rights organization, I am writing to reiterate our strong opposition to the confirmation of Judge Terrence Boyle to the United States Court of Appeals for the Fourth Circuit.

I have attached, for your review, an Action Item adopted by the NAACP National Board of Directors on February 14, 2003 and reiterated on February 20, 2005 expressing our ardent and continued opposition to the confirmation of Judge Terrence Boyle. We also join all 109 units of the North Carolina State Conference of Branches of the NAACP in its opposition to the confirmation of Judge Boyle because of his extreme hostility towards voting rights, disability rights, civil rights, prisoner's rights, and cases involving race.

This nomination is of particular concern to the NAACP because the Fourth Circuit has more African Americans living within its boundaries than any other Circuit Court in the country. In fact, North Carolina has, according to the 2000 Census, 21.2% of the population—one of the largest African American populations in any state. The United States Court of Appeals for the Fourth Circuit is virtually the court of last resort for the federal civil rights claims of all persons residing within North Carolina, South Carolina, Virginia, West Virginia and Maryland.

We consider Judge Boyle's judicial philosophy, which has prompted over 150 of his rulings to be reversed or vacated by the Fourth Circuit, very troubling. In fact, Judge Boyle's reversal rate is higher than any other Bush judicial nominee. Judge Boyle twice decided the 12th Congressional district in North Carolina was drawn for "racial purposes" and that it violated the Constitution. Both of Judge Boyle's decisions were reversed by the Supreme Court, the first time by a unanimous court, with Justice Thomas writing the opinion. Judge Boyle's record clearly indicates hostility towards voting rights laws for African Americans and other racial and ethnic minorities in North Carolina.

Judge Boyle has a common practice of dismissing race cases even before the summary judgment stage, not even permitting evidence to be developed. In *McCauley v. City of Jacksonville*, Boyle dismissed a housing developer's fair housing complaint for "failure to state a claim." The Fourth Circuit reinstated the complaint, finding that the developer broadly alleged that he would have supplied low-income, racially integrated housing, and that actions to prevent it denied housing opportunities on the basis of race. In *Eric v. Causby*, brought on behalf of minority schoolchildren and identified by Boyle as one of his most significant opinions, Boyle stated at a hearing, "There is no such thing as discrimination without intent." This was contrary to holdings that discrimination can be shown through policies with discriminatory effects.

In another case, Judge Boyle refused to accept a settlement, agreed to by both parties, of a civil rights claim brought by the U.S. Justice Department (DOJ) against the North Carolina Department of Corrections for discriminating against women. DOJ had sued the state, claiming that it hired an unusually low number of female corrections officers compared with other states. The state agreed to settle this suit with DOJ and, under the supervision of the federal courts, institute policies to prevent future discrimination. Judge Boyle refused to enforce this agreement, although such agreements are virtually always accepted. In the same case, he later allowed the state to withdraw from the settlement, a decision reversed by the Fourth Circuit. Judge Boyle demonstrated in this case that he would use any means at his disposal to subvert civil rights laws.

Judge Boyle in *Pierce v. King Judge*, found that state prisons were not covered by the Americans with Disabilities Act ("ADA") and dismissed a suit by an inmate claiming an ADA violation. Judge Boyle held that Congress did not have the power to extend the ADA to state prisons. He also speculated that the federal government might have to compensate defendants for losses that they suffer in order to comply with the ADA, a radical interpretation of the Constitution's "takings clause." The Supreme Court unanimously reached the opposite conclusion regarding the scope of the ADA and held that the prisons were covered by the Act.

Accordingly, I hope that you will take these concerns seriously and oppose Judge Boyle's nomination in the Senate Judiciary Committee. Thank you in advance for your attention to this matter. Should you have any questions or concerns, please contact me, or my Bureau Counsel, Crispian Kirk at (202) 463-2940.

Sincerely,

Hilary O. Shelton
Director

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NATIONAL HEADQUARTERS

WILLIAM J. JOHNSON
Executive Director

February 24, 2005

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

The Honorable Patrick Leahy, Ranking Member
Committee on the Judiciary
The United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Terrence Boyle to the Fourth Circuit Court of Appeals*

Dear Mr. Chairman and Ranking Member Leahy:

The National Association of Police Organizations ("NAPO") is comprised of hundreds of law enforcement associations. NAPO represents more than 235,000 law enforcement officers throughout the United States including North Carolina. NAPO works with the Congress and government officials throughout America to protect law enforcement officers from harm.

NAPO is familiar with the judicial record of Judge Terrence Boyle of North Carolina, who has been nominated for the Fourth Circuit Court of Appeals. We have been active in several cases where Judge Boyle's decisions have been challenged.

Judge Boyle does not follow traditional constitutional principles and methodology for the adjudication of constitutional rights. Judge Boyle's decisions and reasoning have repeatedly been found to be inconsistent with controlling precedent, as evidenced by a record of being reversed which spans three decades. Judge Boyle's dismal record with respect to the constitutional rights of law enforcement officers has been especially troublesome to us as it comes at a time when the law enforcement profession has been under increasing attack from several sides.

Judge Boyle's misapprehension of fundamental constitutional law is evident in many cases. For example, see Godon v. N.C. Dept. of Crime Control and Public Safety, 1998 WL 193109, 141 F.3d 1158 (4th Cir. 1998)(erroneously dismissing police

expression case involving speech about discrimination) and Edwards v. City of Goldsboro, N.C., 178 F.3d 231 (4th Cir. 1999)(erroneously dismissing a police expression case where the officer was to teach an off-duty firearms safety course).

In United States v. North Carolina, 180 F.3d 574 (4th Cir. 1999), the Fourth Circuit reversed Judge Boyle's ruling denying and refusing to enter a consent decree that would have settled the litigation. The Fourth Circuit concluded that Judge Boyle abused his discretion in refusing to approve the settlement reached between the United States and the State of North Carolina. The underlying case involved gender discrimination in the hiring and promotion of correctional officers.

In Piver v. Pender County Board of Education, 835 F.2d 1076 (4th Cir. 1987), the Fourth Circuit reversed Judge Boyle's decision and reasoning in a leading First Amendment case involving the expression rights of public employees. The school teacher had spoken out in support of tenure for his principal. Unfortunately, these examples go on and on.

Judge Boyle's record of being **reversed more than one hundred and fifty times** raises grave concern about Judge Boyle's fitness for an appeals bench. America's law enforcement officers must be able to depend on judges who are competent and knowledgeable of the law. Judge Boyle has regrettably not demonstrated such competence.

For these reasons NAPO strongly believes that Judge Boyle should not be confirmed to sit on the Fourth Circuit, or any appellate court.

We would be glad to provide further information to the Senate. NAPO appreciates your consideration.

Sincerely,

William J. Johnson, Esq.
Executive Director and
General Counsel

NATIONAL BAR ASSOCIATION

Reply to: Kim M. Keenan, Esq.
888 17th Street, N.W.
Washington, D.C. 20006
(202) 879-7777

Kim M. Keenan
President
Washington, DC

Reginald M. Turner, Jr
President-Elect
Detroit, MI

Linnes Finney, Jr.
Vice President
Fort Pierce, FL

Cheryl A. Gray
Vice President
New Orleans, LA

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Vice President
Cleveland Heights, OH

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Vice President
St. Louis, MO

Sonya D. Hoskins
Secretary
Dallas, TX

Hon. John L. Braxton
Treasurer
Philadelphia, PA

Tricia (C.K.) Hoffler
General Counsel
Stuart, FL

Joseph H. Hairston
Parliamentarian
Washington, DC

John Crump
Executive Director
Washington, DC

March 2, 2005

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
224 Dirksen Office Building
Washington, D.C. 20510

Dear Chairman Specter:

I am Kim Keenan, President of the National Bar Association (NBA). On behalf of the NBA, I write to strongly oppose the nomination of United States District Court Judge Terrence Boyle (E.D. N.C.) to the U.S. Court of Appeals for the Fourth Circuit. With a network of more than 30,000 members, the NBA is the oldest and largest association of African American and minority attorneys, jurists, legal scholars, and law students in this country. It is not often that we oppose a judicial nominee. Nevertheless, the NBA is compelled to oppose Judge Boyle.

With more than 150 reversals, often in significant civil rights cases, Judge Boyle's judicial record has led the NBA to join in the opposition of many diverse groups, including the NAACP Legal Defense Fund and law enforcement associations. The NBA ranks Judge Boyle as **NOT QUALIFIED** for appointment to the Fourth Circuit. Judge Boyle's judicial record raises serious questions about his professional competence and judicial temperament, including commitment to equal justice under the law and cultural sensitivity. Judge Boyle has not reigned in his judicial activism to apply an appropriate judicial balance. As the U.S. Supreme Court has stated, district court judges should consider the sensitive nature of certain political/civil rights issues, accord a presumption of good faith to legislative enactments, and recognize the intrusive potential of judicial intervention into the legislative realm. *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999); *Miller v. Johnson*, 515 U.S. 900, 916 (1995). This, Judge Boyle, has failed to do. We note that Judge Boyle has received probably the lowest American Bar Association rating of any district court judge nominated to the circuit court by President Bush. For these and other reasons set forth below, it is imperative that the U.S. Senate reject this nominee.

Over the last several years, the NBA has been troubled tremendously about the Fourth Circuit U.S. Court of Appeals, which was a racially segregated institution until the year 2000. This court is widely regarded as the most conservative circuit court in the country. The NBA is particularly opposed to the appointment of an unqualified jurist to the country's most conservative circuit court, a circuit that virtually is the final arbiter of the civil rights of more African Americans than any other circuit court in the country. Judge Boyle's nomination is a poor reflection on the nation's commitment to equal justice with enormous consequences.

Judge Boyle was recommended to the White House by former Senator Jesse Helms. The NBA is all too familiar with the treatment Senator Helms meted out to African American nominees to the very same circuit. During his two terms, former President Clinton tried unsuccessfully to desegregate the Fourth Circuit, the last all-white circuit court in the country. Beginning in 1995, President Clinton nominated no fewer than four African Americans to this court, including two moderate African American candidates from North Carolina. Throughout this period, former Senator Helms blocked the desegregation of the Fourth Circuit. Former Senator Helms refused to consent to the nominees, which consent was then required of home-State Senators by the Senate Judiciary Committee. In deference to former Senator Helms, the Senate Judiciary Committee refused to consider the African American nominees from North Carolina.

In 1995, Federal District Court Judge James Beaty was nominated to the Fourth Circuit. Judge Beaty had been confirmed unanimously by the Senate to the district court. Yet former Senator Helms withheld his approval of Judge Beaty for a seat on the Fourth Circuit. Therefore, the Senate Judiciary Committee refused to consider Judge Beaty for appointment to the Fourth Circuit. When Judge Beaty was re-nominated by former President Clinton in 1997, former Senator Helms objected again. Once more, the Senate Judiciary Committee deferred to former Senator Helms and the nomination did not proceed. The nomination was returned to former President Clinton in 1998. Former President Clinton then nominated North Carolina Appellate Court Judge James Wynn in 1999. As in the past, former Senator Helms objected and the Senate Judiciary Committee refused to act on Judge Wynn's nomination. The nomination was returned in 2000. In early January, 2001, former President Clinton nominated Judge Wynn again for a seat on the Fourth Circuit. The Senate Judiciary Committee did not act on this nomination. Subsequently, President George W. Bush withdrew the nomination. Former President Clinton nominated two other African Americans to the Fourth Circuit from states other than North Carolina. In 2000, former President Clinton nominated Andre Davis, a federal district court judge from Maryland. The Senate Judiciary Committee refused to act on Judge Davis's nomination and it, too, was returned. Former President Clinton nominated Roger Gregory from Virginia in 2000. The NBA led a national appeal to confirm this nominee. Nevertheless, the Senate failed to do so. This led former President Clinton to make the historic recess appointment of Judge Roger Gregory to the court. Without this recess appointment, Judge Roger Gregory would have never been confirmed by the Senate. Against this unconscionable history, the Senate is

prepared to consider Judge Boyle, who brings a judicial philosophy that is even more extreme than that of the Fourth Circuit's most conservative members.

More than 150 of Judge Boyle's seriously flawed rulings have been reversed or vacated by this very same U.S. Court of Appeals for the Fourth Circuit, often due to his refusal to follow longstanding precedent in interpreting civil rights laws. This nominee is not a jurist who should be promoted and elevated to a higher court.

As a national organization composed primarily of minority attorneys, we direct your attention to the following specific troubling observations about Judge Boyle's judicial record on the district court:

- *Judge Boyle prematurely dismisses civil rights complaints at the pretrial stage.*
- *He has been reversed in a number of cases for finding complaints inadequately pled.*
- *Judge Boyle fails to proceed with the "extraordinary caution," that district courts must show to avoid treading upon legislative prerogatives.*
- *His rulings to impose a higher standard than mere notice pleading required under the Federal Rules of Civil Procedure.*
- *Judge Boyle appears unwilling to allow plaintiffs to amend pleadings, which is liberally permitted even by very conservative judges.*
- *Judge Boyle has granted numerous summary judgment motions, concluding improperly that there are no genuine issues of material fact to be tried.*

One very disturbing example of Judge Boyle's poor judicial record is *McCauley v. City of Jacksonville*, 829 F.2d 36 (4th Cir. 1987), 1987 WL 44775 (4th Cir. Sept. 8, 1987). In *McCauley*, Judge Boyle dismissed a fair housing complaint for failure to state a claim. A panel of judges, which included Judge J. Harvie Wilkinson, reversed and remanded, citing a number of precedents that supported plaintiff's pleading. The Fourth Circuit held that the motion to dismiss should not have been granted. The court of appeals found that McCauley primarily contends that the city revoked his building permit, denied sewer service, and re-zoned (sic) his property to prevent racial integration of his apartment project. The city, asserting that its policy was racially neutral, contends that McCauley's allegations are insufficient to support this claim and that he lacks standing to press it. We are not persuaded by the city's stand.

McCauley alleged the city suffers a housing shortage, that his project would offer low to moderate income housing, and that it would be racially integrated, alleviating to some extent residential racial segregation in the city. He alleged that the city's acts and omissions have perpetuated existing residential segregation. McCauley specifically charged that the city's actions in blocking construction of his project 'had the purpose and effect of denying housing opportunities on the basis of race or color.' Our precedents have rejected arguments similar to the city's. McCauley need not allege that he is a member of a minority race, nor need he with certainty allege that potential tenants would be black. (See *Scott v. Greenville County)*, 716 F.2d 1409, 1414 (4th Cir. 1983). McCauley's allegation about the 'purpose and effect' of the city's action is sufficient to state a claim of intentional discrimination under the fourteenth amendment and the Civil Rights Acts of 1866 and 1871. His allegation of 'effect' of the city's action is sufficient to state a claim based on the Fair Housing Act. *Id.* at 2. The *McCauley* decision demonstrates clearly that the Senate must question Judge Boyle's professional competence and commitment to equal justice under the law.

Another illustration of Judge Boyle's flawed rulings is *Franks v. Ross*, 313 F.3d 184 (4th Cir. 2002), 293 F. Supp. 2d (E.D. N.C.). Relying upon federal civil rights laws, a local environmental justice center sued Wake County and the North Carolina Department of Environmental and Natural Resources to halt construction of a landfill in the town within Wake County with the highest number of African American residents. Judge Boyle dismissed the complaint. The Fourth Circuit reversed Judge Boyle's ruling in part, citing several grounds. First, the court of appeals found that Judge Boyle abused his discretion in denying plaintiff's leave to file a second amended complaint based on a decision regarding the issuance of a local permit. Judge Boyle had concluded improperly that the defendants would be prejudiced because plaintiffs had waited seven months after the local permit decision before amending their complaint. But the circuit court found that Judge Boyle made a clearly erroneous finding of material fact because the plaintiffs had moved to amend the complaint within three months of the decision. Id. at 193. The court found that Judge Boyle also erred in concluding erroneously that the statute of limitations began to run when Wake County made its initial decision regarding the landfill, rather than when the state agency finally approved the landfill plan, which the circuit court considered the final step of the [permitting] process. *Id.* at 195. Finally, the circuit court faulted Judge Boyle for dismissing the state agency defendants on the ground of sovereign immunity. The Fourth Circuit held that the longstanding doctrine of *Ex Parte Young* - permitting state officials to be enjoined from future violations of federal law - applied to the case. The second amended complaint sought prospective relief against the State defendants. *Id.* at 197.

Similarly, Judge Boyle's flawed analysis is evident in *Whiting v. Ski's Auto World,* 194 F.3d 1307 (4th Cir. 1999), 1999 WL 753997 (4th Cir. Sept. 23, 1999). An African American male sued for race discrimination after failing to receive a promotion. Judge Boyle granted summary judgment to the employer. He was

reversed by Fourth Circuit Judges William Wilkins, Paul Niemeyer and Karen Williams, all of whom are Reagan/Bush appointees. The panel unanimously concluded that Judge Boyle improperly ruled that the discrimination charge was filed untimely and that the plaintiff failed to establish racial discrimination. The Fourth Circuit stated, "(t)he district court's dismissal of Whiting's §1981 discrimination claim for failure to promote must also be vacated. . . Because the totality of these facts, as alleged by Whiting, and when considered in a light most favorable to him, established a prima facie claim of §1981 discrimination for failure to promote, we vacate that portion of the district court's order that dismissed this claim and remand for further proceedings." *Id.* at 1 -2.

I direct your attention as well to *Clemonts v. West*, 1996 WL 285634 (4th Cir. May 29, 1996), where a prison inmate challenged race discrimination in job assignments at a correctional facility. The prisoner alleged that his supervisor gave more favorable assignments to white inmates than to African American inmates and provided pay raises to white inmates only. Judge Boyle dismissed the action, *inter alia*, for failing to establish a prima facie showing of a constitutional tort. A panel of the Fourth Circuit, which included Chief Judge J. Harvie Wilkinson and Judge Paul Niemeyer, vacated the ruling in a *per curiam* opinion. The court wrote:

> Clemonts claimed that West gave whites more desirable job assignments than blacks. He also claimed discrimination in giving pay raises. Further, Clemonts claimed that West had made derogatory slurs against blacks. The lawsuit has an arguable basis in law and in fact. Accordingly, we conclude that the district court abused its discretion in dismissing the complaint pursuant to § 1915(d). *Id.* at 1.

Significantly, Judge Boyle's major civil rights rulings have been rejected by the United States Supreme Court as well. In *Cromartie v. Hunt*, North Carolina residents brought an action against various state officials challenging North Carolina's congressional redistricting plan as racially motivated in violation of the Equal Protection Clause. The district court granted summary judgment in favor of the residents and State officials appealed. In an opinion written by Justice Thomas for the Court, the Supreme Court reversed and remanded, holding that triable issues regarding the primary motivation for the redistricting plan made summary disposition in favor of the moving parties improper. Justice Thomas stated:

> (a)nd even if the question whether appellants had created a material dispute of fact were a close one, we think that 'the ***sensitive*** nature of redistricting and the presumption of ***good faith that must be accorded legislative enactments*** ... would tip the balance in favor of the District Court making findings of fact .... ('Courts must also recognize ... the ***intrusive potential of judicial intervention into the legislative realm***, when assessing ... the adequacy of plaintiff's

showing at the various stages of litigation and determining whether to permit discovery or trial to proceed.') Id. at 553 (emphasis added).

Judge Boyle failed to heed Justice Thomas' admonition to deliberate with sensitivity and extraordinary caution to avoid intrusion in legislative prerogatives. Instead on remand, a three judge panel of the District Court again held - with Judge Boyle writing the opinion of the court - that the redistricting plan was racially motivated. State officials appealed as before. The U.S. Supreme Court held that the district court's finding was clearly erroneous. *Id.* at 258. The Court held:

> The evidence taken together, however, does not show that racial considerations predominated in the drawing of District 12's boundaries. That is because race in this case correlates closely with political behavior. The basic question is whether the legislature drew District 12's boundaries because of race *rather than* because of political behavior (coupled with traditional, nonracial districting considerations). .... And given the fact that the party attacking the legislature's decision bears the burden of proving that racial considerations are "dominant and controlling," ... given the "demanding" nature of that burden of proof, ... and given the ***sensitivity***, the "***extraordinary caution,*" *that district courts must show to avoid treading upon legislative prerogatives***, ... the attacking party has not successfully shown that race, rather than politics, predominantly accounts for the result. The record leaves us with the "definite and firm conviction," ... that the District Court erred in finding to the contrary. ... We conclude that the District Court's contrary findings are clearly erroneous. Id. at 257-258 (emphasis added).

Furthermore, Judge Boyle's judicial record includes troubling cases evidencing a willful failure to apply - or lack of knowledge of - well established precedent, leading to an improper preclusion of civil rights lawsuits against States as barred by the Eleventh Amendment. For example, in *Ellis v. State of North Carolina*, 2002 WL 31546000 (4th Cir. Nov. 18, 2002), Judge Boyle defied thirty years of Supreme Court precedent and ruled erroneously that the State of North Carolina was immune from an employment discrimination suit by an African American female under the Civil Rights Act of 1964. Judge Michael Luttig, appointed by George H. W. Bush, ruled that Judge Boyle erred in dismissing the case. The U.S. Supreme Court had held that in enacting Title VII, Congress properly abrogated the States' Eleventh Amendment immunity from such suits. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456-57 (1976). Thus, the Fourth Circuit held that Judge Boyle erred by granting the defendants' motion to dismiss on this ground. Accordingly, the Fourth Circuit vacated and remanded the case to the district court to conduct proceedings consistent with three-decades old precedent.

Furthermore, Judge Boyle was one of the first judges in the country to protect States from suits filed by employees under the Americans with Disabilities Act (ADA). In *Pierce v. King*, 918 F. Supp. 932 (E.D. N.C.1996), Judge Boyle held that Congress lacked the power to apply the ADA to State prisons. This interpretation of ADA was ultimately rejected by the U.S. Supreme Court in a unanimous opinion written by Justice Antonin Scalia in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998). In *Pennsylvania Dep't of Corrections v. Yeskey*, the Supreme Court held that Title II of the ADA, prohibits a "public entity" from discriminating against qualified individuals with a disability on account of that individual's disability, and applies to inmates in State prisons. *Id.* at 213.

In the context of the circuit, the history and the record, the nomination of Judge Terrence Boyle should be rejected. A Jesse Helms' protege is simply not the best North Carolina has to offer the Fourth Circuit in the 21st Century. Judge Boyle has disregarded the role of federal courts in enforcing the civil rights legislation passed by Congress. His extraordinary and troubling reversal rate demonstrates a fundamental unwillingness and/or inability to comprehend facts and law, as well as to follow well settled precedent.

For these reasons, the NBA is urging you and each member of the Judiciary Committee to reject Judge Boyle's promotion to a higher court.

If you have any questions, please contact Alfreda Robinson, NBA Chair, Judicial Selection Standing Committee at (202) 994-8162 (w) or arobinson@law.gwu.edu. She is an associate dean at The George Washington University Law School.

Sincerely,

Kim Keenan
President

KMK:bms
cc: Senate Judiciary Committee
Hon. Patrick Leahy
Hon. Mel Watt, Chair, Congressional Black Caucus
John Crump, Executive Director

NELA Advocates for Employee Rights
National Employment Lawyers Association

Founder
Paul H. Tobias

President
Janet E. Hill

Executive Director
Terisa E. Chaw

The Honorable Arlen Specter
711 Hart Senate Office Building
Washington, D.C. 20510-3802

The Honorable Patrick J. Leahy
433 Russell Senate Office Building
Washington, D.C. 20510-4502

Dear Senators Specter and Leahy,

I am writing to you as President of the National Employment Lawyers Association (NELA)[1] to express our strong opposition to the nomination of Judge Terrence Boyle to the Fourth Circuit Court of Appeals. We believe that Judge Boyle's record reveals a disregard for legal precedent, hostility to employees' rights, and a high reversal rate. For those reasons, Judge Boyle's nomination should be denied by the Senate.

Boyle's Disregard for Legal Precedent

One of the most troubling aspects of Judge Boyle's judicial philosophy is his refusal to follow legal precedent and statutory language. The Fourth Circuit severely criticized Judge Boyle for such disregard in *Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346 (4th Cir. 1996). In a *per curiam* opinion, Judges Williams (a Bush appointee), Hall (a Ford appointee), and Motz (a Clinton appointee) were highly critical of Boyle's narrow analysis of the plaintiff's Americans with Disabilities Act (ADA) claim. Among other things, the Court was particularly troubled by Boyle's suggestion that working is not a "major life activity." According to the Court, Judge Boyle improperly described the ADA's regulatory language discussing working as a major life activity as "superfluous." The Court cited Judge Boyle's declaration that "while some courts might entertain claims under the 'major life activity' of 'working,' this Court does not." The Court corrected Judge Boyle, stating that, "[i]n fact, working is a major life activity," and it cited appellate courts, including the Fourth Circuit, for that proposition.

In *United States v. North Carolina*, 914 F. Supp. 1257 (E.D.N.C. 1996), Boyle refused to approve a settlement between the United States Department of Justice and the State of North Carolina regarding sex discrimination in prison employment. Writing that "a federal court should be circumspect before [taking] custody of large segments of a state's sovereign functions," Judge Boyle refused to exercise jurisdiction over the case. He concluded that "a case based substantially on statistics and bolstered with anecdotal allegations of discrimination by claimants who have been recruited or solicited by [the Justice Department], or who have come forward only after prospects of a large cash award have been revealed, is merely a theoretical dispute about subjective notions of societal ideals." According to Judge Boyle, "[t]he concept of 'unintentional discrimination' is logically impossible. Title VII was never intended to require

[1] NELA is the country's only professional organization exclusively comprised of attorneys who represent plaintiffs in employment discrimination and other employment-related claims. NELA and its 67 state and local affiliates have over 3,000 members.

employers to hire by racial, sexual, or other quota applicants who failed to qualify for a job because they could not meet some objective requirement."

Fortunately, the Fourth Circuit reversed Judge Boyle in *United States v. North Carolina*, 180 F. 3d 574 (4th Cir. 1999). In an opinion written by current Chief Judge Wilkins (a Reagan appointee), and joined by Judges Williams (a Bush appointee) and Motz (a Clinton appointee), the Court concluded that Judge Boyle had abused his discretion in refusing to enter the consent decree and ordered him to do so.

And, in *Ellis v. State of North Carolina*, 50 Fed. Appx. 180, 2002 U.S. App. LEXIS 23713 (November 18, 2002), the Fourth Circuit unanimously reversed Judge Boyle's ruling that a state was immune from a Title VII employment discrimination claim under the 11th Amendment. The Fourth Circuit pointed out that United States Supreme Court precedent *dating from 1976* held that states were not immune from Title VII suits (*see Fitzpatrick v. Bitzer*, 472 U.S. 445 (1976)). These cases are illustrative of Judge Boyle's refusal to follow well-established tenets of employment law and demonstrate his unsuitability for a federal appellate judicial post.

Boyle's Hostility to Employees' Rights

NELA also has serious concerns about Boyle's ability to preside over cases with a sufficient degree of objectivity and respect for individual plaintiffs. In *Butler v. Burroughs Wellcome, Inc.*, 920 F. Supp. 90 (E.D.N.C. 1996), an employee brought an ADA claim alleging failure to reasonably accommodate her psychiatric disorder. The plaintiff alleged a history of physical and sexual abuse by relatives. She was diagnosed with "post traumatic stress disorder and severe depression, which led her to have problems dealing with men." During her deposition, the plaintiff objected to a question relating to her sex life and indicated she did not want to discuss any aspect of her marriage. She then moved for a protective order, and the defendant simultaneously filed a motion to compel discovery, seeking the deposition answers as well as full disclosure of plaintiff's medical records. Boyle denied plaintiff's motion for a protective order and granted the defendant's motion.

Boyle's opinion is clearly excessive in that it endorses a "no-holds-barred" discovery approach to defending ADA claims. Even in sexual harassment cases, where the issue of the degree of welcomeness is actually an element of the claim, courts are not prone to allow virtually unchecked discovery about intimate and personal details. Indeed, the advent of Federal Rule of Evidence 412, which limits the purposes for which evidence regarding sexual history can be admitted, indicates a heightened sensitivity by the federal court system to the improper uses of such information. Notwithstanding the Federal Rules of Evidence, Judge Boyle's opinion evidences his disdain toward the plaintiff for even attempting to preserve her privacy. In fact, Boyle assessed attorneys' fees and costs against the plaintiff for "resist[ing] discovery without legitimate grounds."

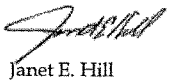
Boyle's High Reversal Rate

Finally, nearly 125 of Judge Boyle's rulings have been reversed by the Fourth Circuit. In employment cases over the last ten years alone , the Fourth Circuit reversed Judge Boyle in whole or in part 12 times in 48 cases. This 25% reversal rate for Judge Boyle compares unfavorably to the Fourth Circuit's average reversal rate of only 1.2% for employment

discrimination cases when plaintiffs appeal. Judge Boyle's long tenure on the district court and the relatively high number of employment cases on his docket would suggest his familiarity with the general principles in employment discrimination law, yet his reversal rate demonstrates otherwise. Given the Fourth Circuit's reputation as the most conservative federal appellate court in the country, Judge Boyle's reversal rate is truly extraordinary.

Judge Boyle's record in employment law cases demonstrates not only his unwillingness to follow statutory language and legal precedent, but an overt antipathy towards employees' rights. For these reasons, NELA strongly opposes the nomination of Terrence W. Boyle to the Fourth Circuit Court of Appeals.

Sincerely,



Janet E. Hill
President
National Employment Lawyers Association

National Organization for Women

Kim Gandy
President

Karen Johnson
Executive Vice President

Olga Vives
Action Vice President

Terry O'Neill
Membership Vice President

The Honorable Arlen Specter, Chair
Senate Judiciary Committee
711 Hart Building
Washington, DC 20510

The Honorable Patrick Leahy, Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Re: The nomination of Terrence Boyle to the Fourth Circuit

Dear Senators Specter and Leahy:

The National Organization for Women is strongly opposed to the nomination of Terrence W. Boyle to the U.S. Court of Appeals for the Fourth Circuit. Our examination of his available record leads us to conclude that his hostility to women's right and civil rights make him ineligible for elevation to a lifetime appointment to one of the highest courts in this nation.

We are stunned that, despite the years that this nomination has languished, Judge Boyle would not have made an effort to insure that the Senate had the benefit of examining the totality of his judicial record. Instead, after twenty years on the bench, and after he has rendered approximately 10,000 judicial opinions, the Judiciary Committee and the general public have only been given access to a handful of published opinions. And as advocates for the rights of women, the few opinions that have been made available have alarming implications.

It has been widely documented that Judge Boyle has the worst reversal record of any other judge nominated during the Bush administration. His reversals have been repeatedly for the reason that he has committed "plain error." And the record we have seen has made it clear that, despite his repeated reversals, Judge Boyle is so fixated on his federalist judicial philosophy that he does not learn from his mistakes, and stubbornly rules erroneously again and again on the same issues.

In cases involving sex discrimination, Judge Boyle has shown antagonism to the employment rights of women. As an adherent to the federalist philosophy, he is so hostile to federal legislation that he has used his opinion in *United States v. North Carolina* (1996) to criticize the right of Congress to protect women from employment discrimination. In that case involving sex

(continued)

1100 H Street, NW • Third Floor • Washington, DC 20005 • (202) 628-8669 • Fax (202) 785-8576
website: www.now.org • email: now@now.org

discrimination in the hiring of prison guards, Boyle ignored all previous law and precedent in the area of employment discrimination and invented his own novel standard in order to exonerate the state. Appallingly, Boyle actually suggests that a state can discriminate against a protected class because of its culture. We condemn the notion that the law should permit discrimination because it is within a state's culture to discriminate.

In *Ellis v. North Carolina* (2002), Judge Boyle dismissed Betty Ellis's Title VII claim of sex discrimination with the remarkable assertion that the 11th Amendment to the Constitution protected states from being sued for employment discrimination.

To further his federalist philosophy, Judge Boyle's rulings in cases involving disability rights repeatedly demonstrate his belief that Congress had no authority to apply the Americans with Disabilities Act to states. Furthermore, Judge Boyle has ruled that the 11th Amendment bars individuals from suing states under the ADA. In *Brown v. North Carolina Division of Motor Vehicles* ((1999) Judge Boyle reveals his true feelings about the rights of people with disabilities when he states that "Title VII...seeks a state of affairs where individuals are treated equally.....The ADA....seeks to single out the disabled for special, advantageous treatment." In other cases regarding disability issues, Boyle has ruled, astonishingly, that work is not a major life activity for purposes of the ADA, and that employers are to be the final arbiters of whether accommodations can be reasonably made for an employee with a disability.

Although Judge Boyle has only submitted for review a mere fraction of the cases upon which he has ruled, those that we have seen demonstrate multiple violations of the voting rights act and an attempt to use the 11th Amendment to shield state officials from acts of environmental racism. He was recently reversed by the Fourth Circuit for improperly dismissing a claim of religious discrimination.

It defies logic that any employer would hire a person for a powerful lifetime position, if the resume submitted to that employer contained enormous holes in experience for which the potential employee refused to give explanation. It is particularly problematic when the documented experience shows an alarming rate of ineptitude. No employer, especially when acting on behalf of the people of the United States, should take that kind of risk with our rights and our judicial system.

We hope that the Judiciary Committee joins us in our opposition to such a nomination. As leaders of that committee we urge you to send a signal that only those justices with impeccable records and a commitment to individual rights under the law will be promoted to lifetime appointments on the federal bench.

Sincerely,

Kim Gandy
President

1100 H Street, NW • Third Floor • Washington, DC 20005 • (202) 628-8669 • Fax (202) 785-8576
website: www.now.org • email: now@now.org

National Urban League

1101 Connecticut Avenue, NW
Suite 810
Washington DC 20036

P 202 898 1604
F 202 408 1965

www.nul.org
info@nul.org

Empowering Communities. Changing Lives.

March 1, 2005

Honorable Patrick Leahy
Ranking Minority Member, Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

On behalf of the National Urban League and our 103 affiliates throughout the country, I write to express our strong opposition to the nomination of Terrence Boyle to the U.S. Court of Appeals for the Fourth Circuit.

The National Urban League views federal judicial nominations as a fundamental civil rights issue for the community we serve and the nation as a whole. This nomination is of particular interest to us, given the substantial and widespread impact the decisions of the Fourth Circuit Court of Appeals have upon the African American community.

Judge Boyle's decisions during his years on the district court display an astonishing disregard for civil and individual rights and lack of respect for judicial precedent. His record demonstrates him to be significantly out of step with mainstream American jurisprudence, be it conservative or liberal, and with the needs of all the residents of a Circuit Court jurisdiction that has more African-Americans than any of the nation's twelve other Circuit Courts. Judge Boyle's repeated failure to follow the law and his history of curtailing civil rights protections make him unqualified for the U.S. Court of Appeals.

Attached, please find my recent *To Be Equal* column urging Senate rejection of Judge Boyle for the Fourth Circuit. My *To Be Equal* column is distributed weekly to newspapers and Web sites nationwide. Each week's topic focuses on important tissues facing not just African Americans, but all of America.

Judge Boyle's dismal record on civil rights and his disregard for settled law and precedent protecting the equal rights of all Americans should disqualify him for elevation to the circuit court. Therefore, the National Urban League urges you to vote against the confirmation of Terrence Boyle to the U.S. Court of Appeals for the Fourth Circuit.

Sincerely,

Marc H. Morial
President and Chief Executive Officer

To Be Equal **Column 10**

The Senate Must Reject Judge Terrence Boyle

Marc H. Morial
President and CEO
National Urban League

Does a United States District Court judge who has demonstrated extraordinary hostility to laws protecting the rights of Americans deserve appointment to a U.S. Court of Appeals?

Does a U.S. District Court judge of extremely conservative views deserve advancement to the U.S. Court of Appeals for his jurisdiction when more than 150 of his decisions have been reversed on appeal by that very Court of Appeals—a panel which itself is universally regarded as the most conservative Appeals Court in the country?

Does a U.S. District Court judge who fails to turn over thousands of his unpublished civil rights opinions to the Senate Judiciary Committee, which is to review his nomination, deserve a lifetime seat on the nation's second highest court?

These and other questions surround the Bush Administration's nomination of U.S. District Court Judge Terrence Boyle for a seat on the U.S. Court of Appeals for the Fourth Circuit. Its jurisdiction covers the states of North Carolina, South Carolina, Virginia, West Virginia, and Maryland

We think the answers to those questions add up to a resounding no—and we urge the Senate Judiciary Committee, which is about to formally consider the nomination, to reject it.

Judge Boyle, of North Carolina, has been a Federal District Court judge since 1984, when he was appointed by President Reagan. He was first nominated to the Fourth Circuit Court of Appeals in 1991 by President George H.W. Bush, but the Judiciary Committee let his nomination lapse. Now, Judge Boyle, long supported by former Republican Senator Jesse Helms, of North Carolina, on whose staff he once served, and the late Republican Senator Strom Thurmond, of South Carolina, has been re-nominated to the Fourth Circuit by President George W. Bush.

But the Senate Judiciary Committee's answer must still be no.

Judge Boyle's decisions overwhelmingly display an astonishing disregard for the rights of individuals and the proper exercise of judicial authority. As his record of reversals on appeal proves, even a significantly conservative review panel has found his rulings unacceptable far too often.

In cases involving race that come before Judge Boyle, the plaintiffs rarely reach the trial stage. He's dismissed numerous cases even before trial—decisions which have prompted numerous reversals by the Fourth Circuit Court.

More ...



February 23, 2005 VIA FACSIMILE

The Honorable Arlen Specter, Chair
Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy, Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Boyle nomination to Fourth Circuit

Dear Senators Specter and Leahy:

We write to express our opposition to the nomination of Terrence W. Boyle to the U.S. Court of Appeals for the Fourth Circuit.

As an organization dedicated to advancing and protecting women's legal rights, the National Women's Law Center has carefully reviewed Judge Boyle's available record on legal issues of importance to women. As a preliminary matter, we note that Judge Boyle's public record is very incomplete. Although he has been a district court judge for over 20 years and has issued thousands of decisions, only a few hundred of those are publicly available. Without access to Judge Boyle's many unpublished opinions, which have not been provided to the Senate Judiciary Committee, the Senate does not have the information necessary to carry out its obligation to carefully evaluate his record.

The record that is available, moreover, reveals that Judge Boyle holds views that would threaten legal rights that are of fundamental importance to women and that he is willing to ignore established legal precedents in making decisions. The Fourth Circuit and the Supreme Court have reversed Judge Boyle's opinions on multiple occasions, particularly in cases involving employment discrimination and other important civil rights laws, because of his failure to follow established precedent, and the Fourth Circuit has repeatedly admonished him for failing to make factual findings or provide any explanation for his decisions.

One of the more troubling examples of Judge Boyle's willingness to overlook established legal standards to the detriment of women's rights came in an employment discrimination case, *United States v. North Carolina*. In that case, the U.S. Department of Justice charged that the North Carolina Department of Corrections, which had the lowest percentage of female guards (8%) of any state corrections department in the country, was engaging in a pattern of discrimination against female applicants for prison guard positions. The parties reached a settlement requiring the state to comply with Title VII of the Civil Rights Act of 1964, adopt

safeguards against sex discrimination in its hiring of prison guards, and compensate the women who had been wrongly denied jobs or promotions in the prison system. Judge Boyle, however, refused to approve the consent decree, asserting that Title VII requires evidence of an intent to discriminate and does not permit challenges to facially neutral employment practices with a discriminatory impact – an assertion that flies in the face of controlling and long-established Supreme Court precedents as well as the Civil Rights Act of 1991. The Fourth Circuit held that Judge Boyle had abused his discretion, and concluded that the decree was fair and should be entered.

In other cases, Judge Boyle has disregarded long-settled, unambiguous precedents establishing Congress' power to pass anti-discrimination legislation. In one case, he ruled that an African-American woman could not sue her state employer for employment discrimination under Title VII because of state immunity. In a brief opinion, the Fourth Circuit *unanimously* reversed Judge Boyle's decision, citing a 1976 Supreme Court case that clearly established that Congress abrogated state immunity when it passed Title VII.

These cases, and others, raise serious questions about Judge Boyle's willingness to follow established precedents that are fundamental to the strength and effectiveness of our nation's civil rights laws, including the laws that guarantee workplaces free from sex discrimination. Based on this record, we conclude that he is unsuitable for elevation to the Fourth Circuit and we urge you to oppose his confirmation. If you have any questions or if we can be of assistance, please contact us at (202) 588-5180.

Sincerely,

Nancy Duff Campbell
Co-President

Marcia D. Greenberger
Co-President

cc: Senate Judiciary Committee

NORTH CAROLINA NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

POST OFFICE BOX 20547
GREENSBORO, NORTH CAROLINA 27420-0547
PHONE (336) 275-0851 • FAX: (336) 275-4832
WWW.NC-NAACP.ORG

Jim Wiggins
Executive Director

Melvin "Skip" Alston
President

January 25, 2004

Senator Arlen Specter
Chairman
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

RE: NORTH CAROLINA STATE CONFERENCE OF NAACP BRANCHES OPPOSITION TO THE NOMINATION OF JUDGE TERRENCE W. BOYLE TO THE FOURTH CIRCUIT COURT OF APPEALS

Dear Senator Spector,

On behalf of the 109 units of the North Carolina State Conference of Branches of the NAACP, I would like to express our strong opposition to the confirmation of Judge Terrence Boyle to the United States Court of Appeals for the Fourth Circuit.

The North Carolina State Conference of Branches of the NAACP is opposed to Judge Boyle because of his record of hostility toward voting rights, and prisoner's rights. Of particular interest to the North Carolina NAACP is Judge Boyle's disturbing decisions regarding a Congressional district in North Carolina that was drawn to have a population that was about 50% African-American. Judge Boyle found that the Congressional district violated the Constitution. The Supreme Court reversed Judge Boyle's decision on two occasions, and the first time with a unanimous court with Justice Thomas writing the opinion.

Judge Boyle's record clearly indicates an hostility towards voting rights laws for North Carolinians, especially African Americans and other racial minorities, a state where African-Americans are, according to the 2000 Census, 21.2% of the population—one of the largest African American population in any state. Judge Boyle's background and North Carolina's history should present great concern.

In another case, Judge Boyle refused to accept a settlement, agreed to by both parties, of a civil rights claim brought by the U.S. Justice Department (DOJ) against the North Carolina Department of Corrections for discriminating against women. DOJ had sued the state, claiming that it hired an unusually low number of female corrections officers

compared with other states. The state agreed to settle this suit with DOJ and, under the supervision of the federal courts, institute policies to prevent future discrimination. Judge Boyle refused to enforce this agreement, although such agreements are virtually always accepted. In the same case, he later allowed the state to withdraw from the settlement, a decision reversed by the Fourth Circuit. Judge Boyle demonstrated in this case that he would use any means at his disposal to subvert civil rights.

Judge Boyle in *Pierce v. King Judge*, found that state prisons were not covered by the Americans with Disabilities Act ("ADA") and dismissed a suit by an inmate claiming an ADA violation. Judge Boyle held that Congress did not have the power to extend the ADA to state prisons. He also speculated that the federal government might have to compensate defendants for losses that they suffer in order to comply with the ADA, a radical interpretation of the Constitution's "takings clause." The Supreme Court unanimously reached the opposite conclusion regarding the scope of the ADA and held that the prisons were covered by the Act.

The North Carolina State Conference of Branches of the NAACP strongly opposes the nomination of Judge Terrence W. Boyle to the Fourth Circuit Court of Appeals and urges the Senate Judiciary Committee and the full Senate, in the strongest possible terms, to defeat his nomination.

Thank you for your careful consideration of this crucial matter. Should you have any questions or concerns, please contact me at (336) 275-0851 or Hilary O. Shelton, Director of the NAACP Washington Bureau, at (202) 463-2940.

Sincerely,

Melvin Alston
President

NORTH CAROLINA
POLICE BENEVOLENT ASSOCIATION, INC.
A Division of Southern States Police Benevolent Association, Inc.
2609 East Millbrook Rd., Suite 103
Raleigh, North Carolina 27604-2849
(919) 790-2275 • 1-800-451-3896

February 24, 2005

The Honorable Arlen Specter, Chair
The United States Senate
Committee on the Judiciary
711 Hart Building
Washington D.C. 20510

The Honorable Patrick Leahy, Ranking Member
The United States Senate
Committee on the Judiciary
433 Russell Building
Washington, D.C. 20510

Re: Nomination of Judge Terrence Boyle to U.S. Court of Appeals

Dear Senators Specter and Leahy:

This Association of law enforcement officers has been active for nearly twenty years in promoting and protecting the law enforcement profession. We work with elected officials at all levels to promote more efficient law enforcement services through legislation, research and scientific studies, administrative advocacy and occasionally in litigation. Our leaders have appeared before the Congress.

In our legal advocacy for police officers, we have encountered Judge Terrence Boyle of Elizabeth City. We have become familiar with the judicial record of Judge Boyle over many years. In several key law enforcement cases, Judge Boyle has committed serious legal errors resulting in severe harm to officers and our profession. Judge Boyle's decisions and his methodology are inconsistent with Supreme Court and Fourth Circuit precedent as evidenced by his being reversed over one hundred times. Judge Boyle's record with respect to the constitutional rights of law enforcement officers has been alarming.

In law enforcement matters, Judge Boyle does not appreciate the split second decision making environment of police officers and the extraordinary pressures often placed upon officers by some unscrupulous police administrations.

We would like to offer a couple of examples. In one case, Judge Boyle would not even allow a police officer to attend an injunction hearing in his own case which involved a challenge to explicit written ticket quotas. Judge Boyle quashed the subpoena issued to the officer and all other fact witnesses. Without witnesses, no litigant can likely prevail.

While criminals enjoy constitutional and other rights including a right to be present at all hearings in their cases, Judge Boyle has demonstrated his belief that police officers do not enjoy such basic rights. Judge Boyle appears to be the only federal district judge in the country who has overtly legitimized police ticket quotas. These outrageous quotas not only violated the rights of the law abiding motoring public, the quotas also subjected our members to unnecessary risks of death and severe injury from being hit roadside while carrying out these dangerous attempts to pad quotas. Roadside traffic stops are among the most dangerous functions that our members perform.

In other cases, Judge Boyle has violated precedent by condoning retaliation against police officers for engaging in simple expression and other protected activities. Time and time again, Judge Boyle has been reversed because his erroneous judicial views, which are far out of the mainstream.

Judge Boyle's misapprehension of the free speech rights of law enforcement officers is overwhelming. See Godon v. N.C. Dept. of Crime Control and Public Safety, 19998 WL 193109, 141 F.3d 1158 (4th Cir. 1998), where Judge Boyle dismissed the complaint and the Fourth Circuit reversed and reasoned that "both the Supreme Court and this Circuit have observed that employee's complaints of discrimination can be speech on a matter of public concern." The Godon case had to be appealed yet again, and on the subsequent appeal, Judge Boyle was reversed in part again. 2000 WL 17634664.

In Edwards v. City of Goldsboro, N.C. 178 F.3d 231 (4th Cir. 1999), Judge Boyle was reversed again when he condoned retaliation against a law enforcement officer who merely sought to teach an off-duty course of firearms instruction which promoted public safety. An examination of Judge Boyle's decision in Edwards demonstrates a fundamental lack of understanding of traditional constitutional values in law enforcement and public personnel cases.

It is clear that Judge Boyle does not appreciate the dangers of our profession. His judicial chambers are free of split second decision making, yet he continues to make serious errors in all kinds of cases. Police officers who confront all kinds of dangers are entitled to fair treatment in court. We have experienced no other judge in North Carolina, or anywhere else, who has treated us this way.

Judge Boyle has not earned a record that would warrant a promotion in any law enforcement agency, much less to the second highest court in the United States. His record of errors would earn him a termination of employment in any professional law enforcement agency.

We have never before taken a position in opposition to one of the President's judicial nominees. We are compelled to do so because of Judge Boyle's embarrassing record.

We respectfully request that you and your colleagues oppose Judge Boyle's confirmation.

Please do not hesitate to contact us if you need further information concerning this matter. Thank you for your consideration.

Sincerely,

John C. Midgette
Executive Director

JCM/dsm

NORTH CAROLINA
POLICE BENEVOLENT ASSOCIATION, INC.
A Division of Southern States Police Benevolent Association, Inc.
2809 East Millbrook Rd., Suite 103
Raleigh, North Carolina 27604-2849
(919) 790-2275 • 1-800-451-3895

FOR IMMEDIATE RELEASE:
FEBRUARY 24, 2005

CONTACT: JOHN MIDGETTE
1-800-451-3895

SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION STRONGLY OPPOSES JUDGE TERRANCE BOYLE FOR APPOINTMENT TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

Today, the Southern States Police Benevolent Association (SSPBA) announced its opposition to the nomination of Judge Terrence Boyle of North Carolina to the U.S Court of Appeals for the Fourth Circuit. The Senate Judiciary Committee will hold a hearing on Judge Boyle's nomination on March 1, 2005.

For decades, SSPBA has represented the law enforcement profession across the South. PBA has state divisions in eleven southern states, with thousands of members. PBA engages in legislative, legal and other advocacy. PBA seeks to enhance public safety and protect the law enforcement profession.

North Carolina PBA Executive Director John C. Midgette states: "Our officers have appeared before Judge Boyle as parties and witnesses. We know Judge Boyle and his long judicial record. Our members have personally suffered from Judge Boyle's repeated legal errors. His rulings have severely harmed our members, their families, the law enforcement profession and the public."

SSPBA believes that Judge Boyle is unfit to serve on an appellate court because of his very poor record as a trial judge. SSPBA refers you to his record, where his rulings have been reversed in over 150 cases including many which involved law enforcement officers.

Executive Director Midgette states: "Judge Boyle's startling judicial record demonstrates a lack of competence in numerous areas of law including those that protect the safety and rights of police officers. Judge Boyle has repeatedly defied settled constitutional and civil rights precedent, imposing his own extremist personal opinions in his decisions."

Judge Boyle has even ruled that police officers who testify truthfully are not constitutionally protected from retaliatory discipline because of their truthful testimony. PBA has never before opposed the nomination of a federal judge. There are many other Republican federal district judges from North Carolina who are well qualified for an appellate judgeship.

Here are a few samples of Judge Boyle's dismal record. In Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999), Judge Boyle erroneously dismissed an officer's constitutional case where the officer was merely trying to teach an off-duty firearms safety course. Judge Boyle committed over five separate errors in one case! Judge Boyle flatly refused to follow settled law supporting constitutional protection for police officers.

In Kirby v. Elizabeth City (No. 2:01-CV-46-BO3), Judge Boyle dismissed a First Amendment speech case by a police officer who was disciplined because he testified truthfully in a hearing on behalf of a fellow officer. The retaliatory discipline was because of the officer's truthful testimony, as admitted in a memoranda from the Chief. Judge Boyle ruled that the officer's testimony was not protected and that the retaliatory discipline was not unconstitutional. The case is now on appeal to the Supreme Court.

In Gravitte v. N.C. Div. of Motor Vehicles (NO. 5:00-CV-845-B02), DMV has imposed mandatory ticket quotas for officers in some DMV districts. DMV required that each officer initiate five enforcement actions per day or else be disciplined. Judge Boyle ruled that police ticket quotas with discipline for officers was lawful despite the fact that DMV management officials testified that they had been taught that such ticket quotas were illegal. Judge Boyle's support for ticket quotas has subjected the law enforcement profession to more retaliation and more injuries from needless roadside traffic stops to meet the quotas.

In Godon v. N.C. Dept. of Crime Control, 1998 WL 193109, 141 F.3d 1158 (4th Cir. 1998), Judge Boyle dismissed the plaintiff's complaint. On appeal, the Court of Appeals reversed and reasoned that complaints about discrimination were protected expression. Godon had to be appealed again, and on the subsequent appeal, Judge Boyle was reversed again. 2000 WL 17634664. (4th Cir. 2000). Judge Boyle botched the case twice and was reversed on appeal twice.

In Burns v. Brinkley, 933 F.Supp. 528 (E.D.N.C. 1996), Judge Boyle dismissed a Deputy Sheriff's case before trial where the Deputy was fired for supporting an unsuccessful candidate for Sheriff. Judge Boyle concluded that the Deputy did not have any due process or First Amendment protection from such an arbitrary firing. Judge Boyle stated in his written decision: "The Constitution does not create rights..."

In U.S. v. State of N.C., 180 F.3d 574 (4th Cir. 1999), the Fourth Circuit reversed Judge Boyle's ruling denying and refusing to enter a consent decree that would have settled the litigation. The Court of Appeals concluded that Judge Boyle abused his discretion in refusing to approve a simple settlement reached between the United States and North Carolina. The underlying case involved discrimination in the hiring and promotions of correctional officers.

In Morrash v. Strobel, 842 F.2d 64 (4th Cir. 1987), Judge Boyle was designated to sit as an appellate judge at the Fourth Circuit Court of Appeals and he wrote the Court's decision. His decision affirmed the dismissal of constitutional retaliation claims brought by three Virginia police officers. The three officers were whistleblowers who exposed misconduct. Judge Boyle concluded that the officers did not have any due process or free association or speech rights. One of the Defendants did not even make the necessary motion to protect his interests. Judge Boyle stated because of that omission, that the Court was "constrained" to remand the case to the District Court.

In Piver v. Pender Bd. of Educ., 835 F.2d 1076 (4th Cir. 1987), the Court of Appeals reversed Judge Boyle's decision and reasoning in a leading First Amendment case involving the expression rights of public employees. The employee had spoken out in support of one of his superiors.

Executive Director Midgette states: "Judge Boyle represents a direct threat to the law enforcement profession and to our Constitution and civil rights. Consequently, we urge the Senate to not confirm his nomination. We urge the President to nominate a judge with a record of competence and respect for the Constitution and the law enforcement profession."

The North Carolina Police Benevolent Association is a division of the Southern States Police Benevolent Association, Inc.- a not-for-profit professional organization dedicated to improving the law enforcement profession. For more information, please browse our website at www.sspba.org or call 1-800-451-3895.

###

NORTH CAROLINA
POLICE BENEVOLENT ASSOCIATION, INC.
A Division of Southern States Police Benevolent Association, Inc.
2809 East Millbrook Rd., Suite 103
Raleigh, North Carolina 27604-2849
(919) 790-2275 • 1-800-451-3895

URGENT JUDICIAL MATTER

March 1, 2005

The Honorable Arlen Specter, Chairman
Senate Judiciary Committee
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510
By Facsimile to 202-228-1229

The Honorable Patrick Leahy, Ranking Member
Senate Judiciary Committee
United States Senate
433 Russell Building
Washington, D.C. 20510
By Facsimile to 202-224-3479

Re: Supplemental Communication Regarding Nomination of Judge Terrence Boyle to the U.S. Court of Appeals for the Fourth Circuit

Dear Chairman Specter and Ranking Member Leahy:

Over the past couple of days, for the first time, we have had an opportunity to review the official questionnaire and answers by Judge Boyle in connection with his pending judicial nomination to the Fourth Circuit. We have observed at least one startling matter that we are compelled to call to your attention.

We understand that this questionnaire is designed to educate the Senate about Judge Boyle's history, performance and conduct. When asked to provide a description about some of the cases whereby Judge Boyle has been reversed, on page 21 of the questionnaire, Judge Boyle identifies the case of *Edwards v. City of Goldsboro*, 178 F.3rd 231 (4th Cir. 1999). Judge Boyle, in his answer,

described that case as follows:

> "Section 1983 police employment case. Officer dismissed from his job for public speech. District Court abused its discretion by not allowing the officer to amend his complaint."

The forgoing description of the case by Judge Boyle is grossly misleading, incomplete and factually inaccurate. So that the Committee may understand the gravity of our concerns, we are attaching hereto a copy of the Fourth Circuit's decision in *Edwards* whereby Judge Boyle was reversed. You will see that a fair reading of the Fourth Circuit's decision in *Edwards* is a far cry from Judge Boyle's mischaracterized description of his own errors.

Judge Boyle's description of the *Edwards* case would lead a reasonable reader to conclude that he had only committed a simple procedural error by "not allowing the officer to amend his complaint." Although the procedural error is significant because it is such an elementary matter, the more troublesome aspect of Judge Boyle's misleading answer to the Senate is that he failed to mention any of the numerous substantive constitutional issues that he erroneously decided.

First, the Fourth Circuit held that Judge Boyle committed reversible error by failing to recognize the officer's free speech claim. 178 F.3d at 245. Second, the Fourth Circuit held that Judge Boyle erred in failing to recognize the officer's freedom of association claim. 178 F.3d at 249. Third, the Fourth Circuit held that Judge Boyle committed prejudicial error in failing to recognize that the officer had made out a valid municipal liability claim so as to hold the municipality responsible. 178 F.3d at 244. Fourth, the Fourth Circuit held that Judge Boyle committed prejudicial error in affording qualified immunity to the individual defendants. 178 F.3d at 250. *Edwards* is a leading case on numerous points of constitutional law, and has been cited 830 times as of today.

The foregoing are serious substantive constitutional errors which demonstrate that Judge Boyle defies precedent and refuses to follow long settled fundamental constitutional doctrine. A careful examination of the *Edwards* case demonstrates that Judge Boyle further erred in the underlying analysis of the four substantive issues noted above.

We find it astounding that a federal district judge, after having been on the bench for over twenty years, would provide a response to the United States Senate which includes seriously misleading representations.

Judge Boyle's description of the *Edwards* case to the Senate includes Judge Boyle's representation that "officer dismissed from his job for public speech." The *Edwards* case absolutely did not involve a dismissal of the police officer. Judge Boyle's representations to the Senate demonstrates the same sort of failure to pay attention to the key critical facts as he has in his cases for twenty years.

Police officers would be fired and decertified as officers if they submitted misleading

representations about their history. As police officers change positions and move from agency to agency, law enforcement officers frequently have to complete very similar questionnaires by the State Training & Standards Certification Commissions in each state. Law enforcement officers typically have to explain their background, previous charges against them and other questions about their competence, fitness and qualifications. In fact, law enforcement officers apparently undergo a more rigorous analytical scrutiny than do candidates for federal judgeships. When law enforcement officers make omissions from their questionnaires, they typically are decertified and therefore precluded from further service in the law profession. Law enforcement officers are trained that when responding to official questions, that they must be forthcoming, complete and entirely accurate. We believe that candidates for United States Circuit Judges should meet a similar standard of honest disclosure.

This matter is deeply troubling to our members and the law enforcement profession. This misrepresentation about the *Edwards* case alone is sufficient grounds to disqualify Judge Boyle from this important national position.

Thank you very much for your consideration.

Sincerely,

JCM/dsm

John C. Midgette
Executive Director, NC Division

T. V. Story
President
Asheboro, NC
(336) 736-9444

Donna Carter
Vice President
Clemmons, NC
(919) 649-6514

Carolyn Logan
Secretary
Charlotte, NC
(800) 446 - 7334

Rex D. Carter
Treasurer
Pilot Mountain, NC
(336) 368-1515

Steven C. Lockhart
Finance Officer
Blounts Creek, NC
(252) 975-1440

1500 Sunday Dr. Suite 102
Raleigh, NC 27607
1-800-446-7334

January 5, 2005

The Honorable Arlen Specter, Chair
U.S. Senate Judiciary Committee
711 Hart Building
Washington D.C. 20510

The Honorable Patrick Leahy, Ranking Member
U.S. Senate Judiciary Committee
433 Russell Building
Washington, D.C. 20510

Re: *Nomination of Judge Terrence Boyle to U.S. Court of Appeals*

Dear Senators Specter and Leahy:

For over fifteen years, this voluntary law enforcement association has served as the voice of Troopers of the North Carolina Highway Patrol. We work to promote public safety through various means of advocacy.

Our Association is very familiar with the judicial record of Judge Terrence Boyle of the Eastern District of North Carolina including his well known record of judicial treatment of law enforcement officers.

We understand that Judge Boyle has committed error and has been reversed by the Fourth Circuit Court of Appeals over one hundred times including cases where police officers have been severely abused. If a North Carolina Trooper had committed as few as two or three errors, that trooper would likely be fired.

Because of Judge Boyle's judicial record, he is not qualified for a promotion to an important appellate judgeship. In the North Carolina Highway Patrol, promotions are reserved for exemplary troopers who do not routinely commit errors.

We strongly urge you to oppose Judge Boyle's confirmation to the U.S. Court of Appeals. We have many other highly qualified federal district judges from North Carolina whom we would be happy to support. In fact, this Association would be honored to strongly support any other current North Carolina federal judge for this position.

We would appreciate your sharing our position with the Judiciary Committee and your colleagues. Thank you for your consideration and thank you for your service to the United States.

Sincerely,

Terry Story, President

Member of the National Troopers Coalition

March 02, 2005

Hon. Arlen Specter, Chairman
Senate Judiciary Committee
711 Hart Senate Office Building
United States Senate
Washington, D.C. 20510

Hon. Patrick Leahy, Ranking Member
Senate Judiciary Committee
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senator Specter and Senator Leahy:

I write to you on behalf of over 250,000 Americans who are members of Parents, Families and Friends of Lesbians and Gays (PFLAG), one of the nation's key family organizations committed to the rights of gay, lesbian, bisexual and transgender persons. Founded in 1973, PFLAG is a nonpartisan charitable organization that includes families of all political perspectives – Republicans, Democrats and more – that sponsors over 500 chapters, located in all fifty states of our Union.

PFLAG and our 250,000 members would like to reiterate our opposition to the confirmation of Terrence Boyle nominated to the U.S. Court of Appeals for the 4th Circuit. As an organization that advocates for the health and well being of the gay, lesbian, bisexual and trangendered minority community, we are concerned by Boyle's repeated promotion of "states rights" at the expense of the minority's federally protected civil rights. His track record of open hostility towards necessary federal protections such as the American with Disabilities Act (ADA) and the laws preventing states from discriminating against women in employment, among numerous examples, suggest that Terrence Boyle is unwilling to adhere to existing civil rights laws and precedents vital to protecting our family members against the tyranny of the majority.

In addition to his dismal record on civil rights issues, Boyle's rulings have been reversed more than 150 times often by the very circuit the Bush administration has nominated him to serve. Boyle's tendency towards misinterpretation, misapplication and fundamental legal mistakes raise grave doubts about his fitness to serve in a lifetime appointment at the appellate level.

For all of the reasons, the Committee should reject Boyle's confirmation to the 4th Circuit.

Sincerely,

Ron Schlittler
Interim Executive Director

Cc: All Members, Senate Judiciary Committee

PFLAG: Parents, Families and Friends of Lesbians and Gays
1726 M Street, NW, Suite 400 / Washington, DC 20036 / phone: (202) 467-8180 / fax: (202) 467-8194 /
www.pflag.org

3075 Howell Mill Rd., NW
Huntingdon Park Townhomes #3
Atlanta, GA 30327

January 24, 2003

VIA FACSIMILE: (202) 224-0103

Senator Saxby Chambliss
United States Senate
Washington, DC 20510

Re: James C. Dever, III
Nominee for the United States District Court for the Eastern District of North Carolina

Dear Senator Chambliss:

I am writing strongly to commend to you, and urge prompt confirmation of the appointment of, James C. Dever, III, as Judge for the United States District Court for the Eastern District of North Carolina.

Mr. Dever is a man of the highest integrity, who would bring to the Bench the judicial demeanor and fair and impartial approach that all litigants deserve. As a practicing attorney who has appeared before many federal judges throughout the country, I can state unequivocally that I would welcome the opportunity to appear before a judge such as Mr. Dever. He has the dedication, work ethic, and temperament to assure a better justice system. His record demonstrates his intellectual acumen. My dealings with him convince me he has the perspicacity to address all types of legal issues and to apply the law and principles of equity in an even-handed manner.

It is a pleasure to endorse Mr. Dever wholeheartedly. I shall sincerely appreciate your efforts on the Judiciary Committee and on the Senate floor to have him considered and confirmed.

Yours very truly,

Judith A. Powell

April, 4, 2003

Chairman Orrin Hatch
Senate Judiciary Committee
224 Dirksen Office Building
Washington, DC 20510

By FAX: 202-224-6331

RE: Nomination of Judge Terrence Boyle to the Fourth Circuit Court of Appeals

Dear Chairman Hatch:

On behalf of the Professional Fire Fighters and Paramedics of North Carolina, I urge you and other members of the Judiciary Committee to oppose the nomination of Judge Boyle to the Fourth Circuit Court of Appeals. Judge Boyle's record here in North Carolina is one that indicates a hostility to the interests of working men and women, both in the private and public sectors. I am informed that during his career as a District Court Judge, his decisions have been reversed more than one hundred times. In particular, and most important to the public employees that elected me their President, Judge Boyle has not shown the sensitivity and the respect for the fundamental rights guaranteed by our constitution, such as the right to free speech, the right to free association, and the right to due process, that are the primary bulwark protecting public employees here in North Carolina from arbitrary, unfair, and retaliatory actions.

The Professional Fire Fighters and Paramedics of North Carolina is an organization consisting of about 2500 emergency service employees from all over the state. It is our member paramedics and firefighters who respond on a daily basis to emergencies, risking their lives to save the lives and property of other citizens. And, as has been recognized many times since September 11, 2001, we are the first responders who will be in the forefront if there is another terrorist attack. The members of my organization are very committed to their work, and, indeed do the jobs not primarily for the pay that they receive (which all too often is inadequate to raise a family), but because of their personal desire and commitment to helping others. In doing this essential and dangerous work, it is important for us to know that if we become the victim of unfair treatment by our employers, there will be fair-minded judges to whom we can take our concerns. Unfortunately, Judge Boyle has shown himself to lack the fairness and concern for working women and men that our federal judges should possess and exercise. For these reasons, I urge you to oppose and reject his nomination.

Respectfully,

Bobby C. Riddle, Jr., President
Professional Fire Fighters and Paramedics of North Carolina

cc: Ranking Member Senator Patrick Leahy (By FAX: 202-228-0861)
Senator John Edwards (By FAX: 202-224-1374)



THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

Stephen A. Saltzburg
Howrey Professor of Trial Advocacy, Litigation and Professional Responsibility
Tel: (202) 994-7089 Fax: (202) 994-7143
E-Mail: ssaltz@law.gwu.edu

September 30, 2003

Senator Orrin Hatch
Senate Judiciary Chairman
104 Hart Building
United States Senate
Washington, D.C., 20510

Re: Judicial Nomination of Robert J. Conrad, Jr.

Dear Senator Hatch:

It is an honor for me to recommend Robert J. Conrad, Jr. for a federal judgeship. The President has nominated him, and those of us who have worked with him are anxiously awaiting his confirmation.

As you know, Bob is the United States Attorney for the Western District of your state. He previously was an Assistant United States Attorney and served for a time as the Chief of the Justice Department's Campaign Financing Task Force. He has a strong law enforcement background, but also will bring to the bench much private practice experience.

Bob graduated from the University of Virginia Law School while I taught there. He then practiced law in Charlottesville at a firm I much admire and with which I have worked. His private practice there prepared him to start his own firm where he worked until he became an Assistant United States Attorney. He has distinguished himself in all his work.

For the past four years, I have been fortunate to have Bob teach with me at the University of Virginia Trial Advocacy Institute, a training program for lawyers throughout the country and for approximately 50 University of Virginia law students. He is an outstanding teacher and devoted to the highest professional standards.

I know that all of those who teach with Bob would join me in urging you to support his nomination. He will make you proud and will make a fine United States District Judge for North Carolina.

Sincerely yours,

Stephen A. Saltzburg

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840 NEWPORT CENTER DRIVE, SUITE 400
NEWPORT BEACH, CA 92660-6324
TELEPHONE (949) 760-0991
FACSIMILE (949) 760-5200

1800 AVENUE OF THE STARS, SUITE 900
LOS ANGELES, CALIFORNIA 90067-4276

TELEPHONE (310) 277-1010
FACSIMILE (310) 203-7199
WEBSITE: www.irell.com

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TELEPHONE (310) 203-7943
dschwarz@irell.com

February 6, 2003

VIA U.S. MAIL

The Honorable Orrin G. Hatch
United States Senator
104 Hart Office Building
Washington, DC 20510

Re: Confirmation of James C. Dever, III

Dear Senator Hatch:

I am writing in support of President Bush's nomination of James C. Dever, III to the United States District Court for the Eastern District of North Carolina. Mr. Dever's appointment to that bench will be a welcome and strengthening addition to the Federal Judiciary.

I will not repeat in this letter Jim's many professional and personal accomplishments; I am sure they have been set forth before you and the Judiciary Committee at some length. I know Jim from my days at Duke Law School, where I served under him during his tenure as Editor-In-Chief of the Duke Law Journal. I observed first-hand Jim's extraordinary abilities of leadership, his judicious temperament, and his ability to deal impartially with a host of competing concerns. He brings extraordinary academic and intellectual accomplishment to the post, but most importantly Jim will inspire confidence in all who appear before him because he is fair.

As a practicing attorney who appears frequently before the federal courts in California, I have come to appreciate the importance of the perception and the reality of a fair-minded and impartial judiciary, as well as the importance of selecting judges of the highest intellectual caliber. Jim brings wisdom, intelligence, maturity and integrity to the bench.

I urge your colleagues to unanimously confirm Jim to this well-deserved post.

Respectfully,

David A. Schwarz

DAS:ab

632348

STERN GREENBERG & KILCULLEN
COUNSELORS AT LAW

HERBERT J. STERN
KEVIN M. KILCULLEN
JEFFREY SPEISER
JOEL M. SILVERSTEIN
EDWARD S. NATHAN
PASQUALE J. RUFOLO
DANIEL J. MULLIGAN
JOHN P. INGLESINO
LING W. LAU
MELISSA NIGLIO

75 LIVINGSTON AVENUE
P. O. BOX 430
ROSELAND, NEW JERSEY 07068
973-535-1900
FAX: 973-535-9664
LINDA A. ELFENBEIN
COUNSEL
MARC E. BERSON
OF COUNSEL

August 26, 2003

The Honorable Orrin G. Hatch
United States Senate
104 Hart Office Building
Second and C Streets
Washington, D.C. 20510

Dear Senator Hatch:

I understand that the President has nominated United States Attorney Robert J. Conrad, Jr. for the position of United States District Judge. It is my great pleasure to write to you in support of his Senate Confirmation.

I would first like to introduce myself. I am formerly United States Attorney and United States District Judge, having served as United States District Judge from December 1973 until January 1987. I am also the Founder and for 21 years the Director of the University of Virginia Trial Advocacy Institute. It was in this latter capacity that I came to know Bob, who has served as a member of my faculty teaching trial practice skills to lawyers from around the country who attended our Institute every year.

As you can readily see from Bob's resume, which I know you have carefully evaluated, it is rare that a judicial candidate has the extensive trial practice background that Bob possesses. I frankly can think of no recent appointee to the federal bench who has had as much trial experience as Bob. From my first-hand experience with him at the Institute at the University of Virginia, I can attest to his outstanding skills and, equally important, to his calm patience and gentlemanly demeanor. It is rare, indeed, that someone of Bob's outstanding abilities, drive, and energy also manifests a kind of courtesy that Bob does in his professional life.

In sum, I can and do unhesitatingly commend Bob to your attention. I believe he will be a United States District Judge of whom you can and will be proud, should he be confirmed.

If there is anything further that you wish me to add, I stand ready to do so at your convenience.

Respectfully,

Herbert J. Stern

HJS/dp

Triangle Urban League

150 Fayetteville Street Mall
Suite 425
Raleigh, NC 27601

919-834-7252 phone
919-834-5717 fax
www.triangleurbanleague.org

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April 29, 2003

The Honorable Elizabeth Dole
United States Senate
Washington, DC 20510

Dear Senator Dole:

On behalf of the Triangle Urban League, I am writing to urge your strong opposition to the pending nomination of Terence Boyle to the Fourth Circuit Court of Appeals. Elevating Judge Boyle to the Fourth Circuit would contribute to further packing the Fourth Circuit with activist conservative judges bent on setting new limits on Congressional legislation, thus tilting the Court so far to the right that any hope of obtaining justice for citizens who suffer from discrimination in the Fourth Circuit would be beyond reach. This is simply unacceptable in today's America!

An examination of Judge Boyle's record reveals a demonstrated hostility to civil rights and an unwillingness to follow the law. If Judge Boyle is elevated to the Fourth Circuit, we are very concerned that the same fate may befall all of the citizens within the Fourth Circuit, which has more African Americans living within its boundaries than any other Circuit Court in the country. Judge Boyle's anti-civil rights stance runs the gamut of civil rights areas and has been reversed on many occasions by the conservative Fourth Circuit. For example: on employment discrimination, *Whiting v. Ski's Auto World*, 1999 WL 753997 (4th Cir. Sept. 23, 1999); on age discrimination, *Beach v. Wake County Public School System*, 1999 WL 198915 (4th Cir. Apr. 9, 1999); on gender discrimination, *United States v. North Carolina*, 180 F.3d 574 (4th Cir. 1999); and on housing discrimination, *McCauley v. City of Jacksonville*, 829 F.2d 36 (4th Cir. 1987), Judge Boyle was reversed by the Supreme Court on voting rights, *Hunt v. Cromartie*, 526 U.S. 541 (1999).

Adding Judge Boyle to the Fourth Circuit would be on the heels of the Senate's addition last November of another activist judge to the Fourth Circuit bent on rewriting Congressional legislation and opposed by the National Urban League, Dennis Shed.

As you know, the Fourth Circuit is the most conservative Court in the nation. The ideological nature of the Circuit was recently featured in a cover story in *The New York Times Magazine*, "The Intellectual Heart of Conservative America." March 9, 2003. The *Times* story warns, "Let the plaintiff beware... the Fourth Circuit is considered the shrewdest, most aggressively conservative federal appeals court in the nation."(P.40)

For all of these reasons, the Triangle Urban League therefore strongly urges that you oppose his confirmation.

Sincerely,

Keith A. Sutton
President/CEO
Triangle Urban League



Expanding Opportunities for Veterans
and All Paralyzed Americans

February 25, 2005

The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

VIA FAX: Fax# 202-224-9102

Dear Senator Leahy:

The United Spinal Association strongly opposes the confirmation of Terrance Boyle to the Court of Appeals for the Fourth Circuit. Judge Boyle has a record of hostility toward individual rights claims by people with disabilities, African Americans, and others seeking justice in his courtroom.

In his twenty years as a district court judge, the conservative Fourth Circuit, the court to which he is being considered, has reversed Judge Boyle more than 150 times for subverting basic procedural rules, not fully and fairly considering the cases before him, ignoring binding precedent and clear statutory mandates, and repeating the same errors more than once. In many instances, the Fourth Circuit found that Judge Boyle misapplied, misinterpreted, or simply ignored controlling Fourth Circuit or Supreme Court precedent. Although a large number of Judge Boyle's opinions are unpublished at this time, the opinions publicly available speak volumes. Judge Boyles' tenure on the district court reveals a sustained hostility to civil rights claimants appearing before him. On numerous occasions, he has dismissed claims of discrimination based on disability, race, gender, or age.

Judge Boyle has handed down some of the most discriminatory rulings in recent memory. He has repeatedly promoted "states' rights" at the expense of federally protected civil rights. He has attacked laws protecting individual rights and liberties. He has assailed the Americans with Disabilities Act (ADA) and has a troubling history of denying voting rights. Judge Boyle's attacks on the ADA are evident throughout his attempts to exempt state agencies from federal anti-discrimination laws, including an Americans with Disabilities Act case in which he suggested that working is "not a major life activity" warranting protection under the ADA. It is clear that Judge Boyle's extreme promotion of States' Rights would dramatically restrict Congress's authority and hinder its ability to pass laws protecting the rights of Americans with disabilities, older workers, and others under the Constitution. For this reason, United Spinal Association strongly urges you not to confirm Judge Boyle to the court.

People with disabilities have fought long and hard to achieve the protections afforded by the ADA and like-minded laws. We must continue the fight to ensure that an activist court does not abridge these rights and protections. Please vote against Terrance Boyle's confirmation.

Sincerely,

Jeremy Chwat

Jeremy Chwat
Director of Legislation

734 15th Street NW, Tenth Floor
Washington, DC 20005

Tel 202 331 1002
Fax 202 783 1150
www.unitedspinal.org

VIRGINIA
POLICE BENEVOLENT ASSOCIATION, INC.
A Division of Southern States Police Benevolent Association, Inc.
1900 Brannan Road
McDonough, Georgia 30253-4310
(770) 389-5391 • 1-800-233-3506
FAX: (770) 389-4572

February 25, 2005

Senator Arlen Specter, Chairman
Committee on the Judiciary
United States Senate, 711 Hart Bldg
Washington, D.C. 20510

Senator Patrick Leahy
Committee on the Judiciary
United States Senate, 433 Russell Building
Washington, D.C. 20510

Re: Judge Terrence Boyle nomination to Fourth Circuit Court of Appeals

Dear Senators Specter and Leahy:

The Virginia Police Benevolent Association is a division of the Southern States Police Benevolent Association. Together we work to promote the law enforcement profession both in Virginia and throughout America.

We are familiar with the judicial record of Judge Terrence Boyle of North Carolina including his record of judicial treatment of law enforcement officers. We are vitally concerned about the quality of judicial appointments to the Fourth Circuit Court of Appeals.

We respectfully oppose Judge Boyle's confirmation because of his judicial record. His judicial philosophy and decisions have been very harmful to the law enforcement profession. Judge Boyle's overall record demonstrates numerous legal errors and reversals. Judge Boyle's decisions have exposed the law enforcement profession to greater risks and harms.

Please share our concerns with the Judiciary Committee and your colleagues

Thank you for your consideration

Sincerely,

David Graham
President, Virginia Division
Southern States Police Benevolent Association

William A. Webb
3908 City of Oaks Wynd
Raleigh, NC 27612

February 25, 2005

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

Dear Mr. Chairman:

I have recently become aware of certain criticism of Judge Terrence Boyle in the context of his nomination to the United States Court of Appeals for the Fourth Circuit which calls into question his impartiality in dealing with African American litigants and lawyers. I write to respond to that criticism. I have known Judge Boyle for eighteen years and practiced before him for approximately ten years, first as an Assistant United States Attorney and later as the Federal Public Defender for this district. During those years I have also had an opportunity to observe how he treated other African American lawyers and litigants. Judge Boyle enjoys a well earned reputation for the even handed and impartial manner in which he treats the lawyers and litigants who appear before him regardless of their race. To say that Judge Boyle takes race into consideration in making decisions is false; to say that he gives any impression or harboring racial animus is baseless. On the contrary, those African American lawyers who have practiced before him, like myself, will attest to his fairness both to them and their clients.

I commend Judge Boyle to you without reservation for elevation to the United States Court of Appeals for the Fourth Circuit.

Sincerely,

William A. Webb

The Honorable Patrick J. Leahy

CAMPBELL UNIVERSITY

NORMAN ADRIAN WIGGINS SCHOOL OF LAW

OFFICE OF THE DEAN

(910) 893-1750

May 16, 2003

Senator John Edwards
301 Century Post Office Building
300 Fayetteville Street Mall
Raleigh, NC 27601

Re: James C. Dever III

Dear John:

Jim Dever has been on the adjunct faculty here for several years teaching an Employment Law course. The course is an important one in today's legal world and is well subscribed by the students. Jim gets excellent ratings from them as a teacher and by all accounts coming to me does an excellent job.

I can further attest that he has appeared before me in my judicial capacity, and he always represented his clients both ably and in a highly professional manner.

From what I know about him, I consider him well qualified for the position on the federal bench for which he has been nominated.

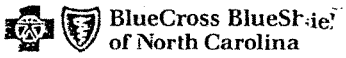
If I can provide you with further information, or be of further assistance in this matter in any way, please let me know.

With appreciation for your consideration and best wishes.

Sincerely,

Willis P. Whichard
Dean and Professor of Law

WPW/bgw



J. Bradley Wilson
Senior Vice President and
General Counsel

July 28, 2003

The Honorable John Edwards
United States Senator
225 Dirksen Senate Office Building
Washington, D.C. 20510-3306

Dear Senator Edwards,

I am pleased to write you on behalf of my good friend and colleague, Jim Dever, who is under consideration for the United States Federal District Court. Jim has represented Blue Cross and Blue Shield of North Carolina in several matters during my tenure. His work has been outstanding. I have no doubt that Jim has the knowledge and experience to be an outstanding jurist.

Jim's academic and military service speaks for itself. An outstanding undergraduate and law school scholar, a United States Air Force Officer, and distinguished practitioner, Jim has the depth and breadth of experience we need in the judiciary. He has excelled in every endeavor. His character, integrity and commitment to family and community are unquestionable. In my judgment, we are fortunate that Jim is interested in continuing his public service commitment through service on the bench. I am honored to join a long list of North Carolinians who support Jim Dever for appointment to the federal bench. I urge you to do the same

Very truly yours,

J. Bradley Wilson

JBW/lb

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YURKO & OWENS, P.A.
ATTORNEYS AT LAW

LYLE J. YURKO
N. TODD OWENS
C. MELISSA OWEN

402 WEST TRADE STREET, SUITE 101
CHARLOTTE, NORTH CAROLINA 28202
TELEPHONE: (704) 347-0407
FACSIMILE: (704) 347-0441

August 27, 2003

The Honorable Orrin G. Hatch
United States Senate
104 Hart Office Building
Second and C Streets
Washington, DC 20510

Dear Honorable Hatch:

I wanted to take some time to write you about the judicial candidacy of United States Attorney Bob Conrad. As you know I primarily practice in Federal Court and have known Bob for more than ten years. I have represented defendants in well over twenty-five matters where Bob was lead prosecutor.

I have found him to be an excellent representative for the United States. His prosecution decisions have been firm but fair. I believe him to be highly qualified to be a United States District Court Judge. Bob is an individual of extraordinary integrity, intelligence, and competency.

I have found Bob to be personally compassionate. When one of his former witnesses was experiencing domestic difficulties, he asked me, as a favor to him, to counsel the young man.

As a result of my work with the Practitioner's Advisory Group to the United States Sentencing Commission, I often come in contact with members of the D.C. Bar. Many of them had extremely high praise for Bob's work during the Campaign Finance Investigation that he was asked to lead by former Attorney General Reno.

Although our political views often differ, I strongly support Bob's candidacy and I believe he will be an excellent judge.

Sincerely,

Lyle J. Yurko

LJY/atn

NOMINATIONS OF JOHN RICHARD SMOAK, OF FLORIDA, TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF FLORIDA; BRIAN EDWARD SANDOVAL, OF NEVADA, TO BE DISTRICT JUDGE FOR THE DISTRICT OF NEVADA; HARRY SANDLIN MATTICE, JR., OF TENNESSEE, TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TENNESSEE; MARGARET MARY SWEENEY, OF VIRGINIA, TO BE A JUDGE FOR THE UNITED STATES COURT OF FEDERAL CLAIMS; AND THOMAS CRAIG WHEELER, OF MARYLAND, TO BE A JUDGE FOR THE UNITED STATES COURT OF FEDERAL CLAIMS

THURSDAY, SEPTEMBER 29, 2005

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

The Committee met, pursuant to notice, at 1:32 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, presiding.

Present: Senator Hatch.

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

Senator HATCH. We are happy to welcome all of you here today for these judicial nomination hearings, and we have Hon. Majority Leader of the U.S. Senate, Senator Frist, and we will go with you first, and then we will go with Senator Alexander, and then we will just—well, if Senator Reid shows up, I will go with him second, and then go right across the board.

Senator Frist, we are happy to hear from you.

PRESENTATION OF HARRY SANDLIN MATTICE, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TENNESSEE, BY HON. BILL FRIST, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator FRIST. Mr. Chairman, thank you, and it is an honor to be before the Committee today, and it is with great pleasure that

I come to introduce "Sandy," Harry S. Mattice, Jr., who has been nominated by President Bush to serve on the United States District Court for the Eastern District of Tennessee. Sandy is joined today by his wife, Janet, and welcome to both of them. I had the opportunity to see them a bit earlier today.

Sandy is a native of Chattanooga and a graduate of the University of Tennessee, where he earned both a bachelor's degree and his law degree. As an attorney, Sandy has enjoyed a successful career in private practice and in public service. He practiced law for almost 17 years with the firm of Miller and Martin in Chattanooga, focusing primary on business investigations, including securities, tax, and white-collar crimes.

In 1997, Sandy served a brief stint here on Capitol Hill. My former colleague, Fred Thompson, asked Sandy to serve as a senior counsel to the Senate Governmental Affairs Committee during the special investigation of the 1996 Federal election campaigns. After leaving Washington, Sandy returned to private practice in Tennessee and later joined the law firm of former Senate Majority Leader Howard Baker.

Sandy's most recent job has been United States Attorney for the Eastern District of Tennessee. He was nominated by President Bush in 2001, and since that time he has served with distinction. In this role, Sandy manages Federal prosecutions for Tennessee's largest judicial district, encompassing 41 counties and 2.5 million citizens. His office has worked with local and State law enforcement to lead the State's East Tennessee's Methamphetamine Task Force, which serves as one of the best examples of effective Federal, State, and local cooperation.

I have had the real privilege of knowing Sandy for many years and give him my highest recommendation to serve on the Federal bench. Sandy respects his colleagues and in turn has earned their respect and admiration, and he has proven his merit as a skilled attorney and a talented prosecutor.

On Tuesday of this week, the American Bar Association gave Sandy its highest possible rating, unanimously well qualified to serve as a Federal judge. In addition to his many professional qualifications, he is an honest, moral person, a man of honor and integrity. He is devoted to his family and active in his local community. I am confident that he will serve with honor on the Federal bench.

Mr. Chairman and Committee members, I thank you for holding the hearing and allowing me to introduce this truly, truly distinguished Tennessean, and I urge my colleagues on the Committee to support Sandy's nomination. As Majority Leader, I look forward to bringing Sandy's nomination to the full Senate soon and voting yes for his confirmation.

Thank you, Mr. Chairman.

Senator HATCH. Well, thank you, Mr. Leader. That is high praise indeed, and Mr. Mattice has got to be very happy that you showed up and said a few words.

With that, we know you are busy, and we know you have a lot to do, so we would be happy to release you.

We will turn now to the distinguished Democrat Leader in the Senate, Senator Reid, for your remarks.

PRESENTATION OF BRIAN EDWARD SANDOVAL, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF NEVADA, BY HON. HARRY REID, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator REID. First of all, Mr. Chairman, let me say something about the man that Brian Sandoval will succeed. A friend of mine by the name of Howard McKibben served that court with distinction, a trial judge in Nevada that everyone looked up to. For example, he was recently recognized by the Nevada Advisory Council of Prosecuting Attorneys for his commitment to improving the administration of justice in Nevada. He has received award after award. But what I would like to say about Judge McKibben is that he was fair. He was a man who had the utmost respect of the attorneys who appeared before him, both those he ruled for and against.

I ask unanimous consent that my full statement be made part of the record.

Senator HATCH. Without objection, we will put it in the record.

Senator REID. Brian Sandoval will be an asset to the State of Nevada as a judge and to our country. I have had the distinct pleasure of offering this job to Brian twice. When the Democrats were in charge back here, I had a Committee of one that chose the people that went on the court, and I was that committee. And even though I am a Democrat and he is a Republican, I called Brian to see if he wanted to be a Federal judge. He at that time decided that he didn't. He had family considerations that he felt were such that he couldn't do that.

One of the reasons that I have always so admired Brian is because of his family. I am not well acquainted with his family, but I know of his family. I know his family because of Brian always talking about his family. And it is obvious when he expresses to me his—one of the reasons that he is looking forward to this job is so that he can spend time with his children, more time with his children. He does not have to worry about campaigning in Elko or Las Vegas or Reno. He can spend time with his family.

Mr. Chairman, John Ensign is a very gracious person in many different ways. He is a very generous person. When he was elected, he indicated that he would have—for every fourth judge, Federal judge we got, that choice would be mine. Senator Ensign chose three. My choice came along, and I chose Brian Sandoval. I appreciate Senator Ensign for being fair with me, and he has no obligation to give me any appointments. He did it because he thought that would be fair, and I appreciate it very much.

I think as a result of that bargain we are going to get a real good judge. Brian is a young man. He can serve with distinction on that court for many, many years, and he will serve with distinction.

Words are not able to express to this Committee what a fine man he is. There has been a lot of squabbling in recent years here with judges. Brian Sandoval will cause no squabbles. Everyone will vote for him. He is a class act. I wish that I had the opportunity someday to appear before him. As a judge I know that he would serve well whatever client that I represented. I have done a lot of work in the trial courts, Mr. Chairman, and I just think that he is somebody that will be—as I look back on my days in the courtroom,

somebody that I would, if I had the opportunity to serve before him, say here is the kind of judge that we should have.

So, Brian, and your family, I wish you the very best.

Senator HATCH. Well, Mr. Sandoval, it is a real tribute to have the Democrat Leader of the Senate, and, Senator Reid, it is a real tribute to you that you put politics aside in these matters, and I appreciate it. We are grateful to have you here.

With that, we will turn to Senator Alexander.

PRESENTATION OF HARRY SANDLIN MATTICE, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TENNESSEE, BY HON. LAMAR ALEXANDER, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator ALEXANDER. Thank you, Mr. Chairman.

Mr. Chairman, it is a pleasure for me to join the Majority Leader, Senator Frist, in appearing today to introduce Sandy Mattice to serve as United States District Court Judge. I can only echo the high praise that Bill Frist offered in his settlement.

Sandy is an excellent choice to succeed Judge Al Edgar in Chattanooga. Judge Edgar served with distinction. I have known him a long time. We rode the same bus to Boys State together in 1957. Al Edgar served in the legislature in the 1970's. He has been an extraordinarily good United States District Judge. So Sandy Mattice has some big shoes to fill.

But Sandy's resume, as Senator Frist pointed out, suggests that he is certainly able to fill those. Graduating from two of our finest universities, working for two of our best law firms, active in a number of charitable organizations, on the adjunct faculty at the University of Tennessee, active in the local bar association, a lifelong Tennessean, he has all of the qualities that should make him an extraordinarily good United States District Judge.

I also think it is worth pointing out that, if past history is any indication, he has a great future ahead of him. When Senator Howard Baker was picked to serve as Vice Chairman of the Senate Watergate Committee in 1973, he turned for help to a young lawyer then making his name in Tennessee, Fred Thompson. Fred Thompson, of course, eventually became Senator Fred Thompson, and when he was Chairman of the Governmental Affairs Committee, Senator Thompson opened a special investigation into the 1996 Federal election campaigns, he took a page from Senator Baker's book. He looked around Tennessee. He tapped an outstanding young man to help him with that. And it was Sandy Mattice, who was Fred Thompson's senior counsel.

So if history repeats itself, following his time as a Federal judge, Sandy Mattice may very well have an opportunity to serve in elective office. Or if he is really successful, he might become a movie star.

[Laughter.]

Senator ALEXANDER. So, Mr. Chairman, it gives me a lot of pleasure to be here today, and I want to especially congratulate Sandy Mattice's family. I know this is an important day for them. Thank you for giving me this time to give my highest recommendation to the President's nomination of Sandy Mattice to be United States District Judge in Chattanooga.

Senator HATCH. Well, thank you, Senator Alexander. I really appreciate your testimony. I don't think we could have a better delegation of Senators than you and Senator Frist recommending a judge for us, so we appreciate it. Thanks so much.

Senator Ensign, we are going to turn to you now.

PRESENTATION OF BRIAN EDWARD SANDOVAL, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF NEVADA, BY HON. JOHN ENSIGN, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator ENSIGN. Thank you, Mr. Chairman. I want to thank you for having this hearing today so that we can bring forward someone who we think is a great Nevadan and someone who will be a terrific representative for us on the Federal District Court in the State of Nevada.

Brian Sandoval is our Attorney General. He is the first Hispanic to be elected statewide in the State of Nevada, but it is the character of the person that has brought my confidence in Brian Sandoval. He is a tremendous father. He is here with his entire family. We actually took pictures this morning, and he has a beautiful wife and kids. Two of his children, from what I understand, are missing school today, and that would probably upset them dearly. But he is somebody who has always bridged across the aisles, whether it was being appointed by a Democrat Governor to serve in the State of Nevada. On the Nevada Gaming Commission, he was the youngest person in our State's history to be the chief gaming regulator. And he was, as I mentioned, appointed by a Democrat at that time.

Today before us, because of the situation that Senator Reid and I have worked out between us, we have a sharing agreement where we consult with each other on our judges that we bring forward, and this happens to be Senator Reid's pick. I get three when there is a Republican, he gets one; when it reverses around, we go the other way. And Senator Reid has decided to bring forward a Republican Attorney General to be on the bench, and somebody we both agree is an outstanding choice for the bench, for the district court in Nevada.

His qualifications are part of my full statement. I would like to ask unanimous consent to bring that full statement as a part of the record.

Senator HATCH. Without objection.

Senator ENSIGN. And just to make a couple of last comments, we are very proud of the entire district court in the State of Nevada. I honestly could not point out a weakness in our entire bench in the whole State of Nevada on the Federal district court. Because of that, we have very high standards to make sure that whoever is going to fit there is not going to drop below a certain level. And no question in my mind that Brian Sandoval will meet the standard that we have set for the court in the State of Nevada. So I enthusiastically join my colleague, Senator Reid, in bringing forward Brian Sandoval to be the next representative for the Federal district court in the State of Nevada.

Mr. Chairman, I know that when he testifies, is given the chance, and if you have questions, you will be impressed by his in-

tellect, by his character, and his integrity. And I thank you, Mr. Chairman.

[The prepared statement of Senator Ensign appears as a submissions for the record.]

Senator HATCH. Well, thank you, Senator Ensign. That is wonderful of you to take time to come and chat with us about Mr. Sandoval. I am sure he is going to make—General Sandoval, I should say. He is going to make a great judge, no question from what you and Harry Reid have said. And, of course, I have heard about him, too, so I am really grateful to have you here. Thank you so much.

Well, we may have one or two others come in to testify as Senators, but until then, let's just set all of you judgeship nominees up on the table.

While we are doing that, we will put the statements of Senator Warner and Senator Allen into the record as if fully delivered.

[The prepared statements of Senator Warner and Senator Allen appear as submissions for the record.]

Senator HATCH. All right. If you would all raise your right hands, do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SMOAK. I do.

Mr. SANDOVAL. I do.

Mr. MATTICE. I do.

Ms. SWEENEY. I do.

Mr. WHEELER. I do.

Senator HATCH. Take your respective seats, Mr. Smoak over here, Mr. Sandoval, Mr.—is it pronounced Mattice or Mattice?

Mr. MATTICE. Mattice.

Senator HATCH. OK. Ms. Sweeney, Mr. Wheeler, and then if Senator Nelson comes, we will interrupt to take his statement.

Let me just say I would like to thank each one of our distinguished nominees for their presence here today and for their willingness to serve our country. We have before us here an impressive array of legal experience and expertise, and as diverse as each of your careers has been, your resumes show a common commitment to public service, private excellence, and community action.

Now, while each of you can be justifiably proud of your respective accomplishments—and they have been many that have really brought you to this point in your careers—I am sure each one of you would readily admit that any success is more easily achieved and certainly sweeter with the support of your families. For those family members who are here with our nominees, I want to thank all of you for your hard work and your sacrifices to support your husbands and wife.

Mr. Mattice, I would like to thank you for being here. I know you are no stranger to these hallowed halls as a former senior counsel to the Senate's Governmental Affairs Committee, and even after that, here you are again. It shows how dumb you are, is all I can say.

[Laughter.]

Senator HATCH. You fortitude alone merits our commendation, I have to say. But it is your exceptional work both in private practice and in public service here in the U.S. Senate and as a U.S. Attor-

ney for the Eastern District of Tennessee that has rightly earned you the respect of your peers and a unanimously well qualified rating from the American Bar Association. That is quite an achievement, and I look forward to seeing you on the Federal bench for the U.S. District Court for the Eastern District of Tennessee.

Mr. Sandoval, you couldn't have had two better people come and testify for you. They are both excellent Senators. They both testified from their hearts, and I thought they did a good job for you. You have accomplished a great thing by getting both of them to come and testify for you, and both of them to agree together.

Now, both of them have praised your work as Attorney General for the State of Nevada, and from what I know about it, the praise is well deserved. And we appreciate you as a neighbor to our home State of Utah. I just want you to know that.

Your notable participation in high-profile legal matters in the State and Federal courts and your tenacious protection of the public I think will be a great asset to you as you continue to serve the people from the Federal bench.

Now, Mr. Smoak, with 30 years of legal experience demonstrating a long-standing commitment to your community in Florida, you are a perfect choice to assume the bench as judge for the U.S. District Court for the Northern District of Florida. In addition to your excellence in private practice, you have shown an unsurpassed commitment to pro bono service, and you are going to be a superb addition to the Federal district court and the Federal bench.

We also have two nominees here for the Federal Court of Claims before us today, and it is impossible to say which one of you is better qualified. You both are so well qualified because your credentials are both so stellar.

Ms. Sweeney, your work as a Special Master on the Federal Court of Claims mediating and adjudicating complex vaccine cases under the National Childhood Vaccine Injury Compensation Act makes you a natural choice to serve as a judge on this very specialized court. In addition, you have strongly demonstrated your commitment to the principles of freedom and justice by your service in the Department of Justice working with our Nation's intelligence agencies before the little known but very critical FISA court in our ongoing struggle to combat worldwide terrorism. So you have a wide experience there, too.

You have served this Nation well in the past, and I am certain you are going to really continue to do a great job on the Court of Claims.

I will be with Senator Nelson in just 1 second.

Mr. Wheeler, you, too, are a natural choice to assume a position on the Federal Court of Claims. With over 30 years of experience in private practice specializing in Government contracts, publishing eight articles on the subject, and appearing numerous times before the court that you have now been nominated to join, I cannot think of better qualifications for this nomination. And I commend you for your desire to continue this work and to serve on this particular very, very important bench, as far as I am concerned.

With that, before we take each of your testimonies, we will turn to Senator Nelson. We are delighted to have you here, Senator Nelson. We look forward to your testimony.

PRESENTATION OF JOHN RICHARD SMOAK, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF FLORIDA, BY HON. BILL NELSON, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator NELSON. Thank you, Mr. Chairman, and I am here on behalf of one of our Floridians, Mr. Smoak, for appointment to the United States District Court. This gentleman has served his Nation before, and I want to thank him for his offer and willingness to serve it again.

His service began when he graduated from the United States Military Academy, and he was highly decorated for service in Vietnam. And then he earned his J.D. from the University of Florida. He settled in the Panhandle town of Panama City, close to where my ancestors came 175 years ago, down in Port St. Joe. And he has been practicing civil law for over the past 30 years, and during that time he, of course, represented a wide variety of clients, from truck drivers to small business owners to national corporations in many areas of the law. And I think that broad experience is going to serve him well as a Federal district judge.

Clearly, he is a leader in his community, and he has been in so many distinguished organizations. And I might just mention that Florida Trend magazine has named him one of Florida's top defense lawyers. And on top of all that, he holds a commercial pilot's license.

Mr. Smoak has the unique understanding of the Northern District of Florida. He has been for now 15 years appointed by the chief judge as a member of the Advisory Committee to study and make recommendations to improve the court's operations, and a number of those recommendations have been adopted in the Northern District.

Clearly, Mr. Chairman, he is highly qualified. He is well respected in his community. I know that. And I along with Senator Martinez strongly believe that he is going to make an outstanding addition to our Federal bench.

Thank you, Mr. Chairman.

Senator HATCH. Well, thank you, Senator. It is awfully good of you to take time from what I know is a real busy schedule to come over here and testify. It means a lot to us, and your testimony is very, very important.

Senator NELSON. Thank you.

Senator HATCH. Thank you so much for being here.

Well, I could sit here and give you all a rough time, but I am not known for that because I know of your reputations, and I think each of you is qualified to serve in your respective positions. And, frankly, these positions are extremely important. I think it is the courts that have saved the Constitution over the years, not so much the Congress or the Presidency. We pass unconstitutional stuff all the time. We may not think it is, but we find out later that it is. Where I think the courts have, by and large, been a great salvation to our country, to me the Federal courts are absolutely crucial to our freedoms and to our democracy and to the various liberties that we all hold near and dear. And the trial courts, in the case of the Federal district courts, are extremely important because

that is where the vast majority of cases are disposed of. And that is where people feel they get a fair shake or they don't.

So I want to commend each of you for being willing to leave your practices and you, Mr. Sandoval, being willing to leave your Government service in a great State. And you two who are up for the Federal Court of Claims, I am very grateful that you are willing to serve there. It is a very important court. A lot of people do not realize what it does, but it is extremely important to this country. So I am grateful to have all of you.

Let me just start with you, Mr. Smoak. You have had a distinguished career as a private practitioner, and as I understand it, you have appeared in court regularly throughout your career. And obviously you have gained some insight from all of this experience that you have had, the professional experience you have had that will influence your Federal judicial temperament as a Federal district court judge.

Now, tell me how these experiences are going to help you to be a better district court judge.

STATEMENT OF JOHN RICHARD SMOAK, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF FLORIDA

Mr. SMOAK. Mr. Chairman, I have come to realize over the years that a citizen's contact with the courts is often the worst experience of their life. With the exception of the most jaded or the most hardened ordinary citizen, it is a terrifying experience. And I think we can do more, and I think it puts a continuing obligation on anyone who sits on the bench to keep that in mind and to treat people with respect, to treat them with courtesy, and to be the immediate face of our country's judiciary by being fair, by being patient, and perhaps even more important, by being prepared and engaged and willing to work hard.

Senator HATCH. That is great.

[The biographical information of Mr. Smoak follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

John Richard Smoak, Jr.
No former names.

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

Residence: **Panama City, Florida**

Office: **103 West Fifth Street**
Panama City, Florida 32401

3. Date and place of birth.

May 11, 1943
Columbus, Georgia

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

Married.
Pamela Joanne Smoak (nèe Pullman)
Assistant State Attorney
Office of State Attorney
Fourteenth Judicial Circuit
421 Magnolia Avenue
Panama City, Florida 32401

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

Juris Doctor 1972, College of Law,
University of Florida 1970-1972

Bachelor of Science 1965, United States Military Academy, West Point, New York 1961-1965

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.

(1) Sole practitioner, August 1, 1991, to present, 103 West Fifth Street, Panama City, Florida 32401.

(2) In 1984, the Isler firm and another Panama City firm merged to become Sale, Brown & Smoak, in which I was a partner. The name of the firm was ultimately Smoak, Harrison, Sale, McCloy & Thompson, 434 Magnolia Avenue, Panama City, Florida 32401. I withdrew from the firm in 1991 to open my present law office.

(3) 1975-1983: I became a partner, and the name of the firm was Isler, Higby, Brown, & Smoak, 434 Magnolia Avenue, Panama City, Florida 32401. It evolved over the years to Isler, Brown, Smoak, Harrison, Nabors, & Bussian.

(4) 1973-1975: I was an associate in Isler, Welch, Higby & Brown, 434 Magnolia Avenue, Panama City, Florida 32401.

(5) 1965-1970: U.S. Army.

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.

1961 - 1965 Cadet, United States Corps of Cadets, United States Military Academy, West Point, New York.

1965 - 1970 Infantry and Special Forces Officer, United States Army. I was commissioned a second lieutenant in the Regular Army upon graduation from West Point in 1965. My service included a tour in Germany; two tours in Vietam; and assignments at Ft. Gordon, GA, and Ft. Bragg, NC. I was a captain when I resigned my commission in 1970. My serial number was OF105028. I received an 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.

(a) Military Awards:

Silver Star Medal
Bronze Star Medal for Valor
Bronze Star Medal for Meritorious Service (two awards)
Air Medal (nine awards)
National Defense Service Medal
Vietnam Service Medal with six campaign stars
Cross of Gallantry from Republic of Vietnam
Vietnam Campaign Medal
Combat Infantryman's Badge
Special Forces Qualification Badge
Parachutist Badge
Republic of Vietnam Parachutist Badge

(b) Fellow, American College of Trial Lawyers

(c) Board Certified Civil Trial Lawyer, Florida Bar Board of Legal Specialization and Education

(d) Certified Civil Trial Advocate, National Board of Trial Advocacy

(e) Recipient of "AV" rating by *Martindale-Hubbell Law Directory*

(f) Listed individually in *Martindale-Hubbell Bar Register of Preeminent Attorneys*

(g) Listed in *The Guide to Leading Florida Attorneys* for the practice area of medical and professional malpractice defense.

(h) Identified as one of Florida's "Top Defense Lawyers" by *Florida Trend*, February 2004

(I) Certified Circuit Court Mediator

(j) Grievance Mediator, The Florida Bar

(k) Federal Aviation Administration Airman's Certificate: Commercial pilot license; single-engine and multi-engine ratings; and instrument rating

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.

Fellow, American College of Trial Lawyers

International Association of Defense Counsel

American Bar Association

The Florida Bar

Bay County Bar Association

Florida Defense Lawyers Association

National Association of Railroad Trial Counsel

National Institute for Trial Advocacy Advocates Association

Defense Research Institute

Master Bencher, St. Andrews Bay Inn of Court, American Inns of Court

Member, Advisory Committee for the Study of Rules of Practice and Internal Operating Procedure, U. S. District Court, Northern District of Florida

Past Member, Florida Supreme Court Committee on Standard Jury Instructions (Civil)

Past Chairman, Judicial Nominating Commission, Fourteenth Judicial Circuit, State of Florida

Past Member, Florida Board of Bar Examiners; Chairman of Questions Committee; Present Board Member Emeritus

Past Member, Civil Justice Reform Act Advisory Group, U. S. District Court, Northern District of Florida

Past Member, Civil Procedure Rules Committee of The Florida Bar

Past Board Member, Young Lawyers Section, The Florida Bar

Past Chairman, Grievance Committee, Fourteenth Judicial Circuit

Past Chairman, Unauthorized Practice of Law Committee, Fourteenth Judicial Circuit

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) **I do not belong to any organizations that are active in lobbying before public bodies.**

(b) **Supreme Court Historical Society**

Association of Graduates, United States Military Academy

Special Forces Association

101st Airborne Division 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.

Supreme Court of Florida	**1973**
U.S. District Court, Northern District of Florida	**1973**
U.S. Court of Appeals, Fifth Circuit	**1975**
U.S. Court of Appeals, Eleventh Circuit	**1981**
U.S. District Court, Middle District of Florida	**1987**
Supreme Court of the United States	**1990**

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 involved 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.

Excellent. April 12, 2005

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

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.

Not applicable.

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.

(a) Public Office:

(1) Judicial Nominating Commission, Fourteenth Judicial Circuit, State of Florida, 1997-2000 (Chairman 2000) Appointed by the Board of Governors of The Florida Bar

(2) Florida Board of Bar Examiners, 1985-1990, (Chairman of Questions Committee, 1989-1990). I was appointed to the Florida Board of Bar Examiners by the Supreme Court of Florida. I was reappointed to the Board in 1992 to fill the remaining term of a former member who had become a judge and served from April to October of 1992. I have served as Board Member Emeritus since 1994.

(b) I have not been a candidate for elective public office.

17. Legal Career:

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

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

No.

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

Sole practitioner, August 1, 1991, to present, 103 West Fifth Street, Panama City, Florida 32401.

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;

1973-1975: I was an associate in Isler, Welch, Higby & Brown, 434 Magnolia Avenue, Panama City, Florida 32401.

1975-1983: I became a partner, and the name of the firm was Isler, Higby, Brown, & Smoak, 434 Magnolia Avenue, Panama City, Florida 32401. It evolved over the years to Isler, Brown, Smoak, Harrison, Nabors, & Bussian.

In 1984, the Isler firm and another Panama City firm merged to become Sale, Brown & Smoak, in which I was a partner. The name of the firm was ultimately Smoak, Harrison, Sale, McCloy & Thompson, 434 Magnolia Avenue, Panama City, Florida 32401. I withdrew from the firm in 1991 to open my present law office.

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

1975 to present.

I have a civil trial practice and a general practice. My civil trial practice is primarily defense-oriented, and has consisted of medical malpractice defense, legal malpractice defense, other professional malpractice defense, personal injury, commercial and real property litigation, products liability, railroad defense, and employment discrimination. I have handled all appeals of my cases. Since 1992, I have served as a certified circuit mediator. My general practice has included representation of a government special district, commercial and real estate transactions, and limited estate planning and probate.

1973 - 1975.

I was an associate in the Isler law firm. I worked with the firm partners in civil defense litigation. I wrote all appellate briefs. I participated in some trials as associate counsel but began acting as sole counsel in jury and non-jury trials during my first year of practice. I also handled foreclosure and collection litigation for bank clients, domestic cases, and real property title examinations.

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

My clients have included truck drivers; small business owners; a bank; professionals such as physicians, attorneys, engineers, and the clergy; hospitals; commercial fishermen; two railroads; insurance companies and their insureds; churches; several international paper companies; national corporations; and a state government special district.

I have specialized in the defense of professional malpractice cases and the defense of railroads in Federal Employer Liability Act cases and other railroad tort cases.

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

Regularly. The frequency of my court appearances has remained relatively constant throughout my career of thirty-one years.

2. What percentage of these appearances was in:

(a) federal courts;
(b) state courts of record;
(c) other courts.

(a) Federal Courts - 15%

(b) State Courts of Record - 80%

(c) Division of Administrative Hearings - 5%

3. What percentage of your litigation was:

(a) civil;
(b) criminal.

(a) Civil 100%

(b) Criminal 0%
(I handled a small number of criminal cases in state and federal courts during the early years of my practice).

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 I have tried in excess of 250 cases to conclusion. During the early years of my practice, I was associate counsel for no more than fifteen cases. I have acted as sole or lead counsel in all other cases.

5. What percentage of these trials was:

(a) jury;
(b) non-jury.

(a) Jury 60%
(b) Non-jury 40%

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. **Style of Case:** Mary Grace Freeman and Mark Freeman v. Marion J. Mathews, M.D., et al

Party Represented: Doctor Marion J. Mathews

Trial Period: May 28, 2002 - Directed Verdict at Trial

Court and Judge: Circuit Judge Glenn L. Hess
Bay County Circuit Court
Fourteenth Judicial Circuit
Case No. 98-3381-CA

Opposing Counsel: Parker B. Smith
1219 Airport Road
Suite 311
Destin, Florida 32541
(813) 269-0880

Linda S. Robinson
1551 Fourth Avenue, Suite 501
San Diego, California 92101
(619) 544-7090

Counsel for Co-Defendant
Donald Cvitkovich, M.D.: Craig A. Dennis
P. O. Box 15589
Tallahassee, Florida 32317-5589
(850) 422-3345

Factual Summary:

This was a medical malpractice action in which the plaintiff, who was then a forty-five year old woman, claimed she developed avascular necrosis of both hip joints because of excessive doses of corticosteroids ordered by Doctor Mathews, a family medicine specialist, and Doctor Cvitkovich, a pulmonologist. The plaintiff had surgical replacement of both hip joints, and further hip replacement surgery was forecast in the future. The defendants had treated the plaintiff with corticosteroids because she was gravely ill with atypical pneumonia, and corticosteroids maintained her ability to breathe. The cause of avascular necrosis of the hip often cannot be determined. There were scientific studies which concluded that extremely high doses of corticosteroids, greater than the doses administered to the plaintiff, could cause avascular necrosis. The plaintiffs' attorneys attempted to make steroids an inflammatory issue, and it was necessary to educate the jury that corticosteroids are different from anabolic steroids, which have been the subject of widespread publicity about serious side effects and abuse by athletes. The trial judge had to make several important rulings of whether expert witness testimony met the Frye standard. Cross-examination of the plaintiffs' expert witnesses impeached their opinions and extracted admissions by them that the doses of steroids ordered by Doctor Mathews were unlikely to cause avascular necrosis. At the conclusion of the plaintiffs' presentation of evidence, the trial judge granted a directed verdict for Doctor Mathews. The court has subsequently denied the plaintiffs' motion for new trial and has awarded Doctor Mathews costs of approximately $15,000.00. I was sole counsel for Doctor Mathews.

2. Style of Case: Jane Doe and John Doe v. North Okaloosa Medical Center, Inc., S. R. Tresch, Mozelle Folmor, and Frank C. Bozeman, Jr.

Party Represented: Frank C. Bozeman, Jr.

Trial Period: Claims Against Frank C. Bozeman, Jr. Dismissed January 2001

Court and Judge: Circuit Judge Jack Heflin
Okaloosa County Circuit Court
First Judicial Circuit
Case No. 96-3523-CA

Opposing Counsel:	Stanley Bruce Powell P. O. Box 400 Niceville, Florida 32588 (850) 678-2188
	Gillis E. Powell, Jr. P. O. Box 277 Crestview, Florida 32536 (850) 682-2757
Counsel for Co-Defendants:	James M. Wilson P. O. Box 13430 Pensacola, Florida 32591 (850) 438-1111
	Pamela K. Frazier 24 West Chase Street Pensacola, Florida 32501 (850) 469-0202

Factual Summary:

Plaintiff Jane Doe, a woman in her sixties, alleged that she was sodomized by co-defendant Tresch, a radiology technician employed at North Okaloosa Medical Center in Crestview, when she was to have a CT scan of the pelvis. The plaintiffs sued Tresch; the hospital; Mozelle Folmor, the hospital's risk manager; and Frank C. Bozeman, Jr., the hospital's attorney. I represented Bozeman, who is a highly respected senior trial lawyer in Pensacola. The plaintiffs claimed that Folmor, with Bozeman's complicity, improperly forced the plaintiffs to accept a nominal settlement of their claim. Folmor had investigated the plaintiffs' allegations and had concluded that they were not true. Preparation for the CT of the pelvis required administration of an enema of radiopaque liquid. Plaintiff Jane Doe incorrectly believed that she had been sodomized when in fact she had been administered the enema of contrast liquid. At the Folmor's request, Bozeman had prepared releases and attended a meeting at the hospital with Folmor and the plaintiffs when the settlement was paid to the plaintiffs and the plaintiffs signed the releases. Approximately one year later, the plaintiffs filed this suit and alleged claims of intentional infliction of emotional distress, fraud and deceit, and civil conspiracy against Bozeman. The plaintiffs claimed that Bozeman forced them to sign a single blank piece of paper with only signature lines printed on it and that he later added printed text to that sheet of paper and appended two other printed pages, thus fabricating a release around their signatures. In truth, the plaintiffs had signed three duplicate release documents. The plaintiffs' expert witness, the former FBI chief document examiner, conceded that the plaintiffs' signatures on each of the three release documents were in fact genuine, despite the plaintiffs' adamant insistence that they had signed only a single piece of paper. However, the expert opined that the alignment of

the text above and below the plaintiffs' signatures demonstrated that the text had been printed at a different time than the printed lines for the plaintiffs' signatures.

We were able to secure the hard drive of the computer which had been used by Bozeman's secretary. A variety of experts were retained to examine Bozeman's hard drive and printer in the hope of developing a persuasive explanation to counter the theory of plaintiffs' document expert. All efforts, however, were inconclusive. As a final attempt to solve the mystery of the releases, I retained a new document examiner who had computer expertise. He was able to demonstrate conclusively, by examination of the three duplicate original releases and by Bozeman's word processing computer program, that the three duplicate original releases were printed completely and saved to the computer hard drive two days before the plaintiffs signed the releases. He further extracted information from the computer that indicated no subsequent changes to the release documents had been made in the word processing program and located a hidden registry in the computer program which confirmed by date and time all steps in the preparation of the release documents. When confronted with that evidence, the plaintiffs' attorneys finally dismissed the suit against Bozeman.

3. Style of Case: Faith Sexton, Personal Representative of the Estate of Martha Baker Cory, Deceased, and Trinity Retreat, Inc. v. Markus Bishop and Faith Christian Family Fellowship of Panama City Beach, Florida

Faith Sexton, Personal Representative of the Estate of Martha Baker Cory, Deceased, and Trinity Retreat, Inc. v. J. David Epstein

Parties Represented:	Markus Bishop, Faith Christian Family Fellowship of Panama City Beach, Florida, and J. David Epstein
Trial Period:	Summary Judgment for Defendants 3/16/98
Court and Judge:	Circuit Judge Lewis Lindsey Walton County Circuit Court First Judicial Circuit Case No. 93-0050-CP
Opposing Counsel:	Bret A. Moore The Moore Law Firm P. O. Box 746 Niceville, Florida 32588 (850) 678-1121

James W. Middleton
216 Hospital Drive, N. E.
Fort Walton Beach, Florida 32548
(850) 243-1941

Factual Summary:

This was a suit by a non-profit corporation and a probate estate personal representative to set aside their gift of valuable south Walton County beach property to the defendant church. I represented the church, its minister, and its tax lawyer as sole counsel in the trial court and in the appellate court. The plaintiffs alleged that the church's minister had procured the gift by undue influence and fraud and with the complicity of the church's lawyer. There were also issues of corporate law. The plaintiffs claimed that the gifts were void because a corporate trustee resigned in protest, albeit ineffectively, and because there had been insufficient notice and lack of a quorum of trustees to approve the gifts, which conveyed all assets of the corporation. Careful questioning of plaintiff in depositions established there were no material facts to support her allegations. Summary judgment was entered for all of my clients and was affirmed on appeal by the District Court of Appeal, First District. 731 So.2d 1276 (Fla. 1st DCA 1999).

4. Style of Case: H & F Land, Inc. v. Panama City-Bay County Airport & Industrial District

Parties Represented: Panama City-Bay County Airport & Industrial District

Trial Period: Summary Final Judgment for Defendant 3/21/97

Court and Judge: Circuit Judge Don T. Sirmons
Bay County Circuit Court
Fourteenth Judicial Circuit
Case No. 95-3295-CA

Opposing Counsel: Cecilia Redding-Boyd
Bryant & Higby, Chartered
P. O. Drawer 860
Panama City, Florida 32402-0860
(850) 763-1787

Thomas Sale, Jr.
602 Harrison Avenue, Suite 1
P. O. Box 426
Panama City, Florida 32402-0426
(850) 763-7311

Factual Summary:

The plaintiff sued for determination that it was entitled to a common law implied easement of necessity across the adjacent land owned by the Panama City-Bay County Airport & Industrial District, which operates the public airport in Bay County. I represented the District as sole counsel in the trial court and in the appellate courts. If the claim of the easement had been upheld, it would have seriously disrupted air operations and compromised security at the District's airport. The District filed a motion for summary judgment which contended that the easement claimed by the plaintiff had been extinguished by the Marketable Record Titles to Real Property Act, Chapter 712, Florida Statutes. The trial judge granted the motion for summary judgment, which was affirmed by the District Court of Appeal, which certified the case as involving an issue of great public interest. 706 So.2d 327 (Fla. 1st DCA 1998). The Supreme Court of Florida upheld the decision. 736 So.2d 1167 (Fla. 1999). This was a case of first impression involving an implied common law easement of necessity under the Marketable Records Titles to Real Property Act.

5. Style of Case: Searcy v. Columbia HCA, Inc., et al

Parties Represented:	Doctor Jon Nagel, Doctor Kenneth Carter, Doctor Cynthia McEvoy, Doctor J. Stephen Sims, and Neonatal Associates of Northwest Florida, P.A.
Trial Period:	Settlement: August 1, 1997
Court and Judge:	Circuit Judge Terry D. Terrell Escambia County Circuit Court First Judicial Circuit Case No. 95-665-CA-01
Opposing Counsel:	Christian D. Searcy P. O. Drawer 3626 West Palm Beach, Florida 33402-3626 (561) 686- 6300
Counsel for Co-Defendants:	Donald H. Partington P. O. Box 13010 Pensacola, Florida 32591-3010 (850) 434-9200 Frank C. Bozeman, Jr. P. O. Box 13105 Pensacola, Florida 32591-3105 (850) 434-6223

Maria A. Santoro
106 East College Avenue
Suite 900, Highpoint Center
Tallahassee, Florida 32302
(850) 224-5252

James Rinaman
P. O. Box 447
1200 Riverplace Boulevard, Suite 800
Jacksonville, Florida 32207
(904) 398-0900

Craig A. Dennis
P. O. Box 15589
Tallahassee, Florida 32317-5589
(850) 422-3345

W. Douglas Moody, Jr.
101 North Gadsden Street
Tallahassee, Florida 32301
(850) 222-6656

Factual Summary:

This was a medical malpractice action which involved severe brain injury to an infant, the nephew of a prominent Florida plaintiff's malpractice attorney. I represented four neonatologists and their professional association. Also named as defendants were two hospitals, an obstetrician, a pediatrician, a private medical group, a nurse-midwife, and a county ambulance service. The plaintiffs contended that their child's brain damage resulted from improper resuscitation after emergency cesarean delivery and failure to recognize and treat blood loss and respiratory and circulatory problems related to prematurity. My clients and the other defendants contended that the child's injury occurred prior to birth because of a myriad of factors which included prematurity, placental insufficiency, intrauterine infection, placenta previa, placental abruption, and the parents' unorthodox beliefs about medical care. The medical issues were extraordinarily complex. There were more than thirty medical expert witnesses. The case was mediated twice unsuccessfully. Summary final judgment was entered for two of my neonatologist clients. The case settled the week before trial was scheduled to begin. I was sole counsel for my clients.

6. Style of Case: Edgar Mathieu, Jane E. Mathieu, and Edgewater Sun Spot, Inc., v. Ben H. Wilkinson, D. Andrew Byrne, and Pennington and Haben, P. A.

Parties Represented:	Ben H. Wilkinson, D. Andrew Byrne, and Pennington and Haben, P. A.
Trial Period:	Summary Judgment for Defendants 10/14/97 U. S. Bankruptcy Court, Northern District of Florida; reversed on jurisdictional grounds by Court of Appeal, Eleventh Circuit Dismissed by Bay County Circuit Court 5/29/01
Court and Judge:	U. S. Bankruptcy Judge Lewis Killian United States Bankruptcy Court Northern District of Florida Bankruptcy Case Nos. 91-02303 and 91-02304
Opposing Counsel:	David L. Fleming David L. Fleming, P. A. P. O. Box 3329 Pensacola, Florida 32516-3329 (850) 458-6633

Factual Summary:

The defendants had been the attorneys for the plaintiffs in their debtor-in-possession Chapter 11 bankruptcy proceedings and in an adversary proceeding against the plaintiffs' bank. The plaintiffs sued the defendants for legal malpractice and breach of fiduciary duty and alleged various acts of misconduct during the bankruptcy proceedings, which included accusations that the defendants improperly persuaded the plaintiffs to file for bankruptcy protection unnecessarily and that the defendants forced the plaintiffs to improvidently settle their multi-million dollar lender liability adversary proceeding against their bank. The case was initially filed in Bay County Circuit Court, and the defendants removed the case to the bankruptcy court. The plaintiffs first challenged the bankruptcy court's jurisdiction based upon the mandatory abstention statute, and the bankruptcy court granted the plaintiffs' motion and remanded the case to state court. The defendants appealed that ruling to the U. S. District Court, which reversed in favor of the defendants. The plaintiffs then contended that the bankruptcy court should remand the case to state court based upon discretionary abstention. The bankruptcy court denied the plaintiffs' motion for discretionary abstention, and the plaintiffs appealed to the U. S. District Court, which affirmed in favor of the defendants. The defendants then filed a motion for summary judgment which contended that the plaintiffs' claims were barred by the doctrines of claim preclusion and issue preclusion, otherwise known as res judicata and collateral estoppel, because the allegations in this suit were virtually identical to issues raised earlier by the plaintiffs in

their objection to the defendants' fee application in their bankruptcy proceeding. The plaintiffs had claimed that the fee application should be disallowed because of the defendants' alleged misconduct. The bankruptcy court previously had completely adjudicated the same claims in the plaintiffs' fee objection and had found those claims to be without merit. The bankruptcy court granted the defendants' motion for summary judgment; the plaintiffs appealed to the U.S. District Court, which affirmed the summary judgment. The plaintiffs also sought to disqualify the bankruptcy judge for bias, which was denied and affirmed on appeal. The plaintiffs then appealed to the Eleventh Circuit Court of Appeals, which reversed. 207 F.3d 661 (11th Cir. 2000). The case was remanded to state court, where it was ultimately dismissed. Three other federal circuits have recently decided similar cases contrary to the Eleventh Circuit's decision. When this case began, appellate authority was unsettled about the constitutional jurisdiction of a bankruptcy court to hear a claim for legal malpractice against a debtor's former attorney without a jury trial.

I represented the defendants as sole counsel in the bankruptcy court; in the three appeals to the district court; in the appeal to the Eleventh Circuit Court of Appeals; and in state court.

7. Style of Case: Bay Bank and Trust Company v. E. Lamar Bailey and Perimeter Investments, Inc.

Party Represented:	Bay Bank and Trust Company
Trial Period:	Summary Final Judgment for Plaintiff December 1995.
Court and Judge:	Circuit Judge Don T. Sirmons Bay County Circuit Court Fourteenth Judicial Circuit Case No. 92-3004-CA
Opposing Counsel:	Donald J. Schutz 535 Central Avenue St. Petersburg, Florida 33701 (813) 823-3222

Factual Summary:

This was an action to foreclose mortgages on land in Bay County and Leon County. The action was filed by prior counsel for the bank in 1992, and extensive settlement negotiations took place until September 1993, when the defendants refused to accept the terms proposed by the bank essentially to restructure the loan and mortgages. The defendants then filed a multi-count counterclaim

alleging breach of a settlement agreement, fraud, a claim for lender liability, and other acts of misconduct by the bank during the settlement negotiations. The defendants alleged that the bank's actions caused them to lose valuable vested zoning rights in Leon County and claimed damages in excess of $3,000,000.00. The bank's prior attorney had to withdraw from the case, and I was retained by the bank as sole counsel. Discovery depositions of the defendants established the lack of merit of their claims. The bank moved for summary judgement and supported its motion with extensive briefs which set forth in careful detail the facts in the record with supporting legal authority. As a result, summary final judgment in excess of $1,900,000.00 was entered in favor of the bank. The summary judgment was upheld on appeal in Bailey v. Bay Bank and Trust Co., 684 So.2d 1354 (Fla. 1st DCA 1996).

8. Style of Case: Quinn A. McMillan as Sheriff of Walton County, Florida vs. Betty L. Hattaway as guardian of Noah Lee Laningham, Incompetent

Party Represented: Betty L. Hattaway

Trial Period: February and March 1994

Court and Judge: District Judge Roger Vinson
United States District Court
Northern District of Florida

Opposing Counsel: J. F. Parker, Jr.
P. O. Box 14436
Tallahassee, Florida 32317
(850) 385-4454

Factual Summary:

This was an action pursuant to Rule 60, Federal Rules of Civil Procedure, for relief from a judgment because of alleged newly discovered evidence and fraud. Mrs. Hattaway had obtained a substantial judgment against Sheriff McMillan for injuries to her son, Noah Laningham. Laningham had been apprehended by Sheriff McMillan after a high speed automobile chase. McMillan forced a garden water hose in Laningham's throat with water flowing at high pressure. The experience caused Laningham severe psychological injury which resulted in his becoming near-catatonic. The sheriff's appeal to the Eleventh Circuit was unsuccessful, but three years after the verdict he filed this action against Mrs. Hattaway. Sheriff McMillan claimed that Laningham was in fact unhurt, that he had faked injury, that he had told other persons that he intended to feign injury in retaliation against the

sheriff, and that he had been observed acting normally on several occasions. The sheriff's proof of his allegations, however, came from a very unsavory lot, virtually all of whom were regular tenants in his jail. I presented evidence that the sheriff had developed the testimony of his witnesses by promises of improper favors, warnings of pending arrest warrants, and intimidation. After a two-day evidentiary hearing, the District Judge ruled in favor of Mrs. Hattaway. I was lead counsel for Mrs. Hattaway.

9. Style of Case: Ole Lighthouse Marine, Inc. vs. Panama City-Bay County Airport & Industrial District

Party Represented: Panama-City Bay County Airport & Industrial District

Trial Period: January 1994

Court and Judge: Circuit Judge Dedee S. Costello
Bay County Circuit Court
Fourteenth Judicial Circuit
Case No. 91-2681-CA

Opposing Counsel: James Richardson
Will Richardson
P. O. Box 12669
Tallahassee, Florida
(850) 893-2734

Factual Summary:

This was an action for inverse condemnation. The plaintiff was a boat dealership located on land adjacent to the airport operated by the District. At a public meeting in 1986, the District announced a land acquisition plan to acquire twenty-nine parcels of land which were located within the runway clear zone and building restriction line of the primary airport runway. The plaintiff's land was one of the parcels to be acquired. The District established a priority list of the order in which the parcels would be acquired, and the plaintiff's parcel had relatively low priority. The District advised the property owners that the parcels would be acquired only if federal grant funding was available. It acquired several parcels, all by negotiation without the necessity of condemnation proceedings. By 1990, however, federal funding vanished, and the District acquired no further parcels. The plaintiff filed this action for inverse condemnation and alleged that the threat of condemnation and publicity about the District's acquisition plan had adversely affected its business and had impaired the value and marketability of its land. The plaintiff also contended that it had abandoned plans to expand its business in the belief that its land would be

acquired by the District. The procedure for inverse condemnation required the judge to first conduct an evidentiary hearing to determine if a governmental "taking" had occurred which deprived the owner of substantial economic use of its property. A twelve-person jury would then determine the amount of compensation. I presented evidence that the more plausible explanation of the plaintiff's difficulty was its poor business management and a depressed national market for boat sales. Following the evidentiary hearing, the trial judge held that the effect of the District's land acquisition plan was not a compensable "taking" of the plaintiff's property. The final order was upheld on appeal. Ole Lighthouse Marine, Inc. v. Panama City-Bay County Airport & Industrial District, 680 So.2d 428 (Fla. 1st DCA 1996). This case is significant because there had then been no other reported Florida case which had considered whether an implicit threat of condemnation can result in a taking by inverse condemnation, for which compensation must be paid. I was sole counsel.

10. Style of Case: White Eagle vs. Tabbaa, et al.

Party Represented: Dr. John Gooding

Trial Period: December 1992

Court and Judge: Circuit Judge Don T. Sirmons
Bay County Circuit Court
Fourteenth Judicial Circuit
Case No. 90-4270-CA

Opposing Counsel: Sidney L. Matthew
P. O. Box 1754
Tallahassee, Florida 32302
(850) 224-7887

Samuel T. Adams
610 West Beach Drive
Panama City, Florida 32401
(850) 785-3469

Counsel for Co-Defendants: G. Bruce Hill
1417 East Concorde Street
Suite 101
Orlando, Florida 32803-5456
(407) 896-0425

John M. Fite
220 McKenzie Avenue
Panama City, Florida 32401
(850) 785-7454

Factual Summary:

This was a medical malpractice case which involved the death of a young child. The child had been seriously injured when struck by a truck. My client, an anesthesiologist and critical care specialist, was involved in the care of the child in the hospital intensive care unit. After a two-week trial, the trial judge directed a verdict in favor of my client. The directed verdict was upheld on appeal in White Eagle v. Tabbaa, 621 So.2d 867 (Fla. 1st DCA 1994). The case was significant for the emotional issues which are part of every trial involving the death of a young child. It presented unique evidentiary issues and complex factual issues of critical care medicine. I was sole counsel.

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.)

(a) Florida Board of Bar Examiners

I was appointed a member of the Florida Board of Bar Examiners by the Supreme Court of Florida in 1985 for a five-year term. In 1992, I was asked to return to the Board to fill the remaining term of a departing board member. Since 1994, I have continued to serve from time to time as Board Member Emeritus. This was a very challenging experience which involved the formulation of bar examination test questions, grading the bar examination, and determining whether applicants for admission possessed the requisite competence, character, and fitness. It often required me to make difficult decisions about a particular applicant.

(b) Board Certification

I am certified as a Board Certified Civil Trial Lawyer by The Florida Bar Board of Legal Specialization and Education and as a Certified Civil Trial Advocate by the National Board of Trial Advocacy. I believe that it is important for lawyers to demonstrate and maintain competency in their specialty of practice.

(c) Certified Circuit Court Mediator

After completing training with the American Arbitration Association, I was certified by the Supreme Court of Florida as a certified circuit court mediator in 1992. I have mediated a wide variety of civil cases, including professional malpractice, real estate, commercial, and employment discrimination suits, and even a patent infringement case.

(d) Florida Bar Grievance Mediator

I have served as grievance mediator for The Florida Bar Grievance Mediation Program. Grievance mediation provides prompt, private, and informal resolution of client disciplinary complaints against lawyers. A disciplinary complaint is particularly challenging to mediate because considerable animosity and distrust have generally developed between the client and the attorney. Some clients initially suspect that a grievance mediator will favor a fellow attorney. Therefore, to be effective, the grievance mediator must be able to establish effective communication with the client and reassure the client that the mediator is absolutely impartial. The public interest is well-served when the client and the attorney reach a mutually agreeable solution to their differences at mediation. Each grievance complaint that I mediated resulted in resolution satisfactory to the client and the attorney.

(e) Advisory Committee for the Study of Rules of Practice and Internal Operating Procedure, U.S. District Court, Northern District of Florida

Civil Justice Reform Act Advisory Group
U. S. District Court, Northern District of Florida

I was appointed by the chief judge of the U. S. District Court, Northern District of Florida, to serve on the Advisory Committee for the Study of Rules of Rules of Practice and Internal Operating Procedure and on the Civil Justice Reform Act Advisory Group. My service on the two committees has given me a unique perspective of the functions of the U.S. District Court. The Civil Justice Reform Act Advisory Group performed a detailed analysis of the court's civil case docket and made recommendations to the chief judge to improve litigation management and to reduce expense and delay. Because the court's criminal case load has such significant impact on the management of civil cases, the Advisory Group also studied the court's criminal docket. The Group's recommendations had to take into account the priority and resources demanded by the court's criminal docket. The district court incorporated a number of the Group's recommendations into the court's Civil Justice Expense and Delay Reduction Plan.

I have served on the Advisory Committee for the Study of Rules of Practice and Internal Operating Procedures since 1992. The committee participates in the revision of the local rules of the court and in issues involving internal operation of the district court such as guidelines for potential conflicts of interest for the district judges.

(f) Panama City-Bay County Airport & Industrial District

I have been counsel for the District for over twenty-five years. This experience has afforded me the opportunity to work in many areas of the law. I advise the District's board members. I have placed particular emphasis on compliance with laws for open public meetings and public records. I have represented the District in a variety of litigation, including commercial and real property disputes, personal injury, eminent domain, and unemployment claims. I was sole counsel for the District in a condemnation proceeding to acquire land on which a manufacturing plant was located. I have been involved with the District's development of two industrial parks, expansion of the airport, and the recent construction of an impressive new airport terminal building. I have negotiated and prepared the necessary legal documents for the lease, sale, and purchase of land. I have participated in the preparation of applications for federal and state grant funding. Currently, I am involved with the District's planning and design of a new regional airport as part of an unprecedented optional sector plan in Florida.

(g) Atlanta and Saint Andrew Bay Railway Company Derailment
Bay County Circuit Court Case No. 87-959

In 1978, an Atlanta and Saint Andrew Bay Railway Company freight train derailed in a small rural community in Bay County. The derailment was believed to have been caused by the intentional sabotage of a rail. A tank car ruptured, and chlorine gas spread across the nearby four-lane highway and into the community. Nine persons driving past the site died from inhalation of the chlorine gas, and scores of people in the surrounding community claimed to have been injured. Many homes were evacuated for approximately one week. The first forty-two lawsuits were consolidated for trial on liability, and I represented the railroad as associate local counsel. Preparation for trial involved the discovery of numerous experts in a variety of specialties and the use of evidence developed by investigations by the NTSB and the FBI. Several hundred prospective jurors were summoned for the trial, and I conducted the voir dire. The cases were settled after the third day of trial. I worked with Nickolas Chilivis of Atlanta, Georgia, who was lead counsel for the railroad. Lead counsel for the defendants was Bill Hoppe of Miami. As a result of that experience, I was retained as counsel for the railroad.

(h) David L. Taunton v. George G. Tapper
Gulf County Circuit Court Case No. 78-167

This was a malicious prosecution case. I represented defendant George G. Tapper who was a former state senator, former Chairman of the Senate Transportation Committee, former candidate for lieutenant governor, and a prominent and sometimes controversial figure in Gulf County. The plaintiff was a non-lawyer county judge who, in his zeal to champion those he perceived to be the down-trodden against the establishment, became known as the "Robin Hood Judge" and was featured in Time Magazine. Facing increasing criticism, Judge Taunton appeared before the Gulf County commission and delivered a lengthy diatribe which accused Tapper and other public figures and politicians of a variety of misdeeds. Taunton and Tapper represented competing political factions in the community. Tapper hired an attorney and filed suit against Judge Taunton for defamation. That suit was dismissed for lack of prosecution because of Tapper's attorney's inaction. The dismissal was improperly entered with prejudice. Taunton then filed suit against Tapper for malicious prosecution. I was retained to defend Tapper, and my first effort was to appeal the dismissal of the defamation suit with prejudice. Tapper's appeal was successful. Tapper v. Taunton, 371 So.2d 595 (Fla. 1st DCA 1979). Plaintiff Taunton then challenged three presiding trial judges in succession to recuse themselves. The case was ultimately assigned to the fourth judge who entered summary judgment in favor of my client. My motion for summary judgment was supported by extensive testimony from numerous witnesses, including former Congressman Bob Sikes, local political figures, and state employees, all of whom established that Judge Taunton would be unable to prove the requisite elements for malicious prosecution or that his earlier accusations about Tapper were true. The summary judgment was affirmed on appeal. Taunton v. Tapper, 433 So.2d 523 (Fla. 1st DCA 1983).

(i) Elliott Monroe vs. Bay Hospital, Inc., et al.
Bay County Circuit Court Case No. 81-1418

Plaintiff Elliott Monroe was a local obstetrician. I represented all of the defendants in this case: a local hospital, an anesthesiologist, the hospital's nursing supervisor, and two operating room nurses. Monroe sued my clients for defamation and for causing wrongful termination of his hospital privileges. After a cesarean delivery, my clients observed Doctor Monroe performing an unauthorized tubal ligation sterilization of the patient. The patient was indigent. My clients confronted the plaintiff, who denied their accusation but concealed the operating field from their view. Later in the recovery room, the patient experienced massive internal bleeding, and the plaintiff reopened her abdomen. It was determined during the litigation that the plaintiff took that opportunity, having second thoughts about his earlier actions, to remove the sutures from the fallopian tubes. My clients reported the incident to the hospital administration, and the plaintiff was suspended from the medical staff. Weeks later, the plaintiff admitted the patient to

another hospital with a proper authorization for sterilization. To demonstrate that he had been falsely accused, the plaintiff summoned other physicians to observe that the patient's fallopian tubes were intact and apparently had not been previously ligated. However, I developed compelling evidence with sophisticated pathology examination that there were microscopic signs of fragments of suture material and old inflammation of the fallopian tubes, which dated to the plaintiff's earlier unauthorized sterilization attempt. With that evidence, the defendants filed a motion for summary judgment on the grounds that the suspension of the plaintiff's hospital privileges had been completely warranted and that the defendants' actions were protected by statutory privileges for quality assurance and peer review. Summary judgement was granted in favor of all defendants. That result was instrumental in causing the plaintiff to leave the community. Although the plaintiff had at one time been an extremely bright and gifted physician, his conduct became increasingly bizarre over the years that followed. He had numerous encounters with law enforcement and professional regulators and ultimately died at a relatively young age.

Appellate Practice:

(j) I have had an active appellate practice as an integral part of my trial work. The following are citations of appellate cases I have handled. With the exception of two cases in which I was assisted by associates, I did all research and writing and presented all oral arguments.

1. Plattenberg v. Dykes, 798 So.2d 915 (Fla. 1st DCA 2001).
2. Mathieu v. Wilkinson, 207 F.3d 661 (11th Cir. 2000).
3. Sanders v. Mathews, 768 So.2d 452 (Fla. 1st DCA 2000).
4. Willis v. Apalachicola Northern Railroad Company, 733 So.2d 1159 (Fla. 1st DCA 2000).
5. H&F Land, Inc. v. Panama City-Bay County Airport and Industrial District, 736 So.2d 1167 (Fla. 1999).
6. Sexton v. Bishop, 731 So.2d 1276 (Fla. 1st DCA 1999).
7. H&F Land, Inc. v. Panama City-Bay County Airport and Industrial District, 706 So.2d 327 (Fla. 1st DCA 1998).
8. Stephens v. Bay Medical Center, 742 So.2d 297 (Fla. 1st DCA 1998).
9. Gore v. Space Science Services, Inc., 697 So.2d 841 (Fla. 1st DCA 1997).
10. LeCroy v. Space Science Services, Inc., 697 So.2d 842 (Fla. 1st DCA 1997).
11. Mathieu v. Wilkinson, Case No. 97CV-48/RV, (N.D. Fla. 1997).
12. Bailey v. Bay Bank & Trust Co., 684 So.2d 1354 (Fla. 1st DCA 1996).
13. Mathieu v. Wilkinson, Case No. 5:96CV-209 (N.D. Fla. 1996).
14. Ole Lighthouse Marine, Inc. v. Panama City-Bay County Airport & Industrial District, 680 So.2d 428 (Fla. 1st DCA 1996).
15. Ahl v. Stone Southwest, Inc., 666 So.2d 922 (Fla. 1st DCA 1995).

16. Wilkinson v. Mathieu, Case No. 95-50130/RV (N.D. Fla. 1995).
17. Ray v. Fiesta, Inc., 646 So.2d 294 (Fla. 1st DCA 1994).
18. Companaro v. Higgins, 643 So.2d 1084 (Fla. 1st DCA 1994).
19. White Eagle V. Tabbaa, 641 So.2d 864 (Fla. 1st DCA 1994).
20. Hagans v. Moody, 640 So.2d 1110 (Fla. 1994).
21. Psychiatric Associates v. Siegel, 610 So.2d 419 (Fla. 1992).
22. Weddle v. Voorhis, 586 So.2d 494 (Fla. 1st DCA 1991).
23. Maddox v. St. Joe Papermakers Federal Credit Union, 572 So.2d 961 (Fla. 1st DCA 1990).
24. Baker v. Sears, Roebuck & Co., 903 F.2d 1515 (11th Cir. 1990).
25. Psychiatric Associates v. Siegel, 567 So.2d 52 (Fla. 1st DCA 1990).
26. Southeast Bank v. Sapp, 554 So.2d 1193 (Fla. 1st DCA 1990), rev. denied 564 So.2d 1087 (Fla. 1990).
27. Anderson v. North, 545 So.2d 46 (Fla. 1st DCA 1989).
28. Reshard v. Britt, 839 F.2d 1499 (11th Cir. 1988).
29. Guyton v. Howard, 525 So.2d 948 (Fla. 1st DCA 1988).
30. Gillman v. U. S. Fidelity & Guaranty Co., 517 So.2d 97 (Fla. 1st DCA 1987).
31. Auto Owners Ins. Co. v. Safety Mut. Cas. Ins. Corp., 476 So.2d 732 (Fla. 1st DCA 1985).
32. Guyton v. Colvin, 473 So.2d 266 (Fla. 1st DCA 1985).
33. Padgett v. West Florida Electric Coop, Inc., 472 So.2d 1186 (Fla. 1st DCA 1985).
34. Williams v. Bay Hospital, Inc., 471 So.2d 626 (Fla. 1st DCA 1985).
35. Mitchell v. Nichols, 458 So.2d 427 (Fla. 1st DCA 1984).
36. Parrish v. Mullis, 458 So.2d 401 (Fla. 1st DCA 1984).
37. Owen v. Bay Memorial Medical Center, 443 So.2d 128 (Fla. 1st DCA 1983).
38. Taunton v. Tapper, 433 So.2d 523 (Fla. 1st DCA 1993).
39. Padgett v. West Florida Electric Cooperative, Inc., 417 So.2d 764 (Fla. 1st DCA 1982).
40. Department of Transportation v. Robinson, 424 So.2d 883 (Fla. 1st DCA 1982).
41. International Patrol & Detective Agency Co., Inc. v. Aetna Ca. & Sur. Co., 419 So.2d 323 (Fla. 1982).
42. Garwood v. International Paper Co., 666 F.2d 217 (5th Cir. 1982).
43. International Chemical Workers Union, Local 328 v. Arizona Chemical Co., 392 So.2d 1257 (Fla. 1st DCA 1981).
44. International Patrol & Detective Agency, Inc. v. Aetna Cas. & Sur. Co., 396 So.2d 774 (Fla. 1st DCA 1981).
45. St. Joe Paper Company v. Southern Oil Exploration, Inc., 90 So.2d 1228 (Fla. 1st DCA 1980).
46. Tapper v. Taunton, 371 So.2nd 595 (Fla. 1st DCA 1979).
47. Hertz Corp. v. Pugh, 354 So.2d 966 (Fla. 1st DCA 1978).

48. State Dept. of Pollution Control v. International Paper Co., 329 So.2d 5 (Fla. 1st DCA 1976).
49. Maloney v. Gibson, 420 U.S. 1004, 95 S.Ct. 1447, 43 L.Ed.2d 762 (1975).
50. White v. Clayton, 323 So.2d 573 (Fla. 1st DCA 1975).
51. Brewer v. Apalachicola Northern R. Co., 303 So.2d 654 (Fla. 1st DCA 1974).
52. Maloney v. Gibson, 295 So.2d 120 (Fla. 1st DCA 1974), cert. denied 303 So.2d 643 (Fla. 1974).

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

I am a sole practitioner. I am not entitled to receive any deferred or future benefits from previous business relationships. My client accounts are customarily billed on a monthly or a quarterly basis, and my clients usually pay my billings for professional services within thirty to sixty days. Therefore, my client accounts are fairly current and would be paid in full soon after my private practice is terminated.

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

I will carefully adhere to the Code of Conduct for United States Judges, specifically Section C of Canon 3, and the requirements of 28 U.S.C. §455. I will be vigilant for any situation in which my impartiality might reasonably be questioned. I will also utilize the Checklists for Financial and Other Conflicts of Interest provided by the Administrative Office of the United States Courts.

I have no financial arrangements that are likely to present potential conflicts of interest.

I am not aware that there are any particular categories of litigation that 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.)

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		27	380	Notes payable to banks-secured			00
U.S. Government securities-add schedule			00	Notes payable to banks-unsecured		62	436
Listed securities-add schedule		43	837	Notes payable to relatives See Mortgage Schedule			
Unlisted securities--add schedule			00	Notes payable to others			00
Accounts and notes receivable:				Accounts and bills due			00
Due from relatives and friends			00	Unpaid income tax			00
Due from others		18	993	Other unpaid income and interest			00
Doubtful			00	Real estate mortgages payable-add schedule		166	604
Real estate owned-add schedule	2	000	000	Chattel mortgages and other liens payable		1	065
Real estate mortgages receivable			00	Other debts-itemize:			00
Autos and other personal property		200	700				00
Cash value-life insurance		67	725				00
Other assets itemize:							00
Law Office Library, Furniture							00
& Equipment		40	000				00
Retirement Accounts		219	718	Total liabilities		230	105
				Net Worth	2	388	248
Total Assets	2	618	353	Total liabilities and net worth	2	618	353
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor			N/A	Are any assets pledged? (Add schedule) See Attached Chattel Mortgage Schedule			Yes
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				

FINANCIAL SCHEDULES

I. LISTED SECURITIES:

SCBT Financial Corporation	$15,675.00
USAA Florida Tax-Free Money Market Fund, USAA Investment Management Company	$28,162.00

II. REAL ESTATE OWNED:

Property	Approximate Value
Personal Residence	$2,000,000.00

III. REAL ESTATE MORTGAGES PAYABLE:

Mortgagee	Balance
Washington Mutual Bank P. O. Box 3139 Milwaukee, Wisconsin 532201-3139	$111,604.00
Kay D. Pullman	$55,000.00

IV. CHATTEL MORTGAGE:

Lienor	Purpose	Balance
Ford Motor Credit Company P. O. Box 11407 Birmingham, Alabama 35246-0003	Auto Loan	$1,065.00

AO-10
Rev. 1/2004

FINANCIAL DISCLOSURE REPORT

Nominee Report

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

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Smoak, John R	**U. S. District Court, ND Fla.**	**6/9/2005**
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) (•) Nomination, Date **6/8/2005** ( ) Initial ( ) Annual ( ) Final	6. Reporting Period **1/1/2004** to **6/7/2005**
7. Chambers or Office Address **103 West Fifth Street** **Panama City FL 32401**	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.	**Proprietor**	**Law Office of Richard Smoak**
2.		

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

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

	DATE	PARTIES AND TERMS
1.		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Smoak, John R	6/9/2005

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

A. Filer's Non-Investment Income

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

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2005	Self-employed, lawyer	$100,567
2.	2004	Self-employed, lawyer	$218,213
3.	2003	Self-employed, lawyer	$184,578

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

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

	DATE	SOURCE AND TYPE
1.	2005	Assistant State Attorney, salary
2.	2004	Assistant State Attorney, salary

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

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

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

	SOURCE	DESCRIPTION
1.		EXEMPT

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Smoak, John R	6/9/2005

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

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

	SOURCE	DESCRIPTION	VALUE
1.		EXEMPT	

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

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

	CREDITOR	DESCRIPTION	VALUE CODE
1.	Key Education Resources	Student loans	L
2.	American Express	Credit card	J

FINANCIAL DISCLOSURE REPORT
Page 1 of 2

Name of Person Reporting	Date of Report
Smoak, John R	6/9/2005

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-37 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
1. **Bay Bank & Trust accounts**	A	Interest	K	T	EXEMPT				
2. **SunTrust account**	A	Interest	J	T					
3. **Equitable Life policy**		None	K	U					
4. **Equitable Life policy**		None	K	U					
5. **SCBT Financial Corp.**	A	Dividend	K	T					
6. **USAA Florida Tax-Free Money Market Fund**	A	Interest	K	T					
7. **USAA S&P 500 Index Fund**		None	J	U					
8. **Scudder Capital Growth Fund (IRA)**		None	K	U					
9. **Vanguard Mid-Cap Index Fund (IRA)**		None	K	U					
10. **Vanguard Small Company Growth Fund (IRA)**		None	J	U					
11. **USAA Life World Growth Fund (IRA)**		None	K	U					
12. **Alger American Growth Fund (IRA)**		None	K	U					
13. **Vanguard REIT Index Fund (IRA)**		None	J	U					
14. **USAA Life World Growth Fund (IRA)**		None	J	U					
15. **USAA Life Aggressive Growth Fund (IRA)**		None	J	U					
16. **USAA Balanced Strategy Fund (IRA)**		None	K	U					
17. **USAA Cornerstone Strategy Fund (IRA)**		None	J	U					

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

FINANCIAL DISCLOSURE REPORT
Page 2 of 2

Name of Person Reporting: **Smoak, John R**

Date of Report: **6/9/2005**

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

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
18. USAA Extended Market Index Fund (IRA)		None	J	U	EXEMPT				
19. USAA Nasdaq-100 Index Fund (IRA)		None	J	U					
20. USAA S&P 500 Index Fund (IRA)		None	J	U					
21. USAA S&P Index Fund (IRA)		None	K	U					

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Smoak, John R	6/9/2005

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

None

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Smoak, John R	6/9/2005

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 John R. Smoak Date 6/9/2005

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 provided pro bono representation to individuals in need on a case-by-case basis throughout my practice. Lawyers in the community frequently refer to me disadvantaged persons who need advice about insurance and medical liability issues.

I participated in the American Bar Association Vietnamese Refugee Legal Assistance Program during the years following the fall of the Republic of Vietnam in 1975. Many of the refugees were illiterate peasant fishermen who settled in Bay County and attempted to resume their former livelihood. They faced a myriad of difficulties when they arrived and encountered an alien culture, language, and legal system. Many were initially blocked in their efforts to acquire legal title to fishing boats, particularly documented vessels. There was overt hostility from local fishermen.

At the request of Vietnamese priest of a local Catholic church, I have recently attempted to help a Vietnamese man in our community, who had paid a significant amount of money to a Texas lawyer who was to handle the necessary tasks for the emigration of the man's wife and child from Vietnam. The lawyer subsequently stopped communicating with the man, who became very distressed because of the lack of information about the status of efforts to bring his family to the United States. I have located the lawyer and have established communication with him to ensure that he is continuing to properly represent his client.

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).

The Florida Federal Judicial Nominating Commission recommended my nomination. The Nominating Commission gave public notice of the present vacancy on the U.S. District Court, Northern District of Florida, and directed that applications were to be submitted by December 15, 2004. Each member of the Nominating Commission reviews each application and ranks each applicant. The members of the Northern District Conference of the Nominating Commission then determine which applicants are best qualified and invite them for personal interviews. The members of the Northern District Conference are from the geographic jurisdiction of the U.S. District Court, Northern District of Florida, and include ten attorneys and five lay persons. The interviews before the Northern District Conference were open to the public. I appeared before the Conference for my interview on January 25, 2005. Following the interviews, I was one of the persons certified by the Conference to be a nominee.

On January 25, 2005, I was interviewed at The White House by two representatives of the Office of the Counsel to the President and a representative of the Department of Justice. I was also interviewed on that date by Florida's two senators, Senator Mel Martinez and Senator Bill Nelson. I was subsequently notified by White House associate counsel on March 18, 2005, that the President had selected me for nomination, subject to the outcome of the required investigations.

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.

Judicial activism suggests action by a judge that ignores the legislative intent of the laws enacted by Congress or the legal precedents established by the Supreme Court and the Courts of Appeal. However, judicial activism should not be confused with judicial independence and judicial courage, which are indispensable attributes of the judicial system.

Article I of the United States Constitution, vests "all legislative powers" in Congress. Article III of the Constitution vests the federal courts with limited jurisdiction over specified "cases" and "controversies". The constitutional function of the judiciary is to interpret and to enforce the laws that have been enacted by Congress. Judges have no power to legislate, and they cannot question the wisdom or the policy of a law so long as the law is constitutional. If the intent of Congress is clear from the language used in a law, a judge's duty is to enforce the statute as written. Congress is presumed to have intended what it has stated by the wording of the law. Only if the law is ambiguous should a judge then resort to established rules of statutory construction to determine the legislative intent. Judges should use those rules of construction to remove the doubt created by ambiguity, not to create doubt about the legislative intent.

A judge should construe a statute in favor of constitutionality if there is any reasonable basis to do so.

Judges should exercise judicial restraint. They should avoid considering constitutional questions if a case can be decided on non-constitutional grounds. Judges should decide only focused, specific "cases" and "controversies" involving persons with proper standing—only those persons with significant and immediate interests to assert. Judges should adjudicate only those issues necessary to reach a proper decision under the facts of the particular case. Judicial restraint is required out of respect for the co-equal branches of government and especially in deference to the legislative branch as the sole source of laws. Judicial restraint also acknowledges the limitations of judicial power and recognizes that the other, elected branches of government may have better appreciation of society's needs and more effective answers to those needs.

Stare decisis, which requires adherence to prior precedent, is a significant component of the concept of judicial restraint. Stare decisis provides stability and certainty to the courts' interpretation and enforcement of the law and to our society which is subject to that law. Stare decisis assures that similarly situated persons are treated alike rather than subject to the personal views of the particular judge on a particular day. Stare decisis or precedent requires that, when the facts are same, the law should be applied the same.

IV. CONFIDENTIAL

PAGES 39 THROUGH 42

AFFIDAVIT

I, John Richard Smoak, Jr., do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Date: June 9, 2005

John Richard Smoak, Jr.

Lisa Marie Hallisey, Notary Public
State of Florida
Commission No./Expiration:

(SEAL)

Lisa Marie Hallisey
MY COMMISSION # DD237206 EXPIRES
July 31, 2007
BONDED THRU TROY FAIN INSURANCE, INC.

Mr. Sandoval, you have had a lot of experience in State government as a public servant there, having served as a Nevada State Assemblyman, a Commissioner of the Nevada Gaming Commission, which in and of itself is a big-time job out there, and currently as the State's Attorney General. You have gained a lot of insight in your professional life. How has this all prepared you for being a Federal district court judge?

STATEMENT OF BRIAN EDWARD SANDOVAL, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF NEVADA

Mr. SANDOVAL. Thank you, Mr. Chairman. I have been very blessed in my life to serve as a legislator, to serve as a regulator, and now to serve as our State's Attorney General. And through my experiences as a private practitioner and as—

Senator HATCH. You have been Attorney General for 7 years, right?

Mr. SANDOVAL. Mr. Chairman, no; for approximately 3 years.

Senator HATCH. Three, OK.

Mr. SANDOVAL. But my experiences in Federal and State courts as well as before our State Supreme Court and the amount of litigation that I have been confronted with and have had an opportunity to participate in, with all that experience I feel that—I believe that the Committee will feel that my qualifications satisfy the necessary requirements to be an effective Federal district court judge. If I'm fortunate to be confirmed, I will treat all litigants with dignity and respect.

[The biographical information of Mr. Sandoval follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

ANSWER: Brian Edward Sandoval

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

ANSWER: Office: Office of the Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701

Office of the Nevada Attorney General
555 E. Washington Street, 3rd Floor
Las Vegas, Nevada 89101

Office of the Nevada Attorney General
5420 Kietzke Ln. #202
Reno, Nevada 89511

Home: Reno, Nevada

3. Date and place of birth.

ANSWER: August 5, 1963
Redding, California

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

ANSWER: I am married to Kathleen Teipner Sandoval. My wife's occupation is the Program Director for Family and Youth Issues at the Children's Cabinet of Reno, Nevada, 1090 S. Rock Blvd., Reno, Nevada 89502.

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

ANSWER:

August 1986	Michael E. Moritz College of Law
to	The Ohio State University
May 1989	55 W. 12th Avenue

	Columbus, Ohio 43210 Juris Doctorate Degree (May 1989)
August 1981 to May 1986	University of Nevada, Reno 900 N. Virginia Street Reno, Nevada 89503 Bachelor of Arts Degree (English)

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.

ANSWER:

Washoe County Law Library (1985-86)
Washoe County Courthouse
75 Court Street
Reno, Nevada 89501

Eldorado Hotel and Casino (1986)
345 N. Virginia Street
Reno, Nevada 89502

Sheppard and Bale (1988-1989)
Alan Wayne Sheppard, Esq.
1900 Crown Park Court
Columbus, OH 43235
(614) 273-3300

McDonald, Carano, Wilson, McCune, Bergin, Frankovich and Hicks (1987-1991)
100 W. Liberty Street, 10th Floor
Reno, NV 89502
(775) 788-2000

Robison, Belaustegui, Robb and Sharp (1991-1995)
71 Washington Street
Reno, NV 89503
(775) 329-3151

Nevada State Assembly (member) (1994-1998)
401 S. Carson Street
Carson City, NV 89701

(775) 684-6800

Law Office of Theodore Gamboa (1995-1998)
200 Ridge Street, Ste. 200
Reno, NV 89501
(775) 329-4111

Gamboa, Sandoval and Stovall (1998-1999)
200 Ridge Street, Ste. 200
Reno, NV 89501
(775) 329-4111

State of Nevada
Nevada Gaming Commission (member) (1998-2001)
1919 E. College Parkway
Carson City, NV 89701
(775) 684-7750

Sandoval Law Office (1999-2002)
421 Court Street
Reno, NV 89501
(775) 329-1766

Technowledge Networks, Inc. (2001-2002)
Director
4022 Technology Way
Carson City, NV 89706

Nevada Attorney General (2003 – present)
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701
(775) 684-1100

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.

ANSWER: I have no military service.

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

ANSWER: Over the years, and particularly in response to my participation in numerous law and public service activities, I have received numerous certificates and letters of appreciation. The following is a list of the honors and awards of recognition that I believe deserve response to Question 8:

In 1995, I was recognized as one of the top new legislators at the Nevada Legislature by the *Las Vegas Review Journal*.

In 1996, I received the *El Broche de Oro Award* for "Your contribution to our community, your leadership, political achievements & Dedication to the Ideology of Hispanics in Politics" from Hispanics in Politics. Specifically, I was recognized for fighting for the passage of a bill that required the certification of Spanish interpreters in Nevada courts.

In 2003, I received the *Torch of Liberty* award from The Anti-Defamation League "In recognition of your outstanding leadership and commitment to community, state and country."

In 2004, I was recognized as one of the "Most Influential Hispanics in the U.S." by the Latino Coalition and as one of the "Top 100" most influential Hispanics by Hispanic Business Magazine.

In 2004 I was recognized as the University of Nevada, Reno's "Alumnus of the Year."

In 2004 I was selected as the "Public Lawyer of the Year" by the State Bar of Nevada, the Washoe County Bar Association and the Access to Justice Foundation "for undeviating support of and devotion to pro bono work."

In 2004 I was notified by Martindale Hubbell that I had received an *AV* rating as determined by my peers in the legal profession.

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.

ANSWER: Nevada Bar Association
October 1989 to date

California Bar Association
June 1990 to date (inactive)

District of Columbia Bar Association
August 1990 to date

Washoe County Bar Association
October 1989 to date

American Bar Association
October 1989 to 1994

American Trial Lawyers Association
1989 to 1994

Nevada Trial Lawyers Association
1989 to 1995

United States Supreme Court
2002 to date

Ninth Circuit Court of Appeals
1990 to date

United States District Court for the District of Nevada
1989 to date

United States District Court for the Southern District of California
1991 to date (inactive)

United States District Court for the Central District of California
1993 to date (inactive)

United States District Court for the Northern District of California
1993 to date (inactive)

United States District Court for the Eastern District of California
1994 to date (inactive)

United States Court of Appeals for the District of Columbia
1990 to date

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.

ANSWER:

I am not aware of any organization to which I belong that is active in lobbying before public bodies. The following is a list of organizations to which I belong.

Member, National Association of Attorneys General (2002 to present)
Member, Conference of Western Attorneys General (2002 to present)
Member, Nevada Hispanic Chamber of Commerce (2002 to present)
Member, Clark County Latin Chamber of Commerce (2002 to present)
Member, State Bar of Nevada (1989 to present)
Member, State Bar of California (active, 1990 to 1998, inactive, 1998 to present)
Member, District of Columbia Bar Association (active, 1990 to 1992, inactive 1992 to 2003, active, 2003 to present)
Member, Washoe County Bar Association (1989 to present)
Member, Washoe County Law Library Board of Trustees (1996 to present)
Member, Committee to Aid Abused Woman Advisory Board (1995 to present)
Member, Nevada State Board of Pardons (2002 to present)
Member, Nevada State Board of Prisons (2002 to present)
Member, Nevada State Board of Examiners (2002 to present)
Member, Nevada State Board of Transportation (2002 to present)
Member and Chairman, Nevada Prosecutorial Advisory Commission (2002 to present)
Member and Chairman, Nevada Cybercrime Task Force (2002 to present)
Member and Chairman, Nevada Domestic Violence Council (2002 to present)
Member and Chairman, Nevada Domestic Violence Commission (2002 to present)
Member and Chairman, Nevada Bully-Free Task Force (2002 to present)
Member, Board of Trustees of St. Jude's Ranch for Children, Boulder City, NV (2003 to present)
Member, Republican Attorneys General Association (2002 to present)
Member, State and Local Advisory Committee, U.S. Department of Homeland Security (2004 to present)
Member, Nevada Republican Party (1981 to 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.

ANSWER: Supreme Court of Nevada
Admitted October 2, 1989.

United States District Court for the District of Nevada

Admitted November 22, 1989.

Supreme Court of California
Admitted June 12, 1990. Active from 1990 to 1998. Inactive 1998 to present.

Ninth Circuit Court of Appeals
Admitted June 12, 1990.

District of Columbia
Admitted in 1990. Inactive from 1992 to 2003. Active 2003 to present.

United States District Court for the Southern District of California
Admitted in1991. Inactive from 1998 to present.

United States District Court for the Central District of California
Admitted in 1993. Inactive from 1998 to present.

United States District Court for the Northern District of California
Admitted in1993. Inactive from 1998 to present.

United States District Court for the Eastern District of California
Admitted in1994. Inactive from 1998 to present.

United States Court of Appeals for the District of Columbia
1990 to date. Inactive from 1991 to 2003. Active 2003 to present.

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.

ANSWER:

I have written and/or edited numerous Nevada Attorney General Opinions on legal questions presented by Nevada constitutional officers, state agencies and local governments. I have also written and/or edited numerous Nevada Attorney General Opinions addressing the Nevada Open Meeting Law. These Opinions are quite voluminous and readily available upon request. The following is a sampling of other articles.

a. "Where I Stand—Brian Sandoval: Quality Gaming Control," article appearing in the August 24, 2000 edition of the *Las Vegas Sun*. I authored this article to describe my responsibilities as Chairman of the Nevada Gaming Commission.

b. "Opinion: Yucca project to fail regardless of politics," article appearing in the September 11-12 edition of the *Las Vegas Sun*. I authored this article in response to an editorial addressing my speech at the 2004 Republican National Convention.

c. Attorney General Opinion 2004-03. I authored this Opinion in response to a question presented by the Nevada Secretary of State with regard to the eligibility of state and local employees to serve in the Nevada Legislature. Press reports regarding the Opinion are attached.

d. Open Meeting Law Opinion 2004-01. I authored this Opinion in response to a question presented by members of the media, a member of the University board of Regents and a member of the Nevada Legislature regarding my interpretation of Nevada's Open Meeting Law.

e. "Yucca Mountain: Nevada Won't Back Down," article appearing in *Nevada Lawyer*, March 2004.

f. Ohio State University College of Law Hooding Ceremony speech given May 9, 2003.

g. Response to *Cincinnati Enquirer* editorial, July 2004.

h. Testimony of Brian Sandoval, Chairman of the Nevada Gaming Commission, to the U.S. Senate Committee on Commerce, March 29, 2000. These comments addressed federal legislation to prohibit legalized sports betting in Nevada on college sporting events.

i. I have given numerous speeches before service clubs, student groups and others regarding the role of the law and the Attorney General's office. These speeches were given extemporaneously and no notes or copies were used or retained.

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

ANSWER: My health is excellent. The date of my last physical examination was December 29, 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.

ANSWER: I have not held any judicial offices.

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.

ANSWER: I have not been a judge.

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

1992-1994: I was appointed by the Reno City Council to serve on the Reno Citizens' Policy and Planning Advisory Commission.

1993-1994: I was appointed by the Reno City Council to serve on the Reno Board of Adjustment.

1994-1998: I was elected to serve two terms in the Nevada State Assembly. I was appointed to serve on the Judiciary, Natural Resources, Agriculture and Mining, Taxation and Labor and Management. As a legislator, I was also appointed to serve on the Sentencing Advisory Commission, The Commission on Community Notification of Sex Offenders, The Juvenile Justice Commission, The Tahoe Regional Planning Advisory Commission and The Legislative Commission.

1998-2001: I was appointed by the Governor of Nevada to serve on the Nevada Gaming Commission. The NGC is a quasi-judicial body that has the final authority on licensing, discipline and policy matters that affect Nevada's gaming industry. In 1999 I was appointed as Chairman of the Nevada Gaming Commission.

1998 -2001: I was appointed by the Nevada members of the Tahoe Regional Planning Agency Governing Board ("TRPA") to serve on the Board. The TRPA

is a bi-state agency (Nevada and California) that sets policy for land use issues at Lake Tahoe.

2002-Present: I was elected by the citizens of Nevada to serve a four year term as the Nevada Attorney General.

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 served as a judicial extern to Justice A. William Sweeney, Ohio Supreme Court Justice, in spring, 1989, prior to my graduation from The Ohio State University College of Law.

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

I was a solo practitioner from April 1999 to December 2002. My office address was 421 Court Street, Reno, Nevada 89501.

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;

1989-1991: McDonald Carano Law Firm
100 W. Liberty Street, 10th Floor
Reno, Nevada 89501
(775) 788-2000

I was a civil litigation associate attorney with the McDonald firm. In that capacity, I performed all aspects of a litigation practice, including legal research and writing, preparation of pleadings, discovery and motions and court appearances.

1991-1995: Robison, Belaustegui, Robb & Sharp

71 Washington Street
Reno, Nevada 89503
(775) 329-3151

I was a civil litigation associate attorney with the Robison firm. In that capacity, I performed all aspects of a litigation practice, including legal research and writing, preparation of pleadings, discovery and motions, conducting discovery and appearing in court. Because I possessed a California bar license, I appeared often in California state and federal courts on behalf of firm clients.

I also commenced a busy administrative law practice before the Public Utilities Commission of Nevada.

1995-1999: Law Office of Theodore D. Gamboa
Gamboa, Sandoval and Stovall
200 Ridge Street, Ste. 200
Reno, Nevada 89501
(775) 329-4111

I was a civil litigation associate attorney with the Gamboa firm. The firm was a busy two person firm representing mostly Hispanic clients in civil, criminal and immigration matters. In that capacity, I performed all the duties of such a practice, including legal research and writing, preparation of pleadings, discovery and motions, conducting discovery and appearing in court.

Because I possessed a California bar license, I often appeared in California state courts on behalf of firm clients.

I also engaged in a busy administrative law practice before the Public Utilities Commission of Nevada and the Nevada State Board of Pharmacy.

1998-2001 Nevada Gaming Commission

In 1998, Governor Bob Miller appointed me to the Nevada Gaming Commission ("NGC"). The NGC is a regulatory and quasi-judicial body that has the final

authority on licensing, discipline and policy matters that affect Nevada's gaming industry.

In 1999, Governor Kenny Guinn appointed me as the Chairman of the NGC. This is considered a half-time post, that includes setting the agenda for the NGC, appearing on behalf of the NGC before the Legislature and other gaming authorities and leading the NGC on all matters that come before it.

1999-2002 Sandoval Law Office

I became a solo practitioner to avoid any alleged or perceived conflict with my duties as Chairman of the NGC. As a solo practitioner, I represented clients in litigation, adoption, administrative law, corporate and business transactions, immigration, and landlord/tenant matters.

My practice was not full-time as I was also the Chairman of the Nevada Gaming Commission. As Chairman, at least half of my time was spent on Gaming Commission matters.

2002-Present Nevada Attorney General

As the Nevada Attorney General, I am responsible for overseeing a staff of 370 employees, including 160 attorneys, 40 investigators and 170 staff and legal researchers. I am also responsible for overseeing a budget of approximately $42 million.

The Nevada Attorney General's office has criminal, civil, litigation, gaming, human resources, conservation and natural resources, taxation, transportation, consumer protection, government affairs, commerce, insurance fraud and worker's compensation fraud units.

I also oversee the state's extradition efforts and the Domestic Violence Ombudsman. The Attorney General's Office administers millions of dollars of grants that are used by entities to protect women against violence.

I also manage an Investigations Division with forty

peace officers trained in all aspects of civil and criminal investigations.

I oversee the Nevada Attorney General's office's efforts to criminally prosecute consumer, insurance and worker's compensation fraud cases. The office also provides legal counsel to all Nevada state agencies and most boards and commissions and is responsible for representing and defending the state in litigation matters.

I also oversee a criminal staff that prosecutes state employees and prison inmates who violate the law and represents the state in all habeas corpus petitions that are filed with the federal courts.

As the Attorney General, I am currently a member of the Nevada State Boards of Pardons, Prisons, Examiners and Transportation. I am also Chairman of the Nevada Prosecutorial Advisory Council, the Domestic Violence Council and the Commission on Domestic Violence, the Bully-Free Task Force, the Cyber-Crime Task Force and the Private Investigators Licensing Board.

I also personally review and edit every Attorney General Opinion on various legal matters and the Open Meeting Law that is authored by the Attorney General's Office.

I personally represented the Governor of Nevada and the Nevada Secretary of State in recent legal matters before the Nevada Supreme Court. I also personally participate in all high profile legal matters, including recent litigation against the Nevada Board of Regents involving interpretation of Nevada's Open Meeting Law. I also personally participated in Nevada's legal action against the U.S. Department of Energy and the U.S. EPA involving the proposed Yucca Mountain nuclear repository and the planned transport of nuclear waste from Ohio to Nevada.

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 first six years of my law practice was spent almost exclusively on civil litigation matters before state and federal courts in Nevada and California.

Few attorneys in the firms where I worked possessed a California bar license. As a result, I was designated by my firms to handle civil and criminal litigation for clients in California, especially when I worked at the *Robison* firm. I appeared in state and federal courts in Los Angeles, San Francisco, San Diego, Bakersfield, Susanville, Colusa and several other Superior Courts in California.

I also handled many litigation matters in alternative dispute resolution formats, including arbitrations, mediations and settlement conferences.

After my election to the Nevada legislature (a part-time position in Nevada), my law practice made a slow transition from litigation to administrative, business transactions and adoption law. This was due to the many time conflicts posed by a busy litigation practice which was incompatible with my service in the Nevada Assembly.

My administrative practice was a busy one, requiring preparation and appearance at lengthy, contested utility rate hearings at the Nevada Public Utilities Commission on behalf of a shareholders' association. These matters involved millions of dollars and important public policy regarding electric, gas and water rate structures.

I also appeared frequently at disciplinary hearings at the Nevada Board of Pharmacy. These matters involved important issues involving public health and patient protection.

I also appeared in family court in termination and adoption hearings on behalf of an adoption agency and several individual clients.

As Chairman of the Nevada Gaming Commission, I was responsible for guiding hearings regarding interpretation of the Nevada Gaming Law Act, and spoke frequently across the country regarding Nevada Gaming Law. I also presided over many complex contested disciplinary and tax matters before the commission that required decisions regarding the

admission of evidence and the outcomes of matters that involved millions of dollars.

As Chairman of the Nevada Gaming Policy and Review Committee, I presided over two "first-of-a-kind" complex legal challenges to matters involving local zoning of so-called "neighborhood casinos." One of the matters was appealed to a district court, and the court found in support of the state with regard to how evidence was received and the procedure utilized.

Prior to my election as Attorney General, I was also trained as an arbitrator and participated in the court-annexed arbitration program.

As the Attorney General of Nevada, I directly participate in both criminal and civil litigation matters. I have participated in matters involving complex, multi-million dollar construction defect litigation involving the state of Nevada, U.S. Supreme Court litigation, complex "takings" matters involving the Department of Transportation, inmate executions, Nevada constitutional issues, and litigation involving the proposed nuclear repository at Yucca Mountain, Nevada.

I review and evaluate all claims against the State of Nevada's Tort Claims Fund in excess of $50,000. Recent claims have involved matters in excess of one million dollars. In 2003, the total amount paid out of the Tort Claims Fund was two million dollars below projection.

I have personally represented the Governor and Secretary of State of Nevada before the Nevada Supreme Court involving matters of interpretation of the Nevada Constitution and appeared in state Court on behalf the Department of Agriculture regarding cattle impoundment issues.

I personally review and edit all high profile pleadings filed by my office, Attorney General Opinions and Open Meeting Law Opinions. I also attended a recent execution of a Nevada inmate as counsel for the Nevada Department of Prisons.

As Attorney General, some of the constitutional matters that I have handled, reviewed and edited in the past two years

include the separation of powers, the First, Fourth, Tenth and Fourteenth Amendments of the U.S. Constitution and numerous *amicus* requests involving a variety of issues related to the Commerce Clause, states' rights and other federal statutes and precedents.

As a member of the State Pardons Board, I sit with the Governor and members of the Nevada Supreme Court to determine whether inmates are entitled to a commutation of their respective sentences.

My office is responsible for representing the state in habeas corpus petitions and Section 1983 actions.

Finally, as Attorney General and Chairman of the Private Investigators' Licensing Board, the Nevada Prosecutorial Advisory Council and the Nevada Cyber-crime Task Force, the Domestic Violence Council and the Committee on Domestic Violence, I am active in important public policy decisions regarding law enforcement, criminal prosecutions and developing relationships with federal agencies like the U.S. Attorney's Office, the FBI and the U.S. Secret Service.

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

In private practice, my former clients included individuals, landowners, small business owners, large corporations, a shareholders association, landlords, contractors and others. While with the *Robison* firm, I represented clients in several complex environmental law issues, including serving as special co-counsel to the City of Sparks, Nevada in a complex, multi-million dollar environmental contamination suit against several large oil companies.

As the Utility Shareholders Association of Nevada's attorney, I represented my client in several complex rate matters before the Public Utilities Commission involving electric, gas and water rates.

As an adoption attorney, I represented clients with complex local and international adoption issues.

As the Attorney General, I represent the Nevada constitutional officers, all state agencies, state employees and the people of Nevada in a variety of matters as more fully discussed above.

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.

As described above, the early part of my legal career involved frequent appearances in state and federal trial courts and other alternative dispute resolution forums. Later, my appearances in court became less frequent, while my appearances before administrative bodies became more frequent. As the Attorney General, I occasionally appear in Court.

2. What percentage of these appearances was in:

(a) federal courts;

1989-1995	1996-2001	2001-Present
50%	20%	5%

(b) state courts of record;

30%	30%	20%

(c) other courts.

20%	50%	75%

3. What percentage of your litigation was:

(a) civil;
97% (in private practice)

(b) criminal.
3% (in private practice)

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.

Including quasi-judicial matters such as cases tried before the Public Utilities Commission, the Nevada Pharmacy Board and court ordered arbitrations, the number is approximately thirty.

I served as sole counsel in about four bench trials and as associate counsel in a few jury trials (3-4).

I served as sole counsel in at least fifteen complex rate cases before the Public Utilities Commission that required

the presentation of evidence and witnesses and the cross-examination of other parties' witnesses.

I served as sole counsel in at least five complex disciplinary cases before the Nevada Pharmacy Board that required the presentation of evidence and witnesses and the cross-examination of the states' witnesses.

I served as sole counsel and co-counsel in at least five arbitration matters involving personal injury and construction defect litigation.

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.

ANSWER: Case No. 1: *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*
373 F.3d 1251, 362 U.S.App.D.C. 204 (C.A.D.C., 2004)

Before: United States Court of Appeals, District of Columbia Circuit
Edwards, Henderson and Tatel, Circuit Judges.

Co-Counsel:

Joseph Egan, Esq.
7918 Jones Branch Dr., Ste. 600
McLean, VA 22102
(703) 918-4942

Tony Rossmann, Esq.
Rossmann & Moore
380 Hayes Street
San Francisco, California 94102
(415) 861-1401

Opposing Counsel:

Thomas Sansonetti
G. Scott Williams
Michele Walter
U.S. Department of Justice
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
(202-514-1950

Decided: July 9, 2004

As the Attorney General of Nevada, I represented the State of Nevada as co-counsel in the lawsuit to oppose the proposed construction of a high-level nuclear waste facility at Yucca Mountain, Nevada. This matter is a major legal issue in Nevada. As the Attorney General of Nevada, it is my responsibility to use every available legal remedy to ensure that the federal agencies and employees comply with applicable law and that the interests of Nevada are represented and advanced.

In this matter, I actively participated in the research, strategy and prosecution of the Yucca Mountain litigation with a world class legal team. Although I did not argue at the hearing on the matter or orally communicate with opposing counsel, I was an active participant in the development of the arguments that resulted in invalidation of the Environmental Protection Agency's inadequate safety standard for radiation releases from the site.

This case has tremendous significance to me because it is one of the most important legal matters in the history of my state. It involved complex legal issues that had never before been litigated or considered by a court of law.

I spent countless hours studying the law and reviewing briefs to familiarize myself with the legal proceedings and to be more than a passive observer to this litigation. The complexity of the law, the volume of legal issues and the limited time I had to prepare myself

for this matter probably posed one of the greatest challenges to me as a lawyer and an advocate for the people of Nevada.

Case No. 2: *Heller v. Legislature of the State of Nevada*
93 P.3d 746 (Nev., 2004)

Before: Supreme Court of Nevada
201 S. Carson Street
Carson City, Nevada 89701
(775) 684-1600

Co-Counsel:

Jeff Parker
Solicitor General
State of Nevada
100 N. Carson Street
Carson City, Nevada 89701
(775) 684-1100

Opposing Counsel:

Brenda Erdoes
Legislative Counsel
Kevin Powers
Principal Deputy Legislative Counsel
401 S. Carson Street
Carson City, Nevada 89701
(775) 684-6800

Decided: July 14, 2004

This matter involved a case of first impression with regard to the Nevada constitution's Separation of Powers doctrine and the eligibility of state and local government employees to serve in the Nevada legislature.

As the Attorney General of Nevada, I personally represented the Secretary of State of Nevada, prepared the pleadings and argued the case before the Nevada Supreme Court. This was an important case as it attempted to seek legal clarity to a legal question that had existed for decades in Nevada. Ultimately, the Supreme Court denied the Petition stating that the Nevada Secretary of State was not the proper party before the Court.

This matter was significant to me because it was very controversial, complex and required numerous hours of research because it had not been previously considered by a Nevada court. It was also important to me because I felt that it was crucial to obtain a judicial finding on a longstanding legal question for the voters of Nevada, the Secretary of State, state employees and the members of Nevada legislature.

This case imposed a personal challenge to me because I was advised that a Nevada Attorney General had not personally argued a case before the Nevada Supreme Court in over twenty years and observers were surprised that I was willing to argue before the Court. Because of the importance of the question and my background, I felt it was my duty as the Attorney General to personally handle this matter.

Case No. 3: *Guinn v. Legislature of Nevada*
71 P.3d 1269 (Nev. 2003); 76 P.3d 22 (Nev. 2003)

Before: Supreme Court of Nevada
201 S. Carson Street
Carson City, Nevada 89701
(775) 684-1600

Co-Counsel:

Ann Wilkinson
Assistant Attorney General
100 N. Carson Street
Carson City, Nevada
(775) 684-1100

Opposing Counsel:

Brenda Erdoes
Legislative Counsel
401 S. Carson Street
Carson City, Nevada 89701
(775) 684-6800

Decided: July 10, 2003; September 17, 2003.

This matter involved another matter of first impression with regard to several questions involving the Nevada constitution and the

Nevada Legislature. In this case, the Nevada Legislature remained in session beyond the constitutionally mandated one hundred and twenty day limit. In addition, pursuant to the Nevada Constitution, the state's budget had to be approved and education funded before the beginning of the new fiscal year, which commenced on July 1, 2003.

At midnight on July 1, 2003, I personally filed a Writ of Mandamus with the Nevada Supreme Court seeking judicial review of the Nevada constitution and a writ compelling the Legislature to comply with the Nevada Constitution.

As the Attorney General of Nevada, I personally represented the Governor of Nevada, prepared the pleadings and appeared before the Nevada Supreme Court. This was an important case as it presented issues of first impression involving the Nevada constitution to the Nevada Supreme Court. Ultimately, the Court issued the writ.

This case presented many unique challenges as it involved legal questions that had never been addressed by any court in both Nevada and the nation. As a result, I had to perform extensive research on novel issues involving civil procedure and the Nevada constitution. The situation was extremely high profile and occurred in the first six months of my administration.

Case No. 4: *Sandoval v. Board of Regents of the University and Community College System of Nevada*

Before:

Eighth Judicial District Court
Judge Jackie Glass, Dept. 5
Case No. 04-A-479152-C
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4655

Co-Counsel:

Vicky Oldenburg
Senior Deputy Attorney General
100 N. Carson Street
Carson City, Nevada
(775)684-1100

Richard Linstrom
Assistant Solicitor General
4505 Maryland Parkway
Box 451085
Las Vegas, Nevada 89154
(702) 895-5185

Opposing Counsel:

Brooke Nielson, Esq.
General Counsel's Office
University & Community College System of Nevada
2601 Enterprise Road
Reno, Nevada 89512
(775) 784-4901

Decided: June 17, 2004; Dismissal of Appeal, October 14, 2004.

This matter involved several issues involving judicial interpretation of Nevada's Open Meeting Law. These issues included questions of first impression of the law's applicability to elected officials, closed meetings and public notice requirements.

Under Nevada law, the Nevada Attorney General is charged with the responsibility of enforcing this law. As such, I was the "client" in these matters and therefore did not appear before Judge Glass. However, I was directly involved in the drafting of opinions and pleadings in this matter and communications with University counsel.

The court granted most of the relief sought in the Complaint and the matter was appealed to the Nevada Supreme Court. The parties ultimately agreed to settle the matter and accepted the decision of the district court.

This case presented many challenges as it was extremely complex, highly contested and received extensive media coverage. It was important to me because I am a firm believer that the public's business should be conducted in public and I felt it was critical that there be a judicial interpretation of the law to guide the Attorney General's Office and public bodies with regard to the Open Meeting Law.

Case No. 5: *Hiibel v. Sixth Judicial Dist. Court of Nevada*

124 S.Ct. 2451 (U.S. Nev., 2004)

Before: Supreme Court of the United States

Co-Counsel:

Conrad Hafen
Senior Deputy Attorney General
555 E. Washington Avenue, Ste. 3900
Las Vegas, Nevada 89101
(702) 486-3420

Opposing Counsel:

Robert Dolan
P.O. Box 909
Humboldt County District Attorney's Office
Winnemucca, Nevada 89446
(775) 623-6364

Decided: June 21, 2004

This matter presented important issues regarding the Fourth and Fifth Amendments to the U.S. Constitution. Specifically, whether an individual is required to identify himself to a law enforcement officer after reasonable suspicion has been established to detain a person for investigative purposes.

As the state's chief law enforcement officer, this case presented important issues affecting Nevada's law enforcement community. Although I did not participate in the oral argument before the U.S. Supreme Court, I was directly involved in reviewing and editing the briefs that were presented to the Court.

The Supreme Court agreed with the state's position in a 5-4 decision, stating that an individual's constitutional rights are not violated if he is asked to identify himself by a law enforcement officer who has established a reasonable suspicion that a crime has been committed.

This case was extremely challenging because it presented many complex issues involving individual constitutional rights and law enforcement. It required me to spend extensive time familiarizing

myself with legal concepts that I had not encountered in several years and established a precedent that has national implications.

Case No. 6: *Larry Colwell v. E.K. McDaniel, et al; Dennis v. Budge and Sandoval; and State of Nevada v. Paul Derischebourg.*

Before: United States District Court (Colwell)
Case No. CV-N-04-0039-HDM
Judge Howard D. McKibben
400 S. Virginia Street, Ste. 804
Reno, Nevada 89501
(775) 686-5880

U.S. Supreme Court (Dennis)
Case No. 04A-114

Seventh Judicial District Court (Derischebourg)
Case No. CR-032013
Judge Steve L. Dobrescu
P.O. Box 151597
Ely, NV 89315
(775) 289-4813

Co-Counsel:

Gerald Gardner
Chief Deputy Attorney General
555 E. Washington Avenue, Ste. 3900
Las Vegas, Nevada 89101
(702) 486-3420

Robert Wieland
Senior Deputy Attorney General
5420 Kietzke Lane, Ste. 202
Reno, Nevada 89511
(775) 850-4115

Opposing Counsel:

Mike Pescetta (Colwell)
Rebecca Blaskey
Federal Public Defender's Office
330 S. Third Street, Ste. 700
Las Vegas, NV 89101
(702) 388-5819

Mike Pescetta (Dennis)
Federal Public Defender's Office
330 S. Third Street, Ste. 700
Las Vegas, NV 89101
(702) 388-5819

Paul Giese (Derischebourg)
State Public Defender's Office
511 E. Robinson Street
Carson City, NV 89701
(775) 687-4880

Decided: March 26, 2004; August 12, 2004; May 5, 2004.

The first two matters involved the executions of two inmates at the Nevada Department of Prisons. These executions were the first executions of Nevada inmates in several years.

The third matter involved the investigation and prosecution of an inmate who brutally murdered his cell mate.

As co-counsel in the first two matters, I did not have any interaction with opposing counsel, as my involvement with the cases related to research, advising the client, drafting pleadings and attending the execution.

In the third matter, as the Attorney General of Nevada, I made the decision to seek the death penalty against the inmate for his brutal murder of his cell mate. Ultimately, the inmate plead guilty and was sentenced to life imprisonment without the possibility of parole.

The *Colwell* matter involved an inmate who had received a death sentence and decided not to pursue any of his federal appellate rights. Prior to his execution, an attempt was made to delay the execution to explore whether Mr. Colwell was competent to waive his appellate rights. Ultimately, the Court found that Mr. Colwell was competent and the inmate was executed.

The *Dennis* matter involved another inmate who exercised his appellate rights to stay his execution. As Counsel to the Department of Prisons, I again participated in the preparation of pleadings in this matter including the Opposition to the Petitioner's Motion for Stay of Execution that was filed with the U.S. Supreme

Court. The Court denied the Petition and the inmate was executed.

These matters had tremendous significance to me for several reasons. First, they impressed upon me the enormous responsibility of legal counsel and the courts to ensure that individuals receive all the constitutional due process to which they are entitled.

Second, the cases were my first exposure to capital cases and the attendant state and federal litigation. Last, it was the first time that I, or any Nevada Attorney General, ever attended an inmate execution as counsel for the Nevada Department of Prisons.

Case No. 7: *Committee to Regulate and Control Marijuana, et. al vs. Heller*

Before:

United States District Court
Case No. CV-S-05-0041-JCM-RJJ
Judge James Mahan
333 Las Vegas Blvd., S., Room 6085
Las Vegas, NV 89101
(702) 464-5520

Co-Counsel:
Josh Hicks
Senior Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701
(775) 684-1100

Opposing Counsel:
Matthew D. Brinckerhoff
Emery Celli Brinckerhoff & Abady LLP
545 Madison Ave., 3rd Floor
New York, NY 10022
(212)763-5000

Decided:

January 28, 2005

This matter involved a case of first impression addressing the Nevada Secretary of State's interpretation of Nevada law and the Nevada constitution with regard to gathering signatures to qualify

Initiative petitions for consideration by the Nevada Legislature. The main question presented to the court was the interpretation of the "last preceding election" language contained in the law, which triggered the calculation for the number of signatures necessary to qualify an initiative for consideration by the Nevada Legislature.

In this case, three initiative petitions were disqualified by the Nevada Secretary of State who found that the petitioners had failed to gather the necessary signatures based upon the number of voters who had cast votes in the 2004 election. The petitioners had operated under the assumption that the number of signatures necessary to qualify their initiatives should be based upon the 2002 election, a difference of over 30,000 signatures.

The petitioners challenged the Secretary's finding, and filed an emergency petition with the court alleging First Amendment, Due Process and other violations of law. Ultimately, the court overturned the Secretary's finding and the initiatives were qualified for consideration by the Nevada Legislature.

This case was extremely challenging because it presented important and sensitive issues of fact and law regarding Nevada's signature gathering process for initiative petitions. This case was important to me because I felt it was critical to obtain judicial guidance in Nevada on the rules governing the signature gathering process that would provide clear direction in the future for the Nevada Secretary of State and initiative petitioners.

Case No. 8: *Multiple matters before the Public Utilities Commission of Nevada*

Before:

Don Soderberg
Chairman, Public Utilities Commission of Nevada
1150 E. William Street
Carson City, Nevada 89701
(775) 687-6001

Co-Counsel:

None.

Opposing Counsel:

William E. Peterson, Esq.
6100 Neil Road, Ste. 500
Reno, Nevada 89511
(775) 688-3006

Shawn Elicegui, Esq.
Lionel, Sawyer & Collins
50 W. Liberty Street, # 1100
Reno, Nevada 89501
(775) 788-8666

Decided: Multiple Dates

For several years I represented the Utility Shareholders Association of Nevada ("USAN"). USAN is a group of utility shareholders that is comprised mostly of senior citizens on fixed incomes that relied upon a stable investment and just and reasonable gas, water and electric rates.

As USAN's attorney, it was my responsibility to intervene on the shareholders' behalf in gas, water and electric rate hearings before the Public Utilities Commission of Nevada ("PUCN"). The issues that I confronted at these hearings were the most challenging that I have ever encountered because they included a combination of legal, economic, social and scientific issues that must be evenly balanced between ratepayers and shareholders.

My responsibility was further complicated because my clients were comprised of both shareholders and ratepayers whose concerns were particularly acute because they were senior citizens who depended upon a consistent rate of return on their investment but at the same time could not afford dramatic increases in their utility rates.

During my tenure as USAN's attorney, I participated in at least fifteen rate matters. I also participated in several regulatory workshops that included a two-year restructuring of Nevada's utilities from a monopolistic environment to a competitive one, the merger of Nevada's two major electric utilities, resource planning hearings and litigation involving appeals of decisions of the PUCN.

The rate hearings often took weeks (sometimes months) to complete. The hearings required the submission of testimony, cross-examination of sophisticated witnesses (often PhDs in

engineering, economics or rate planning) and the filing of legal briefs.

Moreover, because hundreds of millions of dollars were at stake at these hearings, the public policy issues associated with these matters was enormous. The utility rates of every Nevada resident and business was effected along with the stability of the state's utilities. These matters involved detailed analysis of the companies' operating practices, including fuel purchases, employment levels and business acumen.

Of course, each case had a different outcome. In some cases the PUCN increased rates more than expected and it decreased rates more in others. Some cases were settled prior to the PUCN entering a decision and other decisions were appealed to the district court for review.

The significance of my representation of USAN is that the complexity of this area of law challenged my intellect and dramatically accelerated my analytical and oral skills as an attorney. In addition, the challenge associated with balancing the interests of my clients as ratepayers and shareholders required me to carefully examine the nature of my written and oral advocacy on a daily basis.

Case No. 9: *Multiple Matters before the Pharmacy Board of Nevada*

Before:

Nevada State Board of Pharmacy
Keith MacDonald, Executive Secretary
555 Double Eagle Ct. #1100
Reno, Nevada 89521
(775) 850-1440

Co-Counsel:

None.

Opposing Counsel:

Louis Ling, Esq.
Nevada State Board of Pharmacy
555 Double Eagle Ct. #1100
Reno, Nevada 89521

(775) 850-1440

Decided: Multiple dates.

For several years, I represented a large, national chain grocery store and individual pharmacists before the Nevada State Board of Pharmacy ("Board"). These matters included important public health and safety issues associated with the distribution of prescriptions, pharmacy operation and staffing, and development of regulations that guided reporting requirements and pharmacist responsibilities.

The first case that I handled before the Board involved an unprecedented matter in terms of the magnitude of the complaint against my client. The case involved several witnesses, voluminous and detailed evidence and serious allegations of patient harm. It was further complicated by the fact that it received strong media attention and involved a high profile drug chain store. Ultimately, the Board levied a fine against the licensee and ordered significant discipline. However, the fine and discipline were substantially less than that sought by the Board's prosecutor.

The significance of this case as well as the other cases that I handled before the Board was that I gained a great appreciation for the importance of the administrative practice of law and the importance of balancing strict regulation with fair treatment of a licensee. These cases also contributed to my growth as an attorney by developing my skills as an aggressive, but respectful, legal advocate.

Case No. 10: *City of Sparks v. Santa Fe Pacific Pipeline, Inc., et al*

Before:

Second Judicial District Court
Case No. CV91-546
Judge Connie J. Steinheimer
Department 4
Washoe County Courthouse
P.O. Box 89520
Reno, Nevada 89520
(775) 328-3183

Co-Counsel:

Kent R. Robison, Esq.
Robison, Belaustegui, Robb & Sharp
71 Washington Street
Reno, Nevada 89503
(775) 329-3151

Opposing Counsel:

Donald A. Lattin, Esq.
Walther, Key, Maupin, Oats, Cox & LeGoy
4785 Caughlin Pkwy
P.O. Box 30000
Reno, Nevada 89520
(775) 827-2000

Dan Bowen, Esq.
Lionel, Sawyer & Collins
50 W. Liberty Street, # 1100
Reno, Nevada 89501
(775) 788-8666

Decided:

At the time, the "Sparks Tank Farm" case was considered the largest litigated environmental contamination case in the history of Nevada. The City of Sparks ("Sparks") sued several large oil companies, a railroad and a pipeline company for contaminating a site that had been planned to be developed into a regional park.

Sparks alleged, among other claims, that as a result of the defendants' negligence, a large gravel pit was contaminated by fuel, oil and solvents. As a result, Sparks alleged that it was unable to develop the pit into a lake and regional park and that it would take several million dollars to clean up the site.

Because of the magnitude of the parties, damages and the high profile nature of the litigation, the top environmental litigators in Nevada and California were involved in the case. At any given deposition or hearing, at least twenty to thirty lawyers were present.

As co-counsel to Mr. Robison in the *Sparks* case, I researched the law, drafted pleadings, prepared discovery, attended depositions

and court hearings and interviewed experts. I immersed myself in the intricacies of environmental law and practice because of the talent and experience of the attorneys who represented the sophisticated clients on the other side.

Ultimately, after my departure from the *Robison* firm, this case was settled and the people of Washoe County now enjoy a unique natural resource that has a lake with a sandy beach, adjoining running paths and fish to be caught by anglers. Although I was not a counsel of record at the time of the settlement, I felt that my contributions allowed many generations of people to enjoy a beautiful public facility where there was formally a large, dirty hole in the ground.

This case was important to me because it was my first exposure to a cause that I truly believed in. It was significant to my development as a litigator and complex litigation. I learned the importance of preparation, experience and fairness. I learned about the nature of lawyers and zealously representing one's client. I learned that it is important to continue on despite having limited resources.

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.)

ANSWER:

First, as a Nevada legislator and a member of the Judiciary Committee, I had the opportunity to review and amend legislation that affected the Nevada Criminal Code. In 1995, the entire Nevada Criminal Code was rewritten to establish the state's first "truth in sentencing laws." I believe that I played a major role with this legislation that has positively impacted the criminal justice system of Nevada.

As a legislator, I also served on the Nevada Sentencing Advisory Commission, the Juvenile Justice Commission and the Advisory Committee for Community Notification of Sex Offenders. All of these Committees played important roles in the development of legislation that improved Nevada's sentencing structure, addressed issues affecting juvenile offenders and protected children from sexual predators.

As a legislator, I also authored several pieces of legislation that strengthened Nevada's driving and boating under the influence laws, prohibited a convicted felon from suing his/her victim, required more community service for offenders, implemented environmental self-audit procedures and eliminated sales tax on certain medical appliances.

My participation in these activities gave me a unique opportunity to interact with law enforcement, prosecutors and judges. It also gave me a keen insight into the criminal justice system in Nevada from top to bottom. Finally, it provided me with an appreciation for the legislative process and respect for strict interpretation of the law.

As Chairman of the Nevada Gaming Commission, I presided over major hearings that concerned licensing, disciplinary and regulatory issues affecting Nevada's largest industry, gaming. These included consideration of complex tax issues, antitrust issues involved in the merger of some of the largest gaming companies in the world and the adoption of regulations restricting the spread of gaming into local neighborhoods.

As Nevada Attorney General, I personally participated in communications with the U.S. Department of Energy to stop the planned shipment of 153 million pounds of hazardous radioactive waste from Fernald, Ohio to the Nevada Test Site. After advising DOE that this shipment would violate applicable law, the DOE is believed to be seeking other disposal alternatives.

Although my answers to some of the questions above reflect my involvement in a variety of law-related activities, I do not believe that they fully reflect my involvement in legal and community educational activities.

Because I firmly believe that public confidence in our justice system is rooted in its understanding of our court system and legal process, I have continually participated in a number of educational activities designed to reach various segments of the non-legal community.

For example, I have been a speaker at grade schools, middle schools, high schools, university classes and law school forums throughout Nevada to discuss the Nevada legal system and ways to pursue a legal career.

I have met with several senior citizen groups to explain complicated matters associated with Nevada's "Do Not Call" law and other initiatives designed to assist seniors against consumer fraud.

I have also spoken at several Latino youth leadership development events to explain the importance of an education and pursuing one's dreams.

Finally, I have served as a panelist in multiple legal education forums in which I have addressed several issues, including legislation, the Nevada constitution, Nevada's Open Meeting Law, gaming law and Nevada's legal battle against the proposed Yucca Mountain project.

I have focused on hiring more bilingual employees in the Office of Attorney General to ensure that non-English speaking individuals have access to justice and I am working with the Federal Trade Commission on an initiative to protect Hispanic consumers.

I have also participated in community events that promote the distribution of child identification kits to parents in the event of a child abduction.

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.

   ANSWER: Nevada Public Employees Retirement System. Payable upon length of service and age.

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.

   ANSWER: The only perceived conflicts of interest that I anticipate as a United States Judge are cases that existed at the Nevada Attorney General's office during my tenure as Nevada Attorney General. However, I believe that I would have no conflict of interest with regard to any case involving the Nevada Attorney General's Office that is filed after my departure from there.

   Although I anticipate no other conflicts of interest arising after my confirmation as a United States Judge, I would resolve such conflicts in compliance with applicable Codes of Judicial Conduct for United States Judges, and as those Codes may be later modified. I will do two things to determine potential areas of concern with respect to potential conflicts of interest. First, I will attempt to be conscious of potential conflicts of interest myself and will raise them *sua sponte* when they occur with the parties. Second, I will be sensitive to potential conflict of interest concerns raised by all parties that appear 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.

   ANSWER: 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.)

ANSWER: See attached Financial Disclosure Report.

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

ANSWER: See attached Financial Net Worth Statement.

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

ANSWER: From 1993 to 1998 I was a candidate for the Nevada Assembly and served in the 1995 and 1997 legislative sessions (the Nevada Legislature meets biannually) as a Nevada Assemblyman.

In 2001 and 2002 I was a candidate for Nevada Attorney General. I was also President, Secretary, Treasurer and Director for Brian Sandoval for Attorney General, Inc. I was elected by the voters of Nevada in November 2002 and have served as the Nevada Attorney General since January 6, 2003.

In 2003 and 2004 I served as the Co-Chairman of the George W. Bush for President Campaign in Nevada. My responsibilities included making public speeches and appearances on behalf of the President and authoring statements in support of the President. I also greeted and accompanied the President and Vice-President when they visited Nevada during the presidential campaign.

I also accepted an invitation to speak on behalf of President George W. Bush at the 2004 Republican National Convention in New York, New York.

AO-10 (WP)
Rev. 1/2004

FINANCIAL DISCLOSURE 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)	2. Court or Organization	3. Date of Report
Sandoval, Brian E.	U.S. District Court, Nevada	3/4/05
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	5. Report Type (check appropriate type)	6. Reporting Period
U.S. District Judge - Nominee	_X_ Nomination, Date 3/1/05 ___ Initial ___ Annual ___ Final	1/1/04 to 2/28/05
7. Chambers or Office Address	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.	
Office of the Attorney General 100 N. Carson Street Carson City, NV 89701	Reviewing Officer _____ Date _____	

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

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

	POSITION	NAME OF ORGANIZATION/ENTITY
	NONE (No reportable positions.)	
1	Attorney General	State of Nevada
2	Board of Trustees	St. Jude's Ranch for Children
3	Board of Trustees	Washoe County Law Library

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

	DATE	PARTIES AND TERMS
	NONE (No reportable agreements.)	
1	1/6/03	Nevada Public Employees Retirement System/payable upon length of service and age
2		

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

	DATE	SOURCE AND TYPE	GROSS INCOME
A.	Filer's Non-Investment Income		
	NONE (No reportable non-investment income.)		
1	2003	State of Nevada, Salary	$ 110,000
2	2004	State of Nevada, Salary	$ 110,000
3	2005	State of Nevada, Salary	$ 16,876.72
B.	Spouse's Non-Investment Income - If you were married during any portion of the reporting year, please complete this section. (dollar amount not required except for honoraria)		
	NONE (No reportable non-investment income.)		
1	2004	The Children's Cabinet of Reno, Nevada, Salary	
2	2005	The Children's Cabinet of Reno, Nevada, Salary	

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Sandoval, Brian E.	3/4/05

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

	SOURCE	DESCRIPTION
	Exempt	
1		
2		
3		
4		
5		
6		
7		

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

	SOURCE	DESCRIPTION	VALUE
	Exempt		
1			
2		$	
3		$	
4		$	
		$	

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

	CREDITOR	DESCRIPTION	VALUE CODE*
	NONE (No reportable liabilities.)		
1	Wells Fargo Bank	Line of Credit	K
2	Bank One	Credit Card	J
3			
4			
5			

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Sandoval, Brian E.	3/4/05

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) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month & Day	(3) Value Code2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions.)									
1 Salomon Smith Barney	A	Int.	J	T	Exempt				
2 Berkshire Hathaway Inc.	A		J	S					
3 IRA #1 Diamonds Trust Ser I	A		J	S					
4 NASDAQ 100 Trust Ser I	A		J	S					
5 Sierra Pacific Resources	A	Div.	J	S					
6 IRA #2 Tiers Series S&P 2003-10	A		K	S					
7 Hancock Funds Regional Bank	A	Div.	J	S					
8 Hartford Variable Annuity	A		K	S					
9 Alliance Bernstein Fund	A		J	S					
10 Hancock Small Cap 6th B	A		J	S					
11 Hancock Small Cap 6th A	A		J	S					
12 Nevada State Treasurer	A		K	W					
13 Public Employees Retirement System	A		K	W					
14 IRA #3 New Perspective	A		J	S					

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
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: Q=Appraisal (See Col. C2)	R=Cost (real estate only) U=Book value	S=Assessment V=Other	T=Cash/Market W=Estimated	

15	Sky Spec. Eq Port	A		J	S					
16	AmCent SC Value	A		J	S					
17	Hartford Mid Cap HLS	A		J	S					
18	AmCent Eq. Income	A		J	S					
19	AmCent Ultra	A		J	S					
20	Oppen Capital App	A		J	S					
21										
22										
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39										

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Sandoval, Brian E.	3/4/05

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

Investments in Part VII which do not identify an income type had no direct distribution of income during the reporting period. Any distribution is reinvested to the particular fund.

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 [signature] Date March 4, 2005

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

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

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

FINANCIAL STATEMENT

NET WORTH

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

ASSETS				LIABILITIES			
Cash on hand and in banks	8	000	00	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule	3	185	00	Notes payable to relatives			00
Unlisted securities--add schedule				Notes payable to others			00
Accounts and notes receivable:				Accounts and bills due		500	00
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule	650	000	00
Real estate owned-add schedule	900	000	00	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property	70	000	00	First Horizon Home Line of Credit			
Cash value-life insurance							
Other assets itemize:							
Antiques	50	000	00				
University Prepaid Tuition	20	000	00				
IRA, Deferred Comp & Other Retirement	150	000	00	Total liabilities	657	500	00
Contingent Inheritance	50	000	00	Net Worth	593	685	00
Total Assets	1,251	185	00	Total liabilities and net worth	1,251	185	00
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	No		
On leases or contracts	7	000	00	Are you defendant in any suits or legal actions?	No		
Legal Claims				Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax							
Other special debt							

SCHEDULES

1. **Listed Securities:**

   Sierra Pacific Resources $ 3,185.85

2. **Real Estate Owned:**

   Personal Residence $900,000.00

3. **Real Estate Mortgages Payable:**

   Personal Residence $650,000.00

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.

ANSWER:

As I hope can be seen from my answers to this Questionnaire in general, I believe that the vast majority of my professional and personal life reflects an absolute commitment for equal justice under the law.

I have devoted practically my entire professional life to public service and have remained continually active in philanthropic endeavors.

In 1986, at my graduation ceremony from college, I received the "Henry Albert Public Service Award" for my community service activities, particularly my volunteer activities at the Washoe County District Attorney's Office Victim Assistance Unit and Investigations Division.

In 1994, I accepted on behalf my law firm an award of special recognition for small firm pro bono activities. I represented the firm at the ceremony because of my representation of an indigent client in a family law matter.

In 2004 I was recognized by the Internal Revenue Service for my pro bono activities associated with assisting low income individuals with their tax returns and obtaining their earned income tax credit.

In 2004 I was selected as the "Public Lawyer of the Year" by the State Bar of Nevada, the Washoe County Bar Association an the Access to Justice Foundation "for undeviating support and devotion to pro bono work."

In 2004 and 2005 I sponsored and acted as a spokesperson for the "Project Safeplace" program that established safe places for children to obtain shelter, food and assistance in Northern Nevada.

I estimate that I perform at least 50-100 hours per year of pro bono work.

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?

ANSWER: I do not belong and have not belonged to any such organization.

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

ANSWER: In 2001, U.S. Senator Harry Reid discussed with me the possibility of his recommending me to be a candidate for nomination to the federal bench in Nevada. I respectfully declined, and explained that although it was a personal dream to serve in that capacity, I did not feel that I possessed the necessary experience at the time to serve as a federal judge. This was an extremely difficult decision, as I had concluded that this opportunity to fulfill a personal dream was lost.

In November 2004, Senator Reid and I again discussed the prospect of his recommending me to be a candidate for nomination to the federal bench in Nevada. After a brief interview and after considering my additional experience as an attorney, Chairman of the Nevada Gaming Commission and as Nevada Attorney General, I accepted Senator Reid's recommendation of me as a candidate for the federal bench.

A few days later, U.S. Senator John Ensign interviewed me with regard to his possible recommendation of me to the federal bench. After a long discussion, Senator Ensign advised me that he would join in Senator Reid's recommendation of my candidacy for the federal bench to the President of the United States.

Later, Senator Ensign's Chief of Staff interviewed me, explained the rigors of the nomination process and asked me several probing questions with regard to my background. After a long conversation, he advised me that my name would be forwarded to the White House for its consideration.

On December 7, 2004 I was invited to the White House for a December 9, 2004 interview with the White House Counsel and a U.S. Attorney from United States Department of Justice with regard to my candidacy for recommendation to the federal bench. After a challenging and probing series of questions, I was advised that I would be informed whether the President would recommend me as a candidate for nomination.

On December 21, 2004 I was advised by White House Counsel that the President approved me as a candidate for nomination to the federal bench. Counsel also advised me that I would soon be hearing from the U.S. Department of Justice regarding the candidate process. He also told me that once my background was completed, the President would make the decision whether he would formally forward my name for nomination to the federal bench to the U.S. Senate Judiciary Committee.

On December 22, 2004 I spoke with a U.S. Justice Department attorney who explained the candidate process and advised me that I would receive a series of forms that need to be completed expeditiously so that my background investigation could be commenced. He also told me that the process was incredibly rigorous and to prepare myself accordingly.

On December 24, 2004 I received the packet of forms and immediately began gathering the information necessary to finish it.

Thereafter, I was investigated and interviewed by the Federal Bureau of Investigation and the U.S. Department of Justice.

On March 1, 2005, I was informed by the White House that the President had agreed to forward my name to the U.S. Senate for nomination to the U.S. District Court for Nevada.

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.

ANSWER: No one has asked me such a question.

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.

ANSWER: Our system of jurisprudence provides an important forum for the resolution of disputes between parties properly within the jurisdiction of the court. A judge must decide each dispute consistent with pertinent constitutional, statutory and case law authority, as fairly, promptly and economically as possible.

Consistent with this ideology, judges should not treat matters before them as opportunities to make decisions that have an effect beyond that to which the parties are entitled or expect.

"Judicial activism" occurs when decisions are made that are not properly before the court or within the court's authority. Moreover, courts should not usurp the role of the executive or legislative branches of government as contemplated by the Constitution.

"Judicial activism" has the potential to frustrate the balance of powers for each branch of government and the constitutional framework. It undermines the legislative and executive branch's abilities to reach legislative and executive solutions to issues confronting society.

In this regard, only the legislative and executive branches of government may propose and enact laws, and the members of these branches answer for their actions in the democratic process. Having served in both the legislative and executive branches of government, I have an acute awareness and appreciation for the necessity of the responsibilities of each branch of government.

Federal judges are not accountable to the elective process and courts are not equipped to provide a stage for comprehensive debate on important issues of public policy.

Moreover, too broad an interpretation of issues regarding standing and ripeness can lead a court into areas where it does not belong. Only parties with identifiable and defensible standing and ripeness should be allowed within the jurisdiction of the court.

A judge must always be aware that he or she wields an incredibly significant position of prominence and authority. A judge's role demands self-awareness and accountability and such power must be used wisely, judiciously and carefully.

It is with these thoughts in mind that I believe that our system of government, the greatest in the world, should work as our founders intended.

Senator HATCH. Thank you.

Mr. Smoak, you have an excellent record in pro bono work, especially, as I understand it, with the American Bar Association Vietnamese Refugee Legal Assistance Program. So I want to commend you for that.

And, Mr. Sandoval, you have always maintained an open-door policy for people in your respective positions, and I think that has been a very, very good thing on your behalf.

Now, Mr. Mattice, I just want you to know, when I was a janitor out at BYU, I was cleaning the floors and cleaning the steps, and down the steps came absolutely the most stunningly beautiful young girl I had ever seen in my life. I stood there leaning on my broom, transfixed, and her name was Marcia Mattice. And I don't know whether you are relatives or not, but if you are related to her, that is good enough for me.

[Laughter.]

STATEMENT OF HARRY SANDLIN MATTICE, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TENNESSEE

Mr. MATTICE. Thank you, Mr. Chairman.

Senator HATCH. You have had a very distinguished career as well, and you have gained a lot of insights from your professional experience. How is that going to help you to do your job as a Federal district court judge?

Mr. MATTICE. Thank you, Mr. Chairman. I thank you and the Committee for holding these hearings today.

Senator HATCH. By the way, anybody who can put up with Fred Thompson as long as you did, he has got to really be good, is all I can say.

Mr. MATTICE. Thank you, Mr. Chairman.

Senator HATCH. That is meant to be a compliment both ways. I think Fred is a tough, smart, good guy.

Mr. MATTICE. He is. Thank you.

Senator HATCH. And he was a great Senator, and we miss him around here. And he was a great "handler" for Judge Roberts, who just got confirmed 78–22 today. So we really loved having Fred back in the Senate doing that, and I know you loved working for him.

Mr. MATTICE. I did. Thank you, Mr. Chairman.

Mr. Chairman, to answer your question, I have, in fact, been very, very fortunate to have a very varied career and to have been able to fulfill a lot of different roles as an attorney. However, I have to say over the past 4 years and when I was sworn in as United States Attorney for the Eastern District of Tennessee, I told my staff that I couldn't think of any higher honor or privilege for an attorney than to stand up in a court of law in this great country and say that I represent the United States of America. I meant that then, and I certainly 4 years hence mean it now.

I suppose if I can think of any greater honor, if I am fortunate enough to be confirmed by the Senate, it is to serve as United States district judge in my home State and help promote respect for the rule of law, which I feel is so critical to our way of life, to our form of Government, and to our citizens generally.

So, again, as you point out, I have been very fortunate in my career, and if I should be confirmed by the Senate, I look forward to taking this next step.

Senator HATCH. You are all going to get confirmed. We will make sure that happens. OK?

[The biographical information of Mr. Mattice follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Harry Sandlin Mattice, Jr.
(Nickname: Sandy)

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

Residence:
Signal Mountain, TN

Business:
1110 Market Street, Suite 301
Chattanooga, TN 37402

3. Date and place of birth:

March 10, 1954
Chattanooga, Tennessee

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

Marital Status:	Spouse's name:	Spouse's Maiden Name:
Married	**Janet L. Mattice**	**Janet Lynn LeVan**

Spouse's Occupation and Employer:
Office Manager
Associates in Communications Therapies, P.C.
1200 Mountain Creek Road, Suite 260
Chattanooga, TN 37405

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

School	Dates of Attendance	Degree
University of Tennessee **Knoxville, Tennessee**	**9/72 - 6/73**	**None**
University of Tennessee **Chattanooga, Tennessee**	**8/73 - 8/76**	**B.S.** **(August 16, 1976)**
University of Tennessee **Knoxville, Tennessee**	**9/78 - 6/81**	**J.D.** **(June 10, 1981)**

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

Year(s)	Organization	Position(s)
1976-1978	Deloitte, Haskins & Sells	Senior Staff Accountant
1979	Jenkins & Jenkins	Summer Law Clerk
1979-1981	Tennessee Law Review	Student Materials Editor
1980	Stophel, Caldwell & Heggie	Summer Law Clerk
1981-1997 1998-2000	Miller & Martin, LLP	Associate and Partner
1985-1991	Chattanooga Goodwill Industries, Inc.	Director and Assistant to the President
1985-1988	Little Miss Mag Child Care Center, Inc.	Director and Treasurer
1987-1988	Chattanooga Tax Practitioners, Inc.	President
1988-1990	St. Timothy's Episcopal Church	Vestryman and Junior Warden
1989	University of Tennessee at Chattanooga	Adjunct Faculty Member
1991-1995	Hamilton County Republican Party	Treasurer and Chairman
1992-2001	Mountain Top Toys, Inc.	Director and Treasurer
1993-1995	Chattanooga Bar Association	Governor
1994-1995	Signal Mountain Youth Soccer League	Treasurer
1995-1996	General Sessions Court of Hamilton County, TN	Special Judge
1997	U.S. Senate-Committee on Governmental Affairs, Special Investigation	Senior Counsel

2000-2001	**Baker, Donelson, Bearman & Caldwell, P.C.**	**Of Counsel and Shareholder**
2001-present	**United States Department of Justice**	**U.S. Attorney for the Eastern District of TN**

7. Military Service: Have you had any military service? **No.** 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.

Order of the Coif
Phi Kappa Phi

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.

Chattanooga Bar Association (Board of Governors, 1993-1995)
Tennessee Bar Association
American Bar Association
Federal Bar Association
Federalist Society for Law and Public Policy Studies

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

Organizations Which Lobby:
Federal Bar Association

Other Organizations:
Chattanooga Bar Association
YMCA
St. Timothy's Episcopal Church
Signal Mountain Golf and Country 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.

Court	Date of Admission
Tennessee Supreme Court	**October 3, 1981**
U.S. District Court for the Eastern District of Tennessee	**May 3, 1982**
U. S. Tax Court	**August 11, 1982**
U. S. Court of Appeals for the Sixth Circuit	**August 23, 1982**
U.S. Court of Federal Claims (formerly U.S. Claims Court)	**September 9, 1982**
U.S. District Court for the Western District of Tennessee	**May 4, 1989**
U.S. Court of Appeals for the Eleventh Circuit (Admission lapsed at some point. Reason for lapse was that admission was for particular case, and I did not renew admission after case was concluded)	**March 25, 1987**

In addition to the foregoing, I have been admitted to a number of courts, both state and federal, on a *pro hac vice* basis.

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.

Casenote published in Volume 47 of the *Tennessee Law Review*, beginning at page 456, in 1980.

The text of a speech that I delivered to various civic groups in and around Chattanooga following my service as Special Counsel to the U.S. Senate Committee on Governmental Affairs Special Investigation. (The speech was updated several times; the version that I have attached was updated to July 28, 1998).

A newspaper account of the above-described speech, which I delivered to the Chattanooga Rotary Club on or about January 15, 1998.

The text of a speech I have delivered to various civic clubs and professional groups throughout East Tennessee from 2002 to the present, describing the U.S. Attorney's Office and what we do. (The version I have attached was delivered to the Chattanooga Rotary Club on October 31, 2002).

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

Excellent. December, 2004 (updated March, 2005).

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

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.

Not Applicable.

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.

Appointed offices:

Senior Counsel, U.S. Senate Committee on Governmental Affairs, Special Investigation – 1997.

United States Attorney for the Eastern District of Tennessee – 2001 to present.

No elected offices or unsuccessful candidacies for elective public office.

17. Legal Career:

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

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

I have not served as a clerk to a judge.

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

I have never practiced alone.

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

1981-1996 **1998-2000**	**Miller & Martin, LLP** **1000 Volunteer Building** **832 Georgia Avenue** **Chattanooga, Tennessee 37402**	**Associate and Partner**
1997	**U.S. Senate, Committee on Governmental Affairs, Special Investigation** **100 Russell Senate Office Building** **Washington, D.C. 20510**	**Senior Counsel**
2000-2001	**Baker, Donelson, Bearman & Caldwell, P.C.** **1800 Republic Centre, 633 Chestnut Street** **Chattanooga, Tennessee 37450-1800**	**Of Counsel and Shareholder**
2001-present	**U.S. Department of Justice** **U.S. Attorney's Office – Eastern District of TN** **1110 Market Street, Suite 301** **Chattanooga, TN 37402**	**U.S. Attorney**

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 earlier stages of my legal career, I divided my time between a business practice (concentrating on corporate, securities and taxation matters) and a business litigation practice. For at least the last twenty years, the principal focus of my practice has been devoted to civil business investigations and litigation, at both the administrative and judicial levels, and to criminal prosecution.

Due to the size and nature of the law firms in which I practiced, and the nature of the clients which I represented, most of the cases with which I was involved in private practice were large, and involved relatively complex legal and factual issues, often of a financial character. These lawsuits very often involved disputes as to relatively large sums of money and, perhaps accordingly, were protracted and involved extensive discovery and motion practice. They also often involved many lawyers and, particularly later in my

career, my duties included supervising other lawyers in the conduct of the litigation. A very high percentage of the cases on which I worked occurred in federal courts, or before federal agencies.

An incident of the above-described characteristics of my private practice was that a very high percentage of the cases with which I was involved were resolved, pre-trial or pre-judgment through summary judgment, mediation or arbitration, or settlement. This was true of my civil cases (many of which have had criminal or potentially-criminal aspects or implications) as well as my practice before federal agencies such as the IRS and the SEC, where my clients' principal objective typically was to resolve the matter at the administrative level, before escalating the dispute to full-blown litigation. It was also true of my private criminal practice (mostly white collar in nature) in which the objective of my client was to avoid indictment altogether and/or, if possible, obtain immunity from prosecution. Accordingly, a good deal of my private criminal work involved representations in connection with testimony before federal grand juries.

In the course of handling these cases, the substantive areas of law with which I dealt extended over a broad range of the legal spectrum, including contract, negligence, fraud, tax, securities, RICO, defamation and real property, as well as a myriad of more arcane and narrow statutorily-based causes of action.

Since my appointment as U.S. Attorney in 2001, my practice has been heavily concentrated in criminal prosecution. As U.S. Attorney, I have either handled personally, or been integrally involved in dozens, and even hundreds, of criminal prosecutions. These prosecutions have extended over virtually the entire spectrum of federal criminal law including, but not limited to, mail fraud, wire fraud, conspiracy, drug offenses, gun offenses, kidnapping, public corruption, tax evasion, health care fraud and securities fraud.

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

My typical former clients included large-to-medium sized corporations or their officers, directors or shareholders, as well as, for substantial periods of my career, government agencies such as the Federal Deposit Insurance Corporation and the Resolution Trust Corporation. I also, however, represented many individual clients in investigations of civil or criminal wrongdoing by federal agencies such as the IRS or SEC, and in federal grand jury proceedings, as well as with respect to business or personal legal matters. Obviously, since becoming U.S. Attorney, my client has been the U.S. Government and its agencies.

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.

The frequency of my court appearances has varied between frequent appearances to occasional appearances depending, at any particular point in time, on the volume and nature of my caseload, and on the status and posture of the cases on which I was working.

2. What percentage of these appearances was in:

(a) federal courts - **85%**

(b) state courts of record - **15%**

(c) other courts.

3. What percentage of your litigation was:

(a) civil - **60%**

(b) criminal - **40%**

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.

Ten (10) - Two (2) as associate counsel, Four (4) as chief counsel, and Four (4) as sole counsel.

5. What percentage of these trials was:

(a) Jury – **40%**

(b) non-jury - **60%**

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

a. the date of representations;

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. *United States v. Lentsch, et al.* - U.S. Court of Appeals for the Sixth Circuit, Nos. 02-6192 and 02-6193 (reported at 369 F. 3d 948 (6th Cir. 2004)) and U.S. District Court for the Eastern District of Tennessee, Nos. 3:02-m-1038-1040. (2002-2004).

   Served as lead prosecutor in prosecution of trespassers at Y-12 National Security Complex in Oak Ridge, Tennessee. Case represented first prosecution of its kind in the Eastern District of Tennessee, based on national security concerns voiced by client agency in aftermath of events of September 11, 2001. Personally handled all aspects of three-day jury trial which resulted in convictions of all defendants as charged. Personally briefed and argued appeal.

   Judge(s): C. Clifford Shirley (EDTN)
   John M. Rogers (6th Cir.)
   Deborah L. Cook (6th Cir.)
   Cornelia G. Kennedy (6th Cir.)

   Opposing Counsel: Mike Whalen, Esq.
   905 Locust Street
   Knoxville, TN 37902
   (865) 525-1393

   John E. Eldridge, Esq.
   Eldridge, Irvine & Gaines
   P.O. Box 84
   Knoxville, TN 37901-0084
   (865) 523-7731

   Kim A. Tollison, Esq.
   Federal Defender Services of Eastern Tennessee, Inc.
   530 S. Gay Street
   Suite 900
   Knoxville, TN 37902
   (865) 637-7979

2. *Smith v. American National Bank and Trust Company* - U.S. Court of Appeals for the Sixth Circuit, No. 91-6505 (reported at 982 F.2d 936 (6th Cir. 1992)) and U.S. District Court for the Eastern District of Tennessee, No. 1-90-253. (1990-1992). Served as lead counsel to defendant bank in federal securities fraud action in which plaintiff guarantor sought monetary damages alleged to have been caused by bank's failure to warn guarantor of past financial condition of borrower. Participated in and directed all aspects of case, including investigation, extensive discovery and motion practice, and successful argument of motions for summary judgment. Personally briefed and argued appeal. Client bank prevailed on summary judgment in trial court, and was upheld on appeal.

Judge(s): James H. Jarvis, II (EDTN)
Damon J. Keith (6th Cir.)
David A. Nelson (6th Cir.)
James L. Ryan (6th Cir.)

Opposing Counsel: **Michael A. Meyer**
Sidwell & Barrett
121 1st Avenue, S.
Suite 200
Franklin, Tennessee 37064
(615) 790-8868

3. ***United States v. Hodge*** **- U.S. Court of Appeals for the Sixth Circuit, No. 04-5863 and U.S. District Court for the Eastern District of Tennessee, No. 4:03-cr-27. (2003-2005).**

Served as lead prosecutor in prosecution of convicted felon for illegal possession of firearm. Personally handled all aspects of a two-day jury trial which resulted in conviction of defendant on all counts. Also personally handled all aspects of sentencing phase, which resulted in two-level upward departure from Guidelines based on defendant's extensive criminal history. Appeal voluntarily dismissed by defendant following discussion between counsel of merits of asserted basis.

Judge(s): Curtis L. Collier (EDTN)

Opposing Counsel: **Barry L. Abbott, Esq.**
Cavett & Abbott, PLLC
801 Broad Street, Suite 428
Chattanooga, TN 37402
(423) 265-8804

Kevin T. Beck, Esq.
701 Market Street, Suite 1501
Chattanooga, TN 37402
(423) 265-1070

4. ***Crown American Corporation v. Ingles Markets, Inc.*** **- U.S. District Court for the Eastern District of Tennessee, No. 3:92-CV-651. (1992-1995).**

Served as lead counsel to defendant grocery chain in complex business tort action in which plaintiff landlord sought to recover for alleged breach of lease agreement, and defendants counter-claimed to recover damages for lost profits due to landlord's interference with business operations. Personally handled and directed all aspects of case, including investigation, extensive discovery and motion practice, and trial. Client grocery chain prevailed on plaintiff's case-in-chief, following four-day trial.

Judge: James H. Jarvis, II

Opposing Counsel: **David A. Lufkin**
Lufkin & Henley
7th Floor, 530 S. Gay Street
Knoxville, Tennessee 37928
(865) 971-1551

5. ***United States v. Tribble*** **- U.S. Court of Appeals for the Sixth Circuit, No. 03-5757 and U.S. District Court for the Eastern District of Tennessee, Nos. 1:03-cr-64, 1:03-cr-238 and 1:05-cr-33. (2003-2005).**

Served as sole prosecutor in prosecution of mailer of anthrax hoax letter to federal district judge. Personally handled all aspects of two-day jury trial which resulted in mistrial based on hung jury. Personally handled all aspects of successful motion to dismiss appeal based on district court's denial of motion to dismiss. Case ultimately resolved successfully for government upon defendant's plea of guilty to all counts on eve of re-trial.

Judge(s): Curtis L. Collier (EDTN)

Opposing Counsel: **Lex A. Coleman, Esq.**
Johnson, Mulroony & Coleman, P.C.
428 McCallie Avenue
Chattanooga, TN 37402
(423) 266-2300

R. Dee Hobbs, Esq.
Bell & Hobbs
701 Market Street, Suite 1217
Chattanooga, TN 37402
(423) 266-6461

6. ***Ministers Benefit Department of the Baptist Missionary Association of America v. Crews & Associates, Inc., et al.*** **- U.S. District Court for the Western District of Arkansas, No. 95-CV-4013. (1995-1996).**

Served as lead counsel to plaintiff, a large church-sponsored ministers' retirement fund, against several brokerage firms in a federal securities fraud action to recover losses suffered by reason of brokerages' recommendation of investment in unsuitable derivative securities. Personally handled and directed all aspects of investigation, discovery, motion practice and trial preparation. Case ultimately settled, due in large part to insolvency of a number of the defendants.

Judge: Harry F. Barnes

Opposing Counsel: Richard L. Ramsay
Lee S. Thalheimer
Arnold, Grobmyer & Haley
Union National Plaza
124 West Capital Avenue, Suite 875
Little Rock, Arkansas 72201
(501) 376-1171

Co-Counsel: W. David Carter
Mercer, Carter & Elliott, L.L.P.
1730 Galleria Oaks Drive
Texarkana, Texas 75503
(903) 794-9419

7. *Hart v. Hamilton* - Chancery Court of Davidson County, Tennessee, No. 93-3074-I, and Tennessee Court of Appeals for the Middle Section of Tennessee at Nashville, No. 01A01-9411-CH-00543 (reported at 1995 WL 273661). (1993-1996).

   Served as lead counsel to defendant alleged to have fraudulently induced plaintiff to participate in cattle-raising joint venture. Personally conducted all aspects of extensive and complex investigation, discovery and motion practice including, successful briefing and argument of motion for summary judgment in trial court, and unsuccessful defense of same on appeal, and trial preparation. Case ultimately settled in midst of trial, following remand from appeals court.

   Judge(s): Irvin H. Kilcrease, Jr. (Ch. Ct. Dav. Co.)
   Ben H. Cantrell (Ct. App. MS)
   Henry F. Todd (Ct. App. MS)
   Samuel L. Lewis (Ct. App. MS)

   Opposing Counsel: Jay S. Bowen
   Bowen, Riley, Warnock, Jacobsen, PLC
   1906 West End Avenue
   Nashville, Tennessee 37203
   (615) 320-3700

8. *Federal Deposit Insurance Corp. v. Ernst & Whinney* - U.S. District Court for the Eastern District of Tennessee, No. CIV-3-87-364 (reported at 137 F.R.D. 14 (1991) and 1992 WL 535605 (1992)); companion case reported at 921 F.2d 83 (6th Cir. 1990). (1987-1993).

   Served as local counsel to plaintiff Federal Deposit Insurance Corporation in extremely large and complex accounting malpractice action arising out of collapse of extensive East Tennessee banking empire. Participated in all aspects of extensive investigation, discovery and motion practice. Case

ultimately settled (as part of nationwide global settlement) prior to conclusion of eight month trial.

Judge: R. Leon Jordan

Opposing Counsel: **Daniel F. Kolb**
Davis, Polk & Wardwell
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

Robert R. Campbell
Hodges, Doughty & Carson, PLLC
617 Main Avenue
Knoxville, Tennessee 37902
(865) 546-9611

Co-Counsel: **Melvin I. Weiss**
Michael C. Spencer
Milberg, Weiss, Bershad, Hynes & Lerach, LLP
One Pennsylvania Plaza
New York, New York 10019
(212) 594-5300

9. ***Wenz v. Becker, et al.*** **- U. S. District Court for the Southern District of New York, No. 96 CIV. 2161 (reported at 948 F.Supp. 319 (1996)). (1996-1997).**

Served as lead counsel to defendant board chairman of publicly-traded company, in case seeking damages for alleged defamatory remarks about plaintiff, former company president, published in Fortune magazine. Personally conducted all aspects of investigation and extensive discovery and motion practice, including briefing and argument of key motion for summary judgment. Case ultimately settled on terms favorable to defendants.

Judge: Shirley Wohl Kram

Opposing Counsel: **Kenneth E. Kraus**
Schopf & Weiss
312 West Randolph Street, Suite 300
Chicago, Illinois 60606
(312) 701-9300

Co-Counsel: **Nathaniel H. Akerman**
Seyfarth, Shaw, Fairweather & Geraldson
900 Third Avenue
New York, New York 10022
(212) 715-9052

David B. Wolf
Time, Inc.
Time & Life Building
Rockefeller Center
New York, New York 10020
(212) 522-4758

10. ***Steven G. Bradley v. United States*** **- U.S. District Court for the Eastern District of Tennessee, Civil No. 1-85-381 and U.S. District Court for the Northern District of Georgia No. 86-CV-34. (1984-1986).**

Served as lead counsel in prosecution of federal tax refund action on behalf of corporate officer in order to defend against IRS assessment of 100% "responsible person" penalty for failure to pay over trust fund taxes pursuant to Section 6672 of the Internal Revenue Code. Personally handled all aspects of investigation of case at both administrative and judicial levels, including pleading and extensive discovery and motion practice. Client taxpayer prevailed on summary judgment.

Judge: **Thomas G. Hull (EDTN)**
Harold L. Murphy (NDGA)

Opposing Counsel: **Gregory L. Nelson**
Trial Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530
(202) 272-6834

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.)

- **Investigation of illegal or improper activities in connection with the 1996 federal election campaigns**.

In 1997, I served as Senior Counsel to the U.S. Senate Governmental Affairs Committee in its Special Investigation. In addition to having senior supervisory authority over a majority staff consisting of approximately 55 lawyers, investigators and support staff, I dealt on a daily basis with issues of a relatively arcane nature,

but having national legal and constitutional significance. In addition to my supervisory work, I took a direct, hands-on role in developing the parameters of certain key areas of the investigation, and in personally conducting key interviews, depositions and nationally-televised hearings.

Due to the obviously controversial and politically delicate nature of the subject matter of the investigation, I had the opportunity to be directly involved in a number of decisions which had the potential to have a lasting impact on the nature of the relationship between the legislative and executive branches of the federal government.

- **Lead counsel to the Federal Deposit Insurance Corporation (FDIC) in connection with its investigations of accounting malpractice relating to the failure of FirstRepublic Bank of Dallas, Texas.**

  During the years from approximately 1990 through 1993, I served as lead counsel to the Federal Deposit Insurance Corporation in its investigation of accounting malpractice connected with the collapse of FirstRepublic Bank of Dallas, Texas. At the time (and I believe, still today), FirstRepublic Bank was the largest bank failure in U.S. history. In that investigation, I supervised a staff of approximately 15 attorneys, accountants and investigators, and I worked directly with investigators from involved federal agencies such as the FDIC, Comptroller of Currency, IRS, SEC and FBI.

  While I worked over the course of my career on more than a dozen separate cases for the FDIC or RTC, the FirstRepublic Bank investigation was the largest in terms of dollars at stake. My work ultimately involved intensive negotiations with attorneys for the target defendant (the "Big Five" accounting firm Ernst & Whinney), and the case was finally resolved, prior to the institution of litigation, as part of a nationwide global settlement of claims by FDIC against Ernst & Whinney.

  My work for the FDIC and RTC permitted me to be involved with very sophisticated and complex financial investigations and litigations and to deal, on a day-to-day basis, with a number of novel and evolving issues which had direct impacts on the development of national economic and legal policy.

- **Special Counsel to the City of Chattanooga and Hamilton County, Tennessee in connection with the Volunteer Army Ammunition Plant Project.**

  On this project, which began in early 1998 and continued until 2001, I acted as Special Counsel to the City of Chattanooga and Hamilton County, Tennessee in the local governments' efforts to acquire and return to productive use (and the tax rolls) all or portions of the Volunteer Army Ammunition Plant ("VAAP"). VAAP is an approximately 6,350 acre parcel of land situated in the center of urban Hamilton County. Since World War II, VAAP has been owned by the U.S Army which, from World War II through the end of the Vietnam conflict in the mid-1970's, used it to produce TNT and other chemicals essential to munitions production. In working to

acquire this property on behalf of the City and County, I dealt with top officials in a variety of federal and state agencies, including the U.S. Department of Defense, the U.S. General Services Administration, the U.S. Environmental Protection Agency, the Tennessee Department of Environment and Conservation, as well as the Governor's office and key members of Tennessee's congressional delegation and their staffs. In October, 2000, after two and one-half years of intensive work, and by employing innovative and unique legal mechanisms to address the multitude of environmental issues associated with the transfer, the City and County were successful in securing the Army's release and transfer of the initial 940 acre parcel of land, thereby setting the stage for the City and County to market the land to private users.

This project is a continuing one, and represents the single most significant economic development initiative currently being pursued by the City of Chattanooga and Hamilton County.

- **Lead counsel to individual target of Securities and Exchange Commission investigation styled *In the Matter of Sirrom Capital Corporation - SEC File No. A-1697-A.***

While I have represented a number of individuals and corporations being investigated by the SEC over the years, this case, which occurred during the period 2000 to 2001, is noteworthy in that the SEC attempted to assert what appeared to be a novel theory of liability against my client. The SEC staff stated that it sought to impose liability for aiding and abetting a violation of the reporting requirements of Rule 16 of the Securities and Exchange Act of 1934 against my client, the former spouse of a corporate insider. I responded to such indication by making a "Wells Submission" on behalf of my client. The case was ultimately disapproved for prosecution by the Commission itself, overruling the recommendation of its staff.

My work on this case permitted me to become involved with unique and novel issues involving the enforcement of the federal securities laws, and to deal with some of the leading practitioners in the securities field, in both the public and private sectors.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

I am currently an inactive participant in 401(k) plans maintained by my former law firms, Miller & Martin, PLLC and Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. I have no direct or indirect authority over investment of the assets of either plan. All assets in my accounts will be distributed to me only in accordance with the terms of the plans, typically not before age 59 ½.

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.

Based upon my current and prior employment and financial holdings, the only potential conflicts of interest which I expect to encounter deal with my past legal representations of clients, as opposed to financial conflicts of interests. Having been a member of relatively large law firms and an employee of the U.S. Department of Justice for most of my legal career, I am quite familiar with the legal and ethical standards and mechanisms for dealing with this type of potential conflict of interest. I will continue to monitor any possible professional conflicts of interest until such time as I might be appointed and, once appointed, will consult with the appropriate ethics officials and advisory agencies with respect to such matters. I will follow all requirements of the Code of Conduct for United States Judges.

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

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.

The only time my name has appeared on a ballot was in 1996, when I as an unsuccessful candidate for Delegate to the Republican National Convention from Tennessee's Third Congressional District, pledged to Lamar Alexander.

I served as Treasurer (in 1991 to 1993) and as Chairman (in 1993 to 1995) of the Hamilton County, Tennessee Republican Party. During these periods of time, I was publicly identified with, and often quoted in local newspapers as a representative of the Republican Party and its candidates.

Beyond the foregoing, I have for many years served in a variety of capacities in the campaigns of various candidates for public office, at the local, state and federal level. Some of the more recent of these are as follows:

- **Alexander for President - Chairman for Tennessee's Third Congressional District - 1995-1996 and 1999. (Principal responsibility for political organization and media relations in District).**
- **Dole for President - Vice-Chairman for Tennessee's Third Congressional District - 1996. (Co-responsibility for political organization and get-out-the-vote efforts in District).**
- **Frist for U.S. Senate - Chairman for Southeast Tennessee - 2000. (Principal responsibility for political organization, media relations, and get-out-the-vote efforts in Southeast Tennessee).**

AO-10 Rev. 1/2004	**FINANCIAL DISCLOSURE REPORT** Calendar Year 2004	**Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)**

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Mattice, Harry S	U.S. District Court - EDTN	7/29/2005
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) District Judge - Nominee	**5. ReportType** (check appropriate type) (•) Nomination, Date 7/28/2005 ( ) Initial ( ) Annual ( ) Final	**6. Reporting Period** 1/1/2004 to 6/30/2005
7. Chambers or Office Address U.S. Attorney's Office 1110 Market Street, Suite 301 Chattanooga, TN 37402	**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.	Trustee	Trust # 1

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

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	1984	Miller & Martin Profit Sharing Plan (former law firm - no control)
2.	2001	Baker, Donelson, Bearman & Caldwell, P.C. Retirement Savings Plan (fomer law firm - no control)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Mattice, Harry S	7/29/2005

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

A. Filer's Non-Investment Income

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

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.			

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

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

	DATE	SOURCE AND TYPE
1.	2004	Associates in Communications Therapies, P.C. - Salary
2.	2005	Associates in Communications Therapies, P.C. - Salary

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

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

☐ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.		EXEMPT

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Mattice, Harry S	7/29/2005

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

☐ NONE - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.		EXEMPT	

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

☑ NONE - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.			

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Mattice, Harry S	7/29/2005

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

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
1. Morgan Stanley Active Assets Money Trust	A	Dividend	K	T	Exempt				
2. MS Global Advantage Fund B Mutal Fund	A	Dividend	J	T					
3. AT&T Corporation (new) Common Stock	A	Dividend	J	T					
4. Boeing Company Common Stock	A	Dividend	J	T					
5. Charter Communication Corporation Class A Common Stock	A	Dividend	J	T					
6. Comcast Corp. (new) Class A Common Stock	A	Dividend	J	T					
7. Hewlett Packard Corporation Common Stock	A	Dividend	J	T					
8. Lockheed Martin Corp. Common Stock	A	Dividend	J	T					
9. Microsoft Corporation Common Stock	A	Dividend	J	T					
10. Morgan Stanley & Company Common Stock	A	Dividend	J	T					
11. Pfizer, Inc. Common Stock	A	Dividend	J	T					
12. MSDW Dividend Growth Securities Fund B	A	Dividend	J	T					
13. Templeton Global Opportunity Fund A	A	Dividend	J	T					
14. MS American Opportunities Fund B	A	Dividend	J	T					
15. MSDW U.S. Government Money Market Trust	A	Interest	J	T					
16. IRA: MSDW S&P 500 Index Fund B	A	None	J	T					
17. Miller & Martin Profit Sharing (widely held & diversified)	A	None	N	T					
18. Mass Mutual Life Insurance Whole Life (2)	C	Interest	K	T					

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

FINANCIAL DISCLOSURE REPORT
Page 2 of 2

Name of Person Reporting	Date of Report
Mattice, Harry S	7/29/2005

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

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
19. Northwestern Mutual Life Variable Comp Life Agg Growth & Ind	A	None	L	T	Exempt				
20. Baker, Donelson, Bearman & Caldwell 401(k) Retire MSF Fxd Fd	A	None	J	T					
21. Trust #1:				T					
22. SunTrust TN Reserve Fund M/M	A	Interest	K	T					
23. United States Treasury Notes (2)	B	Interest	K	T					
24. SunTrust Investments Classic Fnd Intl Eqty-Index Trust Share	A	Dividend	L	T					
25. SunTrust Investments Classic Fnd-Small Cap Grth Trust Shares	A	Dividend	L	T					
26. SunTrust Investments Classic Fnd-Capital App Trust Shares	A	Dividend	K	T					
27. SunTrust Investments Classid Fnd-Mid Cap Equity Trust Shares	A	Dividend	K	T					
28. SunTrust Investment Classic Fnd-Value Income Trust Shares	A	Dividend	L	T					
29.									

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Mattice, Harry S	7/29/2005

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

Par III. A. Non-Investment Income. All income earned during reporting period was salary as employee of U.S. Government.

Part VII. Investments and Trusts. Trust Assets listed as numbers 22 - 28 are a part of an Irrevocable Insurance Trust created by deceased family member.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Mattice, Harry S	7/29/2005

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 H. S. Mattice Date 7/29/05

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

FINANCIAL STATEMENT

NET WORTH

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

ASSETS				LIABILITIES			
Cash on hand and in banks	4	500	00	Notes payable to banks-secured		-0-	
U.S. Government securities-add schedule		-0-		Notes payable to banks-unsecured		-0-	
Listed securities-add schedule	16	631	56	Notes payable to relatives		-0-	
Unlisted securities--add schedule	75	473	65	Notes payable to others		-0-	
Accounts and notes receivable:				Accounts and bills due	5	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	91	014	81
Real estate owned-add schedule	211	300	00	Chattel mortgages and other liens payable		-0-	
Real estate mortgages receivable		-0-		Other debts-itemize:			
Autos and other personal property	75	000	00				
Cash value-life insurance	103	750	84				
Other assets itemize:							
401(k) Plan	496	386	18				
Retirement Savings Plan	5	307	40				
TSP Plan	23	454	11	Total liabilities	96	014	81
				Net Worth	915	788	93
Total Assets	1,011	803	74	Total liabilities and net worth	1,011	803	74
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		None					
Other special debt		None					

SCHEDULE OF REAL ESTATE OWNED:

• Residence, Signal Mountain, TN.	$211,300.00*

*Per most recent appraisal by Hamilton County Assessor of Property dated April 1, 2005.

SCHEDULE OF REAL ESTATE MORTGAGES PAYABLE:

• Mortgage on residence, Signal Mountain, TN. Mortgagee - SunTrust Mortgage, Inc. of Atlanta, GA.	$82,353.21
• Home Equity Line of Credit Lender - SunTrust Bank, Chattanooga, TN.	$8,661.60
Total Real Estate Mortgages:	$91,014.81

SCHEDULE OF LISTED SECURITIES:

AT&T Corporation (new) Common Stock	$281.25
Boeing Company Common Stock	$2,923.00
Charter Communication Corporation Class A Common Stock	$160.00
Comcast Corp. (new) Class A Common Stock	$810.72
Hewlett-Packard Corp. Common Stock	$2,764.44
Lockheed Martin Corp. Common Stock	$2,442.40
Microsoft Corp. Common Stock	$2,417.00
Morgan Stanley & Co. Common Stock	$2,862.50
Pfizer, Inc. Common Stock	$1,970.25
TOTAL	$16,631.56

SCHEDULE OF UNLISTED SECURITIES:

Morgan Stanley Active Assets Money Trust	$33,904.63
MSDW Global Advantage Fund B	$1,007.49
MSDW Dividend Growth Fund B	$14,103.17
Templeton Global Opportunity Fund A	$11,022.22
MSDW U.S. Government Money Market Trust	$12,633.47
MSDW S&P 500 Index Fund B	$1,911.93
Sears Mortgage Sec. 1984 - 1D	$32.88
MSDW Liquid Asset Exchange Fund B	$211.37
MSDW American Opportunities Fund B	$646.49
TOTAL	$75,473.65

III. GENERAL (PUBLIC)

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

During earlier portions of my career, I participated in the pro bono legal representation program sponsored by the Chattanooga Bar Association, now known as the Volunteer Lawyer Program. I also accepted a number of court-appointed criminal representations in state court. More recently, and before my appointment as U.S. Attorney for the Eastern District of Tennessee, I served on the Criminal Justice Act (court-appointed criminal defense counsel) panel for the U.S. District Court for the Eastern District of Tennessee, administered in conjunction with the office of the Federal Defender for East Tennessee. The amount of time that I devoted to these activities varied, depending on the demands of the cases as to which I accepted appointments, or in which I have served as pro bono counsel. With respect to my last federal Criminal Justice Act panel appointment prior to my appointment as U.S. Attorney, for example, my time records indicated that I spent 54 hours over an approximately six month period. *(United States v. Richard Lee Braden* - U.S. District Court for the Eastern District of Tennessee, No. 4:00-CV-0026.)

Since my appointment as U.S. Attorney my ability to engage in pro bono legal activities has been restricted by the rules imposed on U.S. Government employees by the Ethics in Government Act of 1978.

In addition to the foregoing (and again, prior to my appointment as U.S. Attorney), I donated countless hours of free legal services to a variety of local charitable and/or non-profit organizations which I have served as an officer or director, or with which I have been associated. Most notable among these have been Chattanooga Goodwill Industries, Inc. and Little Miss Mag Child Care Center, Inc.

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?

From approximately 1987 to 1996, and again from January 1998 until May 2000, I was a member of the Mountain City Club, 729 Chestnut Street, Chattanooga, TN 37402. At the time that I first joined, I believe the Mountain City Club was still an

all-male club. Sometime after I joined, the Club changed its membership policies and began admitting female members. I actively supported this change in policy.

I am aware that there have been allegations that, in the past, the Mountain City Club also discriminated in its membership policies or practices on the basis of race and/or religion. I do not know whether these allegations are true with respect to periods prior to my membership. To the best of my knowledge, however, any such allegations are not true with respect to periods during which I was a member. Accordingly, it was unnecessary for me to take action with respect to these former policies.

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

There is not a selection commission in my jurisdiction. Upon learning there would be a vacancy for the judgeship at issue, I indicated my interest in the position by writing and forwarding my resume to each of the U.S. Senators from my state. Shortly thereafter, I was invited to, and participated in, an interview with representatives of the Senators. A short time after that, I was invited to, and participated in, an interview in the White House Counsel's office. Approximately seven weeks later, I received a telephone call from the White House Counsel's office notifying me that I was the President's "preliminary choice" to proceed in the nomination process. Shortly thereafter, I was contacted by an individual in the Department of Justice Office of Legal Policy, who forwarded to me a large volume of forms (background investigation, questionnaires, financial disclosure, etc.) to fill out and return. Shortly after I returned the forms, the FBI and Department of Justice began independent background investigations. I was interviewed in person by the FBI and by telephone by DOJ. Both of these interviews were somewhat longer, and much more in-depth, than the earlier interviews.

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

No.

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

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

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

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

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

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

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

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

In my view, the principal role of the judicial branch within our tripartite form of government is to uphold, and promote respect for, the rule of law. In order to do so, judges must recognize that it is the job of the legislative branch to promulgate the law and the job of the executive branch to enforce and carry the law into effect. It is the job of the judicial branch to interpret the law.

In discharging this duty consistent with the Constitution and the legal traditions of the country, the courts should carry out this interpretive function on a case-by-case basis, addressing itself only to the parties, the facts, and the legal issues brought directly and properly before it. The court's judgment in each case should extend no further than is necessary to resolve the particular controversy presented to it by those parties, those facts, and those issues. If the case before it involves a matter of statutory interpretation, the court's responsibilities are best discharged by a careful and rigorous construction of the text of the statute before it. If the case before it involves issues of the common law, the court should accord substantial weight to applicable precedent, and be careful to observe traditional principles of *stare decisis*.

By conducting its business in this fashion, each court contributes incrementally to the orderly development of the law and thereby promotes pubic confidence and respect for the integrity of our judicial system.

AFFIDAVIT

I, **Harry Sandlin Mattice, Jr.**, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

August 4, 2005
(DATE)

Harry Sandlin Mattice, Jr.
Harry Sandlin Mattice, Jr.

ROSALYN VOGEL NOTARY PUBLIC AT LARGE HAMILTON CO. TN

Rosalyn Vogel
(NOTARY)

Commission Expires: 10/17/07

Ms. Sweeney, you have had a lot of experience as a special master. How has that prepared you for this job on the Court of Claims?

STATEMENT OF MARGARET MARY SWEENEY, NOMINEE TO BE A JUDGE FOR THE COURT OF FEDERAL CLAIMS

Ms. SWEENEY. I have been very blessed to have the privilege to serve as a special master since 2003. It has made me very familiar with the inside operations of the court as well as the courtroom experience in vaccine litigation cases. Those cases are often very complex and involve very delicate issues. It isn't just the science that is terribly complex. We are dealing with families with sometimes very severely injured children or families whose child received a vaccine and died. And I think one has to bring a tremendous sensitivity to any type of litigation, but particularly to those types of cases.

We also hear petitions that involve injured adults as well, and when people have debilitating injuries and the Congress has set up a mechanism so that citizens have redress, one must look very carefully at those cases. And it has been my privilege to do that since 2003.

Of course, before that, I was with the Justice Department for about 16 years, and during that time the bulk of my practice was before the U.S. Court of Federal Claims. And so I became intimately familiar with the full rules of the court and had tremendous courtroom experience, which I brought with me to the Office of Special Master and has served me well.

And, of course, before that, I had the privilege of clerking for the former chief judge of court, who is here today, Mr. Chairman, Senior Judge Loren A. Smith. And not only was he my employer for 2 years, he was my former constitutional law professor. And I think I learned even more about the Constitution and the rule of law as the chief judge's law clerk than I did as his student. He is a tremendous individual, and it was a tremendous blessing, and everything that he taught me from his example with being completely prepared before you go into a courtroom, right to how you treat litigants and witnesses, has served me well over the years.

Senator HATCH. Thank you.

Ms. SWEENEY. Thank you.

[The biographical information of Ms. Sweeney follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Margaret Mary Sweeney
Margaret Sweeney Riegel (Former married name only used socially.)

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

Residence: Alexandria, VA

Office: United States Court of Federal Claims
Office of Special Masters
1440 New York Avenue, N.W., Suite 200
Washington, D.C. 20005

3. Date and place of birth.

June 14, 1955
Baltimore, MD

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

Divorced.

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

College of Notre Dame of Maryland
September 1973-May 1977
B.A. Awarded May 1977

Widener University
August 1977-August 1978 (business and mathematics courses)

Delaware Law School of Widener University
August 1978-May 1981
J.D. awarded May 1981

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

1977-1980: Strawbridge and Clothier - Sales Associate
1980-1981: Gordin and Cimino - Law Clerk; Associate Attorney
1981-1983: Family Court of Delaware - Master
1983-1985: Fedorko, Gilbert and Lanctot - Associate Attorney
1985-1987: United States Court of Federal Claims - Law Clerk
1987-2003: United States Department of Justice Trial Attorney; Attorney Advisor
2003-Present: United States Court of Federal Claims - Special Master

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.

None.

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.

United States Court of Federal Claims Bar Association:
1987-2000: Member of bar association
1990-1997: Secretary of bar association
1998: President-Elect of bar association
1999: President of bar association

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 belong to no organization which is active in lobbying before public bodies.

I am a member of three organizations: the Federalist Society, the John Carroll Society, and St. Thomas More Society.

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.

1981: Supreme Court of Pennsylvania
1985: United States Court of Federal Claims.
1987: District of Columbia There was a lapse in my District of Columbia Bar membership. I was unaware that my then-inactive membership lapsed in 1990 for failure to pay bar dues. I (erroneously) believed that by assuming inactive status, I was not required to pay bar dues. When I discovered my error in 1999, I immediately filed the necessary papers to reinstate my membership and have been current, active member since that date (reinstatement date was sometime February 1999). At the time my District of Columbia bar membership had lapsed, my Pennsylvania bar membership (active status) was current. There have been no lapses in either membership since; however, in 2001, I changed to active status in the District of Columbia bar and elected to take inactive status in Pennsylvania.

At all times while I have practiced law, I have held at least one current, active bar membership.

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 excellent. My last physical was on March 28, 2005.

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

I have never been a judge; however, I was a Delaware Family Court Master and am currently a Special Master of the United States Court of Federal Claims.

1982-1983 (appointed): Delaware Family Court Master
The Family Court of Delaware adjudicates all aspect of family law including, inter alia, separation, divorce, child and spousal support, and equitable distribution.

2003 to Present (appointed): Special Master, United States Court of Federal Claims. The Office of Special Masters adjudicates (i.e., enters final decisions appealable to the Court of Federal Claims) cases arising under the National Childhood Vaccine Injury Act.

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

I am not a judge; however, as a special master, I issue decisions appealable to the United States Court of Federal Claims.

1. Denis J. Troia and Caroline R. Troia v. Secretary of HHS, No. 03-1890V, issued April 30, 2004

2. Sue Good, Representative of the Estate of James C. Davis v. Secretary of HHS, No. 99-32V, issued March 2, 2005

3. Thomas Miller and Kiesha Miller on behalf of their minor son, Isaiah Miller v. Secretary of HHS, No. 04-122V, issued July 26, 2004

4. Molly O'Keefe, by her Mother and Next Friend, Jessie O'Keefe v. Secretary of HHS, No. 03-205V, issued June 28, 2004

5. Elizabeth Rodrigues, as Parent of and Legal Representative of the Estate of, Tyler Felix, Deceased v. Secretary of HHS, No. 03-481V, issued March 24, 2004

6. Dorothy Marue, and Michael Marue, as legal representatives of Paul Marue v. Secretary of HHS, No. 02-1471V, issued January 23, 2004

7. Brian R. Wayda, on behalf of Jacob Patrick Wayda v. Secretary of HHS, No. 01-646V, issued November 4, 2003

8. Gene Velchek v. Secretary of HHS, No. 02-1479V, issued March 30, 2005

9. Sharon Bubb v. Secretary of HHS, No. 01-721V, issued April 29, 2005

10. Esme Johnston Baglio and Michael Baglio, as Legal Representatives of Eva Marie Baglio v. Secretary of HHS, No. 03-1803V, issued June 3, 2005

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.

N/A

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;

* June 1981-December 1982: Law Clerk to the Honorable Robert D. Thompson, Chief Judge, Family Court of Delaware.

* November 1985-September 1987: Law Clerk to the Honorable Loren A. Smith, Chief Judge, United States Court of Federal Claims.

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

N/A

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;

* 1980-1981: Gordin and Cimino: Law Clerk; Associate Attorney, Samson Street, Philadelphia, Pennsylvania.

* May 1983-September 1987: Associate Attorney, Fedorko, Gilbert, and Lanctot, West Trenton Avenue, Morrisville, Pennsylvania.

* September 1987-May 1999: Trial Attorney, United States Department of Justice, Environment Division, [then-named] General Litigation Section.
* May 1999-March 2003: Attorney Advisor, United States Department of Justice, Office of Intelligence Policy and Review.

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?

1980-1981: Law Clerk (while in law school) and Associate Attorney, Gordin and Cimino.
Upon graduation from law school, I continued working for the law firm I clerked for during law school. The law firm, which was located in Philadelphia, PA, dissolved in 1982 around the time of Mr. Gordin's death. As a law clerk and associate attorney in a general practice law firm, I research and prepared memoranda of law concerning contract, domestic relations, tort, and criminal matters. In addition, I also prepared witnesses for depositions, wrote dispositive motions and post trial briefs.

June 1981-December 1982: Law Clerk to the Honorable Robert D. Thompson, Chief Judge, Family Court of Delaware.
As the law clerk to the Chief Judge of the Delaware Family Court, I prepared bench memoranda concerning all aspects of Delaware domestic relations law.

December 1982-May 1983: Master, Family Court of Delaware.
As a Family Court Master I heard cases and issued decisions concerning spousal support, child custody, and equitable distributions. In addition, I conducted bail hearings for criminal cases involving domestic issues.

May 1983-November 1985: Associate Attorney, Fedorko, Gilbert and Lanctot. As an associate for this general practice law firm, I handled real estate transactions, domestic relations, contract, and tort cases.

November 1985-September 1987: Law Clerk to the Honorable Loren A. Smith, Chief Judge, United States Court of Federal Claims. I researched and prepared bench memoranda for the Chief Judge regarding government contracts, civilian and military pay, tax, intellectual property, Indian, and Fifth Amendment takings cases; drafted memoranda, orders, and opinions, and assisted the Chief Judge during hearings and trials.

September 1987-May 1999: Trial Attorney, United States Department of Justice, Environment Division. In this capacity, I personally handled complex civil litigation in Federal Courts, including case preparation, discovery and summary judgment motions, and trials. During this period, I had extensive interaction with numerous federal agency employees and private sector experts in preparing expert witness affidavits and trial testimony. As one of my component's ethics officer's I advised colleagues regarding ethics issues which arose in their cases.

May 1999-March 2003: Attorney Advisor, Department of Justice, Office of Intelligence Policy and Review. I prepared applications on behalf of various United States intelligence agencies for approval by the Foreign Intelligence Surveillance Court for electronic surveillance and/or physical search of individuals within the United States who: (1) engage in clandestine intelligence-gathering activities in the Untied States on behalf of a foreign power, or (2) commit, conspire with other, or aid and abets others, who engage in acts of international terrorism.

March 2003-Present: Special Master, Office of Special Masters, United States Court of Federal Claims. Mediate and adjudicate complex vaccine cases arising under the National Childhood Vaccine Injury Compensation Act. Conduct status conferences as well as Dalbert, onset and merits hearings. Issue subpoenas, interim orders, and final decisions. All final decisions are appealable to the United States Court of Federal Claims.

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

While in private practice, my former clients were individuals or businesses with domestic relations, contract, or tort problems.

While serving as a trial attorney in the Environment Division, Department of Justice, my clients included various executive branch agencies (for e.g., the United States Department of the Interior, the United States Navy, the United States Corps of Engineers, the United States Department of Energy, and the Department of Agriculture) sued for money damages in the United States Court of Federal

Claims, or sued for money damages or injunctive relief in Federal District Court.

While serving as an attorney advisor in the Office of Intelligence Policy and Review, United States Department of Justice, my clients included various United States intelligence agencies for whom I obtained court-authorized orders for electronic surveillance of suspected spies and terrorist as well as warrants for physical search.

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 I served as a trial attorney for the Environment Division of the Department of Justice, I made frequent court appearances perhaps one appearance per week. In all of those cases, I was the attorney of record.

While I served as an attorney advisor for the office of Intelligence Policy and Review of the Department of Justice, I made frequent court appearances, usually several times per week. In the vast majority of those cases, I was the attorney of record. However, I handled cases for colleagues who were unable to appear for health reasons.

While I was in private practice, I appeared in court several times a month as attorney of record.

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

While I was in private practice, ninety percent (90%) of my practice was in Pennsylvania State Court and ten percent (10%) was in federal district court.

While I worked for the United States Department of Justice, one hundred percent (100%) of my practice was in Federal Court.

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.

To the best of my recollection, I handled over 40 cases to verdict or judgment.

5. What percentage of these trials was:
   (a) jury;
   None.

   (b) non-jury.
   One Hundred percent (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:

1. **Banner v. United States**, 38 Fed Cl. 700 (1997), aff'd, 238 F.3d 1348 (Fed. Cir. 2001)
Capsule Summary: The plaintiffs argued that the enactment of a federal statute, the Seneca Nation Land Claims Settlement Act of 1990, 25 U.S.C. §§ 1774 et. seq. (1994 & Supp. IV 2000) constituted a taking of certain property interests in violation the Fifth Amendment. The Court of Federal Claims dismissed appellants' claims on cross-motions for summary judgment.
Party Represented: United States (United States Department of the Interior ("DOI"), Bureau of Indian Affairs (BIA)
Nature of Participation: I handled all aspects of case development, including, discovery, brief writing, and oral argument.
Final Disposition: United States Court of Appeals for the Federal Circuit ("CAFC") affirmed Judge Tidwell's decision.
Date of Representation: 1996-1999
Court: United States Court of Federal Claims
Judge: Hon. Moody R. Tidwell, III
Co-Counsel: David Moran, Esq. (DOI, BIA)
United States Dept. Of the Interior
18th & C Streets, NW
Washington, DC
202-208-3358
Opposing Counsel: Jennifer Coleman, Esquire,
1812 Liberty Bldg.
Buffalo, NY 14202
716-852-2213

2. **Chevron USA, Inc. v. United States**, 17 Cl. Ct. 537 (1989), reversed, 923 F.2d 830 (Fed.Cir. 1991), on remand 27 Cl.Ct. 703 (1991).

Capsule Summary: Thirteen (13) oil and gas corporations sued the United States claiming a breach of contract or in the alternative a 5th Amendment taking as a result of the United States Department of the Interior's (DOI's) denial of refund requests for overpayment of royalties on certain oil and gas leases on federal land. DOI denied the refund requests because the companies failed to file within 2-year period required by the statute. Plaintiffs argued that they had no way of knowing that they were entitled to a refund until a ruling by the DC Court of Appeals confirmed that refunds were, in fact, owed. Although the trial judge found in favor of plaintiffs, the Federal Circuit reversed. In its ruling, the circuit agreed with the United States that the unambiguous terms of the statute required that refund requests must be made within two years specified by the statute and that equitable tolling was not appropriate.

Party Represented: DOI, Mineral Management Service ("MMS")

Nature of Participation: I handled all aspects of case development, including, discovery, brief writing, and oral argument.

Final Disposition: Circuit reversed lower court's adverse ruling and agreed with the reasoning presented by the United States to the trial and appellate courts.

Date of Representation: 1987-1991

Court: United States Court of Federal Claims

Judge: Hon. Moody R. Tidwell, III

Co-Counsel: N/A Agency Counsel:
Howard W. Chalker, Esq,
DOI, 18th & C Streets, NW,
Washington, DC
202-208-2394

Opposing Counsel: Barry St. John, Esq.,
Liskow & Lewis, 50th Floor
One Shell Square
New Orleans, LA 70139
504-581-7979

3. **State of Alaska v. United States**, 35 Fed. Cl. 685, aff'd, 119 F.3d 16 (Fed Cir 1998), cert denied, 522 U.S. 1108 (1998)

Capsule Summary: State of Alaska alleged breach of contract and Fifth Amendment taking as a result of DOI's deducting certain administrative fees from Alaska's 90% share of oil and gas revenues from federal lands in Alaska. Plaintiff argued that the imposition of administrative fees as well as the federal governments failure to increase oil and gas production in Alaska, and, consequently, revenues to Alaska, both breached of the Statehood Act and resulted in a taking of Alaska's property. Judge Bruggink denied all claims.

Party Represented: DOI, MMS

Nature of Participation: I handled all aspects of case development, including, discovery, brief writing, and oral argument.

Final Disposition: Federal Circuit affirmed trial judge's favorable ruling on the government's motion for summary judgment. The United States Supreme Court denied the State's Writ of Certiorari

Date of Representation: 1993-1997

Court: United States Court of Federal Claims

Judge: Eric G. Bruggink

Co-Counsel: Bruce M. Landon
United States Department of Justice, Anchorage, Alaska Field Office
801 B Street, Suite 504
Anchorage, Alaska 99501
907-271-5452

Opposing Counsel: Harold M. Brown, Esquire
Heller, Ehrman, White and McAuliffe
550 W. 7th Avenue
Suite 1900
Anchorage, AL
907-277-1900

4. **Poorbaugh v. United States**, 27 Fed.Cl. 628 (1993)

Capsule Summary: The owner of tract of land in a national forest sued the United States alleged both negligence and a Fifth Amendment taking of his property by certain actions of the Forest Service. Plaintiff alleged that the Forest Service's: (1) erroneous inclusion of plaintiff's tract on Forest service map (indicating that plaintiff's land was public, not privately held) constituted a taking of his property; (2) incorrectly marked maps allowed third parties to trespassed on his private property which constituted both negligence and a taking; (3) cut of trees belonging to plaintiff when building a fence constituted a taking of his property; (4) denying plaintiff access to his property for short periods of time during (rare) periods of road improvement by the Forest Service, constituted a taking of his property. Judge Tidwell agreed with the United States that plaintiffs claims of negligence (conversion and trespass) sounded in tort and were beyond the court's subject matter jurisdiction. The court also found that the agency road repair activities, which inconvenienced petitioner for very on extremely rare occasions and for only brief periods, did not rise to the level of a taking.

Party Represented: United States Department of Agriculture, Forest Service

Nature of Participation: I handled all aspects of case development, including, discovery, brief writing, and oral argument.

Final Disposition: Summary judgment granted in favor of the United States on takings claims and tort claims transferred to federal district court.
Date of Representation: 1991-1993
Court: United States Court of Federal Claims
Judge: Hon. Moody R. Tidwell, III
Co-Counsel: None
Opposing Counsel: Martin E. Threet, Esq.
6605 Uptown Boulevard NE
Albuquerque, NM 87110
505-881-5155

5. **Jewett v. United States**, No. 92-759L
Capsule Summary: This breach of contract case was based upon a real estate lease with an option to purchase entered into between plaintiff and the Farmers Home Administration (FmHA) of the Department of Agriculture. The damages claimed were for the alleged loss of payments related to the placement of land in the Conservation Reserve Program (CRP) of the Agricultural Stabilization and the Conservation Service (ASCS)/Commodity Credit Corporation (CCC). Plaintiff claimed entitlement payments from ASCS even though he was not eligible under the pertinent regulation.
Party Represented: United States Department of Agriculture
Nature of Participation: I handled all aspects of case development, including, discovery, brief writing, and oral argument.
Final Disposition: Defendant's motion for summary judgment granted. The court held that the CRP contract breached by plaintiff deprived the of a basis to its exercise jurisdiction. Plaintiff was unable to demonstrate a contractual basis either express or implied for the court's exercise of jurisdiction.
Date of Representation: 1992-1996
Court: United States Court of Federal Claims
Judge: Hon. Eric G. Bruggink
Co-Counsel: None, Agency Counsel: Priscilla L. Porter
Opposing Counsel:
Michael W. Strain, Esq.
850 Main Street (P.O. Box 729)
Sturgis, South Dakota 57785-0729
605-347-3624

6. **Arco v. Lujan**, 89-C-892, (N.D.OK)
Capsule Summary: Arco filed a complaint seeking declaratory and injunctive relieve of a Mineral Management Service's (MMS) order to Arco advising that additional royalties were owed because in MMS' view, Arco used incorrect accounting procedures when calculating the royalties that it owed to the federal government. The company challenged MMS's interpretation of its regulations.
Party Represented: MMS/DOI

Nature of Participation: I handled all aspects of case development, including, discovery, brief writing, oral argument, and settlement negotiations.
Final Disposition: We achieved a global settlement of all issued raised in this ligation as well as the identical issues raised by Arco and other oil and gas companies in related litigation.
Date of Representation: 1989-1993.
Court: United States District Court for the Northern District of Oklahoma
Judge: Hon. Thomas J. Brett
Co-Counsel: N/A
Agency Counsel:
Howard W. Chalker, Esq,
DOI, 18th & C Streets, NW,
Washington, DC
202-208-2394
Opposing Counsel: Barry St. John, Esq.,
Liskow & Lewis, 50th Floor
One Shell Square
New Orleans, LA 70139
504-581-7979

7. **Conoco v. United States**, No. 643-89L,
Capsule Summary: The case involved a challenge by Conoco to an order by the Mineral Management Service ("MMS") assessing additional royalties on natural liquid gas products produced from offshore Federal oil and gas leases. Also at issue were late payment charges assessed against the company because of the late payment of royalties.
Party Represented: MMS/DOI
Nature of Participation: I handled all aspects of case development, including, discovery, brief writing, and oral argument and settlement negotiations.
Final Disposition: Case settled. Conoco dismissed that case along with other related cases pending in other federal district courts. Conoco did not receive a refund of any of the disputed royalties.
Date of Representation:1989-1992
Court: United States Court of Federal Claims
Judge: Hon. Moody R. Tidwell, III
Co-Counsel: N/A Agency Counsel:
Howard W. Chalker, Esq,
DOI, 18th & C Streets, NW,
Washington, DC
202-208-2394

Opposing Counsel: Barry St. John, Esq.,
Liskow & Lewis, 50th Floor
One Shell Square
New Orleans, LA 70139
504-581-7979

8. **Speerex et al., v. United States**, 97-351 L
Capsule Summary: Plaintiffs sued the United States claiming a breach of contract and a Fifth Amendment Taking (oil/gas leases) as a result of the Bureau of Land Management's (BLM's) failure or inability to process applications for permission to drill (APDs) for a specific period. Plaintiffs' also claimed that the mere designation of the location of plaintiffs' leases as within a wilderness area resulted in a constitutional taking.
Party Represented: BLM/DOI
Nature of Participation: I handled all aspects of case development, including, discovery, brief writing, and oral argument.
Final Disposition; Case settled for small amount of attorney fees.
Date of Representation:
Court: United States Court of Federal Claims
Judge: Hon. Roger B. Anderwelt
Co-Counsel: N/A Agency Counsel:
M. Dennis Daugherty, Esq,
DOI, 18th & C Streets, NW,
Washington, DC
202-208-5038

Opposing Counsel: James M. Hudson, Esq.
HINKLE, COX, EATON, COFFIELD & HENSLEY
P.O. Box 10
Roswell, New Mexico 88202
505-622-6510

9. **Sims et al., v. United States**, 647-88L
Capsule Summary: Plaintiffs alleged a Fifth Amendment taking of their property as a result of the State of Mississippi's denial of its 401 permit to develop their wetlands. In defendant's pre-trial brief, we demonstrated that plaintiffs' property was so swampy that they could not obtain the necessary septic tank sewage disposal permit from the MS Department of Health for their proposed development plan (a light industrial park); that plaintiffs' development scheme was denied by Harrison County several days prior to their filing an application for a joint 404/401 permit; and, as a consequence of plaintiffs' actual knowledge that the property could not be developed as they proposed for health reasons, plaintiffs lacked reasonable investment-backed expectations.
Party Represented: United States Army Corps of Engineers
Nature of Participation: I handled all aspects of case development, including, discovery, brief writing, oral argument, and settlement.

Final Disposition: Plaintiffs agreed to dismiss their case with prejudice the day before trial. No fees or costs were paid to plaintiffs.
Date of Representation: 1988-1992
Court: United States Court of Federal Claims
Judge: Hon. Bohdan A. Futey
Co-Counsel: N/A Agency Counsel: Calon E. Blackburn, Jr., Esq.
Assistant District Counsel
Department of the Army
Mobile District, Corps of Engineers
P. O. Box 2288
Mobile, Alabama 36628-0001
Opposing Counsel: Jess H. Dickinson (formerly Gulfport, MS)
Mr. Dickinson is now a Mississippi Supreme Court Justice (as of January 2004)
Mississippi Supreme Court
Gartin Justice Building
450 High Street
Jackson, MS 39201
601-359-3694 (Clerk of Court)

10. **Spigner v. U,S.**, 96-24L
Capsule Summary: Land owners of tracts adjacent a river sued the United States claiming a taking of their property as a direct result of the Corps' dredging activities and its operation of a lock and dam.
Party Represented: United States Army Corps of Engineers
Nature of Participation: I handled all aspects of case development, including, discovery, brief writing, oral argument, and settlement.
Final Disposition: Prior to my leaving the General Litigation Section, five of the six plaintiffs dismissed their complaints with prejudice. No costs or fees paid.
Date of Representation: 1996-1999
Court: United States Court of Federal Claims
Judge: Hon. John P. Wiese
Co-Counsel: N/A Agency Counsel: Calon E. Blackburn, Jr., Esq.
Assistant District Counsel
Department of the Army
Mobile District, Corps of Engineers
P. O. Box 2288
Mobile, Alabama 36628-0001
Opposing Counsel: David Chandler, Esq.
Jim Waide, Esq.
P. O. Box 1357
Tupelo, Mississippi 38802
601-842-7324

(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.

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.)

From my personal perspective, the most significant cases were those assigned to me while I was an attorney advisor for the Office of Intelligence Policy and Review of the United States Department of Justice. All of these matters are classified, at a minimum, at the secret level, and therefore, I cannot provide more details.

In addition, I handled a number of Fifth Amendment taking cases in the United States Court of Federal Claims which alleged, inter alia, that the Navy's training exercises took plaintiffs' property without just compensation. These are known as overflight takings cases. We were able to settle these case both to the benefit of the land owners and the Navy. My Navy agency counsel in those cases was: Stephen A. Banks, Esq.,United States Dept. of the Navy, 202-685-6786 [Ext.502].

I also litigated a number of wetlands takings cases, which similarly a successful outcome for all the litigants. My agency counsel was William A. Baxter, Esq., United States Army Corps of Engineers, Jacksonville District, Jacksonville, FL. Mr. Baxter died on March 28, 2005. However, one of his D.C. supervisors can discuss my involvement in Corps' cases: Martin Cohen, Office of Counsel, 20 Massachusetts Avenue, N.W., Washington, D.C. 20314-1000, 202-761-8545.

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.

   Potential conflicts-of-interest during my initial service might be any of my decisions which go on appeal to the United States Court of Federal Claims or those vaccine cases of other special masters which were discussed with me. The only other potential area of conflict would be if I was assigned a case in which the plaintiff is a corporation in which I own stock. In any of the aforementioned situations, I would follow the Code of Conduct for United States Judges and applicable statutes.

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 statement.

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

   See attached net worth statement.

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

   I was an unpaid volunteer for President Reagan in the 1980 and 1984 campaigns. I stuffed envelopes and work on a phone bank. All calls were just prior to each election and encouraged registered voters to go to the polls.

AO-10 Rev. 1/2004	**FINANCIAL DISCLOSURE REPORT** **NOMINATION FILING**	**Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)**

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Sweeney, Margaret M	U.S. Court of Federal Claims	6-15-05
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) Judge--Nominee	5. ReportType (check appropriate type) (•) Nomination, Date 6-14-05 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/2004 to 6/8/2005
7. Chambers or Office Address 1440 New York Avenue, N.W. Suite 200 Washington, D.C. 20005	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer_____ Date_____	

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

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

☑ NONE - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1.		
2.		

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

☑ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Sweeney, Margaret M	6-15-05

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

A. Filer's Non-Investment Income

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

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.			

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

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

	DATE	SOURCE AND TYPE
1.		

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

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

☐ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	Exempt	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Sweeney, Margaret M	6-15-05

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

☐ NONE - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		
2.			
3.			

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

☑ NONE - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.			

FINANCIAL DISCLOSURE REPORT
Page 1 of 1

Name of Person Reporting	Date of Report
Sweeney, Margaret M	6-15-05

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

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
1. Dept. of Justice Federal Credit Union Money Markert	A	Interest	J	T	Exempt				
2. Wachovia Bank Money Market	A	Dividends	J	T					
3. Cinergy Energy Corporation	A	Dividends	J	T					
4. Baltimore Gas & Electric	A	Dividends	J	T					
5. Intel Corp	A	Dividend	J	T					
6. EI DuPont De Nemours LTD	A	Dividend	J	T					
7. Reebok International LTD	A	Dividend	J	T					
8. Bank of America Corp	A	Dividend	J	T					
9. CISCO Systems	A	Dividend	J	T					
10. CITIGROUP, Inc.	A	Dividend	J	T					
11. Walt Disney Co.	A	Dividend	J	T					
12. Procter & Gamble Co.	A	Dividend	J	T					
13. Texas Instruments	A	Dividend	J	T					
14. Legg Mason Opportunity Trust	A	Interest	J	T					
15. Legg Mason Value Trust	A	Interest	J	T					
16. Virginia Power Corporation	A	Dividend	J	T					

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

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Sweeney, Margaret M	6/15/05

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

1. Re: Section III. Non-Investment Income. My United States government salary was my non-investment income during the reporting period.

2. Re: Section VII. Investments and Trusts. The following two stocks listed in this section, Cinergy Energy Corporation and Baltimore Gas and Electric Company, are owned jointly with my mother.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Sweeney, Margaret M	6/15/05

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 Margaret M. Sweeney Date 6/15/05

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

FINANCIAL STATEMENT

NET WORTH

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

ASSETS				LIABILITIES			
Cash on hand and in banks	6	000		Notes payable to banks-secured	48	000	
U.S. Government securities-add schedule	4	500		Notes payable to banks-unsecured			
Listed securities-add schedule	85	991		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: 2502 Appian Court Alexandria, VA 22306 Washington Mutual Home Loan Mort. Bal.	306	000	
Real estate owned-add schedule Personal residence	600	000		Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property owned-add schedule	232	000					
Cash value-life insurance							

Other assets itemize:	384	604					
Total Assets 1	**313**	**095**					
				Total liabilities:	**354**	**000**	
				Net Worth:	**959**	**095**	
CONTINGENT LIABILITIES:				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

SCHEDULES

I. ASSETS

1. Government Securities	
Savings Bonds:	$4,500
2. Listed Securities	$85,991
668 shares of Legg Mason Opportunity Trust: $9,786	
326 shares of Legg Mason Value Trust $20,460	
200 shares Bank of America Corp.: $9,330	
200 shares CISCO Systems, Inc.: $3,484	
200 shares Citigroup, Inc.: $9,544	
200 shares Walt Disney: $5,588	
100 shares Dupont.: $5,330	
200 shares Intel.: $4,796	
150 shares Procter & Gamble Co.: $7,963	
100 shares Reebok International, Ltd.: $4,416	
200 shares Texas Instruments, Inc.: $5,294.	
3. Unlisted Securities	
N/A	
4. Real Estate:	
Personal Residence:	$600,000
5. Value of Thrift Savings [Retirement] Plan as of June 2005:	$384,604
TOTAL ASSETS:	**$1,313,095**

II. LIABILITIES

Personal Residence	$306,000

III. GENERAL (PUBLIC)

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

I engage in volunteer activities at my daughter's school and for projects involving my daughter's Jr. Girl Scout Troop. All of these projects involve raising money for the homeless or disadvantaged children. The projects I participate in are walks for the homeless (held in the Fall), as well as collecting and donating school supplies for needy students during the year. I also collect and donate clothing, foods and gifts for needy families in my area. This activities run throughout the year. In addition to donating clothing, food and goods, I help assemble the gift boxes for needy families.

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

No.

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

I am unaware of any selection commission. I was asked by Chief Judge Edward J. Damich, of the United States Court of Federal Claims, if I was interested in serving as one of the judges on the court. He explained that if so, he would submit my name to the White House for consideration to fill a vacancy at the court. In response to a call from the White House, I was interviewed by an assistant counsel to

President Bush to confirm my desire to become a judge of the court.

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.

Judges should not disregard their Constitutionally prescribed roles by substituting their judgment for that of Congress. It is important that courts respect the separation of powers clearly established by the Constitution in order to preserve our freedoms, not the least of which is permitting citizens the right to govern themselves.

Judicial activism erodes one of our most fundamental doctrines; stare decisis, the doctrine of precedents. Its importance cannot be understated because judges, lawyers and litigants rely on well-established bodies of law to guide them not just through litigation but also in their day-to-day conduct of affairs. Lawyers often counsel businesses concerning their day-to-day operations and if the laws are in a constant state of flux, companies can run afoul of statutes of regulations despite good faith compliance efforts. Therefore consistency and fidelity to the law is essential to allowing society to properly function. The outcome of a case should not be determined by judicial caprice; cases must turn on the operative facts and controlling body of law. By disregarding core legal principles derived from the Constitution and statutes (whether state or federal), the law lacks coherence and predictability. Given the litigious nature of society, the stability of the legal process is critical to allowing citizens to exercise their freedom with confidence. At bottom, the doctrine's purpose to provide a consistent level of quality and reasoning in the law enhances our individual freedoms. In addition, by requiring judges to meet certain conscientious standards, the quality of law and judicial functions are enhanced. If a judge who has sworn to uphold the law fails to respect it, society at large may well disregard it was well.

AFFIDAVIT

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

July 5, 2005
(DATE)

Margaret M. Sweeney
MARGARET M. SWEENEY

Keisha Monroe
(NOTARY)

DISTRICT OF COLUMBIA: SS
Subscribed and Sworn to before me, in my presence,
this 5th Day of July, 2005
Keisha Monroe
Keisha Monroe Notary Public, D.C.
My Commission Expires 5/14/2009

Senator HATCH. I appreciate it.

Mr. Wheeler, you have been representing the Global Fund on a pro bono basis, and I want to commend you for that. Please explain how you got involved with the Global Fund and tell us just a little bit about it.

STATEMENT OF THOMAS CRAIG WHEELER, NOMINEE TO BE A JUDGE FOR THE COURT OF FEDERAL CLAIMS

Mr. WHEELER. Thank you, Senator. I would be happy to tell you a little bit about my work for the Global Fund, which has probably been one of the most satisfying and enjoyable projects that I have worked on in my 30-plus years of legal work.

The Global Fund to Fight AIDS, Malaria, and Tuberculosis is based in Geneva, Switzerland, and since January of this year, I have headed a team of six or seven lawyers from our firm in assisting the Global Fund in setting up an Office of Inspector General for all of their operations. It is about a $6 billion a year organization that issues in-country grants to basically Third World developing countries around the world who are afflicted with these diseases. And in the course of this representation, not only have I traveled to Geneva, Switzerland, which has been something that I haven't always done in the world of Government contracts, but I also had a tremendously rewarding trip to Kenya, where I saw on the ground, first person, the work of the Global Fund in trying to tackle some of these horrific diseases.

So that is basically what I have done for the Global Fund.

[The biographical information of Mr. Wheeler follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

A. Thomas Craig Wheeler.

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

A. (Residence) Darnestown, Maryland.

(Office) DLA Piper Rudnick Gray Cary US LLP, 1200 Nineteenth Street, N.W., Washington, DC 20036.

3. Date and place of birth.

A. March 18, 1948, Chicago, IL.

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

A. I am married to the former Janet Eileen Ritter, now Janet R. Wheeler. She is employed as a Guidance Office Assistant & Sports Scoreboard Operator at Quince Orchard High School, 15800 Quince Orchard Road, Gaithersburg, MD 20878.

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

A. Gettysburg College, Gettysburg, PA, September 1966 – May 1970. I received a Bachelor of Arts Degree (Political Science Major) in June 1970.

Georgetown University Law Center, Washington, DC, August 1970 – May 1973. I received a Juris Doctor Degree in June 1973.

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. Sellers, Conner & Cuneo, Washington, DC, (1971–1974).

Pettit & Martin, Washington, DC, (1974-1995).

Piper Marbury LLP, Washington, DC, (1995-1999).

Piper Marbury Rudnick & Wolfe, LLP, Washington, DC, (2000-2001).

Piper Rudnick LLP, Washington, DC, (2002-2004).

DLA Piper Rudnick Gray Cary US LLP, Washington, DC, (2005-Present).

Note: Each of the "Piper" designations above is the same law firm. Name changes have occurred following mergers with other firms.

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. I have not previously served in the military.

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

A. I have not previously received any of the referenced honors or awards.

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. American Bar Association, Public Contracts Section, Litigation Section. I am active in the Bid Protest Subcommittee of the Public Contracts Section.

District of Columbia Bar Association.

Board of Contract Appeals Bar Association.

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. Since January 2005, I have been representing The Global Fund to Fight AIDS, Malaria & Tuberculosis, based in Geneva, Switzerland. I am aware that the Global Fund engages in some lobbying activities, but I am not involved in those activities.

Other organizations to which I belong are:

Darnestown Presbyterian Church (Clerk of Session).

National Defense Industrial Association. I am active in the Legal Subcommittee of the Procurement Planning Committee.

Penn State Nittany Lion 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.

A. I was admitted to the District of Columbia Bar on December 7, 1973.

I am also admitted to practice in the following courts, with the year of admission indicated:

Supreme Court of the United States (1978);
U.S. Court of Appeals for the District of Columbia Circuit (1976);
U.S. Court of Appeals for the Fourth Circuit (1982);
U.S. Court of Appeals for the Federal Circuit (1982);
U.S. Court of Appeals for the Tenth Circuit (1983);
U.S. Claims Court (now U.S. Court of Federal Claims) (1982); and
U.S. District Court for the District of Columbia (1975).

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. I have authored the following articles, four copies of which are enclosed:

"Teaming Agreements – Are We Married, or Just Dating?" Piper Rudnick Client Alert (January 2003);

"The Availability of Sanctions in Government Contracts Litigation," 29 Public Contract Law Journal 569 (Summer 2000);

"Let's Make the Choice of Forum Meaningful," 28 Public Contract Law Journal 655 (Summer 1999) (Special 20th Anniversary Issue on the Contract Disputes Act);

"Noteworthy Changes in Socio-Economic Regulations," Piper & Marbury Government Contracts Law Bulletin (March 1999);

"ASBCA Embraces Standard Order on Proof of Costs," Piper & Marbury Government Contracts Law Bulletin (June 1995);

"The Equal Access to Justice Act: The American Rule Revisited," 15 Public Contract Law Journal 60 (August 1984);

"The Government's Right of Set-Off – A Potent Weapon in Need of Reform," 12 Public Contract Law Journal 67 (May 1981);

"A Government Contractor's Right to Abandon Performance," 65 Georgetown Law Journal 27 (1976).

I have not made any speeches involving constitutional law or legal policy.

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

A. I am in excellent health. My most recent physical examination was on March 24, 2005.

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

A. I have not previously held a judicial office.

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

A. Not applicable.

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.

A. None. I have not run previously for an 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;

A. I have not previously served as a clerk to a judge.

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

A. I have not previously 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. For the past 32 years (1973 – present), I have been in private practice in Washington, DC, specializing in Government Contracts claims, litigation and counseling. I started with the firm of Sellers, Conner & Cuneo in 1973, the firm I had clerked with for two years while at Georgetown Law School. This

firm was a leader in the Government Contracts field, consisting of about 20 lawyers at that time. In April 1974, I accepted an opportunity to open the Washington office of Pettit & Martin, a San Francisco based firm, with five of my colleagues from Sellers, Conner & Cuneo. I was the most junior of our six lawyers, but this setting provided me with immediate trial training and responsibility, which I probably would not have experienced at a larger office or practice. I became a partner at Pettit & Martin on January 1, 1980.

In 1995, Pettit & Martin dissolved its partnership, and the Government Contracts group of that firm moved to Piper Marbury LLP. I continued to practice with the same lawyers as previously, handling claims and trials in the field of Government Contracts. I have remained with that firm as a partner to the present, but the firm has grown dramatically due to mergers with other firms. In late 1999, Piper & Marbury merged with Chicago's Rudnick & Wolfe to become Piper Marbury Rudnick & Wolfe LLP. In 2002, this firm shortened its name to Piper Rudnick LLP. In late 2004, Piper Rudnick merged with Gray Cary Ware & Freidenrich, a California firm, and with DLA, a United Kingdom firm, to become DLA Piper Rudnick Gray Cary LLP. Currently, this firm has approximately 2,800 lawyers in 50 cities throughout the world.

The offices and addresses of the firms where I have worked are as follows:

Sellers, Conner & Cuneo, 1625 K Street, N.W., Washington, DC 20006 (1971-1974).

Pettit & Martin, 1828 L Street, N.W., Washington, DC 20036; 1800 Massachusetts Avenue, N.W., Washington, DC 20036; 601 13th Street, N.W., Washington, DC 20005 (1974-1995).

Piper & Marbury LLP, 1200 Nineteenth Street, N.W., Washington, DC 20036; also at same address, Piper Marbury Rudnick & Wolfe LLP, Piper Rudnick LLP, and DLA Piper Rudnick Gray Cary US LLP (1995-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?

A. I have tried many cases over the years at the U.S. Court of Federal Claims, the Armed Services Board of Contract Appeals, in various Federal District Courts, and at other administrative boards (e.g., the General Services Board of Contract Appeals, the Veterans Administration Board of Contract Appeals, and the Interior Board of Contract Appeals). I have tried or settled approximately 40 complex cases involving military aircraft, military base housing, nuclear and coal-fired power plants, rail and subway cars, transit buses, shipbuilding, health care, air traffic control, and telecommunications, among others. I have participated in many bid protests at the Government Accountability Office (GAO), and the U.S. Court of Federal Claims. I have handled a number of matters under the Freedom of Information Act in Federal Courts, and administratively before various agencies. I am experienced in mediation and other ADR techniques, and have resolved cases successfully without trial. On average, about 60-70 percent of my practice has involved claims or litigation.

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

A. Some of my more significant clients in recent years have included: Harris Corporation, Goodrich Corporation (and its predecessor, Rohr, Inc.), Sierra Military Health Services, MCI WorldCom, PricewaterhouseCoopers, Belleville Shoe Manufacturing Company, Amtrak, and American Water Services. I performed Government Contracts legal work for each of these clients.

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. I have appeared in court and before administrative tribunals on a regular basis throughout my legal career.

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

A. Nearly all of my appearances were before federal courts or federal administrative tribunals. I have appeared only in a small number of state court matters (less than five).

3. What percentage of your litigation was:
(a) civil;
(b) criminal.

A. All of my litigation experience is civil. I have no criminal litigation experience.

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.

A. I have tried to verdict (1) or judgment (24) approximately 25 cases before federal courts or administrative tribunals. I was sole or lead counsel in approximately 20 of these cases. I was associate counsel in five cases.

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

A. All of my trials (except for my first trial in 1975) have been non-jury, because jury trials are not permitted in claims against the Government.

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.

A. I regard the following cases as my ten most significant litigated matters (listed in chronological order, with the most recent first):

1. MCI WorldCom Communications, Inc. v. Social Security Administration, GSBCA No. 16169-SSA, 04-2 BCA ¶ 32,689. In 2003-2004, I represented MCI WorldCom in a $30 million contract interpretation dispute with the Social Security Administration (SSA). The contract required MCI to provide toll-free call-in services from the public to the SSA's 38 national call centers. The dispute concerned the method to be used in calculating the monthly price for recurring services under the contract. The General Services Administration Board of Contract Appeals granted summary judgment in favor of MCI in a published 2004 decision. The parties then settled the damages portion of the case for payment to MCI of nearly the entire amount claimed. Judge Edwin B. Neill of the GSBCA presided over this matter. Other counsel were:

SSA Counsel:	My Co-counsel:
Seth Binstock	Eliza P. Nagle
6401 Security Blvd., Room 617	DLA Piper Rudnick Gray Cary US LLP
Altmeyer Building,	1200 Nineteenth Street, N.W.
Baltimore, MD 21235	Washington, DC 20036
(410) 965-3162	(202) 861-3919

2. Sierra Military Health Services, Inc. v. United States, 58 Fed. Cl. 573 (2003). In 2003, I headed a team of lawyers representing Sierra Military Health Services in a bid protest involving the $32 billion Defense Department TRICARE Next Generation (T-NEX) acquisition of health care services for enlisted military persons and their dependents. The Government Accountability Office (GAO) decided the merits of the bid protest, but we brought a procedural issue to the U.S. Court of Federal Claims – whether the agency, TRICARE, could override the Competition in Contracting Act's (CICA's) automatic stay of performance when a disappointed offeror files a timely bid protest. The case raised the questions of whether the Court had jurisdiction of agency override actions, and if so, what was the legal standard for the Court's review? The Court ruled against our client, Sierra, and held that the agency override was proper under the facts presented. The decision is significant in establishing the scope of the Court's review in bid protests where the agency has overridden CICA's automatic stay of performance. Senior Judge James F. Merow heard and decided this case for the Court. Other counsel were:

Counsel for United States:
Kenneth Kessler
Department of Justice, Civil Division
Commercial Litigation Branch
1100 L Street, N.W., Room 7026
Washington, DC 20005
(202) 307-0313

My Co-counsel:
Paul F. Khoury, (202) 719-7346
Dorthula Powell-Woodson, (202) 719-7150
Wiley, Rein & Fielding LLP
1776 K Street, N.W.
Washington, DC 20006

My Co-counsel:
Kevin P. Mullen, (202) 861-6414
Eliza P. Nagle, (202) 861-3919
David Fletcher, (202) 861-3886
DLA Piper Rudnick Gray Cary LLP
1200 Nineteenth Street, N.W.
Washington, DC 20036

Intervenor Counsel:
Thomas P. Barletta
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-8058

Intervenor Counsel:
Thomas P. Humphrey
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2633

Intervenor Counsel:
David F. Dowd
Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3378

3. Grumman Aerospace Corp. (On behalf of Rohr Corp.), ASBCA No. 50090, 01-1 BCA ¶ 31,316 (2001). In 1994-2001, I represented Rohr, Inc., a subcontractor to Grumman Aerospace Corporation on the Navy's F-14 fighter aircraft program. On behalf of Rohr, we presented and litigated a $34 million over-inspection claim, which Grumman sponsored against the Navy. We had a two-month hearing at the Armed Services Board of Contract Appeals in January and February 1996. Following post-hearing briefs, the Board did not issue a decision until 2001. The Board's decision stands for the proposition that the Navy could not substitute new inspectors imposing stricter standards in Rohr's manufacturing plants toward the end of a 23-year program without compensating Rohr for a change in the parties' course of dealing. Rohr won this case on entitlement, but we appealed the Board's $7.8 million damages award to the U.S. Court of Appeals for the Federal

Circuit, asserting that the Board's jury verdict award was not reasonable. The Federal Circuit denied the appeal, but we ultimately recovered for Rohr more than $13.5 million with interest. I headed this litigation effort from start to finish. Administrative Judge Martin J. Harty at the ASBCA presided over the hearing and was part of a three-judge panel that issued the Board's decision. Other counsel were:

Navy Counsel:
Mark R. Wiener
Stephen O'Neill
Office of the General Counsel
Navy Litigation Office
720 Kennon Street, S.E., Room 233
Washington, DC 20374
(202) 685-6980

My Co-counsel:
Barbara Rowland
U.S. Attorney's Office
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106
(215) 861-8311

My Co-counsel:
Eric B. Kantor
GE Aircraft Engines
One Neumann Way, Mail Stop
H318A
Cincinnati, OH 45215
(513) 243-2787

4. MCI WorldCom, Inc. v. General Services Administration, 163 F. Supp. 2d 28 (D.D.C. 2001). In 2000-2001, I represented MCI WorldCom in challenging a new Government policy to release all federal contract pricing information, whenever requested by a member of the public, under the Freedom of Information Act (FOIA). We argued that much of MCI's thousands of pages of detailed pricing information in the FTS 2001 contract was confidential and proprietary, and if disclosed, would likely cause substantial competitive harm to MCI. The U.S. District Court for the District of Columbia, Judge Gladys Kessler presiding, granted summary judgment for MCI on all grounds, ruling that the agency's actions were improper and lacked a rational basis. Federal contractors watched this case closely as it progressed. The decision received considerable publicity in the public contracts bar.

Counsel for the United States:
Lydia K. Griggsby
U.S. Attorney's Office
555 4th Street, N.W., 10th Floor
Washington, DC 20001
(202) 307-0372

My Co-counsel:
Brian Kennedy
Associate Counsel
MCI WorldCom, Inc.
1945 Old Gallows Road
Vienna, VA 22182
(703) 918-6817

5. Danac, Inc., ASBCA No. 33394, 97-2 BCA ¶ 29,184 (1997). From 1987 to 1997, I represented Danac, a military housing contractor, in disputes with the Air Force involving *inter alia* the discovery of asbestos on a housing renovation project at Loring AFB, Maine, and the issue of whether the contractor was an eligible small business to have competed for the contract at the time of award. The Air Force argued that Danac knowingly falsified its size status when it bid for the contract, and that Danac's claim for delays and changes should be denied because the underlying contract was void for illegality. This litigation involved multiple hearings at the Armed Services Board of Contract Appeals. In the midst of these administrative proceedings, the United States indicted Danac's former President in the U.S. District Court for the Southern District of New York for tax fraud and false certification of Danac's size status. The Air Force then argued at the ASBCA that the former President's guilty plea constituted a judicial admission of the false size certification. Ultimately, the ASBCA denied the Air Force's position that the contract was void for illegality, and sustained Danac's claim for $1,840,000. With the addition of statutory interest, Danac recovered more than $4,000,000. Administrative Judge Alexander Younger presided over the hearings, and was on the three-judge panel that issued the decision. Other counsel were:

Counsel for the Air Force:
Mark E. Landers
Peter M. Ditalia
Air Force Contract Law
Center/JAB
Wright-Patterson AFB, OH 45433
(937) 255-6111

My Co-counsel:
Eric B. Kantor
GE Aircraft Engines
One Neumann Way, Mail Stop H318A
Cincinnati, OH 45215
(513) 243-2787

6. MCI Telecommunications Corp., B-276659.2, 97-2 CPD ¶ 90 (1997). In 1997, I represented MCI in an important bid protest at the GAO, then known as the General Accounting Office. I argued on behalf of MCI that a proposed amendment to AT&T's FTS 2000 contract, calling for the addition of a dedicated network known as "NSAP II" at NASA, constituted a "cardinal change" that should have been advertised for full and open competition under the Competition in Contracting Act. The procuring agency, GSA, and AT&T opposed MCI's protest, but the GAO sustained our position, holding that the proposed amendment was outside the scope of the FTS 2000 contract. MCI recovered its costs and attorneys fees of pursuing the protest. Ralph O. White presided on behalf of the GAO, and participated in the preparation of the decision. Other counsel were:

Counsel for GSA:
Michelle Harrell
General Services Administration
Office of the General Counsel
18th & F Streets, N.W.
Washington, DC 20405
(202) 501-0750

Counsel forAT&T:
C. Stanley Dees, (202) 496-7628
Thomas C. Papson, (202) 496-7639
McKenna, Long & Aldridge LLP
1900 K Street, N.W.
Washington, DC 20006

My Co-counsel:
Kevin P. Mullen
DLA Piper Rudnick Gray Cary LLP
1200 Nineteenth Street, N.W.
Washington, DC 20036
(202) 861-6414

7. Laboratory Supply Corp. v. United States, 4 Cl. Ct. 136 (1983). In 1983, I obtained declaratory and permanent injunctive relief prohibiting the Navy from awarding a contract for meat packaging film and foam trays to anyone other than Laboratory Supply. I entered the case only after Judge Philip Miller had ruled in the Government's favor to dismiss the Complaint. I filed a motion for reconsideration and turned the Court's ruling completely in favor of Laboratory Supply. The issue presented was whether Laboratory Supply's bid complied with the "Brand Name or Equal" requirements of the invitation. Although a modest case, I remember it well because of being able to turn the decision 180 degrees in our favor with an eleventh-hour motion.

Counsel for the United States:
Joseph T. Casey, Jr.
Kelley, Drye & Warren LLP
8000 Towers Crescent Drive, Suite 1200
Vienna, VA 22182
(703) 918-2300
(formerly with U.S. Department of Justice)

8. Litton Bionetics, Inc. v. Glen Construction Co., Inc. et al., 437 A.2d 208 (Md. 1981). My client, Litton Bionetics, was the owner of a building construction project where it had claims against the contractor, Glen Construction, and against the architect, Dickey & Dickey. Each contract had a mandatory arbitration clause for the resolution of disputes, but neither contract provided for consolidated arbitration involving all three parties. The question was whether a Maryland Circuit Court has the authority to order a consolidated arbitration among all three parties for purposes of economy and achieving consistent results. In a 4-3 decision, the Court ruled in my favor, and ordered a consolidated arbitration.

Counsel for Glen Construction:
J. Richard Margulies
Current location unknown
formerly with the firm of Braude, Margulies, Sacks & Rephan.
Firm no longer exists.

My Co-counsel:
Gerard E. Mitchell
Stein, Mitchell & Mezines LLP
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, DC 20036
(202) 737-7777

Counsel for Dickey & Dickey:
Patrick J. Attridge
Current location unknown

9. Ordnance Research, Inc. v. United States, 609 F. 2d 462 (Ct. Cl. 1976). I handled this case on appeal to the U.S. Court of Claims, and obtained a reversal for our client, Ordnance Research, of an adverse decision from the Armed Services Board of Contract Appeals. The case involved a defective specifications claim against the Navy where the contractor experienced six explosions at its manufacturing facility by following the Navy's requirements. The contract was for MK 273 Mod O igniters for fire bombs. This

decision is cited frequently as one of the seminal cases on defective Government specifications. It stands for the proposition that, if the contractor follows the Government's detailed design specifications, the Government impliedly warrants that a satisfactory performance will result.

Counsel for the United States:
Thomas W. Peterson
U.S. Department of Justice
Current location unknown

10. Federal Reserve Bank of Richmond v. Marcellus Wright, Jr., 392 F. Supp. 1126 (E.D. Va. 1975). In 1975, I had my first trial, and my only jury trial. I represented the Federal Reserve Bank of Richmond in an action for negligent architectural services arising from the design and construction of a Communications & Records Center for the Bank near Culpeper, VA. This favorable decision on limitation of action issues allowed the case to go forward to trial. There were multiple design issues, all but one of which settled shortly before trial. The most significant issue involved the design of the facility's rear wall, built into the side of a mountain and covered with earth. I lost the jury trial, but obtained $110,000 for the client in the pretrial settlement. David V. Anthony was the partner who supervised my work on this matter, but he permitted me to try the case in Richmond. Judge D. Dortch Warriner (deceased) presided over this trial.

Counsel for Marcellus Wright, Jr:
Willard I. Walker
McGuire Woods & Battle
Richmond, VA
(not sure of present location)

Counsel for Marcellus Wright, Jr.:
Larry H. Framme III
Framme Law Firm PC
2812 Emerywood Parkway, Suite 220
Richmond, VA 23294
(804) 649-1334

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.)

A. My most significant legal activities include the following:

1. The Global Fund to Fight AIDS, Malaria, and Tuberculosis. On January 1, 2005, our law firm began representing The Global Fund, based in Geneva, Switzerland, on a pro bono basis. I am heading a team of six lawyers from our firm in providing this representation. The Global Fund has received approximately $6 billion from a wide variety of public and private donors during its 2-1/2 year history. The Global Fund offers multi-million dollar grants to developing countries world-wide to fight AIDS, malaria, and tuberculosis. Our legal team is assisting The Global Fund in establishing its Inspector General function, in creating a crisis response capability until the Inspector General Office is operating fully, and in assessing the Fund's procurement practices and grant oversight procedures to minimize opportunities for fraud and corruption among grant recipients. I have pledged one-half of my time to this representation in 2005.

2. Harris Corporation/FAA Buoy Communication System. In 1998-2002, I represented Harris Corporation, Melbourne, FL, in a $9 million contract dispute with the Federal Aviation Administration. The contract called for Harris to develop an unmanned Buoy Communication System to provide air traffic control communications for commercial aircraft flying over the Gulf of Mexico. When Harris was unable to build and test a compliant system within the required schedule, the FAA terminated the contract for default. On behalf of Harris, I filed suit in the U.S. Court of Federal Claims challenging the default termination, and asserting claims for increased costs due to the FAA's constructive changes in the scope of work. Harris contended that the specifications were beyond the state of the art, and could not reasonably be met for the established price or within the contract schedule. After approximately two years of discovery and extended settlement discussions, the parties settled the dispute, resulting in the withdrawal of the default termination. The Honorable James F. Merow of the U.S. Court of Federal Claims presided over this matter. Other counsel were:

Counsel for the United States:
C. Coleman Bird
Department of Justice, Civil Division
1100 L Street, N.W., Room 11046
Washington, DC 20005
(202) 307-0453

My Co-counsel:
Barbara Rowland
U.S. Attorney's Office
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106
(215) 861-8311

3. Chicago Transit Authority Litigation. In 1991-1994, I headed a team of lawyers representing Transportation Manufacturing Corporation in a $54 million constructive change and delay claim against the Chicago Transit Authority (CTA) under a contract for the manufacture and delivery of 745 transit buses for the city of Chicago. We prepared a multi-volume claim submittal with the assistance of company personnel in Roswell, NM. When the claim could not be settled voluntarily, we filed suit against the CTA in the U.S. District Court in Albuquerque, NM. I headed the litigation effort as well. After obtaining an important preliminary ruling from the Court relieving our client from having to exhaust administrative remedies, we settled the matter with the assistance of a nationally known San Francisco mediator, Mr. Tony Piazza. The Honorable C. Leroy Hansen of the U.S. District Court for the District of New Mexico presided over this matter. Other counsel were:

Counsel for CTA:	My Co-counsel:
Richard P. Steinken	Kevin P. Mullen, (202) 861-6414
Jenner & Block LLP	Carl L. Vacketta, (202) 861-6460
One IBM Plaza	DLA Piper Rudnick Gray Cary LLP
Chicago, IL 60611	1200 Nineteenth Street, N.W.
(312) 923-2938	Washington, DC 20036

4. Mason & Hanger, Pantex Nuclear Plant. In 1991, I represented the incumbent contractor, Mason & Hanger-Silas Mason Co., Inc., Lexington, KY, in a bid protest involving the renewal of the Department of Energy's $4.5 billion Maintenance & Operation contract at the Pantex Nuclear Plant near Amarillo, TX. The plant was used to store nuclear materials from missiles that had been retired. The litigation was pending in the U.S. District Court for the Northern District of Texas. With the assistance of John Cibinic, a respected Government Contracts professor at George Washington University, the parties reached a settlement, a somewhat remarkable outcome given the size of the contract at issue.

Opposing Counsel, Lockheed Missile:	Counsel for the United States:
Kenneth B. Weckstein	Lane S. Tucker
Epstein, Becker & Green, P.C.	Department of Justice, Civil Division
	Commercial Litigation Branch

1227 25th Street, N.W., Suite 700
Washington, DC 20037
(202) 861-0900

1100 L Street, N.W.
Washington, DC 20005
(last known address)

5. Pullman R-46 Subway Car Claims. In approximately 1977-1980, I assisted in the preparation of an $81 million claim on behalf of Pullman against the New York City Transit Authority for extra work, delays, and disruption under a contract to supply R-46 subway cars to the City of New York. We prepared the multi-volume claims at the client's facilities on Chicago's south side. A subcontractor, Rockwell, also had claims relating to the cracking of undercarriages. This case ultimately settled after protracted litigation in the U.S. District Court for the Southern District of New York.

My Co-counsel:
Carl L. Vacketta
DLA Piper Rudnick Gray Cary US LLP
1200 Nineteenth Street, N.W.
Washington, DC 20036
(202) 861-6460

6. National Presto, Renegotiation Act Litigation. In approximately 1976-1980, David V. Anthony and I represented National Presto Industries, Inc., Eau Claire, WI, in a $25 million action brought by the Government to recover "excessive profits" realized in manufacturing artillery shells for the military during the Viet Nam War era. After four years of litigation before Trial Judge Harry E. Wood of the U.S. Court of Federal Claims, the matter settled for National Presto's agreement to refund a nominal amount of the claimed $25 million.

Counsel for the United States:
Jerry Bruen
Department of Justice, Civil Division
Commercial Litigation Branch
1100 L Street, N.W.
Washington, DC 20005
(Last known address)

Counsel for the United States:
John N. Hanson
Beveridge & Diamond, P.C.
1350 Eye Street, N.W., Suite 700
Washingon, DC 20005
(202) 789-6000
(formerly with Department of Justice)

7. Teaching Young Lawyers. Throughout my legal career, and especially after I became a law firm partner in 1980, I have enjoyed working with young lawyers to teach them how to write, and how to try cases. I have also taught young people how to use good judgment in developing an overall litigation strategy, and to understand that clear communications with clients and opposing counsel can help to avoid unnecessary disputes. I would hope to continue working with and teaching young people as law clerks if I were confirmed for a judicial position.

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.

A. None. I have no financial arrangements of this type. I have a self-funded and self-directed retirement account with my present law firm, DLA Piper Rudnick Gray Cary US LLP. The law firm offers various investment options for the partners' retirement accounts. When I leave this law firm, I understand that I will have the choice of keeping this account with the firm, or rolling it over to an Individual Retirement Account. My annual contributions to this account will cease when I leave the firm.

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.

A. I will be aware of the circumstances in which potential conflicts of interest could arise, and I will follow the rules set forth in 28 U.S.C. § 455, "Disqualification of Justice, Judge, or Magistrate." I am aware that potential conflicts could arise from: (a) any case involving one of my prior clients, or of any client of my former firm with whom I may have been involved in any capacity; (b) any case involving a lawyer of my former firm; or (c) any case involving a lawyer who previously worked for my former firm. To avoid the appearance of a conflict, even if I felt I could decide a case fairly and objectively, I would disclose to all parties and counsel any relationships that I felt could reasonably cause an objection. I am willing to take any necessary steps to eliminate potential conflicts that could arise from my investments in publicly traded companies or other entities.

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.

A. No, I do not have any such plans, commitments, or agreements.

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

A. Please see the attached Financial Disclosure Report.

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

A. Please see the Net Worth Schedule below.

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.

A. No, I have not held a position or played a role in a political campaign.

AO-10
Rev. 1/2004

FINANCIAL DISCLOSURE REPORT

Calendar Year 2004

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

erson Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
ieeler, Thomas C	U.S. Court of Federal Claims	6/15/2005
itle (Article III Judges indicate active or senior status; gistrate judges indicate full- or part-time)	5. ReportType (check appropriate type)	6. Reporting Period
ge, Nominee	(•) Nomination, Date 6/14/2005 ( ) Initial ( ) Annual ( ) Final	1/1/2004 to 5/31/2005
hambers or Office Address Piper Rudnick Gray Cary US) Nineteenth Street, N.W. hington, DC 20036	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.

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

NONE - (No reportable positions.)

POSITION	NAME OF ORGANIZATION/ENTITY
Partner	DLA Piper Rudnick Gray Cary US LLP

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

NONE - (No reportable agreements.)

DATE	PARTIES AND TERMS
1995	DLA Piper Rudnick Gray Cary US LLP self-funded, self-directed retirement plan. Law firm offers investment options.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Wheeler, Thomas C	6/15/2005

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

Filer's Non-Investment Income

NONE - (No reportable non-investment income.)

DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
2003	Piper Rudnick LLP, Guaranteed Payment.	$325,000
2004	Piper Rudnick LLP, Guaranteed Payment.	$275,000
2005	DLA Piper Rudnick Gray Cary US LLP, Guaranteed Payment.	$104,167

Spouse's Non-Investment Income - (If you were married during any portion of the reporting year, please complete this section. (dollar amount required except for honoraria)

NONE - (No reportable non-investment income.)

DATE	SOURCE AND TYPE
2004	Montgomery County, Maryland Public Schools, Salary
2005	Montgomery County, Maryland Public Schools, Salary

REIMBURSEMENTS -- transportation, lodging, food, entertainment.

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

NONE - (No such reportable reimbursements.)

SOURCE	DESCRIPTION
Exempt.	

NANCIAL DISCLOSURE REPC T	Name of Person Reporting Wheeler, Thomas C	Date of Report 6/15/2005

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

NONE - (No such reportable gifts.)

SOURCE	DESCRIPTION	VALUE
Exempt.		

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

NONE - (No reportable liabilities.)

CREDITOR	DESCRIPTION	VALUE CODE

ANCIAL DISCLOSURE REPO
e 1 of 7

Name of Person Reporting	Date of Report
Wheeler, Thomas C	6/15/2005

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

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
ONE (No reportable income, assets, or transactions)									
SIT Tax Free Income Fund	B	Dividend	K	T	Exempt.				
Bank of America Chacking Account	A	Interest	K	T					
Smith Barney Citigroup Asset Mgt. Account # - JRW Rev. Tr.	D	Dividend	N	T					
Smith Barney Citigroup Asset Mgt. Account #2- TCW IRA	B	Dividend	M	T					
Potomac Cliffs at Watson House Real Est. P-ship		None	K	R					
Piper Rudnick Profit Sharing & 401(k) Plan		None	N	T					
TCW Whole Life Insurance Policy		None	N	T					
JRW Whole Life Insurance Policy		None	K	T					
Broker Account #1-JRW Rev. Tr.									
Daimler Chrysler Common Stock	A	Dividend	J	T					
Altria Group Common Stock	A	Dividend	K	T					
American Express Common Stock	A	Dividend	K	T					
Bristol Myers Squibb Common Stock	A	Dividend	J	T					
Citigroup Common Stock	A	Dividend	K	T					
Walt Disney Common Stock	A	Dividend	J	T					
BP PLC Common Stock	A	Dividend	K	T					
Freescale Semiconductor Common Stock		None	J	T					
HRPT Properties Common Stock	B	Dividend	K	T					

come/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
ee 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
lue Codes: J = $15,000 or less K = $15,001-$50,000 L = $50,001-$100,000 M = $100,001-$250,000
ee 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
lue Method Codes Q = Appraisal R = Cost (Real Estate Only) S = Assessment T = Cash/Market
ee Column C2) U = Book Value V = Other W = Estimated

ANCIAL DISCLOSURE REPO
e 2 of 7

Name of Person Reporting	Date of Report
Wheeler, Thomas C	6/15/2005

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

A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
Healthcare Realty Trust Common Stock	A	Dividend	J	T	Exempt				
Hewlett Packard Common Stock	A	Dividend	J	T					
Kayne Anderson MLP Investment	B	Distribution	K	T					
Motorola Common Stock	A	Dividend	K	T					
Prudential Financial Common Stock	A	Dividend	J	T					
St. Paul Travelers Companies Common Stock	A	Dividend	J	T					
Nuveen Municipal Market Opportunity Fund	B	Dividend	K	T					
Broker Account #2-JRW IRA									
Citigroup Common Stock	B	Dividend	K	T					
Smith Barney Fundamental Value Fund		None	J	T					
Broker Account #3-TCW IRA									
Altria Group Common Stock	B	Dividend	K	T					
American Express Common Stock	A	Dividend	K	T					
BP PLC Common Stock	A	Dividend	K	T					
Boeing Common Stock	B	Dividend	L	T					
Bristol Myers Squibb Common Stock	A	Dividend	K	T					
Cendant Common Stock	A	Dividend	K	T					
Cisco Systems Common Stock		None	J	T					

ıcome/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
ee 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	
lue Codes:	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
ee 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		
lue Method Codes	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
ee Column C2)	U = Book Value	V = Other	W = Estimated		

ANCIAL DISCLOSURE REPOI
e 3 of 7

Name of Person Reporting	Date of Report
Wheeler, Thomas C	6/15/2005

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

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
Citigroup Common Stock	A	Dividend	K	T	Exempt				
Comcast Common Stock		None	K	T					
Walt Disney Common Stock	A	Dividend	K	T					
Emerson Electric Common Stock	A	Dividend	K	T					
General Electirc Common Stock	B	Dividend	K	T					
HRPT Properties Common Stock	C	Dividend	L	T					
Halliburton Common Stock	A	Dividend	J	T					
Hewlett Packard Common Stock	A	Dividend	K	T					
Home Depot Common Stock	A	Dividend	K	T					
IAC Interactive Common Stock		None	K	T					
JPMorgan Chase Common Stock	A	Dividend	K	T					
Kraft Foods Common Stock	A	Dividend	J	T					
Kroger Common Stock		None	J	T					
Marathon Oil Common Stock	A	Dividend	K	T					
McDonald's Common Stock	B	Dividend	L	T					
Microsoft Common Stock	A	Dividend	K	T					
Motorola Common Stock	A	Dividend	J	T					
Nike Common Stock	A	Dividend	K	T					

ncome/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	
alue 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		
alue Method Codes	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
See Column C2)	U = Book Value	V = Other	W = Estimated		

ANCIAL DISCLOSURE REPO
ge 4 of 7

Name of Person Reporting	Date of Report
Wheeler, Thomas C	6/15/2005

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

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
Pacific Energy Partners Ltd. Partnership	A	Distribution	J	T	Exempt				
Prudential Financial Common Stock	A	Dividend	J	T					
Tyco Common Stock	A	Dividend	J	T					
Southwest Airlines Common Stock	A	Dividend	J	T					
3M Company Common Stock	B	Dividend	L	T					
Verizon Communications Common Stock	B	Dividend	K	T					
Wal-Mart Common Stock	A	Dividend	K	T					
New Germany Closed-End Fund	A	Dividend	K	T					
Nuveen Real Estate Income Fund	B	Dividend	K	T					
Putnam Master Intermediate Income Trust	B	Dividend	K	T					
Smith Barney Aggressive Growth Fund		None	L	T					
Broker Account #4-JRW Rev. Tr.									
Amerus Group Common Stock	A	Dividend	L	T					
Dominion Resources of VA Common Stock	B	Dividend	K	T					
Exxon Mobile Common Stock	B	Dividend	M	T					
National City Bank Common Stock	D	Dividend	M	T					
PepsiCo Common Stock	A	Dividend	K	T					
Wal-Mart Common Stock	A	Dividend	K	T					

come/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
ee 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	
lue Codes	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
ee 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		
lue Method Codes	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
ee Column C2)	U = Book Value	V = Other	W = Estimated		

ANCIAL DISCLOSURE REPO
e 5 of 7

Name of Person Reporting	Date of Report
Wheeler, Thomas C	6/15/2005

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

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
Maryland State General Obligation Municipal Bonds-6/05	A	Interest	K	T	Exempt				
University of Maryland System Auxiliary Municipal Bonds-4/08	B	Interest	K	T					
Morgan State University Municipal Bonds-7/07	A	Interest	K	T					
Maryland Water Quality Fin. Adm. Municipal Bonds-9/07	B	Interest	K	T					
Washington County MD Municipal Bonds-1/08	B	Interest	K	T					
Baltimore County MD Municipal Bonds-8/08	B	Interest	K	T					
Maryland State Health Municipal Bonds-7/09	B	Interest	K	T					
Baltimore County MD Municipal Bonds-8/09	B	Interest	L	T					
University of Maryland System Auxiliary Muni. Bonds-10/10	B	Interest	K	T					
Prince George's County MD Municipal Bonds-10/15	B	Interest	K	T					
Maryland State & Local Facilities Municipal Bonds-3/11	B	Interest	K	T					
Howard County Maryland Municipal Bonds-8/12	A	Interest	K	T					
Prince George's County Maryland Muni. Bonds-10/15	A	Interest	J	T					
Puerto Rico Commonwealth Municipal Bonds-7/16	B	Interest	K	T					
Maryland State Health & Higher Education Muni. Bonds-7/18	A	Interest	J	T					
Maryland National Capital Parks Municipal Bonds-11/20	C	Interest	L	T					
Baltimore Maryland Municipal Bonds Pre-Refunded-10/07		None	J	T					
Baltimore Maryland Municipal Bonds Pre-Refunded-10/08		None	J	T					

come/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
ce 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	
lue Codes	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
ce 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		
lue Method Codes	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
ce Column C2)	U = Book Value	V = Other	W = Estimated		

ANCIAL DISCLOSURE REPOI
e 6 of 7

Name of Person Reporting	Date of Report
Wheeler, Thomas C	6/15/2005

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

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
Baltimore Maryland Municipal Bonds Pre-Refunded-10/09		None	J	T	Exempt				
Maryland State Transit Auth. Municipal Bonds-7/11		None	K	T					
MFS Maryland Municipal Bond Fund - Class A	B	Interest	K	T					
Broker Account #5-JRW Rev. Tr.									
Dow Jones Ishares Technology Sector Index Fund	A	Dividend	K	T					
Dow Jones Ishares Financial Sector Index Fund	A	Dividend	K	T					
Dow Jones Ishares Health Sector Index Fund	A	Dividend	K	T					
Dow Jones Ishares Consumer Goods Index Fund	A	Dividend	K	T					
Dow Jones Ishares Real Estate Index Fund	A	Dividend	J	T					
Dow Jones Ishares Consumer Services Index Fund	A	Dividend	K	T					
Dow Jones Ishares U.S. Energy Sector Fund	A	Dividend	K	T					
Dow Jones Ishares Lehman 7-10 Year Treasury Index Fund	A	Interest	K	T					
Dow Jones Ishares Lehman 1-3 Year Treasury Index Fund	A	Interest	K	T					
Ishares Lehman Agg Bond Fund	B	Interest	K	T					
Ishares Lehman U.S. TIPS Fund	A	Interest	K	T					
Broker Account #6-TCW & JRW									
Munivest Fund	B	Interest	K	T					
Munivest Fund II	B	Interest	K	T					

ome/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
e 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	
ue Codes:	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
e 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		
ue Method Codes	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
e Column C2)	U = Book Value	V = Other	W = Estimated		

ANCIAL DISCLOSURE REPO
e 7 of 7

Name of Person Reporting	Date of Report
Wheeler, Thomas C	6/15/2005

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

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
Nuveen Select Tax Free Income Port 3	B	Interest	K	T	Exempt				
Morgan State University Municipal Bonds - 7/05	A	Interest	K	T					
Maryland State Health & Higher Ed Municipal Bonds - 7/18	A	Interest	K	T					
Maryland State Health & Higher Ed Municipal Bonds - 7/23	B	Interest	K	T					
Maryland State Health & Higher Ed Municipal Bonds - 7/23	A	Interest	J	T					
Baltimore County Municipal Bonds - 6/24	A	Interest	K	T					
Maryland State Health & Higher Ed Municipal Bonds - 7/28	B	Interest	K	T					
Baltimore Maryland Municipal Bonds - 7/34	A	Interest	K	T					
Baltimore Maryland Municipal Bonds Pre-Refunded - 10/11		None	K	T					
Prince George's County Maryland Municipal Bonds - 7/08		None	K	T					
Puerto Rico Elec. Power Municipal Bonds - 7/17		None	J	T					
Dreyfus Premier Maryland Municipal Bond Fund	B	Interest	K	T					
Nuveen Insured Premium Income Municipal Fund - 27 Day Ser M		None	K	T					

come/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
ee 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	
lue Codes	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
ee 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		
lue Method Codes	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
ee Column C2)	U = Book Value	V = Other	W = Estimated		

INANCIAL DISCLOSURE REI RT	Name of Person Reporting Wheeler, Thomas C	Date of Report 6/15/2005

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

INANCIAL DISCLOSURE REP T	Name of Person Reporting Wheeler, Thomas C	Date of Report 6/15/2005

CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld ause 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 orted are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

ature Thomas C. Wheeler Date JUNE 15, 2005

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

FINANCIAL STATEMENT

NET WORTH

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

(Amounts are rounded to nearest thousand.)

ASSETS		LIABILITIES	
Cash on hand and in banks	$30,000	Notes payable to banks-secured	4,000
U.S. Government securities-add schedule		Notes payable to banks-unsecured	
Listed securities-add schedule	$3,778,000	Notes payable to relatives	
Unlisted securities--add schedule	0	Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends	0	Unpaid income tax	
Due from others	0	Other unpaid income and interest	
Doubtful	0	Real estate mortgages payable-add schedule	91,000
Real estate owned-add schedule	$575,000	Chattel mortgages and other liens payable	
Real estate mortgages receivable	0	Other debts-itemize:	
Autos and other personal property	$40,000		
Cash value-life insurance	$291,000		
Other assets itemize:			
		Total liabilities	$95,000
		Net Worth	$4,619,000
Total Assets	$4,714,000	Total liabilities and net worth	$4,714,000

CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	0	Are any assets pledged? (Add schedule)	No.
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			
Other special debt	0		

SCHEDULE OF LISTED SECURITIES

Asset	Current Fair Market Value (4/30/05)
SIT Tax Free Income Fund	$29,300
Smith Barney Citigroup Asset Managed Account	$245,800
Smith Barney Citigroup Asset Managed Account (IRA)	$178,000
DLA Piper Profit Sharing & 401(k) Plan	$359,800
Daimler Chrysler Common Stock	$9,800
Altria Group Common Stock	$19,500
American Express Common Stock	$23,700
Bristol Myers Squibb Common Stock	$7,800
Citigroup Common Stock	$23,500
Walt Disney Common Stock	$13,200
BP PLC Common Stock	$32,150
Freescale Semiconductor Common Stock	$2,500
HRPT Properties Common Stock	$14,700
Healthcare Realty Trust Common Stock	$14,700
Hewlett Packard Common Stock	$10,250
Kayne Anderson MLP Investment	$48,075
Motorola Common Stock	$18,400
Prudential Financial Common Stock	$5,700

Asset	Current Fair Market Value (4/30/05)
St. Paul Travelers Companies Common Stock	$5,000
Nuveen Municipal Market Opportunity Fund	$15,500
Citigroup Common Stock	$27,250
Smith Barney Fundamental Value Fund	$6,650
Altria Group Common Stock	$22,425
American Express Common Stock	$53,450
BP PLC Common Stock	$32,155
Boeing Common Stock	$65,475
Bristol Myers Squibb Common Stock	$20,800
Cendant Common Stock	$19,900
Cisco Systems Common Stock	$10,725
Citigroup Common Stock	$18,785
Comcast Common Stock	$25,425
Walt Disney Common Stock	$16,650
Emerson Electric Common Stock	$18,800
General Electric Common Stock	$48,870
HRPT Properties Common Stock	$55,810
Halliburton Common Stock	$5,000
Hewlett Packard Common Stock	$20,470
Home Depot Common Stock	$19,450

Asset	Current Fair Market Value (4/30/05)
IAC Interactive Common Stock	$15,220
JPMorgan Chase Common Stock	$17,750
Kraft Foods Common Stock	$4,050
Kroger Common Stock	$7,900
Marathon Oil Common Stock	$27,950
McDonald's Common Stock	$55,700
Microsoft Common Stock	$27,325
Motorola Common Stock	$12,500
Nike Common Stock	$30,725
Pacific Energy Partners Limited Partner-Ship	$14,000
Prudential Financial Common Stock	$5,700
Southwest Airlines Common Stock	$15,000
3M Company Common Stock	$54,300
Tyco Common Stock	$17,000
Verizon Communications Common Stock	$31,650
Wal-Mart Common Stock	$42,425
New Germany Closed End Fund	$30,900
Nuveen Real Estate Income Fund	$18,430
Putnam Master Intermediate Income Fund	$18,990
Smith Barney Aggressive Growth Fund	$64,450

Asset	Current Fair Market Value (4/30/05)
Amerus Group Common Stock	$55,950
Dominion Resources of VA Common Stock	$28,275
Exxon Mobile Common Stock	$125,460
National City Bank Common Stock	$210,550
PepsiCo Common Stock	$55,650
Wal-Mart Common Stock	$37,700
Maryland State General Obligation Municipal Bonds – 6/05	$25,000
University of Maryland System Auxiliary Municipal Bonds – 4/08	$25,600
Morgan State University Municipal Bonds 7/07	$24,675
Maryland Water Quality Fin. Adm. Municipal Bonds – 9/07	$25,200
Washington County Maryland Municipal Bonds – 1/08	$26,000
Baltimore County Maryland Municipal Bonds – 8/08	$26,175
Maryland State Health Municipal Bonds – 7/09	$36,225
Baltimore County Maryland Municipal Bonds – 8/09	$52,680
University of Maryland System Auxiliary Municipal Bonds – 10/10	$36,300

Asset	Current Fair Market Value (4/30/05)
Prince George's County Maryland Municipal Bonds – 10/15	$27,675
Maryland State & Local Facilities Municipal Bonds – 3/11	$36,775
Howard County Maryland Municipal Bonds – 8/12	$24,150
Prince George's County Municipal Bonds 10/15	$5,500
Puerto Rico Commonwealth Municipal Bonds – 7/16	$29,000
Maryland State Health & Higher Educatio Municipal Bonds – 7/18	$10,600
Maryland National Capital Parks Municipal Bonds – 11/20	$54,375
Baltimore Maryland Municipal Bonds, Pr Refunded – 10/07	$13,185
Baltimore Maryland Municipal Bonds, Pr Refunded – 10/08	$8,275
Baltimore Maryland Municipal Bonds, Pr Refunded – 10/09	$7,785
Maryland State Transit Authority Municipal Bonds – 7/11	$40,165
MFS Maryland Municipal Bond Fund – C A	$47,325
Dow Jones Ishares Technology Sector Ind Fund	$20,035
Dow Jones Ishares Financial Sector Index Fund	$28,875

Asset	Current Fair Market Value (4/30/05)
Dow Jones Ishares Health Sector Index Fu	$32,195
Dow Jones Ishares Consumer Goods Inde Fund	$22,450
Dow Jones Ishares Real Estate Index Fun	$14,815
Dow Jones Ishares Consumer Services In Fund	$14,390
Dow Jones Ishares U.S. Energy Sector Fu	$16,870
Dow Jones Ishares Lehman 7-10 Year Treasury Index Fund	$23,100
Dow Jones Ishares Lehman 1-3 Year Treasury Index Fund	$27,980
Ishares Lehman Aggregate Bond Fund	$35,810
Ishares Lehman U.S. TIPS Fund	$15,500
Munivest Fund	$30,400
Munivest Fund II	$34,250
Nuveen Select Tax Free Income Port 3	$26,260
Morgan State University Municipal Bond 7/05	$25,060
Maryland State Health & Higher Educatio Municipal Bonds – 7/18	$15,885
Maryland State Health & Higher Educatio Municipal Bonds – 7/23	$25,070
Maryland State Health & Higher Educatio Municipal Bonds – 7/23	$10,025

Asset	Current Fair Market Value (4/30/05)
Baltimore County Municipal Bonds – 6/2	$21,250
Maryland State Health & Higher Educatio Municipal Bonds – 7/28	$25,070
Baltimore Maryland Municipal Bonds – 7	$25,000
Baltimore Maryland Municipal Bonds, Pr Refunded – 10/11	$20,615
Prince George's County Maryland Municipal Bonds – 7/08	$18,130
Puerto Rico Electric Power Municipal Bonds – 7/17	$15,050
Dreyfuss Premier Maryland Municipal Bo Fund	$35,770
Nuveen Insured Premium Income Municipal Fund – 27 Day Ser M	$25,000
TOTAL	**$3,778,445**

SCHEDULE OF REAL ESTATE OWNED

Fair market value of Personal Residence, Darnestown, Maryland	$575,000
TOTAL	$575,000

SCHEDULE OF REAL ESTATE MORTGAGES PAYABLE

Mortgage on Personal Residence, Darnestown, Maryland	$91,000
TOTAL	$91,000

III. GENERAL (PUBLIC)

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

A. The following are recent examples of work that I have done in serving the disadvantaged:

1. The Global Fund to Fight AIDS, Malaria, and Tuberculosis. As mentioned in response to Part I, Question 19 above, I am currently representing The Global Fund in Geneva, Switzerland on a pro bono basis. I have pledged one-half of my time to this representation in 2005. If I can contribute to the improvement of The Global Fund's world-wide operations, the targeted population sectors who are afflicted with AIDS, malaria, and tuberculosis in developing countries hopefully will benefit. I volunteered for this assignment within DLA Piper Rudnick Gray Cary, and the firm selected me to lead our six-lawyer team from among many who applied. This project to date has been extremely challenging and rewarding.

2. Representing Family of Deceased Federal Employee. In 2003 and 2004, I represented on a pro bono basis the widow and three children of a former federal employee who had committed suicide. First, I persuaded a filmmaker not to go forward with his plans to produce a documentary film about the life of the deceased employee, and the possible intrigue and explanations for the suicide. The surviving spouse had requested that the film not be made, principally for the protection of the children. Second, I requested information from the deceased employee's lawyer about the matters on which the employee had been seeking legal counsel prior to his death. This request triggered issues under the attorney-client privilege that had not been addressed previously in the District of Columbia. I sought and received clarification from the D.C. Bar Legal Ethics Committee on the application of the attorney-client privilege under the circumstances presented. In July 2004, The Legal Ethics Committee issued Opinion 324, Disclosure of Deceased Client's Files, deciding the issue in favor of my client. Following the decision, I was able to learn about the matters of interest to my client from

the deceased employee's lawyer. I spent approximately 90-100 hours on this matter.

3. Representing Small, Woman-Owned Business. For the past four years (2001-2005), I have represented Interstate Sealant & Concrete, Inc., a small, woman-owned business from Waukesha, WI. I have helped this client resolve issues under her federal paving contracts and subcontracts. Ordinarily, a client of this type would not have the means to retain DLA Piper Rudnick Gray Cary. Nevertheless, I have served this client at reduced rates, and charged less than actual time spent, in the belief that helping a disadvantaged start-up company in my area of practice is something I ought to do. I have handled one or two matters per year for this client.

4. Procurement Counseling for DC Appleseed Project. In 2004, I counseled a Piper Rudnick team on procurement issues relating to the implementation of pilot programs for special education services in the District of Columbia. I spent about 15 hours on this matter.

5. Serving at Capital Area Food Bank. Our law firm regularly assists with food sorting and packaging at the D.C. Capital Area Food Bank. I am a frequent participant in these activities, in an effort to facilitate the feeding of children at schools and other organizations in the District of Columbia. I generally participate in this effort two or three times per year.

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?

A. No, I do not belong to such organizations.

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).

A. There is no selection commission in my jurisdiction to recommend candidates for nomination to the federal courts. I had first expressed an interest to the White House Office of Counsel in 2003 that I would like to be considered for any judicial openings at the U.S. Court of Federal Claims. A number of persons submitted recommendation letters in my behalf to the White House Office of Counsel.

I interviewed at the White House Counsel's Office on February 22, 2005, and I was notified on March 18, 2005 that the President had decided to move forward with my nomination to the U.S. Court of Federal Claims. The Department of Justice then contacted me regarding the arrangements for completing the paperwork for my background review. On June 14, 2005, the White House Counsel's Office notified me that my nomination was being forwarded to the United States Senate.

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

A. 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.

A. If I were confirmed as a judge at the U.S. Court of Federal Claims, I would not under any circumstances employ "judicial activist" tendencies. Rather, I would apply strictly the laws enacted by the Congress, and the case law precedent of the U.S. Supreme Court and the U.S. Court of Appeals for the Federal Circuit. I would look to and consider the case law of other courts or administrative boards for guidance when necessary. I would give appropriate deference to regulations promulgated by federal agencies, which ordinarily should be followed if they are consistent with the aim of the authorizing statute, and have a rational basis. I would afford reasonable discretion to federal decision-makers in the areas they know best, and I would not substitute my judgment for theirs, even if I did not agree fully with their actions or decisions. I would not bend the threshold doctrines of standing, ripeness, or justiciability – if a matter should not be heard in the first instance, it ought to be dismissed.

The "judicial activist" tendencies described in the question improperly tilt toward the judiciary the delicate balance among the three branches of our Government. The courts should not usurp the roles or functions of the Congress or the President. The courts exist for the purpose of deciding disputes that come before them based upon the applicable law and the facts presented. The courts must act with fairness and reasonable promptness to all parties, using the due process afforded by the applicable rules of procedure and evidence.

AFFIDAVIT

I, Thomas Craig Wheeler, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

June 20, 2005
(DATE)

Thomas Craig Wheeler
(NAME)

(NOTARY)

District of Columbia: SS
Subscribed and sworn to before me, in my presence,
this 20 day of June 2005

Doris M. Coulbourne
Doris M. Coulbourne
Notary Public, District of Columbia

My commission expires February 14, 2010

Senator HATCH. Well, thank you. I think this is as good a panel as we have had in all the years I have been here on the Judiciary Committee.

I would like to start with you, Mr. Smoak, and just go across the board and please introduce those who are here with you, your family members or anybody you would care to introduce. You can just stand, and if they would stand as you introduce them.

Mr. SMOAK. Thank you, Mr. Chairman. Our two daughters, Kathleen and Elizabeth. Kathleen works here in the House of Representatives.

Senator HATCH. We know who you are.

Mr. SMOAK. Elizabeth lives in Vermont.

Senator HATCH. That is great. We are glad to have both of you here.

Mr. Sandoval?

Mr. SANDOVAL. Thank you, Mr. Chairman. My wife, Kathleen; my son, James; my daughter, Madeline; my mother, Terry Sandoval; my father, Ron Sandoval; my stepmom, Marion Sandoval; and my baby daughter is outside the room to keep the peace, Mr. Chairman, but my baby daughter, Marisa, and my mother-in-law, Jean Teipner.

Senator HATCH. Well, it is so nice to have all of you here. This is great.

Mr. SANDOVAL. Thank you, Mr. Chairman.

Senator HATCH. Mr. Mattice?

Mr. MATTICE. Thank you, Mr. Chairman. I would like to introduce my wife, Janet, who has come from Tennessee to join me here today. She is not only the joy of my life, but probably more responsible than any person here for me being here today.

Senator HATCH. That is great, Janet. We are glad to have you here.

Ms. Sweeney, do you have—

Ms. SWEENEY. Thank you, Mr. Chairman. Before I introduce my wonderful husband and daughter, I just want to thank you for holding the hearings today and allowing us to be part of this great constitutional process.

My daughter is here with some of her school mates from St. Louis School, and they do have excused absences. And their teachers just thought this was a tremendous learning experience for them, and I want to thank you for that, and, of course, our President for nominating me, and to the Justice Department for all their help with the nomination process. So thank you for that.

Senator HATCH. Thank you.

Ms. SWEENEY. My wonderful husband, Stephen Dillard; and my daughter, Carolyn Elizabeth; and my extended family, former Chief Judge Loren Smith, and my law clerk, Kristin Baczynski, who is my right arm and dear friend.

Senator HATCH. That is great. I think it is a tribute to have Judge Smith here. He is a long-time favorite and friend of mind.

Ms. SWEENEY. Thank you, sir.

Senator HATCH. That is great. Great to have him here.

Yes?

Mr. WHEELER. Yes, Mr. Chairman, I also am just really and truly honored and privileged to be here, and I echo the sentiments of Ms. Sweeney.

Sitting right behind me is my wife, Janet, of 35 years. We met in 1966 at Gettysburg College in Pennsylvania, and here we are today.

In addition, we have two grown children, Cristin and Craig, who could not be here today, Cristin is a wedding planner in Colorado Springs, and our son, Craig, is a young businessman in Norwalk, Connecticut.

I also have just a small number of friends and colleagues who are here providing support today: Susan Commins from Bethesda, Maryland, and then also Robert Reiser and Christopher Kimball.

Senator HATCH. Well, great. Great to have all of you here. We welcome you all. I meant to do that at the beginning and forgot in my desire to ask all these tough questions of the witnesses.

[Laughter.]

Senator HATCH. I know a lot about each of you. I don't have to ask any questions beyond this. I just want you to know that you will all be put on hopefully the next markup. Generally, you are put over for a week in many cases, so don't think that that is anything unusual. If we can do it next week, it would be great. But probably the second week we hopefully will report all of you out.

We congratulate you. We commend you for being willing to serve our country in these distinguished ways, and we are grateful for your family and friends who are here. It is great for them to come. And we are grateful for the Senators who have appeared as well.

So, with that, you have my support. Let's hope that that will help you.

[Laughter.]

Senator HATCH. And we will just move on and hope that we can get you through as quickly as possible. And we know that all of you will serve very well.

So thanks so much and great to be with you. With that, we will recess until further notice.

[Whereupon, at 2:13 p.m., the Committee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD



Statement of Senator George Allen

Good afternoon Mr. Chairman. I have the pleasure of introducing a fellow Virginian, Margaret M. Sweeney, for a judgeship on the United States Court of Federal Claims. Mrs. Sweeney currently serves as a Special Master on that court and in my opinion, has an ideal background for a Federal judge. She has had a long litigation career at the Department of Justice, has practiced law in the private sector, is a former board member and later president of the Court of Federal Claims Bar Association, and has either worked for or litigated in the Court of Federal Claims for approximately 16 years. Since March of 2003, Special Master Sweeney managed a large docket of vaccine injury claim cases at the Court of Federal Claims.

Early in her legal career, she served in a two-year clerkship to former Chief Judge of the United States Court of Federal Claims Loren A. Smith. After leaving the clerkship, she served as a Trial Attorney and later Senior Trial Attorney for the Justice Department's Environment and Natural Resources Division. In this position, Mrs. Sweeney handled complex environmental, 5th Amendment Taking, and Indian Claims cases. More recently, she served as a litigator and advisor for the Justice Department's Office of Intelligence Policy and Review. In that position, she represented various United States intelligence agencies before the Foreign Intelligence Surveillance Act Court. While at the Department of Justice, Mrs. Sweeney received four Outstanding Achievement Awards.

In private practice, Mrs. Sweeney specialized in civil and criminal cases, including commercial litigation, personal injury, domestic relations, real property and estates. She has also served as a Delaware Family Court Master presiding over cases involving domestic relations matters.

Mrs. Sweeney is a member of the Supreme Court of Pennsylvania and the District of Columbia Court of Appeals bars. Special Master Sweeney was a Board Member of the U.S. Court of Federal Claims Bar Association from 1990 to 2003, and was president of that bar in 1999.

Mrs. Sweeney received a B.A. degree in history from Notre Dame of Maryland in 1977, and a J.D. from Delaware Law School, in 1981. She currently resides in Alexandria, Virginia with her husband Stephen W. Dillard and her daughter, Carolyn.

I look forward to the Senate's favorable consideration of Margaret Sweeney's Nomination. Thank you.

Senator John Ensign
Introduction of Brian Sandoval,
Nominee for the United States District Court, District of Nevada
September 29, 2005

I'd like to thank my colleagues on the committee for allowing me to come before you today. It is an honor for me to be here to introduce a great Nevadan and a highly qualified candidate for the federal bench.

Brian Sandoval's journey to this confirmation hearing is filled with remarkable accomplishments, a commitment to his community, and a deep desire to serve this nation.

I want to thank Brian and his wife, Kathleen, for being here today. I also want to thank their children, James, Madeline, and Marisa, for making this trip. James and Madeline must be upset about missing school, but I'm sure they realize what an important day this is for their father.

Nevadans elected Brian Sandoval Attorney General in 2002—making him the first Hispanic elected to a statewide office, but his public service dates back more than a decade to when the people of Washoe County twice sent him to the Nevada State Assembly.

Then, in 1998, he was called upon to serve on the Nevada Gaming Commission and became the youngest person in our state's history to be the chief gaming regulator. Mr. Sandoval was appointed to the Commission by then-Governor Bob Miller—a democrat.

I mention this because throughout his career, Mr. Sandoval has been a conduit for opportunity and bipartisan cooperation. This was evident in Governor Miller's decision to appoint him and more recently in his nomination to the United States District Court in Nevada.

My colleague, Senator Reid, and I agreed when I was elected to the Senate that we would each have a role in recommending Nevadans for federally-appointed judgeships. Senator Reid, with his position as leader of the Senate Democrats, determined that Brian Sandoval was extremely qualified for this job. I commend Senator Reid for reaching across the aisle to choose this candidate. It is a true testament to Mr. Sandoval's qualifications and to the respect he has rightfully earned.

That respect extends beyond the borders of my home state. Last summer, then-Secretary of State Colin Powell asked Mr. Sandoval to serve as his special advisor during meetings of the Organization of American States in Quito, Ecuador. He was also named to be a member of the Department of Homeland Security's State and Local Officials' Advisory Committee. Both assignments are a great honor for Mr. Sandoval.

A graduate of the University of Nevada and The Ohio State University College of Law, Mr. Sandoval is currently a member of the Nevada State Board of Pardons, Prisons, Examiners, and Transportation. He also serves on many councils and commissions focused on domestic violence and cyber crimes.

His commitment to these issues and to the community has been recognized by numerous organizations. Mr. Sandoval was named "2004 Public Lawyer of the Year" by the Nevada State Bar Association, the Washoe County Bar Association, and the Washoe County Access to Justice Foundation. He was also honored with the "Torch of Liberty" from the Anti-Defamation League and the "Broche de Oro" from Hispanics in Politics.

Mr. Sandoval comes before this committee with an impressive resume, but also as an "AV" rated attorney—the highest possible rating of legal professionalism, integrity, and ethics as determined by his colleagues.

And for the past several years, Mr. Sandoval has led the Attorney General's office with an absolute commitment to justice. He has fought tirelessly to protect Nevada's children and seniors from abuse and exploitation, to stop the federal government's plan to store nuclear waste in our state, and to aggressively enforce our laws.

I am confident that his commitment to justice, which has motivated him from his days in law school to his private practice of the law to his role as Attorney General, will make him an outstanding federal district court judge. Mr. Sandoval has often been described as a rising star in Nevada. If confirmed, I have no doubt that this star will shine brightly as a member of the federal bench.

I ask my colleagues to promptly and favorably report this nomination out of committee so that it can be considered by the full Senate as soon as possible.

Thank you again to the committee and to the Sandoval family.

Remarks before the Senate Judiciary Committee
U.S. Congressman Jim Gibbons (NV-02)
September 29th, 2005

Mr. Chairman, I would like to thank you and Ranking Member Leahy for allowing me to testify before your Committee in favor of the nomination of Brian Sandoval to the U.S. District Court in the great State of Nevada.

Brian Sandoval is the current Attorney General of Nevada and has served our state with distinction for over a decade. Brian is a graduate of the University of Nevada and began his career in public service when he was elected to the Nevada Assembly in 1994, when he succeeded me in Carson City. Brian went on to serve on the Nevada State Sentencing Commission and was the youngest person to ever hold the Chairmanship of the Nevada Gaming Commission.

I have known Brian Sandoval for many years, and I am pleased to call him a friend. I can assure you that the President could not have made a better choice for this judgeship. Brian will serve this nation and the people of Nevada with diligence and determination. He understands that the role of a federal judge is to respect the U.S. Constitution and apply its words to the cases that come before him.

Brian will enter his new position with humility, knowing that a judge is not one who imposes his views on the citizens, but one who imposes the Constitution on the law. He realizes that he cannot overturn a law based on his own personal preferences, but can only overturn it if the will of the people is in direct contradiction with that sacred document. This nominee will not rule over the people, but will serve them and protect their liberties.

Brian Sandoval is well-qualified for this position, and I know that he will handle this awesome responsibility with the dignity that he has brought to every endeavor that he has pursued. We need a man of Brian's stature in our federal judiciary, someone who knows and respects the rule of law and the citizens that are bound by that law.

Mr. Chairman, I respectfully request your Committee to approve the nomination of Brian Sandoval to sit on the U.S District Court in Nevada and send it to the full Senate with a favorable recommendation. This nominee is imminently qualified and will bring honor to that Court.

Again, Mr. Chairman, I would like to thank you and Senator Leahy for allowing me the opportunity to speak in support of Mr. Sandoval and for this Committee's commitment to our Constitution and our judicial process.

Introductory Remarks
United States Senate Judiciary Committee
John Richard Smoak, Jr.
Nominee for United States District Judge
Northern District of Florida

September 29, 2005

Senator Mel Martinez of Florida

Mr. Chairman:

It is with pride that I introduce to the committee John Richard "Dick" Smoak, Jr., the President's nominee to serve as United States District Judge in the Northern District of Florida.

Mr. Smoak is a distinguished lawyer from Panama City, in the northwest Florida panhandle. A 1965 graduate of the United States Military Academy at West Point, Mr. Smoak served our country as a Special Forces officer with the 101st Airborne in the United States Army and completed two tours of duty in Vietnam, retiring with the rank of Captain. Captain Smoak was highly decorated for his service having been awarded the Silver Star, Bronze Medal for Valor, Bronze Star for Meritorious Service, Nine Air Medals and many other distinctions for meritorious service.

Following his military service, Mr. Smoak graduated from the University of Florida College of Law and began his law practice in Panama City, Florida. Just as he distinguished himself in the field of battle, Mr. Smoak has also distinguished himself in the legal profession. He is a Fellow in the American College of Trial Lawyers, a recognition extended to less than one percent (1%) of the lawyers in any given state. He has achieved Board Certified status with both the Florida Bar and the National Board of Trial Advocates as a Civil Trial Advocate and hold the highest available ranking of "AV" from Martindale Hubbell based on the recommendations of his peers.

Mr. Chairman, our country and our judicial system are honored when men the caliber of Dick Smoak, make themselves available for public service. I have every confidence that he will bring credit to federal bench and look forward to many years of distinguished service to the citizens of Florida and the nation.

SENATOR WARNER'S STATEMENT John Warner
TO THE JUDICIARY COMMITTEE ON
THE NOMINATION OF MARGARET M. SWEENEY
TO SERVE AS A JUDGE
ON THE UNITED STATES COURT OF FEDERAL CLAIMS
SEPTEMBER 29, 2005

Chairman Specter, Senator Leahy, and my other distinguished colleagues on the Senate's Judiciary Committee, I thank you for holding this confirmation hearing.

Today, I am pleased to introduce a Virginian, Special Master Margaret Sweeney, who has been nominated to serve as a judge on the United States Court of Federal Claims. Margaret is joined today by her family, including her husband Stephen and her daughter Carolyn.

As the Committee knows, the Court of Federal Claims is an Article I court that is authorized to hear primarily money claims founded upon the Constitution, federal statutes, executive regulations, or contracts with the United States. About 25 percent of the cases before this court involve complex tax issues. The judges on this court serve for a term of fifteen years.

In my view, Special Master Sweeney's background makes her well-qualified for a judgeship on this specialized court.

Her background with the law is extensive. She received her law degree in 1981 from the Delaware Law School of Widener University and then went onto work as a law clerk to Judge Robert Thompson of the Family Court of Delaware. Subsequently, Ms. Sweeney served for two years as a federal law clerk to then Chief Judge Loren Smith of the U.S. Court of Federal Claims.

After completing her federal clerkship, Ms. Sweeney worked for 12 years as a trial attorney in the General Litigation Section of the Environment and Natural Resources Division of the United States Department of Justice and then another 4 years as an Attorney-Advisor for the Justice Department's Office of Intelligence Policy and Review. While at the Department, Ms. Sweeney received four Special Service Awards.

In 2003, Ms. Sweeney was appointed to serve as a Special Master on the United States Court of Federal Claims. In this capacity, she hears and decides cases that have been brought under the Vaccine Injury Compensation Program.

In my view, Special Master Sweeney clearly has extensive experience with the Court to which she has been nominated to serve.

I look forward to the reviewing the Committee's deliberations and look forward to the privilege of voting in support of this nominee.

NOMINATIONS OF WAN KIM, TO BE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE; STEVEN G. BRADBURY, TO BE ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE; SUE ELLEN WOOLDRIDGE, TO BE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE; AND THOMAS O. BARNETT, TO BE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

THURSDAY, OCTOBER 6, 2005

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

The Committee met, pursuant to notice, at 2:33 p.m., in Room 226, Dirksen Senate Office Building, Hon. John Cornyn, presiding.

Present: Senators Cornyn, Hatch, DeWine, Kennedy, Kohl, and Durbin.

OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Good afternoon. I want to thank Senator Specter for scheduling this hearing. This involves four very important positions within the Department of Justice and is the first step toward getting these positions filled. If confirmed, each of these nominees will fill vital positions within our government and it is my hope we can get these nominations voted out of the Committee in the near term and through the Senate as soon as possible.

I understand Senator Specter, the Chairman of the full Committee, may be coming, and also some others of our colleagues, but I know that since we have three o'clock votes, what I want to do is promptly get to our first distinguished panel and give them an opportunity to make any statement they wish and then we will turn, of course, to the nominees.

At this time, the Chair would recognize Senator Allen for any introduction he would care to make.

PRESENTATION OF THOMAS O. BARNETT, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, BY HON. GEORGE ALLEN, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator ALLEN. Thank you, Mr. Chairman, Senator Cornyn, Senator DeWine and others, members of the Committee. Thank you for holding this hearing to consider, amongst others, the nomination of a fellow Virginian, Thomas Overton Barnett, as Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice.

I have a statement, and my colleague, Senator Warner, also of Virginia, has a statement which I would like to be made part of the record in his presentation of Mr. Barnett, as well.

Senator CORNYN. Without objection.

Senator ALLEN. Tom is joined, I know, today by his wife, Alexa, and at least one of their children, Braden, a two-and-a-half-year-old young man. Besides his qualifications, I found it very impressive that his son, two-and-a-half-year-old son, wanted to grab on to Daddy. I always thought with my kids, whenever I grabbed them or picked them up, they would always be screaming, "Mama, Mama." So he is also a really good father. It is embarrassing to me, but nonetheless, that shows he is a wonderful father and I am sure he will want to introduce his bride and son when he is presented.

He is, Mr. Chairman, very well qualified for this important position. He grew up in Nebraska. He now for the last 15 years has had the fortune to call the Commonwealth of Virginia home. You can read about his outstanding academic credentials in law school and undergraduate school.

He came to Virginia first clerking for Hon. Harrison Winter of the U.S. Court of Appeals for the Fourth Circuit, which is located in Richmond. After finishing that clerkship, he joined the prestigious Washington law firm of Covington and Burling and moved then to Virginia permanently.

During his almost 14 years as an antitrust attorney at Covington and Burling, Tom rose to become a partner and Vice Chair of the firm's Antitrust and Consumer Protection Practice Group. Tom's practice included mergers, litigation, and counseling across a range of industries, including e-commerce and other issues involving the Internet. Tom has also co-taught an advanced antitrust seminar at my alma mater, the University of Virginia School of Law, and he taught a course at the Georgetown University Law Center on antitrust and sports. In fact, in the law practice, Tom represented colleges and also professional sports leagues.

Tom joined the Antitrust Division of the Justice Department in April of 2004 as Deputy Assistant Attorney General responsible for civil enforcement. Since June of this year, he has served as the Acting Assistant Attorney General with responsibility in the Antitrust Division.

Mr. Chairman, I know that you know, and members of this Committee, how important our antitrust laws are in this country to make sure that our citizens enjoy the healthy competition and choice that comes from an antitrust sense of competition and not monopolies. I think it makes our prices lower, it makes our products better, and companies compete with one another.

The Antitrust Division and its Assistant Attorney General are on the front lines in this fight. Tom's academic achievements, his distinguished legal career as an antitrust attorney, and his enforcement experience to date have all prepared him very well for this important position. I have no doubt that Tom Barnett will be an effective, knowledgeable, and fair enforcer of our antitrust laws. I am delighted that the President has chosen Tom Barnett and I hope that you, Mr. Chairman, and this Committee will act as swiftly as practicable to make sure that he gets his position confirmed and going to work with a full portfolio for the American free enterprise system.

I thank you for your consideration and attention.

Senator CORNYN. Thank you, Senator Allen. I appreciate your personal comments and observations on the nominee.

We will now turn to our other colleague of three colleagues in the Senate and one from the House, our distinguished Senator from Oregon, Senator Smith.

PRESENTATION OF STEVEN G. BRADBURY, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, BY HON. GORDON SMITH, A U.S. SENATOR FROM THE STATE OF OREGON

Senator SMITH. Thank you, Mr. Chairman, Senator DeWine. It is my privilege today to introduce Steve Bradbury to you and to say how delighted I am that the President has nominated him to serve as Assistant Attorney General for the Office of Legal Counsel at the Department of Justice.

Though Steve and his family currently resident in Maryland, as I do, I am proud to say that we both hail from the State of Oregon. Born and raised in Portland, Oregon, he attended Oregon public schools until college and he has become one of our State's best and brightest citizens. I am confident that members of the Committee will quickly appreciate the range of qualities and professional experience that Steve will lend to the position of Assistant Attorney General when you hear from him.

He has been with DOJ and worked there with distinction since 1991. I know he will continue to do an outstanding job in that Department. Steve has held a number of positions at the Department, beginning as an attorney advisor in 1991, and after much hard work, he has moved up the ranks and is currently Acting Assistant Attorney General at the Department.

In addition to his government experience, Steve brings other special qualities, along with a beautiful family that he will introduce to you. He clerked at the appellate level for Judge Buckley in the U.S. Court of Appeals for the District of Columbia, as well as for Judge Clarence Thomas at the United States Supreme Court. In addition, Steve also developed a good reputation in private practice. He was an associate at Covington and Burling and a partner at Kirkland and Ellis. I am sure you recognize the names of these firms as they both have stellar legal practices.

With government, judicial, and private practice experience, Steve has the kind of professional background that will give him the kind of broad, common-sense perspective we need in government.

Of course, his academic credentials speak for themselves. He is a product of the best in private and public education, from Washington High School in Oregon, to Stanford University, and then on to the University of Michigan Law School, where he graduated Magna Cum Laude. Steve has excelled in all of his academic credentials.

Therefore, Mr. Chairman, I commend him to you. I am confident he will continue to serve our country with honor, integrity, and with the utmost professionalism, and I urge his nomination to move forward and that it be confirmed.

Senator CORNYN. Thank you for your introduction, Senator Smith.

Senator Lautenberg, could we hear from you next?

PRESENTATION OF WAN KIM, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE, BY HON. FRANK LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thanks very much, Mr. Chairman. I have a unique honor to introduce a New Jerseyan. His name is Wan Kim. Mr. Kim has been nominated to be Assistant Attorney General for Civil Rights at the Department of Justice. If confirmed, he would be the first Korean American and the first naturalized citizen in this position. We are very proud of that. Coming from New Jersey, the State where the Bill of Rights was first signed, we consider it a distinct honor to be able to introduce Mr. Kim here.

He has had a particular sensitivity to civil rights issues because of his personal background as a minority in our great country. Mr. Kim's parents came to the United States from South Korea in the 1970's. They came to New York with virtually no education and just a couple of hundred dollars. They worked at menial tasks. Their mission was to help their children gain a footing in our country. They worked 7 days a week, and eventually, they bought a small business and a home.

The lesson of hard work rubbed off on Mr. Kim. He graduated at the top of his high school class, went on to Johns Hopkins University and the University of Chicago Law School.

He is not new to the Civil Rights Division. He worked there since 2003 as Deputy Assistant Attorney General with oversight of the Criminal, Educational Opportunities, Housing, and Civil Enforcement Sections. He has led a team of more than 300 attorneys and he will safeguard Americans' voting rights and combat discrimination. He has worked issues like police brutality, hate crimes, as well as protecting the rights of the disabled.

Concerns have been raised of late about civil rights in the country. We want to make sure that we have been aggressive enough in pursuing these cases. But Mr. Kim has affirmed his commitment to equality, and he said this. "I am clearly in a politically appointed position, but my job is to enforce the laws. Show me a violation of the statute, or if I find a violation of the statute, I will bring those cases." It is nice to hear that kind of recognition, that kind of a commitment.

So I congratulation Mr. Kim and his family on the honor of this nomination and I hope that he proves to be the great choice that I think he will be to enforce our Nation's civil rights laws.

Mr. Chairman, I thank you and the Senator from Ohio greatly for permitting us to present Mr. Kim to you.

Senator CORNYN. Thank you very much, Senator Lautenberg, for that introduction.

We will now turn to our colleague from the House, Representative Dan Lungren.

PRESENTATION OF SUE ELLEN WOOLDRIDGE, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE, BY HON. DAN LUNGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Representative LUNGREN. Thank you, Mr. Chairman, and thank you, Senator DeWine, for having us here. It is my privilege and honor to introduce to you the nominee for Assistant Attorney General for Environment and Natural Resources, Sue Ellen Wooldridge, a fellow native-born Californian.

Born in Riverside, California, she spent her early years in Santa Barbara County before her parents, who were both educators, decided to move to the Northern part of the State, in Willows, California, where they thought it was a good idea to have their children grow up on a small farm, which she did. She learned responsibility and self-reliance there, attended the University of California at Davis, where she was the captain of the women's basketball team, graduated Phi Beta Kappa before she went on to Harvard University.

I first met Sue Ellen Wooldridge when she was an associate at the law firm I joined when I left Congress the first time around. I spotted her talents at that time, and when I became Attorney General of the State of California, I invited her to serve as one of my Special Assistant Attorney Generals, and there she served with distinction. Her tenure there was marked by fairness, by integrity.

Frankly, she is brilliant, but she invites other views. She has a capacity to work with people with differing viewpoints and to bring them around to a common position. She was probably one of only two people in the United States who could tell you, without looking it up, the contours of the tobacco settlement that we made as Attorney Generals with the tobacco industry. She was one of two people I designated to negotiate on behalf of the State of California. Then for a number of years, she was counsel to a number of States of the Union in litigation that transpired thereafter.

She has been General Counsel of the Fair Political Practice Commission for the State of California. She has served as Deputy Chief of Staff of the Department of Interior for Secretary Gale Norton, and for the last year and a half been Solicitor of the Department of Interior.

Oftentimes, we are called upon to introduce people from our State who have been nominated. It is rare that you get a chance to be able to stand here and talk about someone you know so well, about whom you would say the President could have done no better. The only caution I would give you is never, ever get involved

in a golf game with her, and certainly never, ever challenge her to a long drive contest, because I will tell you, you will lose it.

Senator CORNYN. Thanks for that advice as well as that introduction.

[Laughter.]

Senator CORNYN. I must extend our gratitude to the entire panel for being here. We know you have many other conflicts. Thanks for making the time to make these important introductions.

I would like to ask the next panel to take their seats, please.

I have no further opening statement that I would make, but I am going to recognize Senator DeWine for any statement he would like to make.

STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Mr. Chairman, I just want to add my words of welcome and congratulations to all four of our nominees today. We are glad to have you with us. We look forward to your testimony.

As Chairman of the Antitrust Subcommittee, I want to give a particular welcome to Mr. Barnett and let me commend him for his work that he has done, and frankly, the way the Antitrust Division has functioned under his leadership as Acting Assistant Attorney General since June. I think you have done a great job and we just look forward to your testimony today, but also look forward to your continuing good work.

Thank you, Mr. Chairman.

Senator CORNYN. Thank you very much, Senator DeWine.

I see we are joined by our colleague from Wisconsin, Senator Kohl. Senator Kohl, do you have any preliminary comments you would like to make?

Senator KOHL. No, I do not, Mr. Chairman.

Senator CORNYN. Thank you very much for being here.

I would like to ask each of the panelists to stand and be sworn. Do each of you swear that the testimony before the panel today will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. KIM. I do.

Mr. BRADBURY. I do.

Ms. WOOLDRIDGE. I do.

Mr. BARNETT. I do.

Senator CORNYN. Thank you. Please have a seat.

I think it might be in order perhaps for each of you to introduce any family members that you happen to have with you here today. I know this is not just your day, this is their day, too, and that none of us accomplish much without the love and support of the people very near and dear to us.

Mr. Kim, would you care to introduce any of your family members who are joining you here today?

STATEMENT OF WAN KIM, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Mr. KIM. Yes, Mr. Chairman. Thank you. I would first like to introduce my wife, Sarah Whitesell, and my two daughters, Anna,

who is five, and Abigail, who is three ,who I hope will be staying with us for at least a little while.

I would like to introduce my parents——

Senator CORNYN. I wonder if you wouldn't mind standing so we can identify you. Great. Thank you.

Mr. KIM. My parents, Hak Soo Kim and Chun Cha Kim. I am grateful for them for coming down today——

Senator CORNYN. Welcome.

Mr. KIM [continuing]. And also to my in-laws, Dr .William Whitesell and Mrs. Phyllis Whitesell, who I am also grateful for being here with us today.

Senator CORNYN. Thank you very much, Mr. Kim.

[The biographical information of Mr. Kim follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Wan Joo Kim

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

Home: Bethesda, MD

Office: 950 Pennsylvania Ave., NW, Rm. 5740, Washington, DC 20001

3. Date and place of birth.

Date of Birth: June 18, 1968
Place of Birth: Seoul, South Korea

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 Sarah Elizabeth Whitesell, an attorney with the Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554.

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

Law School: University of Chicago Law School, 1990-1993
J.D., with honors, 1993

College: Johns Hopkins University, 1986-1990
B.A., Economics, with general and departmental honors, 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.

8/03 to Present US Department of Justice, Civil Rights Division
Deputy Assistant Attorney General

Commissioner, Brown v. Board of Education 50th Anniversary Commission

Member of U.S. Delegation, OSCE Conference on Anti-Semitism

6/04 to Present	Asian and Pacific American Bar Association Education Fund (a Director of this non profit; Washington, DC)
1/99 to 8/03	US Attorney's Office for the District of Columbia Assistant US Attorney (Detailed to Senate Judiciary Committee from 3/02 through 4/03)
1/97 to 12/98	Kellogg, Huber, Hansen, Todd & Evans, PLLC (Washington, DC) Associate
10/94 to 12/96	US Department of Justice, Criminal Division Trial Attorney, Terrorism & Violent Crime Section
8/94 to 9/94	Sidley & Austin (Washington, DC) Summer Associate
8/93 to 8/94	US Court of Appeals for the DC Circuit Law Clerk, Hon. James L. Buckley
6/93 to 8/93	Sidley & Austin (Washington, DC) Summer Associate
9/92	Irell & Manella (Los Angeles, CA) Summer Associate
6/92 to 8/92	Sidley & Austin (Chicago, IL) Summer Associate
6/91 to 9/91	Irell & Manella (Los Angeles, CA) Summer Associate
6/90 to 8/90	Blockbuster Video of NJ (various store locations in NJ) Assistant Store Manager

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. Enlisted as a Private (E-1) in the US Army Reserve in 1985. Commissioned as a Second Lieutenant (O-1), Infantry Corps, United States Army Reserve, from the Johns Hopkins University ROTC program in 1989. My military training includes the Basic Combat Training Course; Advanced Individual Training; Army Airborne School; and the Judge Advocate General Corps' Officer Basic Course. My duty assignments include the 11th Special Forces Group (Airborne), US Army Reserve; the 10th JAG Detachment, US Army Reserve; command of 1st Platoon, B Company, 2d Battalion, 175th Infantry (Light), Maryland Army National Guard; and the Individual Ready Reserve. Accomplishments include the George C. Marshall Award (as the Outstanding ROTC Cadet); the Army Parachutist Badge; an Expert Badge with Rifle and Grenade devices; and the Army Physical Fitness Excellence Award.

I was honorably discharged in 2000. My serial number is my social security number.

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

U.S. Attorney's Office Special Achievement Award (2000, 2001 and 2002).

University of Chicago Law Review (Member, 1991-92; Associate Editor, 1992-93).

Max Hochschild Award (awarded by the Johns Hopkins University to one graduating student for excellence in Economics), 1990.

Phi Beta Kappa.

George C. Marshall Award (as the Outstanding ROTC Cadet).

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.

Hearing Committee, DC Bar Association Board of Professional Responsibility (Alternate Member, 4/04 to Present).
National Asian and Pacific American Bar Association
National Asian and Pacific American Bar Association Education Fund

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 organization that is active in lobbying before public bodies.

Other organizations to which I belong:

Baltimore National Aquarium
Federalist Society
Friend of the National Zoo
Old Georgetown Swim Club (Membership Application Attached as G.)
St. John's Episcopal Church

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.

District of Columbia (admitted 2/7/97)
Pennsylvania (admitted 11/21/94) (inactive)
US Court of Appeals for the 1st Circuit (admitted 11/9/95)

US Court of Appeals for the 9th Circuit (admitted 12/1/95)
US Court of Appeals for the DC Circuit (admitted 9/1/98)
US District Court for the District of Columbia (admitted 8/3/98)

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.

Panelist, The Travis Smiley Show, National Public Radio (November 19, 2004). (Attached as A.)

Delivered remarks at OSCE Conference on Anti-Semitism, Workshop on State Action: Legislation, Enforcement, Prosecution and Training (Berlin, April 28, 2004). (Attached as B.) The U.S. Consulate in Calcutta also did a press release.

Author, Letter to the Editor, "Steger Story Unfair," Chicago Tribune, (September 12, 2004). (Attached as C.)

Keynote Speaker, Federal Asian Pacific American Coalition Leadership and Training Conference (May 18, 2004; San Francisco, CA). (Attached as D.)

Panelist, "Battling Cybercrime through International Cooperation," The Federalist Society (October 2, 2002). (Attached as E.)

Author, DC Circuit: Literalism with an Eye Towards Discretion, 7 Federal Sentencing Reporter 264, 1995 Westlaw 468706 (Mar/Apr 1995). (Attached as F.)

For the following panel discussions and speeches, I am unable to provide copies of the speeches as I extemporize heavily even when I have draft outlines. While many of these speeches may not be characterized as involving constitutional law or legal policy, I list them here out of an abundance of caution:

Panelist – Consumer Finance Litigation and Class Actions (Apr. 2005; Chicago, IL)

Panelist, Fair Lending – Case by Case, CRA and Fair Lending Colloquium (Nov. 2004; Orlando, FL).

Panelist, Consumer Finance Class Actions Conference (Sept. 2004; New York, NY).

Speaker, HUD Annual Fair Housing Awards Dinner (June 16, 2004; Washington, D.C.)

Speaker, Celebration of Asian Pacific Heritage Month (May 18, 2004; San Francisco, CA).

Speaker, Separate vs. Equal – A Celebration of Brown v. Board of Education (April 22, 2004; Sacramento, CA).

Keynote Speaker, Fair Housing Center of the Greater Palm Beaches Third Annual Fair Housing Month Celebration (April 8, 2004; West Palm Beach, FL).

Speaker, DC Bar Steering Committee on Criminal Justice and Civil Liberties (March 11, 2004; Washington, D.C.).

Panelist, Fair Lending Enforcement, CRA and Fair Lending Colloquium (Nov. 3, 2003; Atlanta, GA).

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

Excellent.

My last physical examination occurred in October 2004.

14. 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.

8/03 to Present	US Department of Justice, Civil Rights Division Deputy Assistant Attorney General
1/99 to 8/03	US Attorneys' Office for the District of Columbia Assistant US Attorney
10/94 to 12/96	US Department of Justice, Criminal Division Trial Attorney, Terrorism & Violent Crime Section

15. 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 served as a law clerk to Judge James L. Buckley on the US Court of Appeals for the DC Circuit from 8/93 to 8/94.

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

dates;

I have never practiced law 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;

8/03 to Present	Deputy Assistant Attorney General US Department of Justice, Civil Rights Division 950 Pennsylvania Ave., NW Washington, DC 20007
1/99 to 8/03	Assistant US Attorney US Attorney's Office for the District of Columbia 555 Fourth Street, NW Washington, DC 20001
	[Detailed from 3/02 to 4/03 to the Senate Judiciary Committee Dirksen Building, US Senate Washington, DC 20001]
1/97 to 12/98	Associate Kellogg, Huber, Hansen, Todd & Evans, PLLC 1615 M Street, NW (current location) Washington, DC 20036
10/94 to 12/96	Trial Attorney US Department of Justice, Criminal Division Terrorism & Violent Crime Section 950 Pennsylvania Ave., NW Washington, DC 20001

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?

From 8/93 to 8/94, I was a law clerk. I spent the bulk of my time researching legal issues and writing legal memoranda.

From 1/97 to 12/98, I was a general litigator. My practice consisted of both complex civil and criminal litigation. I represented persons who were being investigated by law enforcement officials, as well as companies engaged in civil disputes. I did not specialize in any particular area of law.

I have spent the rest of my legal career at the Department of Justice. For the majority of this time (10/94 to 12/96 and 1/99 to 8/03), I served as a criminal prosecutor. I have investigated and prosecuted a wide variety of US and DC Code offenses. From 3/02 to

4/03, I was detailed to work on the Senate Judiciary Committee, where I worked primarily on criminal legislation and related issues. Since 8/03, I have focused on federal enforcement the fair housing, education and criminal civil rights laws.

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

During my two years in private practice, I represented a wide range of clients, from individuals to businesses. I was a general litigator, and did not specialize in any particular area of law.

While in government service, I prosecuted a wide variety of criminal offenses, particularly violent crimes, as set forth more fully below.

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 while employed as a Trial Attorney with the Terrorism and Violent Crime Section of the Criminal Division (10/94 to 12/96) and as an Assistant U.S. Attorney for the District of Columbia (1/99 to 8/03). I appeared in court occasionally while employed as an associate with Kellogg, Huber, Hansen, Todd & Evans, PLLC (1/97 to 12/98). In my current position, I appear in court very infrequently (8/03 to Present).

1. What percentage of these appearances was in:

(a) federal court;
(b) state courts of record;
(c) other courts.

Over the course of my career, I would approximate that 25% of my appearances were in federal courts; 74% were in the Superior Court for the District of Columbia; and 1% were in state courts of record.

3. What percentage of your litigation was:

(a) civil:
(b) criminal.

Over the course of my career, I would approximate that 20% of my litigation was civil, and that 80% was criminal.

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

Over the course of my career, I have tried approximately 50 cases. In the majority of these trials, I have been sole counsel. I would approximate that I have not been sole or chief counsel in fewer than 6 trials.

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

I would approximate that a third of my trials have been before a jury; the remainder have been tried before a judge.

16. 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.

United States v. Kevin Gray, Case No. 00-CR-157 (RCL) (DDC 2003) (Judge Lamberth). Litigated admissibility of statements made by an incarcerated defendant to a government agent, as well as allegedly privileged documents seized during a search of defendant's cell. Defendant was held without bond pending his trial on numerous counts of racketeering and murder. During his detention, he made several incriminating statements to another inmate who was cooperating with the government in an unrelated prosecution. The government then obtained a search warrant to seize incriminating documents that defendant had authored in his jail cell. After several rounds of briefing and an evidentiary hearing, the Court ruled that all of the evidence would be admissible at trial. I litigated this matter equally with another prosecutor.

Co-Counsel: Jeffrey Ragsdale
United States Attorney's Office for the District of Columbia
555 4th St NW
Washington, DC 20001
(202) 514-8321

Opposing counsel: Francis Carter
(current address) Zuckerman Spaeder,
1201 Connecticut Ave., NW
Washington, DC 20036
(202) 778-1800

United States v. Gloria Johnson, Criminal No. 03-255 (CKK) (DDC 2003) (Judge Colleen Kollar-Kotelly)
Investigated and negotiated plea agreement with defendant charged with identity theft and fraud offenses. Defendant agreed to plead guilty to misappropriating checks made payable to her employer by creating a false bank account, and to stealing the identity of another employee to fraudulently obtain credit. I litigated this matter alone.

Opposing counsel: Tony Axam
Assistant Federal Public Defender
625 Indiana Ave., NW, Suite 550
Washington, DC 20004
(202) 208-7500

United States v. Nehemiah Hampton, Case No. F-85-99 (DC Sup. Ct. 2003) (Judge Bowers). Convicted defendant after trial for murder, conspiracy and weapons violations. Defendant conspired to rob a known drug dealer. During the course of the robbery, the victim's friend was murdered, and defendant attempted to clean up the crime scene while his accomplices removed the victim and the surviving defendant. This case involved extensive forensic evidence. It also was complicated by the extreme reluctance of the surviving defendant to participate in the prosecution. I litigated this matter equally with another prosecutor.

Co-counsel: Emory Cole
United States Attorney's Office for the District of Columbia
555 4th St NW
Washington, DC 20001
(202) 616-3388

Opposing counsel: Renee Raymond
Assistant Public Defender for the District of Columbia
633 Indiana Ave., NW
Washington, DC 20004
(202) 628-1200

United States v. Michael Wonson, Case No. 2000 CR 233 (RMU) (DDC 2002) (Judge Urbina). Investigated and convicted defendant for drug trafficking and weapons offenses. This case was prosecuted a theory of constructive possession, and considerable efforts were required to investigate and establish defendant's connection to the charged contraband. Defendant pleaded guilty after an evidentiary hearing regarding Fourth Amendment issues. I litigated this matter alone.

Opposing counsel: Valencia Rainey
Assistant Federal Public Defender
625 Indiana Ave., NW, Suite 550
Washington, DC 20004
(202) 208-7500

United States v. Tyrone Clipper, Case No. 2000-CR-0380 (RMU) (DDC 2001) (Judge Urbina), affirmed 313 F.3d 605 (DC Cir. 2002) (Judges Ginsburg, Henderson, Williams).

Investigated and convicted defendant for unlawful possession of a firearm by a convicted felon. Defendant pleaded guilty, but vigorously litigated the appropriate sentence under the U.S. Sentencing Guidelines. Among the disputed issues was the applicability of a prior conviction that had been discredited by a subsequent Supreme Court ruling. I litigated this matter alone before the district court; I participated very little in the appeal.

Opposing counsel: Robert Tucker
Assistant Federal Public Defender
625 Indiana Ave., NW, Suite 550
Washington, DC 20004
(202) 208-7500

United States v. Ronald Brisbon and Michael Wonson, F-3113-02 (DC Sup. Ct 2002) (Judge Richter). Investigated, indicted and convicted defendants after trial for murder and weapons offenses. Defendants fired into a crowd of people with high-powered assault rifles, murdering two persons and seriously injuring another. This was an unfortunate case of mistaken identity; defendants believed that they were shooting primarily at an individual whom they had sought to kill for a petty grudge. I litigated this matter equally with another prosecutor.

Co-counsel: Emory Cole
United States Attorney's Office for the District of Columbia
555 4th St NW
Washington, DC 20001
(202) 616-3388

Opposing counsel: John Beaman (for Mr. Brisbon)
4660 Martin Luther King Ave., SE
Suite C1010
Washington, DC 20032
(202) 563-2538

Douglas Evans (for Mr. Wonson)
408 Cedar Street, NW
Washington, DC 20012
(202) 291-8752

United States v. Patrick Andrews, Case No. F-7292-98 (DC Sup. Ct. 2002) (Judge Retchin). Indicted and tried defendant for murder and weapons offenses. This was a "cold case"; the murder occurred in 1997. Defendant held a grudge with the decedent, whom he hunted down and executed in August 1997. Due in part to the passage of time, the trial involved numerous reluctant and uncooperative witnesses. The first jury trial ended with a mistrial; a strong majority was in favor of conviction, but the jury could not reach a unanimous verdict. The second trial resulted in a conviction. I was the lead prosecutor in first trial; I was away from the U.S. Attorney's Office on detail to the Judiciary Committee during the retrial.

Co-Counsel: Anthony Barkow
(current address) United States Attorney's Office for the
Southern District of New York

1 St. Andrews Plaza
New York, NY 10007
(212) 637-2580

Opposing counsel: Cynthia Katkish
601 Pennsylvania Ave. N.W.
Suite 900S
Washington, DC 20004-3615
(202) 639-8132

United States v. Michael Schaufele, 11 F. Supp.2d 25 (DDC 1998) (Judge Robertson), aff'd in part, 167 F.3d 552 (DC Cir 1999) (Judges Wald, Tatel, Williams).
Defended an individual prosecuted by the Office of Independent Counsel for tax fraud. Our client, an accountant, was charged with conspiring with Webster Hubbell to evade the payment of taxes owed to the Internal Revenue Service. The district court granted defendants' joint motions to dismiss the indictment based on an immunity order and the Independent Counsel's limited jurisdiction. I assisted the lead attorney in representing our client. In particular, I took a lead role in drafting the motion to dismiss the indictment on jurisdictional grounds, and argued that motion in the district court. I also played a significant role in briefing the jurisdictional argument on appeal.

Lead Counsel: K. Chris Todd
Kellogg, Huber, Hansen, Todd & Evans, PLLC
1615 M Street, NW, Suite 400
Washington, DC 20036
(202) 326-7900

Opposing counsel: David Barger
(current address) Williams Mullen
8270 Greensboro Drive, Suite 700
McLean, Virginia 22102
(703) 760-5200

United States v. Wright, Case No. SA 97CR112 OG (WD Tex. 1997) (Judge Garcia)
Defended an individual prosecuted for federal income tax fraud, from indictment through trial. Our client was charged with conspiring, with her spouse, a tax attorney, and a friend, to evade the payment of federal income taxes, primarily through a straw purchase of an expensive home. After a month-long trial, each of the defendants was convicted. I assisted the lead attorney in representing our client, drafting and arguing numerous motions, as well as presenting the testimony of witnesses at trial.

Lead Counsel: K. Chris Todd
Kellogg, Huber, Hansen, Todd & Evans, PLLC
1615 M Street, NW, Suite 400
Washington, DC 20036
(202) 326-7900

Opposing counsel: William Harris
Assistant US Attorney
601 NW Loop 410, Suite 600

San Antonio, TX 78216
(210) 384-7100

United States v. Gilberg, 73 F.3d 15 (1st Cir. 1996) (Judges Selya, Cyr and Stahl) Briefed and argued an appeal of defendant's conviction after trial of numerous counts of a complicated bank fraud. Defendant conspired with loan applicants to submit false information to banks, which resulted in significant losses. I litigated this appellate matter alone.

Opposing counsel: Gary Crossen
(current address) 50 Rowes Wharf
Boston, Massachusetts 02110
(617) 330-7036

17. 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).

Prior to being appointed to my current position, I spent the bulk of my career engaged in hands-on litigation. As an attorney selected for a position with the Department of Justice through the Attorney General Honors Program, I worked on both criminal appeals as well as trial matters. In particular, I spent a significant amount of time in 1996 working on the prosecution of Timothy McVeigh and Terry Nichols for the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. While very much a junior attorney on this case, I spent most of 1996 in Oklahoma City and Denver, Colorado, writing briefs and motions, supervising the grand jury's continuing investigation, interviewing witnesses and providing discovery. Following my work in the Criminal Division, I spent two years in private practice where I litigated a wide variety of criminal and civil cases, including those that involved antitrust, securities fraud, RICO and Lanham Act issues.

I returned to the Department of Justice in 1999 as an Assistant United States Attorney for the District of Columbia. In this position, I investigated and prosecuted more than 100 felony indictments and first-chaired prosecutions for murder, violent crimes, drug trafficking and firearms offenses. I also worked on significant legal matters not involving litigation while detailed for approximately one year to the staff of the Senate Judiciary Committee. I played a large role in drafting S-151, the Hatch-Leahy PROTECT Act, which the Senate unanimously approved in February 2003. This was a comprehensive child crimes bill that, among other things, helped to remedy the state of federal child pornography laws after the Supreme Court's decision in Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389 (2002). I assisted in preparing for hearings on this bill; readying the bill for mark-up by the Judiciary Committee; and moving the bill on the floor of the Senate.

As a Deputy Assistant Attorney General in the Civil Rights Division, I have managed significant litigation and legal matters. Since August 2003, I have supervised three

sections totaling nearly 120 attorneys within the Civil Rights Division: the Criminal, Educational Opportunities, and Housing and Civil Enforcement Sections. Each has shown a marked increase in productivity during my tenure. In FY 2004, we brought the most criminal cases ever brought in a single year – a 30% increase from the previous year. The Educational Opportunities Section likewise opened more investigations, by far, than in any of the previous eight years. And in CY 2004, the Housing and Civil Enforcement Section nearly doubled the number of pattern or practice filings from the previous year, in addition to favorably resolving a record number of these cases.

Not only was there a substantial increase in the amount of enforcement activity in these three sections, but this increase also included many significant cases. For example, I supervised the Division's Title II lawsuit against Cracker Barrel Old Country Stores for allegedly discriminating against minority patrons; the Division's role in re-opening the investigation into the 1955 murder of Emmett Till; the largest verdict ever obtained by the Division in a discrimination case brought under the Fair Housing Act; two major lending discrimination cases; a religious discrimination case involving a school's refusal to allow a Muslim girl to wear her hijab; convictions of five white supremacists for assaulting and stabbing African-American men inside of a restaurant; and the first case brought under Title IV since 1990 alleging racial discrimination by school officials.

I also have served as a member of the Brown v. Board of Education 50th Anniversary Commission ("Brown Commission"), and a member of the US delegation to the OSCE Conference on Anti-Semitism in Berlin during April 2004. During my service on the Brown Commission, I helped to plan and execute public programs commemorating the anniversary of the Brown v. Board decision. As a member of the delegation to the OSCE's conference, I delivered remarks about hate crimes enforcement in the United States during a panel discussion.

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.

   US Government, Thrift Savings Plan (current value approximately $115,000).

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 potential conflict of interest, I would consult with the Department of Justice ethics officials.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? 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.)

   Please see attached SF 278.

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

   Please 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.

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 a Director on the Board of the Asian and Pacific American Bar Association Education, a non-profit organization dedicated to charitable and educational activities. I have spent many hours coordinating a mock interview event for law students, working on the annual fundraising dinner, reviewing the applications of summer fellowship recipients, and attending board meetings.

I have served as an Alternate Member on a Hearing Committee for the DC Bar Association's Board of Professional Responsibility. In this capacity, I have volunteered my time to reviewing and approving disciplinary recommendations for lawyers accused of professional malfeasance.

While employed in private practice, I devoted time for pro bono legal work.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion - 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.

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	116	000	Notes payable to banks-secured		
U.S. Government securities-add schedule US Savings Bonds	3	000	Notes payable to banks-unsecured		
Listed securities-add schedule	429	500	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 tax and interest		
Doubtful			Real estate mortgages payable-add schedule – GMAC Mortgage	692	000
Real estate owned-add schedule (Personal residence in Bethesda, MD)	865	000	Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts-itemize: Citibank Credit Card	4	800
Autos and other personal property 2005 Toyota Camry 2004 Honda Pilot 1999 Toyota Camry	50	000			
Cash value-life insurance					
Other assets itemize:					
			Total liabilities	696	800
			Net Worth	766	700
Total Assets	1463	500	Total liabilities and net worth	1463	500
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor	No		Are any assets pledged? (Add schedule)	No	
On leases or contracts	No		Are you a 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				

Securities Schedule:

Joint Account (approximately $17,000)
JP Morgan
SMH (Semiconductor Index Fund)

Retirement Accounts (approximately $377,500)

IRA Accounts:
Bristol Myers Squibb
Federal National Mortgage Association
Schering Plough
IBB Ishares (Biotechnology Index Fund)
EWJ Ishares (Japan Index Fund)
Vanguard Small Cap Value Index Fund

Spouse IRA Account:
Vanguard Small Cap Growth Index Fund

Spouse 401(k) Account:
Rainier Core Equity Fund
Vanguard 500 Fund
Excelsr Value & Restruct Fund
T. Rowe Price Sm-Cap Stk Fund

US Government TSP Accounts (self and spouse)

Children's College Savings Accounts (approximately $35,000)

Child's UTMA Account:
Merck
USAA S&P 500 Index Fund

Children's NY & MD 529 Accounts:
Vanguard Total Stock Index Fund
T. Rowe Price Equity Index 500 Fund
T. Rowe Price Blue Chip Growth Fund
T. Rowe Price Value Fund
T. Rowe Price Mid-Cap Growth Fund
T. Rowe Price Mid-Cap Value Fund
T. Rowe Price Small Cap Stock Fund
T. Rowe Price Int'l Stock Fund
T. Rowe Price Int'l Growth & Income Fund

U.S. Department of Justice

Washington, D.C. 20530

JUN 21 2005

Marilyn Glynn
Acting Director
Office of Government Ethics
Suite 500
1201 New York Avenue, NW
Washington, DC 20005-3919

Dear Ms. Glynn:

In accordance with the provisions of Title I of the Ethics in Government Act of 1978 as amended, I am forwarding the financial disclosure report of Wan J. Kim, who has been nominated by the President to serve as Assistant Attorney General, Civil Rights Division, Department of Justice. We have conducted a thorough review of the enclosed report.

The conflict of interest statute, 18 U.S.C. Section 208, requires that Mr. Kim recuse himself from participating personally and substantially in a particular matter in which he, his spouse, or anyone whose interests are imputed to him under the statute, has a financial interest. Mr. Kim has been counseled and has agreed to obtain advice about disqualification or to seek a waiver before participating in any particular matter that could affect his financial interests.

Upon confirmation, Mr. Kim will resign from his position as Director of the National Asian Pacific American Bar Association Education Fund, and as Alternate Member on the Hearing Committee of the District of Columbia Bar Board on Professional Responsibility. Pursuant to 5 CFR 2635.502, for at least one year from the date of his resignation from these positions, Mr. Kim will recuse himself from participating in any particular matter involving specific parties in which any of these organizations are a party or represent a party, unless he is authorized to participate. We have advised Mr. Kim that because of the standard of conduct on impartiality at 5 CFR 2635.502, he should seek advice before participating in a particular matter involving specific parties which he knows is likely to have a direct and predictable effect on the financial interest of a member of his household, or in which he knows that a person with whom he has a covered relationship is or represents a party.

Based on the above agreements and counseling, I am satisfied that the report presents no conflicts of interest under applicable laws and regulations and that you can so certify to the Senate Judiciary Committee.

Sincerely,

Paul R. Corts
Assistant Attorney General
for Administration and
Designated Agency Ethics Official

Enclosure

SF 278 (Rev. 03/2000)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

Executive Branch Personnel PUBLIC FINANCIAL DISCLOSURE REPORT

Form Approved:
OMB No. 3209 - 0001

Date of Appointment, Candidacy, Election, or Nomination *(Month, Day, Year)*	**Reporting Status** (Check Appropriate Boxes)	Incumbent ☐	Calendar Year Covered by Report	New Entrant, Nominee, or Candidate ☒	Termination Filer ☐ Termination Date *(If Applicable) (Month, Day, Year)*

Reporting Individual's Name	Last Name	First Name and Middle Initial
	Kim	Wan J
Position for Which Filing	Title of Position	Department or Agency *(If Applicable)*
	Assistant Attorney General	USDOJ, Civil Rights Division
Location of Present Office (or forwarding address)	Address *(Number, Street, City, State, and ZIP Code)*	Telephone No. *(Include Area Code)*
	950 Pennsylvania Ave., NW, Washington, DC 20001	202-353-0742
Position(s) Held with the Federal Government During the Preceding 12 Months *(If Not Same as Above)*	Title of Position(s) and Date(s) Held	
	Deputy Assistant Attorney General, USDOJ, Civil Rights Division (8/03 to Present)	
Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination	Do You Intend to Create a Qualified Diversified Trust?
	Committee on Judiciary	☐ Yes ☒ No

Certification	Signature of Reporting Individual	Date *(Month, Day, Year)*
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge.	Wan J Kim	6/17/05
Other Review (If desired by agency)	Signature of Other Reviewer	Date *(Month, Day, Year)*
	James M. Rodgers	6/21/05
Agency Ethics Official's Opinion	Signature of Designated Agency Ethics Official/Reviewing Official	Date *(Month, Day, Year)*
On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments in the box below).	[illegible]	6-20-05
Office of Government Ethics Use Only	Signature	Date *(Month, Day, Year)*

Comments of Reviewing Officials *(If additional space is required, use the reverse side of this sheet)*

(Check box if filing extension granted & indicate number of days _____) ☐

(Check box if comments are continued on the reverse side) ☐

Fee for Late Filing

Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing extension period, shall be subject to a $200 fee.

Reporting Periods

Incumbents: The reporting period is the preceding calendar year except Part II of Schedule C and Part I of Schedule D where you must also include the filing year up to the date you file. Part II of Schedule D is not applicable.

Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.

Nominees, New Entrants and Candidates for President and Vice President:

Schedule A--The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing.

Schedule B--Not applicable.

Schedule C, Part I (Liabilities)--The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.

Schedule C, Part II (Agreements or Arrangements)--Show any agreements or arrangements as of the date of filing.

Schedule D--The reporting period is the preceding **two** calendar years and the current calendar year up to the date of filing.

Agency Use Only
OGE Use Only

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Reporting Individual's Name	SCHEDULE A	Page Number
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Assets and Income	Valuation of Assets at close of reporting period											Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.														
BLOCK A	BLOCK B											BLOCK C														
												Type			Amount										
For you, your spouse, and dependent children, report each asset held for investment or the production of income which had a fair market value exceeding $1,000 at the close of the reporting period, or which generated more than $200 in income during the reporting period, together with such income. For yourself, also report the source and actual amount of earned income exceeding $200 (other than from the U.S. Government). For your spouse, report the source but not the amount of earned income of more than $1,000 (except report the actual amount of any honoraria over $200 of your spouse). None ☐	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000*	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Estate (Decedent's)	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
Examples: Central Airlines Common				x												x					x										
Examples: Doe Jones & Smith, Hometown, State																														Law Partnership Income $130,000	
Examples: Kempstone Equity Fund																							x								
Examples: IRA: Heartland 500 Index Fund																								x							
1 ING Direct Money Market & CDs					X											x						X								
2 JP Morgan		x														x			x				x							
3 Boeing	x																		x			x								
4 Eli Lilly	x																		x				x							
5 Koninklijke Ahold NV	x																		x			x							^	
6 Schering Plough		x														x					x									

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Assets and Income	Valuation of Assets at close of reporting period										Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.														
BLOCK A	BLOCK B													BLOCK C											
														Type			Amount									
	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000*	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 Citigroup	X													X		X				X										
2 SMH (Semiconductor ~~Holding Index~~ Holders Trust)		X											X						X											(SDA)
3 IBB Ishares (Biotechnology Index)			X										X					X			X									
4 Merck		X														X		X					X							
5 USSPX (S&P 500 Index)		X											X						X											
6 Tyco	X																	X		X										
7 Phillip Morris	X															X		X		X										
8 Fannie Mae			X													X		X			X									
9 EWJ Ishares (Japan Index)		X											X						X											

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Assets and Income	Valuation of Assets at close of reporting period											Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.																
BLOCK A	BLOCK B														BLOCK C													
															Type			Amount										
	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 Vanguard IRA Acct, Small Cap Value Index		X											X						X											
2 Vanguard IRA Acct, Small Cap Growth Index		X											X						X											
3 USAA Checking Accounts		X															X		X											
4 USAA Money Market Accounts		X														X				X										
5 Medco	X																	X		X										
6 Bristol Myers Squibb		X														X				X										(SDN)
7 NY 529 College Savings Plan:		X																	X											
8 - Vanguard Total Stock Index Fund		X											X						X											
9 Maryland 529 College Savings Plan:			X																X											

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Assets and Income	Valuation of Assets at close of reporting period												Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.														
BLOCK A	BLOCK B												BLOCK C														
													Type				Amount										
	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000*	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties*	Interest	Capital Gains*	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 - T. Rowe Price Equity Index 500 Fund		X											X							X												
2 - T. Rowe Price Blue Chip Growth Fund		X											X							X												
3 - T. Rowe Price Value Fund		X											X							X												
4 - T. Rowe Price Mid-Cap Growth Fund		X											X							X												
5 - T. Rowe Price Mid-Cap Value Fund		X											X							X												
6 - T. Rowe Price Small Cap Stock Fund		X											X							X												
7 - T. Rowe Price Int'l Stock Fund		X											X							X												
8 - T. Rowe Price Int'l Growth & Income Fund		X											X							X												
9 Rainier Core Equity Fund		X											X							X												(SD N)

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Reporting Individual's Name	SCHEDULE A continued (Use only if needed)	Page Number
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Assets and Income	Valuation of Assets at close of reporting period											Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.																
BLOCK A	BLOCK B												BLOCK C															
													Type				Amount											
	None (or less than $1,001)*	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Trust - Qualified Blind Trust	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 Vanguard 500 Index Fund		x											x							x												
2 Excelsior Value & Restructuring Fund		x											x							x												
3 T. Rowe Price Small Cap Stock Fund		x											x							x												
4																																
5																																
6																																
7																																
8																																
9																																

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Do not complete Schedule B if you are a new entrant, nominee, or Vice Presidential or Presidential Candidate

Reporting Individual's Name	SCHEDULE B	Page Number
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Part I: Transactions

Report any purchase, sale, or exchange by you, your spouse, or dependent children during the reporting period of any real property, stocks, bonds, commodity futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss.

Do not report a transaction involving property used solely as your personal residence, or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of divestiture" block to indicate sales made pursuant to a certificate of divestiture from OGE.

None ☐

	Identification of Assets	Transaction Type (x)			Date (Mo., Day, Yr.)	Amount of Transaction (x)										
		Purchase	Sale	Exchange		$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Certificate of divestiture
Example	Central Airlines Common	X			2/1/99			X									
1																	
2																	
3																	
4																	
5																	

*This category applies only if the underlying asset is solely that of the filer's spouse or dependent children. If the underlying asset is either held by the filer or jointly held by the filer with the spouse or dependent children, use the other higher categories of value, as appropriate.

Part II: Gifts, Reimbursements, and Travel Expenses

For you, your spouse and dependent children, report the source, a brief description, and the value of: (1) gifts (such as tangible items, transportation, lodging, food, or entertainment) received from one source totaling more than $260, and (2) travel-related cash reimbursements received from one source totaling more than $260. For conflicts analysis, it is helpful to indicate a basis for receipt, such as personal friend, agency approval under 5 U.S.C. § 4111 or other statutory authority, etc. For travel-related gifts and reimbursements, include travel itinerary, dates, and the nature of expenses provided. **Exclude** anything given to you by the U.S. Government; given to your agency in connection with official travel; received from relatives; received by your spouse or dependent child totally independent of their relationship to you; or provided as personal hospitality at the donor's residence. Also, for purposes of aggregating gifts to determine the total value from one source, exclude items worth $104 or less. See instructions for other exclusions.

None ☐

	Source *(Name and Address)*	Brief Description	Value
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/99 (personal activity unrelated to duty)	$500
	Frank Jones, San Francisco, CA	Leather briefcase (personal friend)	$300
1			
2			
3			
4			
5			

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Part I: Liabilities

Report liabilities over $10,000 owed to any one creditor at **any time** during the reporting period by you, your spouse, or dependent children. Check the highest amount owed during the reporting period. **Exclude** a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

None [x]

	Creditors *(Name and Address)*	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (x)										
						$10,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000
Examples	First District Bank, Washington, DC	Mortgage on rental property, Delaware	1991	8%	25 yrs.											
	John Jones, 123 JSt., Washington, DC	Promissory note	1999	10%	on demand											
1																
2																
3																
4																
5																

*This category applies only if the liability is solely that of the filer's spouse or dependent children. If the liability is that of the filer or a joint liability of the filer with the spouse or dependent children, mark the other higher categories, as appropriate.

Part II: Agreements or Arrangements

Report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

None [x]

	Status and Terms of any Agreement or Arrangement	Parties	Date
Example	Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1/00.	Doe Jones & Smith, Hometown, State	7/85
1			
2			
3			
4			
5			
6			

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Reporting Individual's Name	SCHEDULE D	Page Number
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Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. **Exclude** positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

None ☐

	Organization *(Name and Address)*	Type of Organization	Position Held	From *(Mo., Yr.)*	To *(Mo., Yr.)*
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/92	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
1	National Asian Pacific American Bar Association Education Fund	Non-profit organization	Director *	06/2004	Present
2	Hearing Committee, Board of Professional Responsibility, DC Bar	Non-profit organization	Alternate Member *	04/2004	Present
3					
4					
5					
6	* Will resign upon confirmation.				

Part II: Compensation in Excess of $5,000 Paid by One Source

Report sources of more than $5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

Do not complete this part if you are an Incumbent, Termination Filer, or Vice Presidential or Presidential Candidate.

None ☒

	Source *(Name and Address)*	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State	Legal services
	Metro University (client of Doe Jones & Smith), Moneytown, State	Legal services in connection with university construction
1		
2		
3		
4		
5		
6		

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Senator CORNYN. Mr. Bradbury, would you care to introduce any of your family members who are here?

STATEMENT OF STEVEN G. BRADBURY, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. BRADBURY. Yes. Thank you, Mr. Chairman. My wife, Hilde; my son, James, who is 11; my son, Will, who is nine; my daughter, Susanna, who will be turning seven in 2 weeks; and my wife's parents, Barbara and Walter Kahn.

Senator CORNYN. Thank you very much for that introduction and welcome to each of you. I am sure your children all got a pass from school to be here.

[Laughter.]

Senator CORNYN. I am sure they will learn a lot in this process, and I know they want to be here with their Dad.

[The biographical information of Mr. Bradbury follows:]

SENATE COMMITTEE ON THE JUDICIARY
QUESTIONNAIRE FOR NONJUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

   Steven Gill Bradbury. Former name used: Steven Dean Bradbury, 1958–1986 (judicial name change July 15, 1986).

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

   Residence:

   Potomac, Maryland 20854

   Office:

   U.S. Department of Justice
   Robert F. Kennedy Main Justice Building
   950 Pennsylvania Avenue, N.W.
   Washington, D.C. 20530

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

   Born September 12, 1958, Portland, Oregon.

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 Hilde Elisabeth Kahn. Wife's current occupation: Homemaker.

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

   – Stanford University (Sept. 1976–June 1980), BA English, June 1980.

   – University of Michigan Law School (Aug. 1985–May 1988), JD *magna cum laude*, May 1988.

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.**

April 2004–Present:

Principal Deputy Assistant Attorney General
(Acting Assistant Attorney General, Feb. 5–Feb. 14, 2005, and June 23, 2005–Present, pursuant to the Vacancies Reform Act)
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 5218
Washington, D.C. 20530

September 1993–April 2004:

Share Partner (Feb. 1999–April 2004)
Non-Share Partner (Oct. 1994–Feb. 1999)
Associate (Sept. 1993–Oct. 1994)
Kirkland & Ellis LLP
655 Fifteenth Street, N.W., Suite 1200
Washington, D.C. 20005

July 1992–July 1993:

Law Clerk to Justice Clarence Thomas
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

July 1991–July 1992:

Attorney-Adviser
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

July 1990–July 1991:

Law Clerk to Judge James L. Buckley
U.S. Court of Appeals for the D.C. Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001

September 1988–July 1990:

Associate
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

May 1987–July 1987:

Summer Associate
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

May 1986–August 1986:

Summer Associate
Miller, Nash, Wiener, Hager & Carlsen
111 SW Fifth Avenue
Portland, Oregon

September 1983–August 1985:

Legal Assistant
Davis Polk & Wardwell
1 Chase Manhattan Plaza
New York, New York 10001
(Now located 47th Street & Park Avenue)

November 1981–September 1983:

Assistant Editor (Feb. 1983–Sept. 1983)
Editorial Assistant (Nov. 1981–Feb. 1983)
Avon Books, a Division of the Hearst Corporation
1790 Broadway
New York, New York 10019

August 1981–October 1981:

Waiter & Bus Boy
Off Broadway Company (restaurant)
West 69th Street & Broadway
New York, New York
(No longer in business)

April 1981–June 1981:

Waiter
Le Café Meursault (restaurant)
Palo Alto, California
(No longer in business)

September 1980–October 1980:

Food Service (sandwich maker)
Stanford Coffee House
Tresidder Student Union
Stanford University
Stanford, California 94305

June 1980–September 1980:

Installer of insulation blankets for water heaters in university housing
Stanford Conservation Center
Stanford University
Stanford, California 94305

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.**

- J.D., *magna cum laude*, University of Michigan Law School, May 1988
- Order of the Coif, University of Michigan Law School, 1988
- Article Editor, *Michigan Law Review*, 1987-1988
- Dean's Law Review Award for outstanding contribution to the *Michigan Law Review*, 1987–1988
- Book Awards for top grade in law school classes: Administrative Law, Civil Procedure II, and Legal Process
- Included in list of Washington's top 40 lawyers under age 40, *Washingtonian* Magazine, August 1998
- Student Body President, Washington High School, Portland, Oregon, 1976
- Officer, Honor Society, Washington High School, Portland, Oregon, 1975-1976
- National Merit Scholarship Letter of Commendation, Washington High School, Portland, Oregon, 1976

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.**

District of Columbia Bar, active member since Dec. 1988
American Bar Association, member 1988–1992

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 am not a member of an organization that is active in lobbying before public bodies. Other current and recent organization memberships:

- River Falls Community Center Associations, Inc. (community pool and tennis courts); member since Aug. 1996
- Civic Association of River Falls; member since Aug. 1996
- District of Columbia Bar; member since Dec. 1988
- Federalist Society; member off and on beginning in 1993; not currently a member
- Registered member of the Republican Party
- Maryland Republican Party; member since 1991
- Republican National Committee; Sustaining Member since 2000; member of President's Club since 2003

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

- Supreme Court of the United States (since 1/8/1996)
- United States District Court for the District of Columbia (since 11/2/1998)
- United States Courts of Appeals:
  - D.C. Circuit (since 5/10/1991)
  - First Circuit (since 1/6/1998)
  - Second Circuit (since 7/1998)
  - Fourth Circuit (since 8/25/1997)
  - Fifth Circuit (since 6/1/1994)
  - Sixth Circuit (since 3/1998)
  - Seventh Circuit (since 9/2003)
  - Ninth Circuit (since 1/14/2003).
- District of Columbia Court of Appeals (since 12/5/1988)

There have been no lapses in my admissions to these courts.

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.

– Memorandum Opinion for the General Counsel, Department of Health & Human Services, and the Senior Counsel to the Deputy Attorney General, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Scope of Criminal Enforcement Under 42 U.S.C. § 1320d-6* (June 1, 2005), *available at* www.usdoj.gov/olc/opinions.htm

– Memorandum Opinion for the Deputy Secretary, Department of Commerce, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Use of Appropriations to Pay Travel Expenses for an International Trade Administration Fellowship Program* (Oct. 7, 2004), *available at* www.usdoj.gov/olc/opinions.htm

– Memorandum Opinion for the Attorney General from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Howard C. Nielson, Jr., Deputy Assistant Attorney General, and C. Kevin Marshall, Acting Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Whether the Second Amendment Secures an Individual Right* (Aug. 24, 2004), *available at* www.usdoj.gov/olc/opinions.htm

– Memorandum Opinion for the General Counsel, Department of Health & Human Services, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Expenditure of Appropriated Funds for Informational Video News Releases* (July 30, 2004), *available at* www.usdoj.gov/olc/opinions.htm

– Memorandum Opinion for the Acting General Counsel, Department of Commerce, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Authority to Prescribe Regulations Limiting the Partisan Political Activities of the Commissioned Officer Corps of the National Oceanic and Atmospheric Administration* (July 29, 2004), *available at* www.usdoj.gov/olc/opinions.htm

– Steven G. Bradbury & Grant M. Dixton, *Court Ruling Wrongly Creates New Right to Sue Telecom Companies*, Washington Legal Foundation Legal Opinion Letter, Vol. 12 No. 22 (Aug. 30, 2002) (discussing *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 294 F.3d 307 (2d Cir. 2002), a case later reversed by the Supreme Court)

– Steven Bradbury & Kelion Kasler, Kirkland & Ellis, *Verizon Communications: The Merger of Bell Atlantic and GTE*, published in Corporate Finance, *Global M&A Yearbook 2000: New Strategies in M&A* at 47 (Nov. 2000)

– Steven G. Bradbury, Paul T. Cappuccio & Patrick F. Philbin, Kirkland & Ellis, *Telecommunications*, published in International Financial Law Review, *United States: A Legal Guide* at 33 (June 1998)

– Steven G. Bradbury, Paul T. Cappuccio & Patrick F. Philbin, Kirkland & Ellis, *United States*, published in International Financial Law Review, *Telecommunications: An International Legal Guide* at 69 (Aug. 1997)

– Steven G. Bradbury, *The Unconstitutionality of* Qui Tam *Suits*, Federalist Society Federalism & Separation of Powers News, Vol. 1 No. 1 (Fall 1996) (discussing pending cert. petition in *Hughes Aircraft Co. v. United States ex rel. Schumer*)

– Steven G. Bradbury, *Original Intent, Revisionism, and the Meaning of the CGL [Comprehensive General Liability Insurance] Policies*, 1 Environmental Claims J. 279 (Spring 1989)

– Note, *Corporate Auctions and Directors' Fiduciary Duties: A Third-Generation Business Judgment Rule*, 87 Mich. L. Rev. 276 (1988)

– Book Note, 85 Mich. L. Rev. 941 (1987)

– *A Cattleman's Calling* (short story), published in *The Hoboken Terminal*, Vol. 1 No. 1 (Spring 1982)

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

Excellent. Date of last physical examination: May 23, 2001

14. **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 currently hold an appointment as the Principal Deputy Assistant Attorney General for the Office of Legal Counsel in the U.S. Department of Justice (since April 19, 2004); in that position, I served as Acting Assistant Attorney General, Feb. 5–Feb. 14, 2005, and am now serving again as Acting Assistant Attorney General since my nomination on June 23, 2005, pursuant to the Vacancies Reform Act. I have been the senior official in the Office of Legal Counsel since Feb. 5, 2005.

– I served as an Attorney-Adviser (career staff attorney) in the Office of Legal Counsel, July 1991–July 1992.

– I have not held an elected public office nor have I been a candidate for elective public office.

15. **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 served as a law clerk to Judge James L. Buckley on the U.S. Court of Appeals for the District of Columbia Circuit, from July 1990 until July 1991.

I served as a law clerk to Justice Clarence Thomas on the Supreme Court of the United States, from July 1992 until July 1993.

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

I have not practiced law 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.

Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
Associate, Sept. 1988–July 1990

Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Attorney-Adviser, July 1991–July 1992

Kirkland & Ellis LLP
655 Fifteenth Street, N.W., Suite 1200
Washington, D.C. 20005
Associate, Sept. 1993–Oct. 1994
Non-Share Partner, Oct. 1994–Feb. 1999
Share Partner, Feb. 1999–Apr. 2004

Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Principal Deputy Assistant Attorney General, Apr. 2004–Present

Acting Assistant Attorney General, Feb. 5–Feb. 14, 2005; June 23, 2005–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?

Following graduation from Michigan Law School in 1988, I joined the law firm Covington & Burling in Washington, D.C., as an associate. My law practice at Covington & Burling focused principally on two areas: (1) Representing States and state agencies in defending suits brought by hospitals and nursing homes seeking additional Medicaid reimbursement payments; and (2) Representing policyholders and supporting *amici* in suits and appeals seeking insurance coverage for environmental cleanup liabilities. I also worked on pro bono matters involving prisoners' rights and immigration law.

In July 1990, I left Covington & Burling to become a law clerk to Judge James L. Buckley on the U.S. Court of Appeals for the D.C. Circuit.

At the conclusion of my clerkship for Judge Buckley in July 1991, I accepted a position as an Attorney-Adviser in the Office of Legal Counsel, where I worked on a variety of issues.

I left OLC in July 1992 to become a law clerk to Justice Clarence Thomas on the Supreme Court.

Following my clerkship with Justice Thomas, I became an associate in the Washington, D.C. office of the law firm Kirkland & Ellis in September 1993. On October 1, 1994, I became a non-share partner of Kirkland & Ellis. I became a share partner on February 1, 1999.

My practice at Kirkland & Ellis LLP focused primarily on civil litigation and administrative law matters, with principal emphases in telecommunications, antitrust, and securities law:

From 1993 until 2000, and again in 2003 and 2004, I concentrated on telecommunications antitrust and regulatory issues for telecommunications companies, including antitrust litigation, merger reviews before the Department of Justice Antitrust Division and the Federal Communications Commission, and legal challenges to FCC and state public utility commission orders.

In 2000 and 2001, I focused on antitrust representation in the airline industry, including seeking approval for a proposed merger and for a code share agreement before DOJ and the Department of Transportation.

From 2001 until 2004, I concentrated primarily on securities law, acting as lead counsel to a major investment bank in defending securities class action suits and parallel

investigations by the Securities and Exchange Commission and the National Association of Securities Dealers concerning allocation of shares in initial public offerings.

On two occasions, in 1998 and in 2004, I represented clients in trademark litigation. In addition, I handled several arguments in various appeals to U.S. courts of appeals.

I left the Kirkland & Ellis LLP partnership in April 2004 to accept my current position as Principal Deputy Assistant Attorney General for the Office of Legal Counsel in the Department of Justice. In this position, I have served under Assistant Attorney General Jack L. Goldsmith III and Acting Assistant Attorney General Daniel B. Levin. I am currently serving as the Acting Assistant Attorney General for the Office of Legal Counsel. Since April 2004, I have been responsible for or involved in most of the significant matters addressed by the Office of Legal Counsel, including legal advice on various matters provided to the President, the Attorney General, the Deputy Attorney General, other components of the Department of Justice, and the general counsels of various agencies and departments of the Executive Branch.

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

In private practice at Covington & Burling, Sept. 1988–July 1990, my typical clients and areas of specialization included:

- state governments and agencies, including the Missouri Department of Social Services and the Washington State Department of Social and Health Services, in defending against lawsuits by nursing homes and hospitals challenging reimbursement rates for health services under state Medicaid plans.

- preparing *amicus* briefs for companies and associations, including the Chemical Manufacturers Association, the American Petroleum Institute, and E.I. duPont de Nemours & Co., in support of policyholders in appeals of civil actions against insurance companies seeking insurance coverage for environmental cleanup costs.

In private practice at Kirkland & Ellis LLP, Sept. 1993–Apr. 2004, my typical clients and areas of specialization included:

- Bell Atlantic Corp., GTE Corp., and their successor Verizon Communications, in antitrust litigation and merger reviews and in telecommunications regulatory matters.

- United Air Lines, Inc., in seeking antitrust approval from the Department of Justice Antitrust Division and the Department of Transportation for United's proposed acquisition of US Airways, Inc., and United's code share agreement with US Airways.

- Morgan Stanley, in defending securities and antitrust class action litigation relating to the underwriting of initial public offerings in the late 1990s and in related SEC and NASD investigations.

In the Office of Legal Counsel, my work has involved advising the President, the Attorney General, the Deputy Attorney General, other components of the Department of Justice, and the general counsels of various Executive Branch agencies and departments on a wide range of statutory and constitutional legal questions.

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.**

During my time in private practice at Kirkland & Ellis LLP (Sept. 1993–Apr. 2004) and, before that, at Covington & Burling (Sept. 1988–July 1990), I made appearances in court on behalf of clients occasionally. In my positions as a law clerk and in the Office of Legal Counsel at the Department of Justice (July 1991–Sept. 1993 and Apr. 2004–present), I have not entered appearances in court. The Office of Legal Counsel is not a litigating division of the Department of Justice.

2. **What percentage of these appearances was in: (a) federal court; (b) state courts of record; and (c) other courts?**

Of my court appearances in private practice, approximately 95% were in federal court and approximately 5% were in state court.

3. **What percentage of your litigation was: (a) civil; and (b) criminal?**

Of my litigation matters in private practice, 100% were civil litigation matters.

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 two cases to verdict or judgment in private practice, and in both cases I was an associate counsel, serving as the third chair on the trial team.

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

One trial (50%) was a jury trial; one trial (50%) was a non-jury, or bench, trial.

16. **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. *In re IPO Securities Litigation*, 21 MC 92 (S.D.N.Y.) (Scheindlin, J.). Class action securities litigation concerning the share allocation and underwriting practices of investment banks in initial public offerings of Internet and high tech companies in the late 1990s. Significant rulings include: *In re IPO Securities Litigation*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003) (motions to dismiss); 297 F. Supp. 2d 668 (S.D.N.Y. 2003) (motions for judgment on the pleadings re loss causation); 227 F.R.D. 65 (S.D.N.Y. 2004) (class certification). I represented defendant Morgan Stanley as lead counsel from the outset of the litigation in spring 2001 until my departure from Kirkland & Ellis LLP in April 2004. The litigation involves more than 300 IPOs, of which Morgan Stanley was the lead underwriter in more than 45.

   Other counsel included:

   Andrew B. Clubok
   Brant W. Bishop
   KIRKLAND & ELLIS LLP
   655 Fifteenth Street, N.W.
   Washington, D.C. 20005
   (202) 879-5000
   Counsel for Morgan Stanley

   James N. Benedict
   Mark Holland
   CLIFFORD CHANCE US LLP
   200 Park Avenue
   New York, NY 10166
   (212) 878-8000
   Counsel for Merrill Lynch

   Gandolfo V. DiBlasi
   John L. Hardiman
   Penny Shane
   SULLIVAN & CROMWELL
   125 Broadway
   New York, NY 10004
   (212) 558-4000
   Counsel for Goldman Sachs & Liaison Counsel for Underwriters

   Melvyn I. Weiss
   Robert A. Wallner
   Ariana J. Tadler
   MILBERG WEISS BERSHAD & SCHULMAN LLP
   One Pennsylvania Plaza
   New York, NY 10119
   (212) 594-5300
   Liaison Counsel for Plaintiffs

Robert B. McCaw
Fraser L. Hunter, Jr.
WILMER CUTLER PICKERING HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800
Counsel for CSFB & Citigroup

Stanley D. Bernstein
Rebecca M. Katz
BERNSTEIN LIEBHARD & LIFSHITZ, LLP
10 East 40th Street
New York, NY 10016
(212) 779-1414
Liaison Counsel for Plaintiffs

Andrew J. Frackman
Brendan J. Dowd
O'MELVENY & MYERS LLP
Citigroup Center
153 East 53rd Street
New York, NY 10022
(212) 326-2000
Counsel for Robertson Stephens

Jack C. Auspitz
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, NY 10104
(212) 468-8000
Liaison Counsel for Issuers

2. *In re IPO Antitrust Litigation*, No. 01 CIV 2014 (S.D.N.Y.) (Pauley, J.). Class action antitrust litigation concerning the share allocation and underwriting practices of investment banks in initial public offerings of Internet and high tech companies in the late 1990s. Significant ruling: *In re IPO Antitrust Litigation*, 287 F. Supp. 2d 497 (S.D.N.Y. 2003) (granting motions to dismiss). I represented defendant Morgan Stanley as lead counsel from the outset of the litigation in spring 2001 until my departure from Kirkland & Ellis LLP in April 2004. The litigation involves more than 300 IPOs, of which Morgan Stanley was the lead underwriter in more than 45. The other counsel involved in this litigation were the same as those listed above for the parallel IPO Securities Litigation.

3. *GTE Corp. and Bell Atlantic Corp.*, CC Docket No. 98-184 (F.C.C. 1998-2000). From 1998 to 2000, I served as lead antitrust counsel to GTE Corp. in seeking regulatory approval from DOJ and the FCC for GTE's merger with Bell Atlantic. In connection with the merger, certain regulatory issues were litigated between the parties to the merger and AT&T Corp. before the FCC, and I was lead counsel to GTE in that litigation.

   Other counsel included:

   Kirkland & Ellis: Paul T. Cappuccio (current tel. 212 484-7980) and John P. Frantz (current tel. 703 351-3030 or 3161).

David W. Carpenter
Peter D. Keisler
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, DC 20006
(202) 736-8132
Counsel for AT&T Corp.

William P. Barr
John Thorne
VERIZON COMMUNICATIONS
1515 North Court House Road
Arlington, VA 22201
(703) 351-3030
Co-Counsel for Applicants

4. *Bell Atlantic Corp. & DSC Communications v. AT&T Corp. & Lucent Technologies* (E.D. Tex. 1996-1997) (Folsom, J.). I represented Bell Atlantic during 1996-1997 in this antitrust suit alleging monopolization of telecommunications equipment and Caller ID markets. I was the primary counsel on damages issues. The case settled on the eve of trial after the jury had been seated. I was the lead attorney negotiating the settlement on behalf of Bell Atlantic.

   Other counsel included:

   Kirkland & Ellis: Craig Primis and Michael Becker (202 879-5000).

   Dan K. Webb
   Charles B. Molster III
   WINSTON & STRAWN
   35 W. Wacker Drive
   Chicago, IL 60601
   (312) 558-5856
   Lead trial counsel for Bell Atlantic

   G. Irvin Terrell
   Bruce McDonald
   Larry Carlson
   Samuel Cooper
   BAKER BOTTS LLP
   One Shell Plaza
   910 Louisiana Street
   Houston, TX 77002
   (713) 229-1234
   Counsel for DSC

   Peter Huber
   Mark Hansen
   Mark Evans
   KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, PLLC
   1615 M Street, N.W., Suite 400
   Washington, DC 20036
   (202) 326-7900
   Co-Counsel for Bell Atlantic

   Paul Saunders
   Elizabeth Grayson
   CRAVATH SWAINE & MOORE
   Worldwide Plaza
   825 Eighth Avenue
   New York, NY 10019
   (212) 474-1000
   Counsel for Lucent Technologies

   Charles W. Douglas
   David W. Carpenter
   SIDLEY AUSTIN BROWN & & WOOD
   One Fist National Plaza
   Chicago, IL 60603
   (312) 853-7000
   Counsel for AT&T Corp.

5. *In re GTE Hawaiian Telephone Co.*, No. 94-0346 (Hawaii Pub. Utils. Comm'n 1995-1998), and No. 94-0346 (Hawaii Sup. Ct. 1996-1997), *GTE Hawaiian Telephone Co. v. Hawaii Public Utilities Commission*, Civ. No. 97-4372-10 (Hawaii Circuit Ct. 1997-1999) (Kevin Chang, J.), and *TelHawaii, Inc. v. GTE Hawaiian Telephone Co.*, Civ. No. 97-4372-10 (Hawaii Sup. Ct. 1998-1999). I represented GTE Corp. and GTE Hawaiian Tel in challenging a competing telephone company's efforts to displace GTE Hawaiian Tel and take over its network as the local telephone company in a region of the Big Island of Hawaii. We ultimately prevailed on appeal in the Hawaii courts.

   Other counsel included:

   Kirkland & Ellis: Theodore W. Ullyot (current tel. 202 514-2001), Paul D. Clement (current tel. 202 514-2206), Richard A. Cordray (202 879-5000), and Paul T. Cappuccio (current tel. 212 484-7980).

   Heather H. Grahame
   Michelle A. Stone
   Michael A. Grisham
   BOGLE & GATES P.L.L.C.
   1031 West 4t Avenue, Suite 600
   Anchorage, AK 99501
   (907) 276-4557
   Counsel for TelHawaii, Inc.

   Bert T. Kobayashi, Jr.
   Clifford K. Higa
   Rod S. Aoki
   KOBAYASHI, SUGITA & GODA
   745 Fort Street, 8th Floor
   Honolulu, HI 96813
   (808) 539-8700
   Co-Counsel for GTE Hawaiian Tel

   David W. Proudfoot
   BELLES, GRAHAM, PROUDFOOT & WILSON
   Watamull Plaza
   4334 Rice Street, Suite 202
   Lihue, Kauai, HI 96766
   (808) 245-4705
   Counsel for TelHawaii, Inc.

   Jeffrey A. Maldonado
   Leslie Alan Ueoka
   GTE HAWAIIAN TEL
   1177 Bishop Street
   Honolulu, HI 96841
   (808) 546-3606
   Co-Counsel for GTE Hawaiian Tel

   Jeffrey S. Portnoy
   Catherine Carey
   CADES SCHUTTE FLEMING & WRIGHT
   1000 Bishop Street
   Honolulu, HI 96813
   (800) 521-9200
   Co-Counsel for GTE Hawaiian Tel

6. *Time Inc. v. Petersen Publishing Co. L.L.C.*, No. 97 Civ. 5879 (S.D.N.Y. 1998) (Baer, J.), and No. 98-7589 (2d Cir. 1998) (opinion by Walker, J.). In 1998, I represented Petersen Publishing, publisher of *Teen* Magazine, in a Lanham Act trademark litigation against Time, Inc., publisher of *Teen People*, relating to Time's use of the name "Teen." I was third chair in the jury trial, which resulted in a verdict for Time, and I argued the appeal to the Second Circuit, which affirmed the verdict for Time.

   Other counsel included:

   Kirkland & Ellis: Donald G. Kempf, Jr. (current tel. 212 761-6321), Sheri J. Engelken (312 861-2000), David M. Elston (current tel. 212 761-4173), and John P. Frantz (current tel. 703 351-3030 or 3161).

   Thomas C. Morrison
   Robert P. LoBue
   PATTERSON, BELKNAP, WEBB & TYLER LLP
   1133 Avenue of the Americas
   New York, NY 10036
   (212) 336-2000
   Counsel for Time, Inc.

7. *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996). I served as counsel for NFL football players during 1995 and 1996 in this Supreme Court case addressing the non-statutory labor exemption to the antitrust laws. I was the primary author of the briefs and assisted Ken Starr at the argument.

   Other counsel included:

   Kirkland & Ellis: Kenneth W. Starr (202 879-5000).

   Joseph A. Yablonski
   Daniel B. Edelman
   YABLONSKI, BOTH & EDELMAN
   1140 Connecticut Avenue, N.W.
   Washington, D.C. 20036
   (202) 833-9060
   Co-Counsel for Petitioners

   Herbert Dym
   Gregg H. Levy
   Sonya D. Winner
   Robert A. Long, Jr.
   COVINGTON & BURLING
   1201 Pennsylvania Avenue, N.W.
   Washington, D.C. 20044
   (202) 662-6000
   Counsel for Respondents

8. *Lipco Partners, L.P. v. Mattel, Inc.*, No. 94 Civ. 1709 (S.D.N.Y. 1994) (Owen, J.), and No. 94-9151 (2d Cir. 1995). I represented Lipco Partners in 1994-1995 in a suit against Mattel, Inc. seeking interest owed on convertible bonds. I prepared the briefs on a motion to dismiss and on appeal. The matter settled while the appeal was pending.

Other counsel included:

Kirkland & Ellis: Donald G. Kempf, Jr. (current tel. 212 761-6321), Frank M. Holozubiec (212 446-4800), and Andrew B. Clubok (202 879-5000).

Ronald S. Rolfe
Brian D. Hail
CRAVATH SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
Counsel for Mattel, Inc.

9. *Bell Atlantic Corp., Bell Atlantic Mobile Systems, Inc., NYNEX Corp. & NYNEX Mobile Communications Co. v. AT&T Corp. & McCaw Cellular Communications, Inc.*, No. CV 94-3682 (E.D.N.Y.) (Korman, J.) (1994). I represented Bell Atlantic and NYNEX during 1993 and 1994 in this antitrust challenge to AT&T's acquisition of McCaw Cellular. The matter settled on the eve of a preliminary injunction trial.

   Other counsel included:

   Kirkland & Ellis: Donald G. Kempf, Jr. (current tel. 212 761-6321), Paul T. Cappuccio (current tel. 212 484-7980), Jonathan Putnam (212 446-4800), James Gillespie (202 879-5000), and Dan Attridge (202 879-5000).

   Charles W. Douglas
   David W. Carpenter
   SIDLEY AUSTIN BROWN & WOOD
   One First National Plaza
   Chicago, IL 60603
   (312) 853-7000
   Counsel for AT&T Corp.

   David Boies
   CRAVATH SWAINE & MOORE
   Worldwide Plaza
   835 Eighth Avenue
   New York, NY 10019
   (212) 474-1000
   Counsel for McCaw Cellular

   Harvey M. Stone
   Richard H. Dolan
   SCHLAM, STONE & DOLAN
   26 Broadway
   New York, NY 10004
   (212) 344-5400
   Co-Counsel for Plaintiffs

10. *Folden v. Washington State Dept. of Social & Health Servs.*, 744 F. Supp. 1507 (W.D. Wash. 1990) (Bryan, J.). In 1989-1990, while an associate at Covington & Burling, I represented the Washington State Department of Social & Health Services in

successfully defending a class action by hospitals and nursing home owners challenging the reimbursement levels provided under the State's Medicaid plan as inconsistent with federal requirements. I was third chair at the bench trial, which resulted in a judgment for our client.

Other counsel included:

Charles A. Miller
Mark H. Lynch
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, DC 20044
(202) 662-6000
Counsel for Washington State Dept. of Social & Health Services

Thomas H. Grimm
John F. Sullivan
James R. Watt
INSLEE, BEST, DOEZIE & RYDER, P.S.
Rainier Plaza, Suite 1900
777 108th Avenue, NE
Bellevue, WA 98004
(425) 455-1234
Counsel for Plaintiffs

Charles F. Murphy
Susan Lomax
OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON
Olympia, WA
Co-Counsel for DSHS

17. **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 litigation matters described in response to Question 16, I have also handled the following significant legal matters:

Office of Legal Counsel

– For the past 15 months, I have been responsible for or significantly involved in most of the legal matters handled by the Office of Legal Counsel. Since Feb. 5, 2005, I have served as the senior official in the Office of Legal Counsel and have been responsible for all legal advice provided by the Office. Pursuant to the Vacancies Reform Act, I had the title Acting Assistant Attorney General, Feb. 5–Feb. 14, 2005, and I currently have that title since my nomination on June 23, 2005. During my tenure, the Office of Legal Counsel has advised the President, the Attorney General, the Deputy Attorney General, other components of the Department of Justice, and the general counsels of several agencies and departments of the Executive Branch on a wide range of statutory and constitutional legal questions.

Private Practice

- Lead counsel to Morgan Stanley in SEC and NASD investigations of IPO allocation practices (2001-2004) (parallel regulatory investigations to the IPO Securities Litigation and IPO Antitrust Litigation described above).

- Lead counsel to Verizon Directories Corp. in Lanham Act action against Yellow Book USA, Inc. for false advertising and sales claims (E.D.N.Y. 2004) (Weinstein, J.). (I prepared the complaint, briefed the motion to dismiss, organized discovery proceedings, negotiated the trial schedule, and handled the initial pretrial proceedings before I left Kirkland & Ellis for my current DOJ position in April 2004. I was replaced as lead trial counsel by Dan K. Webb and Charles B. Molster III of Winston & Strawn. The case was tried before Judge Weinstein in a bench trial in August 2004.)

- Lead counsel to Verizon in defending antitrust class action against former Bell companies relating to competition for local telephone service (S.D.N.Y. 2003-2004) (Lynch, J.) (2d Cir. 2003-2004). We prevailed on a motion to dismiss before Judge Lynch, and that ruling is currently pending on appeal to the Second Circuit. Other counsel included Mark Hansen and Neil Gorsuch of Kellogg Huber, Hansen, Todd, Evans & Figel, PLLC, Robert Zastrow and John Thorne of Verizon, William Kolasky of Wilmer Cutler Pickering Hale and Dorr LLP, and J. Douglas Richards of Milberg Weiss Bershad & Schulman LLP.

- Represented Verizon and its former subsidiary Genuity in 2003 in successfully defending on appeal to the Seventh Circuit an order dismissing an action against an Internet service provider for breach of privacy based on content created by third parties as barred by the provisions of the Communications Decency Act of 1996 that provide immunity from such liability for ISPs. The Seventh Circuit opinion affirming the dismissal of the action was authored by Judge Easterbrook and issued in September 2003.

- Lead antitrust counsel to United Air Lines in obtaining approval from the DOJ Antitrust Division for United's code-share agreement with US Airways (2002). Other counsel included Michael Becker of Kirkland & Ellis LLP; Charles F. ("Rick") Rule of Fried Frank Harris Shriver & Jacobson LLP; and Joel Burton of O'Melveny & Myers LLP.

- Lead antitrust counsel to United Air Lines in seeking DOJ and DOT clearance for United's proposed acquisition of US Airways, which was eventually abandoned (2000-2001). Other counsel included William Singer and Michael Becker of Kirkland & Ellis LLP; Henry Thumann and Joel Burton of O'Melveny & Myers LLP; Charles F. ("Rick") Rule of Fried Frank Harris Shriver & Jacobson LLP; Charles James of Jones Day; and Scott Barshay and Alan Finkelstein of Cravath Swaine & Moore.

- Lead antitrust and regulatory counsel to GTE Corp. in successfully obtaining DOJ Antitrust Division and FCC approval for GTE's merger with Bell Atlantic, forming

Verizon Communications (1997-2000). Other counsel included William Singer and John Frantz of Kirkland & Ellis LLP; William P. Barr and M. Edward Whelan of GTE Corp.; John Thorne and Michael Glover of Bell Atlantic Corp.; Richard Wiley and Mike Senkowski of Wiley Rein & Fielding; and Peter D. Keisler of Sidley & Austin (now Sidley Austin Brown & Wood).

– Represented America Online (AOL) in defending AOL-Time Warner merger before the competition authorities of the European Commission in Brussels (2000). Other counsel included Paul T. Cappuccio of AOL; Theodore W. Ullyot of Kirkland & Ellis LLP; and Thomas Mueller of Wilmer Cutler Pickering Hale and Dorr LLP.

– Counsel to GTE Corp. before DOJ Antitrust Division, FCC, European Commission, and the U.S. District Court for D.C. in successfully challenging Internet aspects of the MCI-WorldCom merger. Other counsel included John Frantz of Kirkland & Ellis; William P. Barr of GTE; and Robert Ruyak, Mark Schechter and Scott Flick of Howrey LLP.

– Represented Meineke and its parent, GKN Plc, in successful appeal of $400 million damages award in class action brought by Meineke franchisees (4th Cir.). Other counsel included Kenneth W. Starr and Christopher Landau of Kirkland & Ellis; Ted Olson and Ted Bhoutros of Gibson Dunn & Crutcher LLP; and Chuck Cooper of Cooper Carvin & Rosenthal (now Cooper & Kirk).

– Represented Brown & Williamson in working with state attorneys general to craft statutory language resolving constitutional issues raised by proposed national tobacco settlement. Other counsel included Stephen Patton and Edward Warren of Kirkland & Ellis; Meyer Koplow, Herb Wachtell, and Jeffrey Wintner of Wachtell Lipton Rosen & Katz; and Lowell Gordon Harris and Charles Duggan of Davis Polk & Wardwell.

– Represented Bell Atlantic Corp. in antitrust defense of Bell Atlantic's acquisition of NYNEX. Other counsel included Peter Huber of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC.

– Represented GTE Corp. in obtaining stay of FCC pricing rules under the Telecommunications Act of 1996 (8th Cir. & Sup. Ct. 1996-1997). Other counsel included Paul T. Cappuccio and Patrick F. Philbin of Kirkland & Ellis; William P. Barr of GTE Corp.; Mark Evans of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC; and David W. Carpenter of Sidley & Austin (now Sidley Austin Brown & Wood).

– In 1995, I represented GTE Corp. in motion before Judge Harold Greene, D.D.C., to terminate the GTE consent decree relating to the acquisition of Sprint following GTE's divestiture of Sprint. This motion was mooted by passage of the 1996 Telecom Act, which superseded the GTE consent decree. Other counsel included William P. Barr and M. Edward Whelan of GTE Corp.; Paul T. Cappuccio of Kirkland & Ellis; Jim Rill, Jim Loftis and Joseph Simon of Collier Shannon Rill & Scott; and Nancy Garrison of DOJ's Antitrust Division.

– Represented General Motors before the Federal Trade Commission in seeking FTC approval for a possible sale of GM's National Car Rental System, Inc. to Alamo Rent-A-Car, Inc. Other counsel included Thomas D. Yannucci of Kirkland & Ellis; and Jim Rill of Collier Shannon Rill & Scott.

– Represented Bell Atlantic Corp. in 1993-1994 seeking waiver from restrictions of the AT&T/Bell System consent decree to enable Bell Atlantic to acquire TCI cable systems. The waiver application was withdrawn when Bell Atlantic abandoned the acquisition. Other counsel included John Thorne of Bell Atlantic and Peter Huber of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC.

– While an associate at Covington & Burling in 1989, I represented the Missouri Department of Social Services in defending a lawsuit by nursing home owners challenging Missouri's Medicaid cost reimbursements. I was the principal drafter of the motion to dismiss. *See AGI-Bluff Manor, Inc. v. Reagen, Director, Missouri Dept. of Social Servs.*, 713 F. Supp. 1535 (W.D. Mo. 1989) (Scott O. Wright, J.). Other counsel included Mark H. Lynch of Covington & Burling; Rexford H. Carruthers and Peter W. Herzog of St. Louis, MO; and Joseph E. Casson of Washington, DC.

– While at Covington & Burling, I drafted several appellate briefs on behalf of *amici*, including the Chemical Manufacturers Association, the American Petroleum Institute, E.I. duPont de Nemours & Co., and others, supporting claims by businesses against insurance companies for insurance coverage under comprehensive general liability policies for cleanup costs associated with environmental liabilities. Other counsel included Robert N. Sayler and William F. Greaney of Covington & Burling.

II. FINANCIAL DATA AND CONFLICT OF INTEREST INFORMATION (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.**

Pursuant to the articles of partnership of my former law firm, Kirkland & Ellis LLP, I have a right, as a former share partner, to receive a pro-rated share of Kirkland & Ellis earnings for services performed by the firm prior to my departure date, April 16, 2004, in certain contingent fee matters not involving the federal Government. This arrangement has been approved by the Departmental Ethics Office of the Department of Justice and is disclosed in my SF-278 public financial disclosure report. I currently estimate the value of this interest to be approximately $25,000. I will receive payments for such earnings, if any, in these contingent fee matters annually according to the ordinary schedule for former partner distributions provided in the articles of partnership of my former firm.

I also have an interest in a 401(k) retirement savings plan and a defined contribution plan that remain with Kirkland & Ellis LLP and are managed by Vanguard and invested in Vanguard mutual funds. Kirkland & Ellis has made and is making no contributions to these plans since my departure from the firm. I also have a rollover IRA derived from employment with Kirkland & Ellis that is invested in Fidelity Investments mutual funds.

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 potential conflict of interest, I will consult with the ethics officials of the Department of Justice and will adhere to all applicable statutes, regulations, standards of conduct, and Department of Justice policies.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? 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.)

Please see my SF-278 public financial disclosure report, submitted separately.

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

Please see attached financial net worth statement.

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

No.

III. GENERAL INFORMATION (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.**

   In 1988 and 1989 while at Covington & Burling, I did pro bono legal work for an organization that represented the interests of inmates of D.C.'s Lorton Prison system, pursuant to a court decree administered by Judge Joyce Hens Green of the U.S. District Court for D.C. I spent approximately 5-10% of my time on this work.

   In 1989 and 1990, I did pro bono work for the D.C. Lawyers' Committee for Human Rights representing a family whose car had been seized and forfeited by the INS for alleged immigration law violations. I spent approximately 5% of my time on this project.

   While a partner at Kirkland & Ellis LLP, I supported the firm's commitment to pro bono work through my involvement in the firm's administration, and I encouraged and supported pro bono work by attorneys who worked with me. I also participated in and supported financially numerous charitable events for the benefit of organizations serving the needs of the disadvantaged.

2. **Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion—through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?**

   No.

NET WORTH

Assets:

Cash on hand and in banks:	$ 20,000
Fidelity Investments—Mutual Funds: (See attached schedule A for detailed breakdown of individual mutual funds.)	$1,048,873
Rollover IRA—Fidelity Mgmt. Trust Co. Mutual Funds: (See attached schedule B for detailed breakdown of individual mutual funds.)	$ 340,378
Harsco Stock:	$ 868
Kirkland & Ellis Defined Contribution Retirement Plan: (Vanguard Mutual Funds—see attached schedule C for breakdown of individual mutual funds.)	$ 251,367
K&E 401(k) Savings Plan (Vanguard Mutual Funds): (See attached schedule D for breakdown of individual mutual funds.)	$ 87,860
Merrill Lynch Medical Savings Account: (Merrill Lynch Global Allocation Fund)	$ 4,775
Wachovia Securities Trust for Son James: (See attached schedule E for breakdown of trust investments.)	$ 85,480
Wachovia Securities Trust for Son Will: (See attached schedule F for breakdown of trust investments.)	$ 85,007
Maryland College Savings Plan for daughter: (See attached schedule G for breakdown of investments.)	$ 5,031
Real Estate Owned—Personal Residence:	$1,400,000
Real Estate Owned for Investment Purposes: (Amount is cost basis of property with home under construction to be sold.)	$ 850,000

Life Insurance—Cash Value: (See attached schedule H for breakdown of investments.)	$ 84,525
Interest in Future K&E Earnings for Pre-4/16/04 Work on Contingent Fee Matters Not Involving the Federal Government:	$ 25,000
Automobiles—Used (two):	$ 43,000
Other Assets—Home Contents: (Furniture, art, rugs, jewelry, etc.)	$ 100,000
Total Assets:	$4,432,164

Liabilities:

Home Equity Line of Credit—Wachovia Bank: (Out of total available line of credit of $500,000.)	$ 260,000
Total Liabilities:	$ 260,000
Net Worth:	$4,172,164
Total Liabilities and Net Worth:	$4,432,164

CONTINGENT LIABILITIES

I have no contingent liabilities.

GENERAL INFORMATION

I have no assets pledged. I am not a defendant in any suits or legal actions. I have never taken bankruptcy.

SUPPORTING SCHEDULES

Schedule A: Fidelity Investments—Mutual Funds:

Spartan International Index Fund	$ 31,150
Dimensional Advisor 5-Year Government Portfolio	$ 189,661
Dimensional Advisor 1-Year Fixed Income Portfolio	$ 346,714
Dimensional Advisor US Large Company Portfolio	$ 20,861
Dimensional Advisor Real Estate Securities Portfolio	$ 33,284
Dimensional Advisor US Small Cap Portfolio	$ 51,507
Dimensional Investment Group Inc. International Value	$ 20,546
Frank Russell Real Estate Securities S	$ 22,081
Frank Russell Quantitative Equity Class S	$ 31,453
Vanguard Bond Index Total Market (VBMFX)	$ 126,503
Vanguard Short Term Bond Index	$ 156,982
Fidelity Municipal Money Market	$ 18,130
Total:	$1,048,873

Schedule B: Rollover IRA—Fidelity Mgmt. Trust Co. Mutual Funds:

DFA International Small Cap Value Portfolio (DISVX)	$ 13,910
DFA International Small Company Portfolio (DFISX)	$ 16,934
Dimensional Investment Group Inc. Int'l Value Portfolio (DFIVX)	$ 20,098
Dimensional Advisor Real Estate Securities Portfolio (DFREX)	$ 14,385
Dimensional Advisor US Large Company Portfolio (DFLCX)	$ 57,685
Dimensional Advisor US Small Cap Portfolio (DFSTX)	$ 50,690

Dimensional Advisor US Small Cap Value Portfolio (DFSVX)	$ 27,099
Fidelity Cash Reserves (FDRXX)	$ 5,466
Frank Russell Quantitative Equity Class S (RQESX)	$ 40,751
Frank Russell Real Estate Securities S (RRESX)	$ 14,328
Fidelity Spartan International Index Fund (FSIIX)	$ 26,986
Dimensional Advisor US Large Cap Value Portfolio (DFLVX)	$ 52,046
Total:	$ 340,378

Schedule C: K&E Defined Contribution Retirement Plan (Vanguard):

Vanguard 500 Index Fund Investor Shares (SEP plan)	$ 185,148
Loomis Sayles Small Cap Value Fund Retail Class (SEP plan)	$ 66,219
Total:	$ 251,367

Schedule D: K&E 401(k) Savings Plan (Vanguard):

Vanguard Emerging Markets Stock Index Fund (401(k))	$ 13,686
Vanguard International Explorers Fund (401(k))	$ 74,174
Total:	$ 87,860

Schedule E: Wachovia Securities Trust for Son James:

Evergreen Treasury Money Market Fund A	$ 49,636
SPDR Trust, Series A	$ 35,844
Total:	$ 85,480

Schedule F: Wachovia Securities Trust for Son Will:

Evergreen Treasury Money Market Fund A	$ 49,163

SPDR Trust, Series A	$ 35,844
Total:	$ 85,007

Schedule G: Maryland College Savings Plan for Daughter (T. Rowe Price):

T Rowe Price Equity Index 500 Fund	33%
T Rowe Price Blue Chip Growth Fund	10%
T Rowe Price Value Fund	10%
T Rowe Price Mid-Cap Growth Fund	4%
T Rowe Price Mid-Cap Value Fund	4%
T Rowe Price Small Cap Stock Fund	8%
T Rowe Price International Stock Fund	4%
T Rowe Price International Growth & Income Fund	4%
T Rowe Price Spectrum Income Fund	23%
Total:	$ 5,031

Schedule H: Northwestern Mutual Variable Life Insurance:

Select Bond	10%
Index 500 Stock	20%
Russell Non-US	19%
Russell Real Estate Securities	9%
Russell Core Bond	10%
T Rowe Price Small Cap Value	17%
T Rowe Price Equity Income	15%
Total:	$ 84,525

U.S. Department of Justice

Washington, D.C. 20530

JUN 24 2005

Ms. Marilyn L. Glynn
Acting Director
Office of Government Ethics
Suite 500
1201 New York Avenue, NW
Washington, DC 20005-3919

Dear Ms. Glynn:

In accordance with the provisions of Title I of the Ethics in Government Act of 1978 as amended, I am forwarding the financial disclosure report of Steven G. Bradbury, who has been nominated by the President to serve as Assistant Attorney General, Office of Legal Counsel, Department of Justice. We have conducted a thorough review of the enclosed report.

The conflict of interest statute, 18 U.S.C. § 208, requires that Mr. Bradbury recuse himself from participating personally and substantially in a particular matter in which he, his spouse, or anyone whose interests are imputed to him under the statute has a financial interest. We have counseled him to obtain advice about disqualification or to seek a waiver before participating personally and substantially in any particular matter that could affect his financial interests. Mr. Bradbury has a contingent interest in several contingency matters being litigated by his former firm. Consistent with 18 USC 208, he will recuse himself from participating personally and substantially in any particular matter that would have a direct and predictable effect on the cases or on his financial interest in the cases, unless he is granted a waiver to participate.

We have advised Mr. Bradbury that because of the standard of conduct on impartiality at 5 CFR 2635.502, he should seek advice before participating in a particular matter involving specific parties which he knows is likely to have a direct and predictable effect on the financial interest of a member of his household, or in which he knows that a person with whom he has a covered relationship is or represents a party.

Based on the above agreements and counseling, I am satisfied that the report presents no conflicts of interest under applicable laws and regulations and that you can so certify to the Senate Judiciary Committee.

Sincerely,

Paul R. Corts
Assistant Attorney General
for Administration and
Designated Agency Ethics Official

Enclosure

SF 278 (Rev. 03/2000)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

Executive Branch Personnel PUBLIC FINANCIAL DISCLOSURE REPORT

Form Approved:
OMB No. 3209 - 0001

Date of Appointment, Candidacy, Election, or Nomination *(Month, Day, Year)*	**Reporting Status** (Check Appropriate Boxes)	Incumbent ☐	Calendar Year Covered by Report	New Entrant, Nominee, or Candidate ☒	Termination Filer ☐	Termination Date *(If Applicable)(Month, Day, Year)*

Reporting Individual's Name	Last Name	First Name and Middle Initial
	Bradbury	Steven G.
Position for Which Filing	Title of Position	Department or Agency *(If Applicable)*
	Assistant Attorney General for the Office of Legal Counsel	U.S. Department of Justice
Location of Present Office (or forwarding address)	Address *(Number, Street, City, State, and ZIP Code)*	Telephone No. *(Include Area Code)*
	950 Pennsylvania Avenue, N.W., Room 5222 Washington, DC 20530	(202) 514-2046
Position(s) Held with the Federal Government During the Preceding 12 Months *(If Not Same as Above)*	Title of Position(s) and Date(s) Held	
	Principal Deputy Assistant Attorney General for the Office of Legal Counsel -- 4/19/04-Present (served as Acting Assistant Attorney General -- 2/4/05-2/14/05)	
Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination	Do You Intend to Create a Qualified Diversified Trust?
	Committee on Judiciary	☐ Yes ☒ No

Certification	Signature of Reporting Individual	Date *(Month, Day, Year)*
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge.	Steven G Bradbury	6/6/05
Other Review (If desired by agency)	Signature of Other Reviewer	Date *(Month, Day, Year)*
	Jan M. Baker	6/24/05
Agency Ethics Official's Opinion	Signature of Designated Agency Ethics Official/Reviewing Official	Date *(Month, Day, Year)*
On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments in the box below).	RLCab	6-24-05
Office of Government Ethics Use Only	Signature	Date *(Month, Day, Year)*

Comments of Reviewing Officials *(If additional space is required, use the reverse side of this sheet)*

(Check box if filing extension granted & indicate number of days _____) ☐

(Check box if comments are continued on the reverse side) ☐

Fee for Late Filing

Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing extension period, shall be subject to a $200 fee.

Reporting Periods

Incumbents: The reporting period is the preceding calendar year except Part II of Schedule C and Part I of Schedule D where you must also include the filing year up to the date you file. Part II of Schedule D is not applicable.

Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.

Nominees, New Entrants and Candidates for President and Vice President:

Schedule A--The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing.

Schedule B--Not applicable.

Schedule C, Part I (Liabilities)--The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.

Schedule C, Part II (Agreements or Arrangements)--Show any agreements or arrangements as of the date of filing.

Schedule D--The reporting period is the preceding **two** calendar years and the current calendar year up to the date of filing.

Agency Use Only
OGE Use Only

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Reporting Individual's Name	SCHEDULE A	Page Number
Bradbury, Steven G.		2 of 11

Assets and Income — BLOCK A

For you, your spouse, and dependent children, report each asset held for investment or the production of income which had a fair market value exceeding $1,000 at the close of the reporting period, or which generated more than $200 in income during the reporting period, together with such income.

For yourself, also report the source and actual amount of earned income exceeding $200 (other than from the U.S. Government). For your spouse, report the source but not the amount of earned income of more than $1,000 (except report the actual amount of any honoraria over $200 of your spouse).

None ☐

Valuation of Assets at close of reporting period — BLOCK B

Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item. — BLOCK C

Assets and Income	Valuation of Assets: None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Type: Dividends	Type: Rent and Royalties	Type: Interest	Type: Capital Gains	Amount: None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
Examples: Central Airlines Common				x												x						x									
Examples: Doe Jones & Smith, Hometown, State			x																											Law Partnership Income $130,000	
Examples: Kempstone Equity Fund					x								x										x								
Examples: IRA: Heartland 500 Index Fund							x						x											x							
1 Kirkland & Ellis LLP -- Washington, DC Partnership income (for servs. pre 04/16/04)																														$1,456,008 law partner income (2004)	
2 S Sole owner real property, 6104 Temple Street, Beth., MD (building house; currently for sale)							x												x												
3 J Wachovia Bank accounts (checking & savings) -- includes a home equity line of credit				x														x			x										
4 Capital gain on 05/19/04 sale of unimproved real property -- Potomac, MD	x																		x								x				
5 S Energy East stock	x															x			x	D x		CG x									
6 S Harsco stock	x															x			x	D x		CG x									

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

Prior Editions Cannot Be Used.

OGE/Adobe Acrobat version 1.0.1 (3/29/01)

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U.S. Office of Government Ethics

Reporting Individual's Name	SCHEDULE A continued (Use only if needed)	Page Number
Bradbury, Steven G.		3 of 11

Assets and Income	Valuation of Assets at close of reporting period														Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.																	
BLOCK A	BLOCK B														BLOCK C																	
															Type				Amount													
	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 Interest in K&E income for pre-4/16/04 work on contingent fee matters not involving fed govt				X																												
2 Vanguard 500 Index Fund Investor Shares (SEP plan)					X								X										X									
3 Loomis Sayles Small Cap Value Fund Retail Class (SEP plan)				X									X											X								
4 Vanguard Emerging Markets Stock Index Fund (401k)		X											X								X											
5 Vanguard International Explorer Fund (401k)				X									X									X										
6 Northwestern Mutual (variable life insurance) Select Bond (10%)		X											X							X												
7 Northwestern Mutual (variable life insurance) Index 500 Stock (20%)		X											X							X												
8 Northwestern Mutual variable life insurance Russell Non-US (19%)		X											X							X												
9 Northwestern Mutual variable life insurance Russell Real Estate Securities (9%)		X											X							X												

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Assets and Income	Valuation of Assets at close of reporting period												Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.																
BLOCK A	BLOCK B												BLOCK C																
													Type				Amount												
	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 Northwestern Mutual variable life insurance Russell Core Bond (10%)		X											X							X											
2 Northwestern Mutual variable life insurance T Rowe Small Cap Value (17%)		X											X							X											
3 Northwestern Mutual variable life insurance T Rowe Price Equity Income (15%)		X											X							X											
4 (F&S) Fidelity Investments -- Spartan Int'l Index Fund			X										X							X											
5 (F&S) Fidelity Investments -- Dimensional Advisor 5-yr Gov't Portfolio					X								X										X							
6 (F&S) Fidelity Investments -- Dimensional Advisor 1-yr Fixed Income Portfolio						X							X										X							
7 (F&S) Fidelity Investments -- Dimensional Advisor US Large Co Portfolio			X										X								X									
8 (F&S) Fidelity Investments -- Dimensional Advisor Real Estate Securities Portfolio			X										X									X								
9 (F&S) Fidelity Investments -- Dimensional Advisor US Small Cap Portfolio			X										X								X									

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Assets and Income	Valuation of Assets at close of reporting period												Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.																
BLOCK A	BLOCK B												BLOCK C																
													Type				Amount												
	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Exempted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 (F&S) Fidelity Investments -- Dimensional Inv't Grp Inc. Int'l Value			X										X								X										
2 (F&S) Fidelity Investments -- Frank Russell Real Estate Secs S			X										X										X								
3 (F&S) Fidelity Investments -- Frank Russell Quantitative Equity Class S			X										X								X										
4 (F&S) Fidelity Investments -- Vanguard Bond Index Total Market (VBMFX)					X								X									X									
5 (F&S) Fidelity Investments -- Vanguard Short Term Bond Index					X								X								X										
6 (F&S) Fidelity Investments -- Fidelity Municipal Money Market			X										X								X										
7 (F&S) Fidelity Investments -- Frank Russell Diversified Bond	X												X									X									
8 (F&S) Fidelity Investments -- Frank Russell Short Term Bond	X												X									X									
9 (F&S) Fidelity Investments -- Frank Russell International Securities	X												X								X										

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Assets and Income	Valuation of Assets at close of reporting period													Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.																		
BLOCK A	BLOCK B													BLOCK C																		
														Type				Amount														
	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Exempt Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 IRA: DFA International Small Cap Value Portfolio (DISVX)		X											X							X												
2 IRA: DFA International Small Company Portfolio (DFISX)			X										X								X											
3 IRA: Dimensional Investment Group Inc. International Value Portfolio (DFIVX)			X										X								X											
4 IRA: Dimensional Advisor Real Estate Securities Portfolio (DFREX)		X											X								X											
5 IRA: Dimensional Advisor U.S. Large Company Portfolio (DFLCX)				X									X								X											
6 IRA: Dimensional Advisor U.S. Small Cap Portfolio (DFSTX)				X									X								X											
7 IRA: Dimensional Advisor U.S. Small Cap Value Portfolio (DFSVX)			X										X									X										
8 IRA: Fidelity Cash Reserves (FDRXX)		X											X							X												
9 IRA: Frank Russell Special Growth Class S (RSPSX)	X												X										X									

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Assets and Income	Valuation of Assets at close of reporting period													Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.																								
BLOCK A	BLOCK B													BLOCK C																								
														Type				Amount																					
	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 IRA: Frank Russell Quantitative Equity Class S (RQESX)			X										X								X														
2 IRA: Frank Russell Real Estate Securities S (RRESX)		X											X									X														
3 IRA: Fidelity Spartan International Index Fund (FSIIX)			X										X							X															
4 IRA: Dimensional Advisor U.S. Large Cap Value Portfolio (DFLVX)				X									X								X														
5 T. Rowe Price International Stock	X												X							X																
6 Merrill Lynch Medical Savings Account – Merrill Lynch Global Allocation Fund		X											X								X														
7 (DC) Wachovia Secs Cap First--Evergreen Treasury MM Fund A (trusts for two children)				X									X								X														
8 (DC) Wachovia Secs Cap First--SPDR Trust, Series A (trusts for two children)				X									X									X													
9 (DC) T. Rowe Price – Maryland College Investment Plan--Portfolio 2015 (for child)		X											X							X															

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Assets and Income	Valuation of Assets at close of reporting period												Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.															
BLOCK A	BLOCK B												BLOCK C															
														Type				Amount										
	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 [(DC) Breakdown of Md College Fund (above): T Rowe Price Equity Index 500 Fund (33%);													X																		
2 T Rowe Price Blue Chip Growth Fund (10%);													X																		
3 T Rowe Price Value Fund (10%);													X																		
4 T Rowe Price Mid-Cap Growth Fund (4%);													X																		
5 T Rowe Price Mid-Cap Value Fund (4%);													X																		
6 T Rowe Price Small Cap Stock Fund (8%);													X																		
7 T Rowe Price International Stock Fund (4%);													X																		
8 T Rowe Price Int'l Growth & Income Fund (4%);													X																		
9 T Rowe Price Spectrum Income Fund (23%)]													X																		

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Do not complete Schedule B if you are a new entrant, nominee, or Vice Presidential or Presidential Candidate

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Part I: Transactions

Report any purchase, sale, or exchange by you, your spouse, or dependent children during the reporting period of any real property, stocks, bonds, commodity futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss.

Do not report a transaction involving property used solely as your personal residence, or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of divestiture" block to indicate sales made pursuant to a certificate of divestiture from OGE.

None ☐

	Identification of Assets	Transaction Type (x)			Date (Mo., Day, Yr.)	Amount of Transaction (x)												
		Purchase	Sale	Exchange		$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Certificate of divestiture
Example	Central Airlines Common	X			2/1/99			X									
1																	
2																	
3																	
4																	
5																	

*This category applies only if the underlying asset is solely that of the filer's spouse or dependent children. If the underlying asset is either held by the filer or jointly held by the filer with the spouse or dependent children, use the other higher categories of value, as appropriate.

Part II: Gifts, Reimbursements, and Travel Expenses

For you, your spouse and dependent children, report the source, a brief description, and the value of: (1) gifts (such as tangible items, transportation, lodging, food, or entertainment) received from one source totaling more than $260, and (2) travel-related cash reimbursements received from one source totaling more than $260. For conflicts analysis, it is helpful to indicate a basis for receipt, such as personal friend, agency approval under 5 U.S.C. § 4111 or other statutory authority, etc. For travel-related gifts and reimbursements, include travel itinerary, dates, and the nature of expenses provided. **Exclude** anything given to you by the U.S. Government; given to your agency in connection with official travel; received from relatives; received by your spouse or dependent child totally independent of their relationship to you; or provided as personal hospitality at the donor's residence. Also, for purposes of aggregating gifts to determine the total value from one source, exclude items worth $104 or less. See instructions for other exclusions.

None ☐

	Source (Name and Address)	Brief Description	Value
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/99 (personal activity unrelated to duty)	$500
	Frank Jones, San Francisco, CA	Leather briefcase (personal friend)	$300
1			
2			
3			
4			
5			

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Part I: Liabilities

Report liabilities over $10,000 owed to any one creditor at **any time** during the reporting period by you, your spouse, or dependent children. Check the highest amount owed during the reporting period. **Exclude** a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

None ☐

	Creditors *(Name and Address)*	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (x)										
						$10,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000
Examples	First District Bank, Washington, DC	Mortgage on rental property, Delaware	1991	8%	25 yrs.			x								
	John Jones, 123 JSt., Washington, DC	Promissory note	1999	10%	on demand					x						
1	Citibank, Washington, DC	Capital loan for partnership (paid off 4/04)	1999	B-,75%	7yrs			X								
2																
3																
4																
5																

*This category applies only if the liability is solely that of the filer's spouse or dependent children. If the liability is that of the filer or a joint liability of the filer with the spouse or dependent children, mark the other higher categories, as appropriate.

Part II: Agreements or Arrangements

Report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

None ☐

	Status and Terms of any Agreement or Arrangement	Parties	Date
Example	Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1/00.	Doe Jones & Smith, Hometown, State	7/85
1	Right to receive pro-rated share of K&E earnings for pre-4/16/04 work on contingent fee matters (see Sched A)	Kirkland & Ellis LLP, Chicago, IL	04/04
2	Vanguard 401k and defined contribution plan remain with Kirkland & Ellis LLP but no further contributions from K&E	Kirkland & Ellis LLP, Chicago, IL	4/04
3			
4			
5			
6			

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Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. **Exclude** positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

None ☐

	Organization *(Name and Address)*	Type of Organization	Position Held	From *(Mo., Yr.)*	To *(Mo., Yr.)*
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/92	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
1	Kirkland & Ellis LLP, Washington, DC	Law firm	Partner	10/1994	04/2004
2					
3					
4					
5					
6					

Part II: Compensation in Excess of $5,000 Paid by One Source

Do not complete this part if you are an Incumbent, Termination Filer, or Vice Presidential or Presidential Candidate.

Report sources of more than $5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

None ☐

	Source *(Name and Address)*	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State	Legal services
	Metro University (client of Doe Jones & Smith), Moneytown, State	Legal services in connection with university construction
1	Kirkland & Ellis LLP, Washington, DC	Legal services
2	Morgan Stanley & Co., Incorporated, New York, NY	Legal services
3	Verizon Communications, Inc., New York, NY	Legal services
4	United Air Lines, Inc., Elk Grove Village, IL	Legal services
5		
6		

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Senator CORNYN. Ms. Wooldridge, would you care to introduce any of your family members who are here?

STATEMENT OF SUE ELLEN WOOLDRIDGE, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE

Ms. WOOLDRIDGE. Yes. Thank you, Senator. My sister, Tricia McCall, is here with me today. I would be remiss, though, if I didn't mention that she is here representing my parents, Robert and Patricia Wooldridge. My father recently passed away and my mother is terrified of flying, so I kind of forewent the opportunity to actually invite her to come today because she would have been in a panic, but I am very lucky to have my sister and friend with me today.

Senator CORNYN. Thank you very much, and welcome.

[The biographical information of Ms. Wooldridge follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
Sue Ellen Wooldridge.

2. Address: List current place of residence and office address(es.)
Residence – Arlington VA 22207.
Office – 1849 C. Street, NW Washington DC 20240.

3. Date and place of birth.
February 8, 1961; Riverside, California.

4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
I am single, never married.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
Law School – Harvard University Law School; 9/1984 – 5/1987; JD June 1987.
College – University of California, Davis; 9/1979 – 6/1983; AB June 1983.

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.
As an employee or partner I was connected to:
(1983) Hunt/Wesson Cannery, Davis, CA. (summer employee in a tomato cannery, working in the industrial engineering department doing systems testing on a whole-peel tomato peeler.)
(1984) Tortilla Flats Restaurant, Placerville, CA. (summer/spring employee, as a waitress in a Mexican food restaurant)
(1985) Diepenbrock, Wulff, Plant & Hannegan, Sacramento, CA. (summer employee, as a law clerk)
(1986) Harvard University Law School, Cambridge, MA. (school-term employee as a resident assistant in a law school dormitory)
(1986) Diepenbrock, Wulff, Plant & Hannegan, Sacramento, CA. (summer employee, as a law clerk)
(1987) Harvard University Law School, Cambridge, MA. (school-term employee as a resident assistant in a law school dormitory)
(8/1987 – 7/1994) Diepenbrock, Wulff, Plant & Hannegan, Sacramento, CA. (employee, as an associate attorney)
(7/1994- 1/99) California Department of Justice, Office of the Attorney General, Sacramento, CA (employee, as a Special Assistant Attorney General)

(1/99 – 1/03) Riegels Campos & Kenyon LLP, Sacramento, California (partner of a law firm; please note that while I held the formal affiliation with the firm until 1/03, I was not an income partner after 1/01.)
(9/00 – 1/01) California Fair Political Practices Commission, Sacramento CA (employee, as general counsel for the agency)
(1/01 – present) United States Department of the Interior, Washington DC (employee, as Deputy Chief of Staff and Counselor to the Secretary (1/31/01 – 5/28/04) and as Solicitor (5/28/04 – present)

As an officer or director I was connected to:
(1994) Leukemia Society of Sacramento (trustee, Board of Directors)
(2000) Sacramento Sierra Chapter of the American Red Cross (Board Member)
(1994-1996) Rotary Club of Point West Sacramento (Board Member)
(1998-1999) Federalist Society of Sacramento (Board Member)

7. Military Service: Have you had any military service: If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.
I have not had any military service.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.
Phi Beta Kappa (1983).

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.
California Bar Association (1987- present)
Sacramento County Bar Association (1987 – 2001)
California Commission on Criminal Justice (approximately 1995)
Judicial Nominees and Evaluation Commission Advisory Committee (approximately 1997)
Milton Schwartz Inn of Court (1998-2001)

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.
Other than the California Bar Association, I do not believe any organizations to which I belong are active in lobbying before public bodies. I am an honorary member of the Rotary Club of Point West, in Sacramento, California. I am a member of the Homeowners Association for my residential property.

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.
I am licensed to practice before all of the courts of the State of California (1987 – present); I am admitted to practice before the United States District Court for the Eastern District of California (1987 to present), and since August, 2002, duly admitted to practice before the United States Supreme Court. There have been no lapses of membership.

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.

(1999) Sacramento Lawyer – Sacramento's Newest Appellate Justice (Biographical sketch of California Appellate Justice Daniel Kolkey).

(June 16, 2001) Written statement regarding Water Management and Endangered Species Issues in the Klamath Basin, Hearing before the Committee on Resources, U.S. House of Representatives in Klamath Falls, Oregon.

(March 13, 2002) Written statement regarding the National Research Council Draft Interim Report on Endangered and Threatened Fishes in the Klamath River Basin, Hearing before the Committee on Resources, United States House of Representatives in Washington, DC.

(2002) ELI - Environmental Forum – (Article on the problems in the Klamath Basin, in California/Oregon.)

I have given a number of speeches since commencing my employment with the Department of the Interior. The remarks in each case were not given from a prepared text. The topics of these speeches have included the duties of public service, cooperative partnerships, handling environmental and resource conflicts, the general topic of western water conflicts.

For example, without prepared text I have spoken to the following groups: the Association of California Water Agencies on February 27, 2001 on the transition of the new administration into the Department of the Interior; the Rocky Mountain Mineral Law Institute on July 16, 2001, on the federal legacy and perspectives on the problems of the Klamath Basin in California/Oregon; the Conference of

Western Attorneys General on July 28, 2002 on the topic of solving water conflicts in the West; the Association of California Water Agencies on February 16, 2005 on the role of the Solicitor's Office within the Department of the Interior; the National Association of Counties on March 4, 2005 on the role of the Solicitor's office; the National Hydropower Association on the role of the Solicitor's Office. I am providing any press reports about the speeches that are readily available. I am also providing the transcript of the hearing on my nomination to be Solicitor, dated March 11, 2004.

13. Health: What is the present state of your health? List the date of your last physical examination.
I am in good health; my last physical examination was February 22, 2005.

14. 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.
Special Assistant Attorney General, California Department of Justice, Office of the Attorney General (7/94-1/99) (Appointed by then Attorney General Daniel E. Lungren)
General Counsel, California Fair Political Practices Commission (9/00-1/01) (Appointed by the non-partisan Commission)
Deputy Chief of Staff and Counselor to the Secretary, United States Department of the Interior (1/01-5/04) (Appointed by Secretary Gale A. Norton)
Solicitor, United States Department of the Interior, (5/04-present) (Appointed by the President George W. Bush, and confirmed by the Senate)

I have never been a candidate for public office.

15. Legal Career:

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

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
I did not serve as a clerk to a judge.

2. whether you practiced alone, and if so, the addresses and dates;
I have never practiced alone.

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

(8/87-7-94) Diepenbrock, Wulff, Plant & Hannegan, 300 Capitol Mall, 17th Floor, Sacramento, California 95814 (The firm was a private full service civil law firm, that dissolved entirely on or about 12/98. I was an associate employee of the firm, handing primarily commercial, insurance and employment litigation matters, in both the state and federal courts.)

(7/94-1/99) Special Assistant Attorney General, California Department of Justice, Office of the Attorney General, 1300 I Street, Sacramento, California 95816 (I served as a legal and policy advisor to the Attorney General for all program areas within the Department, as directed. My general duties included litigation management, governmental relations, legislation and legislative advocacy on particular matters and coordination of policy with other constitutional officers.)

(1/99-1/03) Partner, Riegels Campos & Kenyon LLP, 2500 Venture Oaks Way, Suite 250, Sacramento California 95833; (I was a partner in small civil litigation firm; I represented primarily governmental entities. Though I ended all work for the firm in January, 2001, I remained a nominal/non-income partner until January, 2003.)

(9/00-1/01) General Counsel, California Fair Political Practices Commission, 428 J. Street, Sacramento, California 95814 (I served as chief legal officer to the non-partisan Commission and was the head of the Commission's Legal Division. As such, my responsibility was to interpret, implement and defend the state's campaign finance, campaign disclosure and conflict of interest laws.)

(1/01 – 5/04) Deputy Chief of Staff and Counselor to the Secretary, United States Department of the Interior, 1849 C Street, NW, Washington, DC 20240 (I served as a policy and legal advisor to the Secretary, and on her behalf, provided legal and policy direction to the Department by working with senior level policy, program and management officials to address specific programs, proposed legislation, cross-bureau conflicts and other matters.)

(5/04 – present) Solicitor, United States Department of the Interior, 1849 C Street, NW, Washington, DC 20240 (I serve as the Department's chief legal officer, with management of nearly 400 lawyers and eighteen offices nationwide.)

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?

(8/87-7-94) Diepenbrock, Wulff, Plant & Hannegan. As an associate employee of a medium-sized full service law firm, my practice covered the full range civil litigation - from the filing of pre-judgment remedies to final disposition. The nature and subject matter of the cases varied widely, but included: insurance matters (life and disability or property and casualty); civil RICO; trade secret/intellectual property; personal injury; business fraud; construction contracts and claims; and employment discrimination.

(7/94-1/99) Special Assistant Attorney General, California Department of Justice, Office of the Attorney General. My role as Special Assistant Attorney General was primarily one of litigation management. I acted as a liaison between the Attorney General and the litigating divisions for the Department in both affirmative (enforcement) and defensive litigation. The California Department of Justice is litigation counsel for a myriad of state agencies and the People. Thus, the subject matter of my practice varied widely, such as: false claims prosecution; enforcement of statutes against entities engaged in fraudulent business practices; defense of statutes and constitutional amendments adopted by referendum, initiative or legislative processes; prescription drug reporting; child abuse reporting and recordkeeping; conservation and liquidation of insolvent insurers and conversions of hospitals from non- to for-profit status.

(1/99-1/03) Partner, Riegels Campos & Kenyon LLP. My practice generally was a civil litigation practice, focusing primarily on representing the states, territories, Washington D.C., and the Commonwealth of Puerto Rico (via the National Association of Attorneys General) concerning the terms of a settlement agreement entered into by the states and certain tobacco companies, representing a number of states individually (North Dakota, Alabama, Colorado and California) on tobacco settlement-related matters and representing the State of California involving investigations of potential false claims actions to be brought against banking institutions for failure to report unclaimed property.

(9/00-1/01) General Counsel, California Fair Political Practices Commission. As chief legal advisor to the Commission, my duties included representing the Commission before the Legislature, defending it before the state and federal courts, and supervising a staff of lawyers in interpreting and implementing the state's campaign finance, campaign disclosure, conflict of interest, lobbying and related rules and statutes.

(1/01 – 5/04) Deputy Chief of Staff and Counselor to the Secretary. My practice involved giving policy and legal advice the Secretary and others on a myriad of issues, among others involving the law of public lands, Indian and non-Indian water rights, conflicts of interest and conflict resolution.

(5/04 – present) Solicitor, United States Department of the Interior. The Solicitor is the chief law officer and principal legal adviser to the Secretary. As such, I deal with the variety of substantive legal areas endemic to the Department, including, but not limited to

that of: public land management, natural resource damages; mineral leasing; budget and appropriations; intellectual property; Freedom of Information Act; Privacy Act; ethics; federal tort claims; personnel and Equal Employment Opportunity matters; water rights; hydroelectric power licensing; Indian lands and minerals management; Indian gaming; land acquisitions; wilderness management; forest management; law enforcement; Indian education; Indian trust matters; fifth amendment takings; onshore and offshore oil and gas development and regulation; abandoned mine land reclamation and coal regulatory programs; endangered and threatened species; refuge management; migratory birds; first amendment; and National Environmental Policy Act.

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

(8/87-7-94) Diepenbrock, Wulff, Plant & Hannegan. Former clients include but are not limited to life and disability insurers, property and casualty insurers, construction companies, manufacturers of goods, individuals harmed in or by accidental occurrences, individuals and businesses harmed by the tortious conduct of others, businesses alleging breach of contract, or infringement of intellectual property.

(7/94-1/99) Special Assistant Attorney General, California Department of Justice, Office of the Attorney General. The California Department of Justice represented the People, the constitutional officers of the state and a variety of state agencies. For example, I was involved in litigation matters involving, among others, the Governor, the Controller, the Attorney General, the Department of Justice, Division of Law Enforcement, the Commissioner of Insurance and the Department of Health Services.

(1/99-1/03) Partner, Riegels Campos & Kenyon LLP. Former clients include: the National Association of Attorneys General, as well as a number of other states (North Dakota, Colorado, Alabama, California) individually, for work related to the enforcement of a settlement agreement between forty-six states the Commonwealth of Puerto Rico and the territories and certain tobacco companies; the state of California, investigating potential false claims actions against private banking institutions for failure accurately to report unclaimed property; and businesses seeking to enforce trademarks or to defend against assertions of breach of contract.

(9/00-1/01) General Counsel, California Fair Political Practices Commission. As a public servant, my first obligation was to Federal and State constitutions and laws; my immediate client was the non-partisan Commission.

(1/01 – 5/04) Deputy Chief of Staff and Counselor to the Secretary. As a public servant, my first obligation was to Federal and State constitutions and laws; my immediate client was the Secretary of the Interior and her representatives and delegated authorities.

(5/04 – present) Solicitor, United States Department of the Interior. As a public servant, my first obligation is to Federal and State constitutions and laws; my immediate client is the Secretary of the Interior and her representatives and delegated authorities.

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.

(8/87-7-94) Diepenbrock, Wulff, Plant & Hannegan. I appeared in court (both state and federal) frequently on behalf of clients arguing: pretrial remedies, discovery law and motion, dispositive motions, pre-trial practice and, less frequently, trial. During this time, I participated in two criminal trials and three civil trials. I also handled seven judicial arbitrations.

(7/94-1/99) Special Assistant Attorney General, California Department of Justice, Office of the Attorney General. While I would attend court occasionally, I rarely appeared in a formal representational capacity.

(1/99-1/03) Partner, Riegels Campos & Kenyon LLP. I would appear in court occasionally, though most of my work involved either pre-litigation investigation or post-settlement enforcement work. I also volunteered as a settlement judge pro-tem in civil litigation matters, for the Sacramento County Superior Court.

(9/00-1/01) General Counsel, California Fair Political Practices Commission. I did not appear in court at all, representing the Commission.

(1/01 – 5/04) Deputy Chief of Staff and Counselor to the Secretary. Except for a single judicial mediation, which involved hundreds of hours, I rarely appeared in court in a formal representational capacity.

(5/04 – present) Solicitor, United States Department of the Interior. I have not appeared in court representing the Secretary, her representatives, or delegees.

2. What percentage of these appearances was in:

(a) federal court;
Roughly 40%
(b) state courts of record;
Roughly 60%
(c) other courts

3. What percentage of your litigation was:

(a) civil:
Roughly 98%
(b) criminal.
2%

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 five cases to verdict or judgment. Two were misdemeanor criminal trials, were I was sole counsel for the prosecution. (The law firm I worked for was in a program with the District Attorneys Office to provide trial counsel to augment the Deputy District Attorneys staff, to assist with misdemeanor criminal trial caseload.) One was a short superior court bench trial over a breach of contract for waste management services, wherein I was sole counsel. Two were civil bench trials, one involving a partition action and the other an alleged breach of computer system sale and warranty. I was the associate counsel for both.

5. What percentage of these trials was:
(a) jury;
40%
(b) non-jury.
60%

16. 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.

Litigation Activity #1: I was the lead settlement negotiator (1998) on behalf of the state of California, in the case People of the State of California, et al. v. Philip Morris, Inc., et al., Sacramento County Superior Court, No. 97-AS-30301. The case involved a number of claims against the major tobacco companies, the primary one being alleged violations of state business and advertising fraud statutes. In addition to settling the California case, the five month negotiation and eventual settlement resolved the similar cases brought by

forty-five other states, Washington DC, the Commonwealth of Puerto Rico, American Samoa, the Northern Marianas, Guam, and the US Virgin Islands. Those cases involved claims ranging from antitrust violations, consumer protection violations, healthcare cost reimbursement, unlawful profit taking and restitution. California, along with seven other states (Washington, Colorado, North Dakota, Oklahoma, Pennsylvania, North Carolina, New York), was tasked with engaging in the day to day settlement activity. The settlement ("Master Settlement Agreement") resulted in long-term reforms of the business practices of the companies, establishment of a national public education fund and payment to the states of approximately $206 billion (pre-adjustment).

As with every instance that I worked on litigation matters in the Attorney General's office (1994-1999), I was not the named/trial counsel. My role often was to monitor, at times manage, and report the progress of litigation to the Attorney General. In this case, as with some others, I was assigned specially to represent the Attorney General in settlement of the case. In addition to my formal role, I was a member of an informal drafting group, responsible for reducing the agreement to writing.

The staff counsel for the State of California on the matter included Tom Green, Chief Assistant Attorney General, and Dennis Eckhart, Deputy Attorney General, 1300 I. Street, Sacramento, CA 95814; phone, respectively, (916) 324-5433 and (916)323-3770.

Opposing counsel included: Meyer Koplow, Jeff Wintner and Jeff Boffa, Wachtell, Lipton, Rosen & Katz, 51 West 52nd Street, New York, NY 10019; phone (212) 403-1000 and Stephen R. Patton, Kirkland & Ellis, 200 East Randolph Dr., Chicago, IL 60601; phone (312) 861-2000.

Co-settlement counsel included among others: the Honorable Christine O. Gregoire, former Attorney General and now Governor, state of Washington, Office of the Governor, 416 14th Ave SW, Olympia, WA 98504; phone (360) 902-4111; the Honorable Heidi Heitkamp, former Attorney General, state of North Dakota, 21Captain Leach Dr., Mandan, ND 58554; phone (701) 667-1955; the Honorable Mike Fisher, now Judge, 3rd Circuit Court of Appeal and former Attorney General, state of Pennsylvania; U.S. Post Office and Courthouse 700 Grant Street, Pittsburg, PA 15219; phone (412) 208-7320; Joe Rice, Motley Rice, LLC, 28 Bridgeside Blvd., Mt. Pleasant, SC 29465; phone (843) 720-9159; and Jack McConnell, Motley Rice LLC, 321 S. Main Street, Providence, RI 02903; phone (401) 457-7700.

Litigation Activity #2: I provided consulting advice to the state of Colorado in the matter Premium Tobacco Stores, Inc. d/b/a Cigarettes Cheaper, et al. v. State of Colorado, Civ. No. 99-K-869, United States District Court for the District of Colorado (1999-2000) (Judge John Kane, judge presiding). The case involved a challenge by several tobacco companies to statutes passed by Colorado that prohibited the sale of "gray market" cigarettes and other tobacco products in the State. Gray market goods are produced for

export, not for sale in the United States, but are subsequently brought back in to the United States for resale. Under the Master Settlement Agreement (MSA) entered into by Colorado in 1998 in settlement of the litigation against the major tobacco companies, the number of cigarettes shipped by the settling companies in part determines their payment obligations. Generally, if the number of cigarettes "shipped" declines, so does their payment. Thus, the MSA makes a connection between the number of cigarettes shipped and a state's expected health care and other costs. Cigarettes designated for "export only" are not counted as "shipped." To the extent that such cigarettes are repatriated to the United States and supplant domestic cigarettes, the relationship between consumption and societal costs is distorted. The plaintiffs in this case were not settling companies; they raised commerce clause, federal supremacy, equal protection, contract clause challenges to the statutes. Colorado raised a number of successful defenses, but specifically contracted with me to consult with them on the MSA and testify about the way the MSA was structured, its purposes and how it worked in market conditions. Plaintiffs' request for preliminary injunction was denied. Ultimately, Colorado prevailed on summary judgment. Counsel for the State of Colorado was Neil Tillquist former Assistant Attorney General Business and Licensing Section, and now Director, Taxpayer Services Division, Colorado Department of Revenue, 1375 Sherman Street, Room 205, Denver, CO 80203; phone (303) 866-2114. I had no interaction with opposing counsel.

Litigation Activity #3: I provided legal advice and testimony in the matter Blaylock, et al. v. American Tobacco Co., et al., Circuit Court of Montgomery County, No. CV.-96-1508-PR. In order to be a settling state under the Master Settlement Agreement (MSA), each signatory was required by a date certain to achieve entry of the settlement and a consent decree. The state of Alabama filed its action (CV-98-2941-PR) and consent decree in the Circuit Court after becoming signatory to the MSA. The Honorable Charles Price, Presiding Circuit Judge, ordered appointment of a number of experts to review and give opinions regarding the financial terms of the settlement and thus to assist the court in determining whether the settlement was in the best interest of the people of the State of Alabama. At stake for the state and people of Alabama were approximately $3 Billion (pre-adjustment) and the non-economic benefits of the agreement, ranging from the significant voluntary restrictions on advertising and promotions to restrictions on lobbying and joint activities. In turn, I was engaged by the Attorney General of Alabama, with consent of the Governor, to provide advice to the court-appointed experts and to give testimony as needed. I provided such advice and testimony. The consent decree was approved. The state of Alabama was represented by Deputy Attorney General Richard Allen, 11 South Union Street, Suite 303, Montgomery, AL 36104; phone (334) 242-4891; Court appointed experts included among others Edward W. Sauls, Jackson Thornton & Co., 200 Commerce Street, Montgomery, AL 36104; phone (334) 240-3690.

Litigation Activity #4: In this matter I assisted in the defense of client manufacturer and retailer of consumer devices against tort and contract claims by another manufacturer arising out of an alleged failure to purchase agreed upon number of plaintiff's product.

My role was primarily to assist in the discovery and law and motion phase of the litigation. The case was captioned Play Industries v. Minolta Corporation, CIV-S-97-1505 EJG/DAD, the Honorable Edward J. Garcia judge presiding. Lead counsel for defendant was David A. Riegels, Riegels Campos & Kenyon LLP, 2500 Venture Oaks Way, Suite 250, Sacramento, CA 95833; phone (916) 779-7106. Opposing counsel for plaintiff was Joseph S. Genschlea, 400 Capitol Mall, 11th Floor, Sacramento, CA 95814; phone (916) 558-6000. The matter was settled, after extensive discovery.

Litigation Activity #5: In this matter, again as Special Assistant Attorney General, I reviewed and monitored the staff lawyers in the Department of Justice litigating the matter filed in 1993, Coe v. City of Los Angeles, CA Department of Justice, et al., Los Angeles County Superior Court, No. BC088404, the Honorable Charles W. McCoy, Jr., judge presiding. The case (litigated under seal) involved a challenge by a fictitiously-named plaintiff to the manner and methods by which all police, sheriffs, probation, and child welfare departments in California create, retain, disclose, or use alleged child abuse records maintained by the California Department of Justice in its Child Abuse Central Index, created in 1965. While judgment ultimately was entered on behalf of defendants, in response to the litigation, wholesale management and legislative changes were made and/or obtained, in order to better enforce Californians' state and federal Constitutional rights of privacy. In addition to the litigation oversight, I was involved in monitoring the program changes that were undertaken. Counsel for the state of California included former Deputy Attorney General and now Superior Court Judge Allen Sumner, Sacramento County Superior Court, 720 Ninth Street, Sacramento, CA 95814; phone (916) 874-5911. I had no contact with plaintiff's counsel.

Litigation Activity #6: While at the California Department of Justice, we prosecuted a case captioned State of California ex rel. Stull v. Bank of America, San Francisco City and County Superior Court, CV 95-968484, (1995). The case originally was filed by a qui tam plaintiff, alleging that the Bank had overcharged for municipal bond accounts it administered. Our amended complaint alleged on behalf of the State of California that in addition, the bank had failed to escheat as unclaimed property from its municipal and corporate bond accounts millions of dollars in unclaimed bond principal and interest. Eventually, the case involved hundreds of public entity plaintiffs. On behalf of the Attorney General, I monitored the litigation and as needed, provided input to the litigation team - among others former Deputy Attorney General Brian Taugher, 980 Ninth Street, Suite 1900, Sacramento, CA 95814; phone (916) 447-9151; Mr. Manny Mateo, 6110 Cobblestone Road, Placerville, CA 95667; phone (530) 621-3552). As the case progressed toward trial, I was assigned by the Attorney General to work with our trial team as lead negotiator during the court-directed arbitration. The case settled, upon the Bank's agreement to pay approximately $200 million. It was at the time the largest false claims act settlement in the State's history. The arbitrator was the Honorable Daniel Weinstein, JAMS Endispute, Two Embarcadero Center, Suite 1100, San Francisco, CA 94111; phone (415) 982-5267.

Litigation Activity #7: I have been the Secretary's lead representative in matters involving the Klamath Basin (Southern Oregon/Northern California) since approximately March, 2001. In that year, litigation arose over the decision by the Bureau of Reclamation that, due to drought and the requirements of the Endangered Species Act, the normal diversions from its major storage lake could not take place, and that instead the available water would either remain in the lake or be sent downstream to sustain three endangered or threatened fish species. The litigation was captioned Kandra v. United States, 145 F. Supp. 2d 1192 (D. Or. 2001), the Honorable Ann Aiken judge presiding. Plaintiff irrigation districts sought to enjoin the Bureau of Reclamation's 2001 operations plan that allowed only minimal releases to the water users in the Klamath Project. The District Court directed the matter to mediation. The mediation occurred over several months, and ultimately did not result in changes to how the Bureau would implement its annual plan of operations. In the absence of such an agreement, the court ruled against plaintiffs, denying the motion for preliminary injunction.

While unsuccessful in terms of the immediate case, the mediation began discussions and established relationships which have resulted in many changes and activities that will redound to the benefit of the natural resource and ecosystems, the water users, fishermen, hunters, power generators, American Indian communities, hunters and the area national wildlife refuges. There were many participants in the litigation, including: Mr. Paul Simmons, 813 Sixth Street, 3rd Floor, Sacramento, CA; phone (916) 446-7979 (for plaintiffs); Charles Shockey and Steve MacFarlane, Natural Resources Section, United States Department of Justice, 501 I. Street, Suite 9-700, Sacramento, CA; phone (916) 930-2203 and (916) 930-2204 (for the United States); and Mike Harty, Center for Collaborative Policy, 1301 J. Street, Suite 250, Sacramento, CA 95814; phone (916) 341-3328 (mediator).

Litigation Activities #8 - 10: Please note that much of my early litigation experience was with the law firm Diepenbrock, Wulff, Plant & Hannegan, in Sacramento, California. This firm, established in 1855, dissolved into four firms in November-December, 1998. As the vast majority of my legal work was done assisting litigating partners of the firm, the case files belonged to those partners and that firm. To my knowledge, those files no longer exist.

Unlike my government practice, which often had regional, state-wide, or national significance, the issues in the cases I litigated affected often only a single individual or company. Yet, to that individual or company, the matter was often significant. Thus, I would here give some examples of the cases, knowing however that I have not provided the information in the detail requested.

- This case involved allegations made against a group of physicians and a medical

device manufacturer arising out of injuries sustained to one of their patients during a surgical procedure. I participated as an associate counsel, defending the manufacturer of the equipment alleged to have malfunctioned. After extensive pre-trial discovery, the matter was settled. The case was captioned Norma Wade v. Sacramento Plastic and Reconstructive Surgery, CV56273. David Riegels, Riegels Campos & Kenyon LLP, 2500 Venture Oaks Way, Suite 250, Sacramento, CA 95833; (916) 779-7106 was lead counsel. The attorney for the Plaintiff was Joseph Fornasero, 917 G. Street, Sacramento, CA 95814; (916) 444-8633; opposing counsel).

- This case involved a complaint brought on behalf of a small business owner against a major insurer for bad faith in handling claims for property damage under an inland marine insurance policy. I was the lead counsel for the plaintiffs; after extensive discovery, the matter was settled. The case was venued in the United States District Court for the Eastern District of California, and was captioned Honeywell v. Underwriters at Lloyds of London, CV–01913–EJG. Opposing counsel was David S. Porter, P.O. Box 22686, Long Beach, CA 90801; phone (310) 435-5626.

- In this case, I assisted in the defense of a law firm alleged to have aided its client's alleged fraud involving the conversion of a non-profit hospital to for-profit status. After extensive discovery in the case, the plaintiff and defendant merged their businesses, and the matter was settled by a voluntary dismissal. The case was set in the Sacramento County Superior Court, and captioned Qual-Med, Inc., et al. v. Health Net, et al., CV523693 (1991). The lead counsel David A. Riegels, Riegels Campos & Kenyon LLP, 2500 Venture Oaks Way, Suite 250, Sacramento, CA 95833; (916) 779-7106. The trial judge was former Superior Court Judge and Appellate Justice the Honorable Fred K. Morrison, 914 Capital Mall, Sacramento, CA 95814; (916) 654-0209. Opposing counsel included, among many others Ronald Zumbrun, 3800 Watt Ave. #101, Sacramento, California 95821; phone (916) 486-5900.

17. 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).

Legal Activity #1: The California Department of Justice has the responsibility to enforce the provisions of California's non-profit public benefit corporation law and California trust law, so as to fully protect charitable assets for the benefit of the public. After numerous issues arose involving the sale or conversion of non-profit hospitals to for-profit status, I worked with career attorneys within the Department of Justice and

members of the state legislature, in particular former assembly-member the Honorable Phil Eisenberg (428 J. Street, Suite 400, Sacramento, CA 95814; phone (916) 447-7933), to obtain passage of a bill to modify/strengthen the authority of the California Department of Justice to review for approval or disapproval such transactions. In addition to passage of the legislation, we also drafted new internal protocols to guide the state auditors and attorneys whose role it was to review such transactions. The lead attorney for the California Department of Justice in such matters was former Deputy Attorney General Jim Schwartz, Manatt Phelps et al. 11355 West Olympic Blvd, Los Angeles, CA 90064; phone (310)312-4182.

Legal Activity #2: One of my duties (shared with another attorney) at the California Department of Justice was to provide background reports to the Commission on Judicial Appointments on the Governor's Supreme and Appellate Court nominees and appointees. These reports were used by the Commission members (usually, the Chief Justice of the California Supreme Court, the Attorney General, and the senior presiding justice of the Appellate Court to which the person had been nominated/appointed) to prepare for the public hearings that were held by the Commission prior to its vote on the nomination or appointment. In most cases, the duty involved gathering and reviewing biographical data, reading published and unpublished opinions by the nominee/appointee, and conducting interviews of and obtaining comments from counsel that had appeared before the nominee/appointee which were then included in the reports without attribution.

Legal Activity #3: The Department of the Interior has a great many ongoing responsibilities in the Klamath Basin (Southern Oregon/Northern California). As stated, I have been the lead representative for the Department on Klamath Basin related issues since March, 2001. Since then, the Federal Government has undertaken many actions to respond to the challenges in the Basin (over appropriation of water, compromised natural resource, economic hardship, tribal trust management issues, endangered and threatened species).

We have had to respond to a number of suits. For instance: Kandra v. United States, 145 F. Supp. 2d 1192 (D. Or. 2001); Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, et al., 138 F. Supp. 2d 1228 (N.D. Cal 2001) (PCFFA I); Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, et al., No. C 02-2006 SBA (N.D. Cal. July 14, 2003) (PCFFA II); Wilderness Soc'y v. Norton, CV S-02-2375 (E.D. Cal. June 12, 2003); Moden v. Fish and Wildlife Service, 281 F. Supp. 2d 1193 (D. Or. 203); Klamath Irrigation District v. United States, No. 01-591 L (Fed. Cl. 2001); Environmental Protection Info. Ctr. v. National Marine Fisheries Service, C-02-5401 (N.D. Cal. March 2, 2004).

Much of our effort however has been programmatic. Among many other items, we have: established pilot projects for water banks to increase flows to and reduce diversions upper Klamath Lake to meet endangered species requirements; funded improvements in

irrigation efficiency; established conservation buffers; funded wetland improvements and upland watershed management actions; sponsored wildlife habitat and invested in fish habitat restoration to improve spawning nursery and other habitat for listed and non-listed species; revised our biological opinions so that they have full scientific support; engaged in multi-year operational planning, which provides flexibility to irrigators, refuges and threatened and endangered species and we are in the process of opening up many miles of previously blocked habitat for endangered fish. In addition, we completed a large fish screening for the largest water diversion to the Bureau of Reclamation's Klamath Project, to reduce entrainment and loss of larval, juvenile and adult endangered suckers. Finally, we have augmented flows to the Klamath River by additional water during mid-summer through the end of September to aid upriver migration of salmon and improve water temperature.

Legal Activity#4: One of my responsibilities as Deputy Chief of Staff and Counselor to the Secretary, beginning approximately 2002, was to work with our career ethics staff to improve the profile, efficacy, staffing, and management function of the ethics office within the Department. Working with the Designated Agency Ethics Official, we have made many improvements in the program, including: establishing a single ethics office with a director a career member of the Senior Executive Service; moving the ethics function from being part of and reporting through a number of management levels to the Assistant Secretary for Policy Management and Budget to being part of the Office of the Solicitor and reporting directly to the Solicitor and Deputy Solicitor; augmenting the budget for the program to improve its staffing needs; and establishing training for persons with formal screening responsibilities to detect conflicts of interest. While further improvements are in the process, the ethics office function has demonstrably improved since 2002, to the monumental credit of its dedicated career staff. Indeed, the Office of Government Ethics recently provided favorable results of an audit it performed of the Department's ethics operations.

Legal Activity #5: Since becoming the Solicitor of the Department of the Interior, my focus, working with senior managers, has been to continue to plan and execute a series of management reforms that have been long needed. For instance, in the last year we have finalized a strategic human capital and workforce plan, redesigned some of our business practices to provide more control and accountability over expenditures, piloted a case/matter tracking system to allow better management of office workloads, engaged the assistance of experts from another public legal office to review and report recommendations for systems improvements (information systems tracking and retention), developed a position management system to ensure sound deployment of our employees to serve the mission needs, begun planning for knowledge management systems and retention (e.g., brief banks) and reconnected the office to computer-based legal research services.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

I have a rollover individual retirement account from an employee welfare benefit plan that I was enrolled in as an employee of the law firm Diepenbrock, Wulff, Plant & Hannegan. Part of that rollover account contains moneys from the 401k plan established and funded as a partner of the law firm Riegels Campos & Kenyon LLP (the total amount of this account is $162,521 ; the particular holding in that account are reported on my Form 278). I have a small Roth IRA in the amount of $2,962. I also have retirement benefits from my employment with the State of California (Savings Plus Program) ($67,685); the particular holdings in that account are reported on my Form 278. I also am a participant in the federal Thrift Savings Plan program ($81,928). Finally I own rental property (a townhouse) with fifteen months remaining on a tenant contract worth $36,000. I do not have any other arrangements to be compensated in the future for any financial or business interest.

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

If a conflict should arise, either as a true conflict or because of the potential for an appearance of a conflict, the procedure I would employ, after seeking appropriate ethics advice from the ethics official for the Department of Justice, is to issue a written recusal and then have a designated person(s) screen for the particular matter, person or issue, to ensure that I do not have any conflicted involvement.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? 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 Form 278)

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

   (See attached financial net worth statement)

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

   I have never held a position or played a role in a political campaign.

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.

   Pro Bono: I was allowed by my employer law firm to represent an elderly man whose son had absconded with his life savings. I obtained a judgment against his son, and after a lengthy search, a sister state judgment. I expended approximately 200 hours on this matter. I also served over a number of years as either a coach of a high school moot court or judge of mock-trial teams. I have also served as a volunteer settlement judge pro-tem of the Sacramento County Superior Court.

   Civic: I have volunteered for the American Lung Association (occasional neighborhood fundraising), the Leukemia Society of Sacramento (board membership), and the Sacramento/Sierra Chapter of the American Red Cross (board membership), in each case serving the individuals or communities targeted by those associations. I was also a Rotarian for nearly a decade, actively involved in community service work directed toward the elderly and disadvantaged children. Projects I worked on included residential clean-up for elderly or disabled citizens, speech contests for youngsters, fundraisers to enable underprivileged children to attend summer camps, etc. I also worked on a Habitat for Humanity house-building project in Sacramento, California.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion - through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies.

   I have never belonged to any organization which discriminates on the basis of race, sex, or religion - through either formal membership requirements or the practical implementation of membership policies.

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	43	000	00	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule	316	000	00	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 tax and interest			
Doubtful				Real estate mortgages payable-add schedule	833	096	00
Real estate owned-add schedule				Chattel mortgages and other liens payable			
Home – estimated value	625	000	00				
Rental Property – estimated value; 2304 No. Greenbrier Ct. Arlington, VA	625	000	00				
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property	10	000	00				
Cash value-life insurance							

Other assets itemize: Rental Contract Income -- 2304 Greenbrier Ct. Arlington VA	36	000	00				
				Total liabilities	833	096	00
				Net Worth	822	004	00
Total Assets	1,655	000	00	Total liabilities and net worth	1,655	000	00
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor	NO			Are any assets pledged? (Add schedule)	NO		

On leases or contracts	NO			Are you a 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						

Listed Securities (Schedule)

Cisco Systems Inc	$2,590
Intel Corp	$3,528
Isco International Inc.	$150
Microsoft Corp	$3,036
*Morgan Stanley Mutual Funds (401k rollover, IRA, Roth IRA)	
Health Sciences Trust B	$7,027
Global Dividend Grwth Sec B	$10,760
Financial Fervices Trust B	$7,096
Equally Weighted S&P A	$68,196
S&P 500 Index Fund	$48,553
Equally Weighted S&P B	$5,082
Dividend Growth Securities B	$10,323
**Savings Plus Program State of California (401k)	
Calpers S&P 500	$48,432
Hartford Stock HLS	$19,253
***Thrift Savings Plan (federal)	$81,928
Total	$315,954

Real Estate Mortgages Payable (Schedule)

Suntrust Mortgage - (home)	$69,074
Suntrust Mortgage - (home)	$366,597
Suntrust Mortgage - (Rental)	$397,425
total	$833,096

U.S. Department of Justice

Washington, D.C. 20530

JUN 2 [illegible] 2005

Ms. Marilyn Glynn
Acting Director
Office of Government Ethics
Suite 500
1201 New York Avenue, NW
Washington, DC 20005-3919

Dear Ms. Glynn:

In accordance with the provisions of Title I of the Ethics in Government Act of 1978 as amended, I am forwarding the financial disclosure report of Sue Ellen Wooldridge, who has been nominated by the President to serve as Assistant Attorney General, Environment and Natural Resources Division, Department of Justice. We have conducted a thorough review of the enclosed report.

The conflict of interest statute, 18 U.S.C. Section 208, requires that Ms. Wooldridge recuse herself from participating personally and substantially in a particular matter in which she, her spouse, or anyone whose interests are imputed to her under the statute, has a financial interest. Ms. Wooldridge has been counseled and has agreed to obtain advice about disqualification or to seek a waiver before participating in any particular matter that could affect her financial interests.

We have advised Ms.Wooldridge that because of the standard of conduct on impartiality at 5 C.F.R. § 2635.502, she should seek advice before participating in a particular matter involving specific parties which she knows is likely to have a direct and predictable effect on the financial interest of a member of her household, or in which she knows that a person with whom she has a covered relationship is or represents a party. Furthermore, Ms. Wooldridge has been advised and understands that as a Senate-confirmed Presidential appointee, she is not permitted to have any outside earned income during her service in the position.

Based on the above agreements and counseling, I am satisfied that the report presents no conflicts of interest under applicable laws and regulations and that you can so certify to the Senate Judiciary Committee.

Sincerely,

Paul R. Corts
Assistant Attorney General
for Administration and
Designated Agency Ethics Official

Enclosure

SF278 (Rev. 05.2000)
5 C.F.R Part 2634
U.S. Office of Government Ethics

Executive Branch Personnel PUBLIC FINANCIAL DISCLOSURE REPORT

Form Approved:
OMB No. 3209-0001

Date of Appointment, Candidacy, Election or Nomination (Month, Day, Year)	Reporting Status (Check appropriate box(es)): Incumbent ☐	Calendar Year Covered by Report	New Entrant, Nominee, or Candidate ☒	Termination Filer ☐	Termination Date (If Applicable) (Month, Day, Year)

	Last Name	First Name and Middle Initial
Reporting Individual's Name	Wooldridge	Sue Ellen
Position for Which Filing	Title of Position: Assistant Attorney General for Environment and Natural Resouces	Department or Agency (If Applicable): U.S. Department of Justice
Location of Present Office (or forwarding address)	Address (Number, Street, City, State, and ZIP Code): 1849 C Street, NW, Washington, DC 20240	Telephone No. (Include Area Code): 202-208-6003
Position(s) Held with the Federal Government During the Preceding 12 Months (If Not Same as Above)	Title of Position(s) and Date(s) Held: Solicitor: 05/28/04 to Date; Deputy Chief of Staff and Counselor to the Secretary of the Interior: 01/01/01- 05/27/04	
Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination: Committee on the Judiciary	Do You Intend to Create a Qualified Diversified Trust? Yes ☐ No ☒

Certification	Signature of Reporting Individual	Date (Month, Day, Year)
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge.	Sue Ellen Wooldridge	5/17/05
Other Review (If desired by agency)	Signature of Other Reviewer: Lauri M. Rodgers	Date (Month, Day, Year): 6/21/05
Agency Ethics Official's Opinion On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments in the box below).	Signature of Designated Agency Ethics Official Reviewing Official: R R Cate	Date (Month, Day, Year): 6-24-05
Office of Government Ethics Use Only	Signature	Date (Month, Day, Year)

Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)

(Check box if filing extension granted & indicate number of days _____) ☐

(Check box if comments are continued on the reverse side) ☐

Fee for Late Filing

Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing extension period shall be subject to a $200 fee.

Reporting Periods

Incumbents: The reporting period is the preceding calendar year except Part II of Schedule C and Part I of Schedule D where you must also include the filing year up to the date you file. Part II of Schedule D is not applicable.

Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.

Nominees, New Entrants and Candidates for President and Vice President:

Schedule A--The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing.

Schedule B--Not applicable.

Schedule C, Part I (Liabilities)--The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.

Schedule C, Part II (Agreements or Arrangements)--Show any agreements or arrangements as of the date of filing.

Schedule D--The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

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C.F.R Part 2634
J.S. Office of Government Ethics

Reporting Individual's Name: Wooldridge, Sue Ellen

SCHEDULE A

| Assets and Income (BLOCK A) | Valuation of Assets at close of reporting period (BLOCK B) | | | | | | | | | | | | | Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item. (BLOCK C) | | | | | | | | | | | | |

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Reporting Individual's Name: Wooldridge, Sue Ellen

SCHEDULE A continued
(Use only if needed)

Page Number: 3 of 7

Assets and Income (BLOCK A)	Valuation of Assets at close of reporting period (BLOCK B)														Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item. (BLOCK C)																				
															Type				Amount																
None ☐	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Exempt Investment Fund	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	Over $25,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 *** Health Sciences Trust B		X											X							X													
2 *** Global Divident Growth Sec B		X											X						X														
3 *** Financial Services Trust B		X											X							X													
4 *** S&P 500 Index Fund B				X									X						X														
5 *** Equally Weighted S&P B				X									X							X													
6 *** Dividend Growth Sec B		X											X							X													
7 MSDW (Roth IRA) Equally Weighted S&P 500 B		X											X						X														
8 State of California Savings Plus Program (defined contribution) ** Includes																																		
9 **Calpers S&P 500			X										X							X													

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

Prior Editions Cannot be Used.

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Reporting Individual's Name: Wooldridge, Sue Ellen

SCHEDULE A continued
(Use only if needed)

Page Number: 4 of 7

Assets and Income (BLOCK A)	Valuation of Assets at close of reporting period (BLOCK B)												Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item (BLOCK C)																								Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
																Type				Amount																			
None ☐	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000 *	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Exempt Investment Fund	Excepted Trust	Qualified Trust	Trust Income	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000	$1,000,001 - $5,000,000	Over $5,000,000		
1																																						
2	** Hartford Stock HLS		X										X							X																		
3	Residential Rental (2304 N. Greenbrier Ct., Arlington, VA 22207) (bought 2/05)						X										X							X														
4	Residential Rental (535 37th St., Sacramento, CA) (sold 1/05)	X															X		X								X											
5																																						
6																																						
7																																						
8																																						
9																																						

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Reporting Individual's Name	SCHEDULE D	Page Number
Wooldridge, Sue Ellen		7 of 7

Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

None [X]

	Organization *(Name and Address)*	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples:	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/92	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
1					
2					
3					
4					
5					
6					

Part II: Compensation In Excess Of $5,000 Paid by One Source

Report sources of more than $5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

Do not complete this part if you are an Incumbent, Termination Filer, or Vice Presidential or Presidential Candidate

None [X]

	Source *(Name and Address)*	Brief Description of Duties
Examples:	Doe Jones & Smith, Hometown, State	Legal services
	Metro University (client of Doe Jones & Smith), Moneytown, State	Legal services in connection with university construction
1		
2		
3		
4		
5		
6		

Prior Editions Cannot Be Used.

Senator CORNYN. Mr. Barnett, would you care to introduce any of your family?

STATEMENT OF THOMAS O. BARNETT, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. BARNETT. Yes. Thank you, Mr. Chairman. I would like to introduce my wife, Alexa, and our 2-year-old son, Braden, and our—who impressed Senator Allen, and our 17-month-old daughter, Avery. Along with them are my brother, Paul, who is also a Virginia resident, and my cousin, the Reverend Jeffrey MacKnight, and if I could just acknowledge my parents, who were not able to be here in person but certainly without whose support I would not be here.

Senator CORNYN. Thank you very much for those introductions.

[The biographical information of Mr. Barnett follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

   Thomas O. Barnett

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

   Residence: McLean, VA 22101

   Office: Antitrust Division
   U.S. Department of Justice
   Room 3109
   950 Pennsylvania Avenue, NW
   Washington, DC 20530-0001

3. Date and place of birth.

   August 1, 1962
   Norfolk, Nebraska

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

   I am married to Alexa Boonstra Barnett (maiden name Alexa Kathleen Boonstra). Alexa is an attorney, but currently works at home caring for our two children.

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

   I attended college at Yale University from 1981 to 1985, receiving a B.A. in June 1985.

   I attended the London School of Economics from 1985 to 1986, receiving a M.Sc. in Economics in June 1986.

   I attended Harvard Law School from 1986 to 1989, receiving a J.D. in June 1989.

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.

   I worked as a research assistant in Washington, D.C. during the summers of 1985 and 1986 for the Committee on the Status of Black Americans, created by the National

Research Council of the National Academy of Sciences.

I worked at Harvard Law School as a Legal Methods instructor during the 1987-88 academic year and as a member of the Board of Student Advisers during the 1987-88 and 1988-89 academic years.

I worked as a summer associate for the law firm of Bell, Boyd & Lloyd during the summer of 1987 in Washington, D.C.

I worked as a summer associate for the law firm of Arnold & Porter during the summer of 1988 in Washington, D.C.

I worked as a summer associate for the law firm of Jenner & Block during the summer of 1989 in Washington, D.C.

I worked as a judicial clerk for the Hon. Harrison Winter, U.S. Court of Appeals for the Fourth Circuit, from 1989 to 1990 in Baltimore, Maryland.

I worked as an associate for the law firm of Covington & Burling from 1990-1997 and then as a partner from 1997 to 2004 in Washington, D.C.

I co-taught an advanced antitrust seminar at the University of Virginia School of Law during multiple years between 1991 and 2003.

I worked as an adjunct professor to Georgetown University Law Center in 2001 and 2003, teaching a course on sports and antitrust law.

I worked as Deputy Assistant Attorney General for the Antitrust Division, U.S. Department of Justice, from 2004-2005 and then as Acting Assistant Attorney General from 2005 to the present.

I served as a member of the National Advisory Council to the U.S. Small Business Administration from 2003-2005.

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

I have not served in the military.

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

Yale University: Graduated *summa cum laude* and elected to Phi Beta Kappa.

Fulbright Scholar to the United Kingdom during 1985-86, which I used to support my studies at the London School of Economics.

Harvard Law School: Graduated *magna cum laude* and a John M. Olin Fellow in Law and Economics from 1987 to 1989.

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
Antitrust Section:
Vice Chair, Section 1 Committee (2003-present)
Member, Editorial Board, Antitrust Law Developments (2003-2005)

D.C. Bar Association, member, no offices.

Maryland Bar Association, member, no offices.

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 Automobile Association Mid-Atlantic
Chesterbrook Swimming and Tennis Club, McLean, VA (bylaws attached)
Diver's Alert Network
Federalist Society
Friends of the National Zoo
Lee Center Cooperative Playgroup, Arlington, VA
National Aquarium in Baltimore
National Republican Senatorial Committee
Nebraska Polio Survivors Association
Nebraska Society
Parents Board of the Mount Olivet Preschool, Arlington, VA
Republican National Committee
St. Dunstan's Episcopal Church, Bethesda, MD
Yale Alumni Association
Yale Club of D.C.

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.

U.S. Supreme Court (1999).

U.S. Court of Appeals: Federal (1993), Fourth (1990), Fifth (1997), Sixth (1993), and D.C. (1995) Circuits.

U.S. District Courts: D.C. (1992) and Maryland (1990). I did not renew my federal district court admission in Maryland this year because of a lack of activity in that court.

U.S. Court of International Trade (1991).

Maryland Court of Appeals (1989) (includes lower state courts in Maryland).

D.C. Court of Appeals (1991) (includes lower courts in D.C.).

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.

"Annual Report on Antitrust Division Activity," Leadership Meeting of the Antitrust Section of the American Bar Association (August 2005) (no written remarks).

"Antitrust Enforcement Today: Views from Washington," NERA Antitrusst & Trade Regulation Seminar (July 2005) (attached).

"Defining and Detecting Cartel Activity," International Symposium on Competition Policy and Legislation (June 2005) (attached).

"Antitrust Enforcement and Intellectual Property Rights" International Symposium on Competition Policy and Legislation (June 2005) (no written remarks).

"Competition Advocacy and the Marketplace of Ideas," Insight Conference (June 2005) (attached).

"Antitrust in the Technology Economy: Issues in High-Tech Mergers," Berkeley Conference on Antitrust in the High Technology Industry (June 2005) (attached).

"Antitrust Update," Antitrust Forum (May 2005) (attached).

"Update from the Antitrust Division," Practicing Law Institute (May 2005) (attached).

"Interview with Thomas Barnett, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice," *Antitrust Source* (May 2005) (attached).

"Joint Ventures, Networks and Strategic Alliances," Conference Board (March 2005) (attached).

"Substantial Lessening of Competition – The Section 7 Standard," Milton Handler Annual Antitrust Review (December 2004) (presentation and article attached).

"United States v. Oracle" (November 2004) (attached).

"Antitrust Enforcement Priorities: A Year in Review," 2004 Fall Forum of the American Bar Association Section of Antitrust Law (November 2004) (attached).

"Antitrust Enforcement & Uncertain IP Rights," The Federalist Society (November 2004) (attached).

"Civil Antitrust Reform in Canada: A View from Next Door," Canadian Bar Association Annual Fall Conference on Competition Law (September 2004) (attached).

"Competition & Convergence," Southeastern European Antitrust Conference (September 2004) (attached).

"The Essentials for an Effective Anti-Cartel Program," Southeastern European Antitrust Conference (September 2004) (attached).

"United States v. Oracle" (July 22, 2004) (attached).

Principal author of the antitrust chapter in "Information Technology and Electronic Commerce: Law & Practice," Aspen Law & Bus. (2003) (attached).

FTC/DOJ hearings on "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy," (May 2002) (transcript attached).

"Implications of the Cartel Experience on Civil Litigation and Merger Analysis: Stay the Course," 2002 Spring Meeting of the American Bar Association Section of Antitrust Law (co-author) (attached).

"B2Bs: The Next Generation," 2001 Spring Meeting of the American Bar Association Section of Antitrust Law (attached).

Panel on information exchanges, 1999 Spring Meeting of the American Bar Association Section of Antitrust Law (no written remarks available).

"B2Bs and Antitrust" *George Mason Law Review* (Spring 2001) (co-author) (attached).

"Ninth Circuit upholds Kodak's liability for monopolizing the 'aftermarket' for servicing of its equipment but vacates some damages and modifies injunction," *The National Law Journal* (September 29, 1997) (co-author) (attached).

"Sherman Act can apply to criminal antitrust actions taken entirely outside the country, if these action have foreseeable, substantial effect on U.S. commerce," *The National Law Journal* (April 21, 1997) (co-author) (attached).

I have appeared on a number of other panels over the years for which I do not have specific dates or records of any remarks. In some instances, I appeared as a substitute when the original speaker developed a conflict. I recall a Practicing Law Institute panel in New York City on distribution issues, another Practicing Law Institute panel in San Francisco on the software industry, a Practicing Law Institute conference in Washington, D.C. on B2B e-commerce ventures, and two appearances at Georgetown Law Center on sports and antitrust issues. During the 1985-86 academic year when I was studying at the London School of Economics, I spoke to a high school group and a men's club in England on American foreign policy issues.

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

My health is generally excellent. I have no serious illnesses or disabilities. My last physical examination was in early 2005.

14. 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 served as Deputy Assistant Attorney General at the appointment of the President from April 2004 to June 2005.

I have served as Acting Assistant Attorney General, pursuant to Vacancies Act, from June 2005 to the present.

15. 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 clerked for the Honorable Harrison Winter of the U.S. Court of Appeals for the Fourth Circuit from August 1989 through August 1990. Although Judge Winter passed away in April 1990, I continued to work as a judicial clerk for the Court through August, helping to close the judge's chambers and providing support to other judges.

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

I never practiced law on my own.

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;

Since graduating from law school, I have been connected with the following law firms or offices, companies or governmental agencies:

Summer associate, Jenner & Block, 601 13th, N.W.
Suite 1200 South, Washington, DC 20005-3823 (current address) (May 1989-July 1989).

Associate, Covington & Burling, 1201 Pennsylvania Avenue, NW, Washington, DC 20001 (October 1990-September 1997).

Partner, Covington & Burling, 1201 Pennsylvania Avenue, NW, Washington, DC 20001 (October 1997-April 2004).

Adjunct Professor, Georgetown University Law Center, 600 New Jersey Avenue, NW, Washington DC 20001 (2001 and 2003).

Co-instructor for advanced antitrust seminar at University of Virginia School of Law, 580 Massie Road, Charlottesville, Virginia 22903-1789 (unpaid participant during various years between 1991-2003).

Deputy Assistant Attorney General for civil enforcement, Antitrust Division, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530 (April 2004-June 2005).

Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530 (June 2005-present).

Member, National Advisory Council, U.S. Small Business Administration, 409 Third Street, SW
Washington, DC 20416 (March 2003-May 2005).

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 several years as an associate at Covington & Burling, my practice focused on antitrust with some additional work on international trade matters (antidumping and countervailing duty cases). My work included advising clients, mergers and acquisitions, government investigations, and litigation.

Beginning around 1993, I began working on campaign finance matters and gradually ceased working on international trade matters. After that time, my practice at Covington was principally antitrust with a significant minority of my time spent on campaign finance matters.

From April 2004 to the present, I have been working in the Antitrust Division of the U.S. Department of Justice.

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

For my antitrust work at Covington & Burling, my typical former clients were Fortune 500 companies and/or joint ventures and sports leagues. Examples include American Standard Inc., CoLinx, Eli Lilly and Company, Expedia, Federal-Mogul Corporation, Montedison, National Basketball Association, National Football League, and Coalition of 5 Division I-A College Football conferences. My work included extensive experience with mergers and acquisitions and antitrust issues involving intellectual property rights.

For my campaign finance work, my typical former clients were political committees and corporations seeking federal campaign finance compliance advice. Examples include Bush-Quayle '92 campaign committees, National Republican Senatorial Committee, and Republican National Committee.

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

I appeared in court occasionally. A large portion of my practice consisted of representing parties before the Antitrust Division, the

Federal Trade Commission, and the Federal Election Commission.

2. What percentage of these appearances was in:

(a) federal court;
(b) state courts of record;
(c) other courts.

Virtually 100 percent of my court appearances were in federal court.

3. What percentage of your litigation was:

(a) civil:
(b) criminal.

Virtually 100 percent of my litigation was civil. I represented a criminal defendant in D.C. Superior Court in the early 1990s on a pro bono basis.

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 was chief counsel in 2 cases in courts of record that were resolved by a verdict or judgment of the court.

I was associate counsel in 8 cases in courts of record that were resolved by a verdict or judgment of the court.

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

Two of the cases were jury trials. The remaining cases were non-jury trials or dispositions by the court without a trial.

16. 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.

ANTITRUST MATTERS:

1. *U.S. v. Oracle Corporation*, 331 F.Supp. 2d 1098 (N.D. Cal. 2004). The Antitrust Division and ten state attorneys general challenged Oracle Corporation's proposed acquisition of PeopleSoft as a violation of Section 7 of the Clayton Act. The Division alleged that the acquisition would substantially reduce competition in markets for high-function financial management and human resources software. I began working on the case as Deputy Assistant Attorney General in May 2004 and supervised the trial team. The trial took place in U.S. District Court for the Northern District of California during June and July 2004, and the matter concluded in October 2004. Judge Vaughn Walker ruled for the defendant Oracle after a bench trial, and the Antitrust Division and the co-plaintiff states declined to appeal the decision.

Co-counsel for the United States of America (on the pleadings)

R. Hewitt Pate, Assistant Attorney General
J. Bruce McDonald, Deputy Assistant Attorney General
United States Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

Renata B. Hesse, Chief
N. Scott Sacks, Assistant Chief
Claude F. Scott, Jr., Trial Attorney
Conrad J. Smucker, Trial Attorney
Owen M. Kendler
Joseph M. Miller
United States Department of Justice
Antitrust Division
Networks & Technology Enforcement Section
600 E Street NW, Suite 9500
Washington, DC 20530
Telephone: (202) 307-6200

Phillip H. Warren, Chief
Pamela P. Cole, Trial Attorney
Phillip R. Malone, Trial Attorney
United States Department of Justice

Antitrust Division
450 Golden Gate Ave., Room 10-0101
San Francisco, CA 94102
Telephone: (415) 436-6660

Additional co-counsel for the United States of America (from the Antitrust Division):

Sanford M. Adler
Kyle D. Andeer
Andrea Bellaire
Paula L. Blizzard
Howard M. Blumenthal
Benjamin D. Brown
Kent Brown
Michael D. Chaleff
Aaron Comenetz
Craig W. Conrath
Justin M. Dempsey
John Paul Fonte
Carolyn E. Galbreath
Nancy C. Garrison
Kenneth W. Gaul
Nina B. Hale
Frank Patrick Hallagan
Michael K. Hammaker
Adam D. Hirsh
J. Robert Kramer II
Steven B. Kramer
David C. Kully
Benjamin S. Labow
John P. Lohrer
Robert L. Mcgeorge
Robert B. Nicholson
Ann Marie O'Brien
James J., Jr. O'Connell
Paul J. O'Donnell
Catherine G. O'Sullivan
Howard J. Parker
Scott A. Scheele
Jacqueline Shipchandler
Jack Sidorov
Joshua H. Soven
William H. Stallings
Lowell R. Stern

James J. Tierney
Jeffrey James Vanhooreweghe

Counsel for State of Connecticut

Richard Blumenthal, Attorney General
Steven M. Rutstein, Assistant Attorney General
& Department Head, Antitrust Department
Clare E. Kindall, Assistant Attorney General
55 Elm Street
Hartford, CT 06106
Telephone: (860) 808-5169

Counsel for State of Hawaii

Mark J. Bennett, Attorney General
Department of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813
Telephone: (808) 586-1282

Counsel for State of Maryland

J. Joseph Curran, Jr., Attorney General
Ellen S. Cooper, Assistant Attorney General & Chief
Alan M. Barr, Assistant Attorney General & Assistant Chief
John R. Tennis, Assistant Attorney General
Gary Honick, Assistant Attorney General
Antitrust Division
200 St. Paul Place, 19th Floor
Baltimore, MD 21202
Telephone: (410) 576-6470

Counsel for the Commonwealth of Massachusetts

Thomas F. Reilly, Attorney General
Timothy E. Moran, Assistant Attorney General
Consumer Protection and Antitrust Division One Ashburton Place
Boston, MA 02108
Telephone: (617) 727-2200, ext. 2516

Counsel for State of Michigan

Michael Cox, Attorney General
Paul F. Novak, Assistant Attorney General In Charge
Special Litigation Division
Michigan Department of Attorney General
P.O. Box 30212
Lansing, MI 48909 Telephone: (517) 335-4809

Counsel for State of Minnesota

Mike Hatch, Attorney General
Kristen M. Olsen, Assistant Attorney General
445 Minnesota Street, Suite 1200
St. Paul, Minnesota 55101-2130
Telephone: (651) 296-2921

Counsel for State of New York

Eliot Spitzer, Attorney General
Jay L. Himes, Chief, Antitrust Bureau
Office of the Attorney General of New York
120 Broadway, 26th Floor
New York, NY 10271
Telephone: (212) 416-8282

Counsel for State of North Dakota

Wayne Stenehjem, Attorney General
Todd A. Sattler, Assistant Attorney General
Consumer Protection and Antitrust Division
600 E. Boulevard Ave., Dept. 125
Bismark, ND 58505-0040
Telephone: (701) 328-2811

Counsel for State of Ohio

Jim Petro, Attorney General
Beth A. Finnerty, Assistant Attorney General
Mitchell L. Gentile, Assistant Attorney General
Jennifer L. Edwards, Assistant Attorney General
Antitrust Section
Office of the Attorney General
150 E. Gay St., 20th Floor
Columbus, Ohio 43215
Telephone: (614) 466-4328

Counsel for State of Texas

Greg Abbott, Attorney General
Barry R. Mcbee, First Assistant Attorney General
Edward D. Burbach, Deputy Attorney General For Litigation
Mark Tobey, Assistant Attorney General
Chief, Antitrust and Civil Medicaid Fraud Division
Kim Van Winkle, Assistant Attorney General
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548
Telephone: (512) 463-2185

Counsel for Oracle Corporation

Daniel M. Wall
J. Thomas Rosch
Gregory P. Lindstrom
Latham & Watkins, LLP
505 Montgomery Street, Suite 1900
San Francisco, CA 94111
(415) 391-0600

Dorian Daley
Jeffrey S. Ross
Oracle Corporation
500 Oracle Parkway, 7th Floor
Redwood Shores, CA 94065

2. *Drummond Company, Inc. v. Blue Cross and Blue Shield of Alabama* (N.D. AL, Docket No. CV-00-AR-1354-S, 2000). I represented the defendant Blue Cross and Blue Shield of Alabama ("BCBSA") in an antitrust challenge to most-favor-nation clauses that BCBSA was alleged to have had with numerous

hospitals. My representation lasted from 2000 to 2001. The case was filed in the U.S. District Court for the Northern District of Alabama and was before Judge William M. Acker, Jr. I had principal responsibility for the antitrust issues in the litigation. The parties ultimately settled the case before trial.

Co-counsel representing BCBSA:

Charles F. Rule
Jennifer Plitsch
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20044
(202) 662-6000

Jere F. White, Jr.
Jackson Sharman
William H. Brooks
Lightfoot, Franklin & White, LLC
The Clark Building, 400 20th Street North
Birmingham, Alabama 35203-3200
(205) 581-0700

Counsel for Drummond:

Charles E. Koob
Simpson, Thatcher & Bartlett
425 Lexington Avenue
New York, NY 10017-3954
(212) 455-2970

William Anthony Davis, III
Starnes & Atchison LLP
100 Brookwood Place
Birmingham, AL 35209
(205) 868-6000

3. *Shipper v. American Automobile Association* (N.D. Texas, CA-3-94-CV-2558-R, 1997). I represented the defendant American Automobile Association ("AAA") from 1994 through 1997. The case was litigated in the U.S. District Court for the Northern District of Texas before Judge Jerry Buchmeyer. The plaintiff alleged that AAA violated Section 1 of the Sherman Act by entering into an exclusive advertising agreement for the publication of certain automobile sales advertisements in AAA's member magazine. The district court granted summary judgment in favor of AAA. The plaintiff appealed the judgment to the U.S. Court of Appeals for the Fifth Circuit, but the appeal was dismissed by the parties before

a decision on the merits. I was the principal attorney handling all aspects of the case. The representation began in 1994 and ended in 1997.

Co-counsel for American Automobile Association:

Bobby R. Burchfield
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 662-6000

Ernest E. Figari, Jr.
Figari & Davenport, L.L.P.
4800 Nationsbank Plaza
901 Main Street
Dallas, Texas 75202
(214) 939-2001

Counsel for Automotive Dealers' Marketing, Inc.:

J. Karl Viehman
Hartline, Dacus, Dreyer & Kern
2626 Cole Avenue
Suite 800
Dallas, Texas 75204
(214) 954-0101

Counsel for Ronald N. Shipper:

Dean Carlton
The Carlton Law Firm
3109 Carlisle
P.O. Box 190427
Dallas, Texas 75210
(214) 871-2000

Carl A. Skibell
Law Offices of Carl A. Skibell
5944 Luther Lane
Suite 650
Dallas, Texas 75225
(214) 691-3366

4. *Entech Sales & Services, Inc. v. American Standard Inc.* (N.D. Texas, Docket No. 3-93-CV-0330-D, 1996). I represented the defendant American Standard Inc. (d/b/a The Trane Company) in this antitrust action by the plaintiff Entech Sales & Services, Inc. Entech alleged a nationwide conspiracy to fix the price of aftermarket parts and other actions to limit competition for the service and repair of Trane heating and air conditioning equipment. Entech sought to certify a nationwide class of plaintiffs and sought damages exceeding $1 billion after trebling. The U.S. District Court for the Northern District of Texas (Judge Sidney A. Fitzwater) certified a plaintiff class, but granted summary judgment for the defendant on the class claims. The parties settled the remaining individual claims shortly thereafter. I was the principal attorney handling the case with supervision from a partner in my firm. The representation began in 1993 and ended when the case settled in 1997.

Co-Counsel for American Standard Inc:

John H. Schafer
Kenneth P. Cohen
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20044
(202) 662-6000

Ernie E. Figari
Parker D. Young
Figari & Davenport
4800 NationsBank Plaza
901 Main Street, LB 125
Dallas, Texas 75202-3796
(214) 939-2001

Counsel for Entech:

Thomas M. Melsheimer
Lynn Stodghill Melsheimer & Tilloston, L.L.P.
750 N. St. Paul Street
Suite 1400
Dallas, Texas 75201
(214) 981-3800

Ray G. Besing
Timothy R. George
1100 St. Paul Place
750 N. St. Paul
Dallas, Texas 75201
(214) 220-9090

5. *Tarrant Service Agency, Inc. v. American Standard Inc. (d/b/a The Trane Company)*, 12 F. 3d 609 (1993). I represented American Standard Inc. in this antitrust action brought by Tarrant Service Agency alleging Section 1 and 2 Sherman Act claims involving the aftermarket for Trane heating, ventilating and air conditioning equipment. The district court (Judge Carl B. Rubin, sitting by designation in the Western District of Kentucky) granted summary judgment for American Standard Inc. on the Section 1 claims but sent the Section 2 claims to a jury trial. Judge Rubin directed a verdict for the defendant after the trial. The plaintiff Tarrant appealed to the U.S. Court of Appeals for the Sixth Circuit, which affirmed the district court. The panel included Judges Kennedy, Milburn, and Guy. Tarrant filed a petition for a writ of certiorari with the U.S. Supreme Court, which was not granted. My representation began in 1991 and ended in 1994. I was the principal associate on the case at all times, including serving as second chair at a preliminary injunction hearing and at the trial.

Co-counsel for American Standard Inc.:

John H. Schafer
Mitchell F. Dolin
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20044
(202) 662-6000

Edgar A. Zingman
Michael Kirk
Wyatt, Tarrant & Combs
2600 Citizens Plaza
Louisville, KY 40202
(502) 589-5235

Counsel for Tarrant Service Agency, Inc.:

Wesley A. Gersh
Gary W. Anderson
H. Edwin Bornstein
Gersh Law Offices, P.S.C.
333 Guthrie Green

Suite 308
Louisville, KY 40202
(502) 589-2300

6. *Brown v. Pro Football*, 518 U.S. 231 (1996). I represented the National Football League in this antitrust challenge by a class of practice squad players alleging illegal price fixing. The district court (Judge Royce Lambert, U.S. D.C. D.C.) granted summary judgment on liability in favor of the plaintiff class and held a jury trial to determine damages. On appeal, the U.S. Court of Appeals for the D.C. Circuit reversed the district court and held that the plaintiffs' antitrust claims were barred by the non-statutory labor exemption to the antitrust laws. The panel included Judges Edwards, Randolph, and Wald. The Supreme Court granted a writ of certiorari and affirmed the dismissal of the plaintiffs' claims on the same grounds. I was an associate counsel who participated in pretrial discovery, the trial and the appellate briefing. My representation began in 1990 and ended in 1996.

Co-counsel for the NFL:

Gregg H. Levy
Herbert Dym
Peter J. Nickles
Sonya D. Winner
Richard W. Buchanan
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20044
(202) 662-6000

Counsel for Brown:

Kenneth W. Starr (then at Kirkland & Ellis)
Dean and Professor of Law
Pepperdine University School of Law
24255 Pacific Coast Highway
Malibu, CA 90263
(310) 506-4621

Joseph A. Yablonski, Esq.
Daniel B. Edelman
Yablonski, Both & Edelman
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9060

7. *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). I was co-counsel representing the Republican National Committee and several other plaintiffs in a constitutional challenge to the Bipartisan Campaign Reform Act. The case began in April 2002 and ended in December 2003. I was essentially second chair to the principal counsel, Bobby Burchfield, during the discovery, briefing, and paper trial of the claims before a three-judge panel and in briefing the direct appeal to the U.S. Supreme Court. The Supreme Court affirmed the three-judge panel's upholding the statute against the principal challenges.

Other counsel:

Bobby R. Burchfield
Robert K. Kelner
Richard W. Smith
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20044
(202) 662-6000

Joseph E. Sandler
Neil P. Reiff
John Hardin
Sandler, Reiff & Young
50 E Street, SE
Suite 300
Washington, DC 20003
(202) 479-1111

Charles H. Bell, Jr.
Bell, McAndrews, Hiltachk & Davidian, LLP
455 Capitol Mall
Suite 801
Sacramento, CA 95814
(916) 442-7757

Jan Witold Baran
Thomas W. Kirby
Lee E. Goodman
Caleb P. Barnes
Wiley, Rein & Fielding
1776 K Street NW
Washington, DC 20006
(202) 719-7000

Thomas J. Josefiak
Charles R. Spies
Republican National Committee
310 First Street, SE
Washington, DC 20003
(202) 863-8500

Benjamin L. Ginsberg
Eric A. Kuwana
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6000

Michael A. Carvin
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939

Kenneth W. Starr (then at Kirkland & Ellis)
Edward W. Warren
Kannon K. Shanmugam
Grant Dixton
Kirkland & Ellis, LLP
655 15th Street, N.W.
Washington, DC 20005
(202) 879-5000

Floyd Abrams
Susan Buckley
Brian Markley
Donald John Mulvihill
Cahill, Gordon & Reindel, LLP
80 Pine Street
Room 1914
New York, NY 10005-1702
(202) 701-3000

Kathleen M. Sullivan
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 725-9875

G. Hunter Bates
Frost, Brown, Todd, LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363
(502) 779-8600

Jay Alan Sekulow
James Matthew Henderson, Sr.
The American Center for Law and Justice
1000 Thomas Jefferson St., NW
Suite 609
Washington, DC 20007
(202) 337-3167

Jack N. Goodman
Jerianne Timmerman
National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036
(202) 429-5300

Charles G. Curtis, Jr.
David J. Harth
Michelle M. Umberger
Heller, Ehrman, White & McAuliffe, LLP
One East Main Street
Suite 201
Madison, WI 53703-5118
(608) 663-7460

Cleta Deatherage Mitchell
Foley & Lardner
3000 K Street, N.W.
Suite 500
Washington, DC 20007
(202) 672-5300

Charles J. Cooper
David H. Thompson
Hamish P.M. Hume
Derek L. Shaffer
Brian S. Koukoutchos
Cooper & Kirk, PLLC
1500 K Street, NW

Suite 200
Washington, D.C. 20005
(202) 220-9600

James Bopp, Jr.
Richard E. Coleson
Thomas J. Marzen
James Madison Center for Free Speech
Bopp, Coleson & Bostrom
1 South Sixth Street
Terre Haute, IN 47807
(812) 232-2434

Lance H. Olson
Deborah B. Caplan
Olson, Hagel & Fishburn
555 Capitol Mall
Suite 1425
Sacramento, CA 95814-4602
(916) 442-2952

Joel M. Gora
Professor of Law &
Associate Dean for Academic Affairs
Brooklyn Law School
250 Joralemon Street
Room 918
Brooklyn, NY 11201
(718) 780-7926

Mark J. Lopez
Steven R. Shapiro
Joel M. Gora
American Civil Liberties Union Foundation, Inc.
125 Broad Street
18th Floor
New York, NY 10004
(212) 549-2500

John C. Bonifaz
Bonita P. Tenneriello
Lisa J. Danetz
Brenda Wright
National Voting Rights Institute
27 School Street

Suite 500
Boston, MA 02108
(617) 624-3900

David A. Wilson
Avi Samuel Garbow
Hale and Dorr, LLP (now Wilmer, Cutler, Pickering, Hale & Dorr LLP)
The Willard Office Building
1455 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 942-8476

William J. Olson
John S. Miles
William J. Olson, P.C.
8180 Greensboro Drive
Suite 1070
McLean, VA 22102-3860
(703) 356-5070

Richard O. Wolf
Moore & Lee, LLP
1750 Tysons Boulevard
Suite 1450
McLean, VA 22102-4215
(703) 506-2050

Gary G. Kreep
U.S. Justice Foundation
2091 East Valley Parkway, Suite 1-C
Escondido, CA 92027
(760) 741-8086

Perry B. Thompson
6127 Carroll Lake Rd
Commerce Township, MI 48382
(248) 363-0640

Larry P. Weinberg
1101 17th Street, NW
Washington, D.C. 20036
(202) 775-5900

Jonathan P. Hiatt
Laurence E. Gold

AFL-CIO
815 16th Street, NW
Washington, D.C. 20006
(202) 637-5000

Michael B. Trister
Lichtman, Trister & Ross, PLLC
1666 Connecticut Avenue, N.W.
Suite 500
Washington, DC 20009
(202) 328-1666

Stephen A. Bokat
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062-2000
(202) 463-5337

Jan Amundson
National Association of Manufacturers
1331 Pennsylvania Ave., NW
Washington, DC 20004-1790
(202) 637-3000

L. Lynn Hogue
Harry W. MacDougald
Valle Simms Dutcher
Southeastern Legal Foundation, Inc.
6100 Lake Forrest Drive
Suite 520
Atlanta, Georgia 30328
(404) 257-9667

Laurence Edward Gold
American Federation of Labor
815 Sixteenth Street, N.W.
Washington, DC 20006
(202) 637-5130

Herbert W. Titus
Troy A. Titus, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

Sherri Lynn Wyatt
Sherri L. Wyatt PLLC
International Square Building
1825 I Street, NW
Suite 400
Washington, DC 20006
(202) 429-2009

Cherlyn F. Freeman-Watkins
Capitol Legal Group, LLP
1250 H Street, NE
Washington, DC 20002
(202) 399-1100

Theodore B. Olson
Robert D. McCallum, Jr.
Paul D. Clement
Peter D. Keisler
Rupa Bhattacharyya
Shannen Coffin
Andrea Gacki
Gregory G. Garre
Ara B. Gershengorn
James J. Gilligan
Terry M. Henry
Joseph H. Hunt
Marc Kesselman
John Knepper
Douglas N. Letter
Dana J. Martin
Colette G. Matzzie
Michael S. Raab
Irene M. Solet
Malcolm L. Stewart
Serrin Turner
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-3301 (Civil Division)
(202) 514-2201 (Solicitor General)

Lawrence H. Norton
Richard B. Bader
Stephen Hershkowitz
David Kolker

Robert W. Bonham III
Vivien Clair
Holly J. Baker
Colleen T. Sealander
Harry Summers
Benjamin A. Streeter III
Greg Mueller
William Shackelford
Kevin Deeley
Leigh G. Hildebrand
Brant Levine
Michelle Abellera
Mark Goodin
Federal Election Commission
999 E Street, NW
Washington, DC 20463
(202) 694-1100

Roger M. Witten
Seth P. Waxman
Randolph D. Moss
Lynn Bregman
Eric J. Mogilnicki
Edward C. DuMont
Michael D. Leffel
Anja L. Manuel
Stacy E. Beck
Krisan Patterson
Jennifer L. Mueller
Paul R.Q. Wolfson
Jerrod C. Patterson
Wilmer, Cutler & Pickering (now Wilmer, Cutler, Pickering, Hale & Dorr LLP)
2445 M Street, N.W.
Washington, DC 20037-1420
(202) 663-6000

Bradley S. Phillips
Michael R. Doyen
Stuart N. Senator
Deborah N. Pearlstein
Randall G. Sommer
Shont E. Miller
Munger, Tolles & Olson, LLP
355 South Grand Avenue
35th Floor

Los Angeles, CA 90071-1560
(213) 683-9100

David J. Harth
Charles G. Curtis, Jr.
Monica P. Medina
Michelle M. Umberger
Sarah E. Reindl
Heller Ehrman White & McAuliffe LLP
One East Main Street
Suite 201
Madison, WI 53703-5118
(608) 663-7460

Frederick A.O. Schwarz, Jr.
E. Joshua Rosenkranz
Prof. Burt Neuborne
Elizabeth Daniel
Laleh Ispahani
Adam H. Morse
Brennan Center for Justice
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

Fred Wertheimer
Alexandra Edsall
Democracy 21
1825 I St, NW
Suite 400
Washington, DC 20006
(202) 429-2008

Theodore C. Hirt
Douglas N. Letter
Alan B. Morrison
Scott L. Nelson
Public Citizen Litigation
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Trevor Potter
Glen M. Shor

Campaign Legal Center
1640 Rhode Island Ave., NW
Suite 650
Washington, DC 20036
(202) 736-2200

8. *Bush-Quayle '92 Primary Committee, Inc. v. Federal Election Commission*, 104 F.3d 448 (D.C. Cir. 1997). I was associate counsel representing Bush-Quayle '92 Primary Committee, Inc. (and the other 1992 campaign committees for President Bush) in the post-election audits by the Federal Election Commission. My representation began in late 1993 or early 1994 and ended in 1997 when the case ended. I helped prepare and draft the arguments to the Federal Election Commission against any repayment determinations. The FEC decided to request repayment for only one significant amount, relating to a category of primary committee expenditures that the FEC held should have been attributed to the general election campaign committee. I participated as associate counsel in appealing the FEC's repayment determination to the D.C. Circuit, which vacated and remanded the FEC's decision as an unjustified departure from prior precedent. The panel included Judges Wald, Sentelle, and Rogers. The FEC ultimately dismissed the matter without requesting any repayment.

Co-counsel for Bush-Quayle committees:

Bobby R. Burchfield
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20044
(202) 662-6000

Counsel for the FEC:

Lawrence Noble
Richard B. Bader
Vivian Clair
Federal Election Commission
999 E Street, NW
Washington, DC 20463
(202) 219-3690

9. *Kasap v. Folger Nolan Fleming & Douglas et al.*, 166 F.3d 1243 (D.C. Cir. 1999). I represented the defendant Folger Nolan Fleming Douglas and an individual broker in an NASD arbitration initiated by a former client. After an evidentiary hearing, the arbitration panel dismissed the claims. The plaintiff appealed the arbitral decision to the U.S. District Court for the District of Columbia. Judge Thomas A. Flannery dismissed the appeal. The plaintiff

appealed the dismissal to the U.S. Court of Appeals for the D.C. Circuit, which affirmed the dismissal. The panel included Judges Silberman, Sentelle, and Randolph. I was lead counsel throughout the case, which began in 1996 and ended in 1999.

Co-counsel for Folger Nolan Fleming & Douglas and Joseph Anderson

Mitchell F. Dolin
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20044
(202) 662-6000

Counsel for the Matt Kasap:

John P. Connolly
211 North Union Street, Suite 100
Alexandria, Virginia 22314
(703) 684-4865

Harold Richard Mayberry, Jr.
Ernest P. Francis
Mayberry Law Firm
888 16th Street, N.W.
Suite700
Washington, DC 20006
(202) 785-6677

10. *Texas Crushed Stone Co. v. United States*, 35 F.3d 1535 (Fed. Cir. 1994). I represented Texas Crushed Stone in this antidumping proceeding filed initially before the International Trade Commission (ITC). The ITC dismissed the antidumping petition, and the Court of International Trade and the Federal Circuit affirmed the dismissal. I was an associate counsel on the case from 1991 through 1994.

Co-counsel for Vulcan/ICA:

Harvey M. Applebaum
O. Thomas Johnson
David R. Grace
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20044
(202) 662-6000

Counsel for Texas Crushed Stone:

Eugene L. Stewart
Terence P. Stewart
Lane S. Hurewitz
Stewart and Stewart
2100 M Street NW
Suite 200
Washington D.C. 20037
(202) 785-4185

James R. Cannon, Jr.
Williams Mullen
1666 K Street N.W., Suite 1200
Washington, DC 20006
(202) 293-8123

Counsel for the ITC:

Lyn M. Schlitt
Judith M. Czako
Shara L. Aranoff
U.S. International Trade Commission
500 E Street, SW,
Washington, DC 20436
(202) 205-2000

15. 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).

ANTITRUST EXPERIENCE

I served as Deputy Assistant Attorney General for civil enforcement and then as Acting Assistant Attorney General for the Antitrust Division from April 2004 to the present. During that time I have managed merger and non-merger investigations and litigation for three civil sections with approximately 90 attorneys, including supervising the trial team in *U.S. v. Oracle*. I have represented the Division in meetings with foreign competition authorities, including officials from Canada, China, Japan, European Commission, other OECD member countries, and numerous Southeastern European competition agencies. I have made regular public appearances on a wide range of antitrust issues. In addition, I have advised the Assistant Attorney General on policy issues, such as the implementation of the

Merger Guidelines, the intersection of antitrust and intellectual property laws, appellate cases, and personnel administration.

I have provided antitrust advice in connection with corporate transactions and licensing arrangements in the airline, chemical, construction aggregate, defense, durable equipment, hospital, petroleum, pharmaceutical, and other industries. Some of the representative transactions in which I was the lead antitrust counsel include the acquisition and sale of intellectual property rights by a range of pharmaceutical and biotech companies, Montedison's $1.3 billion sale of its Ausimont subsidiary to Solvay (cleared by the Federal Trade Commission after a second request and pursuant to a consent decree requiring certain divestitures), and Montedision's $400 million sale of its Cerestar subsidiary to Cargill (received a second request from the Antitrust Division but ultimately cleared without action).

I was a key provider of antitrust counsel in numerous other transaction, including the Exxon/Mobil merger (at the time, the largest merger in history, cleared by the FTC pursuant to a consent decree requiring certain divestitures), Eli Lilly and Company's acquisition from Sepracor Inc.of a patent to a potential antidepressant (cleared by the FTC after an extensive investigation relating to the combination of the potential new antidepressant and Lilly's Prozac), and the USAirways acquisition of Shuttle Inc. (cleared by the Antitrust Division).

I represented major corporations and associations in transactions, arbitrations, litigation, and government investigations as follows:

Antitrust counseling: I advised Fortune 500 companies on intellectual property, distribution, e-commerce, joint venture, and other antitrust issues, including antitrust compliance presentations and reviews. My counseling of joint ventures included providing antitrust advice for the development, formation, and implementation of CoLinx. CoLinx is an Internet and logistics joint venture among such companies as INA, Rockwell Automation, SKF, and Timken for the sale and distribution of certain industrial products. Similarly, I provided antitrust advice as associate counsel and then as lead counsel to MobiLink, a joint venture among cellular telephone service providers (including several regional Bell operating companies) to improve the integration and service levels across their cellular networks.

Sports law: I advised the National Football League and National Basketball Association on antitrust and intellectual property licensing matters, including government investigations and litigation. In addition to the litigation set forth above, I represented the National Football League and related entities in an arbitration proceeding arising out of claims by the Orlando Thunder, a former team of the World League of American Football. I was an associate counsel responsible for day-to-day matters in the case, including discovery and briefing, and was second chair during the arbitration hearing. As another example, I

represented the NBA and WNBA in an investigation by several state attorneys general concerning the circumstances leading to the failure of the American Basketball Association, another women's professional basketball league. I was the principal attorney handling the matter. I also was the lead counsel representing a coalition of Division I-A college football conferences that negotiated an expansion of the eligibility requirements for the Bowl Championship Series, including the addition of a fifth BCS bowl game.

Teaching: I was an Adjunct Professor at Georgetown University Law Center, teaching a course on antitrust and intellectual property issues in sports law in 2001 and 2003. I also was a co-teacher of an advanced antitrust seminar at the University of Virginia Law School during various years between 1991-2003.

OTHER EXPERIENCE

Covington & Burling encourages attorneys to work in more than one substantive area of the law in the belief that a broader experience base will make them more effective. Accordingly, I worked on several antidumping and countervailing duty cases during my early years and later began spending a minority of my time working on campaign finance law matters. Representative examples of significant matters are summarized below.

Federal election law: I advised clients on compliance with campaign finance laws, in proceedings before the Federal Election Commission, and in court proceedings. In addition to the litigation experience described above, a representative example includes Democratic Senatorial Campaign Committee v. Federal Election Commission, 139 F.3d 951 (D.C. Cir. 1998) (permitting intervention on behalf of National Republican Senatorial Committee and vacating the district court decision).

Antidumping and countervailing duty matters: I participated in proceedings before the International Trade Commission and Department of Commerce and in litigation before the Court of International Trade and the Federal Circuit.

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.

   My 401(k) and defined benefit pension plans remain with Covington & Burling. There are no longer any contributions being made to these plans on my behalf, and the amount of benefits under the defined benefit pension plan is fixed pursuant to a formula based on my service prior to my date of separation in April 2004.

   Otherwise, I have no other anticipated sources of income 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.

   In the event of a potential conflict of interest, I will consult with the Department of Justice ethics official.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? 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 financial disclosure report.

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

   See 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 volunteered for Lawyers for Bush in 1992.

I volunteered for the Dole campaign in 1996 and provided services related to delegate selection.

I volunteered for the Bush-Cheney 2000 campaign and provided services on delegate selection, elector issues, and the Florida recount.

I provided legal services on a compensated basis to a number of political committees, including the Republican National Committee, the National Republican Senatorial Committee, the National Republican Congressional Committee, the Bush-Quayle '92 campaign committees, the Dallas County (Iowa) Republican Party, Republican Party of Colorado, Republican Party of New Mexico, and Republican Party of Ohio.

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 was the supervising partner for many years for pro bono services provided by Covington & Burling to Food and Friends. The work spanned a range of subject matters depending on the needs of the organization. As an associate, I participated in the firm's pro bono program under the Criminal Justice Act and represented a criminal defendant in a misdemeanor D.C. Superior Court proceeding.

   As a partner at Covington & Burling, I provided financial support to the firm's extensive firm pro bono program and occasionally would supervise associates in individual pro bono matters. We supported several associates working full time on a pro bono basis for six month periods for Legal Aid and for the D.C. Corporation Counsel's office in addition to a broad range of individual matters. Approximately 10 percent of the firm's attorney time was dedicated to pro bono efforts each year. My personal time would have averaged a few hours per year.

   I also have provided financial support to a range of organizations that serve the disadvantaged, such as the American Red Cross, Habitat for Humanity, the Salvation Army, and the Nebraska Polio Survivors Association.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion - 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

U.S. Department of Justice

Washington, D.C. 20530

SEP 0 8 2005

Ms. Marilyn Glynn
Acting Director
Office of Government Ethics
Suite 500
1201 New York Avenue, NW
Washington, DC 20005-3919

Dear Ms. Glynn:

In accordance with the provisions of Title I of the Ethics in Government Act of 1978 as amended, I am forwarding the financial disclosure report of Thomas Barnett, who has been nominated by the President to serve as Assistant Attorney General, Antitrust Division, Department of Justice. We have conducted a thorough review of the enclosed report.

The conflict of interest statute, 18 U.S.C. Section 208, requires that Mr. Barnett recuse himself from participating personally and substantially in a particular matter in which he, his spouse, or anyone whose interests are imputed to him under the statute, has a financial interest. Mr. Barnett has been counseled and has agreed to obtain advice about disqualification or to seek a waiver before participating in any particular matter that could affect his financial interests.

We have advised Mr. Barnett that because of the standard of conduct on impartiality at 5 C.F.R. § 2635.502, he should seek advice before participating in a particular matter involving specific parties which he knows is likely to have a direct and predictable effect on the financial interest of a member of his household, or in which he knows that a person with whom he has a covered relationship is or represents a party. In addition, upon confirmation, Mr. Barnett will resign from his positions as Vice Chair, Section I Committee and member, Editorial Board, ALD VI, both of which are with the American Bar Association, Antitrust Section.

Based on the above agreements and counseling, I am satisfied that the report presents no conflicts of interest under applicable laws and regulations and that you can so certify to the Senate Judiciary Committee.

Sincerely,

Paul R. Corts
Assistant Attorney General
and Designated Agency Ethics Official

Enclosure

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5 C.F.R. Part 2634
U.S. Office of Government Ethics

Executive Branch Personnel PUBLIC FINANCIAL DISCLOSURE REPORT

Form Approved:
OMB No. 3209 - 0001

Date of Appointment, Candidacy, Election, or Nomination (Month, Day, Year)	Reporting Status (Check Appropriate Boxes)	Incumbent ☐	Calendar Year Covered by Report	New Entrant, Nominee, or Candidate ☒	Termination Filer ☐	Termination Date (If Applicable) (Month, Day, Year)

	Last Name	First Name and Middle Initial
Reporting Individual's Name	Barnett	Thomas O
Position for Which Filing	Title of Position: Assistant Attorney General	Department or Agency (If Applicable): Antitrust Division, Dept. of Justice
Location of Present Office (or forwarding address)	Address (Number, Street, City, State, and ZIP Code): 950 Pennsylvania Avenue, NW	Telephone No. (Include Area Code): 202-514-2401
Position(s) Held with the Federal Government During the Preceding 12 Months (If Not Same as Above)	Title of Position(s) and Date(s) Held: Deputy Assistant Attorney General, Antitrust Division, Dept. of Justice (4/04-present)	
Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination: Committee on Judiciary	Do You Intend to Create a Qualified Diversified Trust? ☐ Yes ☒ No

Certification	Signature of Reporting Individual	Date (Month, Day, Year)
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge.	Thomas O. Barnett	7-28-05
Other Review (If desired by agency)	Signature of Other Reviewer: Lani M. Rodgers	Date (Month, Day, Year): 9/7/05
Agency Ethics Official's Opinion: On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments in the box below).	Signature of Designated Agency Ethics Official/Reviewing Official: RRC	Date (Month, Day, Year): 9-7-05
Office of Government Ethics Use Only	Signature	Date (Month, Day, Year)

Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)

(Check box if filing extension granted & indicate number of days _____) ☐

(Check box if comments are continued on the reverse side) ☐

Fee for Late Filing

Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing extension period, shall be subject to a $200 fee.

Reporting Periods

Incumbents: The reporting period is the preceding calendar year except Part II of Schedule C and Part I of Schedule D where you must also include the filing year up to the date you file. Part II of Schedule D is not applicable.

Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable.

Nominees, New Entrants and Candidates for President and Vice President:

Schedule A--The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing.

Schedule B--Not applicable.

Schedule C, Part I (Liabilities)--The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.

Schedule C, Part II (Agreements or Arrangements)--Show any agreements or arrangements as of the date of filing.

Schedule D--The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

Agency Use Only

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U.S. Office of Government Ethics

Reporting Individual's Name	SCHEDULE A	Page Number
Barnett, Thomas O		2 of 12

Assets and Income — BLOCK A

For you, your spouse, and dependent children, report each asset held for investment or the production of income which had a fair market value exceeding $1,000 at the close of the reporting period, or which generated more than $200 in income during the reporting period, together with such income.

For yourself, also report the source and actual amount of earned income exceeding $200 (other than from the U.S. Government). For your spouse, report the source but not the amount of earned income of more than $1,000 (except report the actual amount of any honoraria over $200 of your spouse).

None ☐

Valuation of Assets at close of reporting period — BLOCK B

Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item. — BLOCK C

Assets and Income	Valuation of Assets: None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Type: Dividends	Rent and Royalties	Interest	Capital Gains	Amount: None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
Examples: Central Airlines Common				x												x						x									
Examples: Doe Jones & Smith, Hometown, State																															Law Partnership Income $130,000
Examples: Kempstone Equity Fund					x								x										x								
Examples: IRA: Heartland 500 Index Fund								x					x											x							
1 Fidelity Mt. Vernon Street Trust: Fidelity Aggressive Growth Fund			x										x							x											
2 Vanguard Tax Exempt Fds Inc. Long Term Port.		x											x								x										
3 Carmax Inc.			x																	x											
4 Covance Inc.				x																x											
5 Exactech Inc.				x																x											
6 Fedex Corporation		x																		x											

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

Prior Editions Cannot Be Used.

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U.S. Office of Government Ethics

Reporting Individual's Name	SCHEDULE A continued (Use only if needed)	Page Number
Barnett, Thomas O		3 of 12

Assets and Income	Valuation of Assets at close of reporting period													Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.																
BLOCK A	BLOCK B													BLOCK C																
														Type			Amount													
	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Location: Investment Trust*	Excepted Trust	Qualified Trust	Dividends	Rents and royalties	Interest	Capital gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1																															
2 Ameritrade (cash balance of brokerage account)				X													X				X										
3 Novellus Systems Inc.		X																	X												
4 Pharsight Corp.		X																	X												
5 T Rowe Price Small Cap. Stk Fd			X										X									X									
6 Safeco Equity Fd. Inc. Core Eq. Fd Inv.			X										X					X			X										
7 Covington & Burling Pension Plan				X																X											
8																															
9 Vanguard Prime Money Market Fund (C&B 401(k))					X								X									X									

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

Prior Editions Cannot Be Used.

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Reporting Individual's Name	SCHEDULE A continued (Use only if needed)	Page Number
Barnett, Thomas O		4 of 12

Assets and Income	Valuation of Assets at close of reporting period												Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.																	
BLOCK A	BLOCK B															BLOCK C														
																Type				Amount										
	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 Vanguard Wellington Fund (C&B 401(k))		X											X								X										
2 Vanguard 500 Index Fund (C&B 401(k) and Ameritrade Account)					X								X									X									
3 Brandywine Fund (C&B 401(k))				X									X							X											
4 Vanguard Total Bond Market Index Fund (C&B 401(k))			X										X								X										
5 T Rowe Price Mid-Cap Growth Fund (C&B 401(k))		X											X							X											
6 Covington & Burling	X																													$789,946 partner earnings and return of capital	
7 American Beacon International Equity Fund		X											X							X											
8 Vanguard Extended Market Index Fund		X											X							X											
9 Virginia Education Savings Trust Chesapeake Portfolio (529 Plan)		X											X							X											

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Reporting Individual's Name	SCHEDULE A continued (Use only if needed)	Page Number
Barnett, Thomas O		5 of 12

Assets and Income	Valuation of Assets at close of reporting period													Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.																		
BLOCK A	BLOCK B													BLOCK C																		
														Type				Amount														
	None (or less than $1,001)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Spouse/dependent child	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 Wachovia CAP First Account -- Money Market Account (cash)		X																X													
2 Wachovia Checking Account		X																	X													
3 AG Edwards (cash balance of brokerage account)			X															X			X											
4 Coca-Cola Co.		X														X					X											
5 Pepsico Inc.		X																	X													
6 Citibank Money Market Account						X												X				X										
7 Citibank Checking Account			X																X													
8 Pioneer Fund Investor Class		X											X						X													
9																																

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Assets and Income	Valuation of Assets at close of reporting period												Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item.																
BLOCK A	BLOCK B												BLOCK C																
													Type				Amount												
	None (or less than $1,000)	$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Excepted Investment Fund	Excepted Trust	Qualified Trust	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than $201)	$201 - $1,000	$1,001 - $2,500	$2,501 - $5,000	$5,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	Over $5,000,000	Other Income (Specify Type & Actual Amount)	Date (Mo., Day, Yr.) Only if Honoraria
1 American Funds Fundamental Investors (Keller & Heckman 401(k), spouse's		x											x							x											
2 Munder Series Trust: Munder Index 500 Fund: Class A Shares (Keller & Heckman		x											x								x										
3 Growth Fund of America (K & H 401(k), spouse's former employer)		x											x							x											
4 American Funds Washington Mutual (K & H 401(k), spouse's former employer)		x											x							x											
5 American Funds Europacific Growth (K & H 401(k), spouse's former employer)		x											x							x											
6 Pimco Total Return III Admin (Keller & Heckman 401(k), spouse's former		x											x							x											
7																															
8																															
9																															

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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Do not complete Schedule B if you are a new entrant, nominee, or Vice Presidential or Presidential Candidate

Reporting Individual's Name	SCHEDULE B	Page Number
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Part I: Transactions

Report any purchase, sale, or exchange by you, your spouse, or dependent children during the reporting period of any real property, stocks, bonds, commodity futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss.

Do not report a transaction involving property used solely as your personal residence, or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of divestiture" block to indicate sales made pursuant to a certificate of divestiture from OGE.

None ☐

	Identification of Assets	Transaction Type (x)			Date (Mo., Day, Yr.)	Amount of Transaction (x)												
		Purchase	Sale	Exchange		$1,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000	Certificate of divestiture
Example	Central Airlines Common	X			2/1/99			X									
1	Not Applicable																
2																	
3																	
4																	
5																	

*This category applies only if the underlying asset is solely that of the filer's spouse or dependent children. If the underlying asset is either held by the filer or jointly held by the filer with the spouse or dependent children, use the other higher categories of value, as appropriate.

Part II: Gifts, Reimbursements, and Travel Expenses

For you, your spouse and dependent children, report the source, a brief description, and the value of: (1) gifts (such as tangible items, transportation, lodging, food, or entertainment) received from one source totaling more than $260, and (2) travel-related cash reimbursements received from one source totaling more than $260. For conflicts analysis, it is helpful to indicate a basis for receipt, such as personal friend, agency approval under 5 U.S.C. § 4111 or other statutory authority, etc. For travel-related gifts and reimbursements, include travel itinerary, dates, and the nature of expenses provided. **Exclude** anything given to you by the U.S. Government; given to your agency in connection with official travel; received from relatives; received by your spouse or dependent child totally independent of their relationship to you; or provided as personal hospitality at the donor's residence. Also, for purposes of aggregating gifts to determine the total value from one source, exclude items worth $104 or less. See instructions for other exclusions.

None ☐

	Source *(Name and Address)*	Brief Description	Value
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/99 (personal activity unrelated to duty)	$500
	Frank Jones, San Francisco, CA	Leather briefcase (personal friend)	$300
1	Not Applicable		
2			
3			
4			
5			

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Part I: Liabilities

Report liabilities over $10,000 owed to any one creditor at **any time** during the reporting period by you, your spouse, or dependent children. Check the highest amount owed during the reporting period. **Exclude** a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

None [X]

Creditors *(Name and Address)*	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (x)										
					$10,001 - $15,000	$15,001 - $50,000	$50,001 - $100,000	$100,001 - $250,000	$250,001 - $500,000	$500,001 - $1,000,000	Over $1,000,000*	$1,000,001 - $5,000,000	$5,000,001 - $25,000,000	$25,000,001 - $50,000,000	Over $50,000,000
Examples: First District Bank, Washington, DC	Mortgage on rental property, Delaware	1991	8%	25 yrs.			X								
John Jones, 123 J St., Washington, DC	Promissory note	1999	10%	on demand					X						
1															
2															
3															
4															
5															

*This category applies only if the liability is solely that of the filer's spouse or dependent children. If the liability is that of the filer or a joint liability of the filer with the spouse or dependent children, mark the other higher categories, as appropriate.

Part II: Agreements or Arrangements

Report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

None [ ]

	Status and Terms of any Agreement or Arrangement	Parties	Date
Example	Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1/00.	Doe Jones & Smith, Hometown, State	7/85
1	401K account remains with Covington & Burling (separately managed and no further contributions after separation in April 2004)	Covington & Burling, Washington, DC	4/04
2	Defined benefit pension interest remains with Covington & Burling (amount fixed by formula as of date of separation in April 2004)	Covington & Burling, Washington, DC	4/04
3			
4			
5			
6			

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Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. **Exclude** positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

None ☐

	Organization *(Name and Address)*	Type of Organization	Position Held	From *(Mo., Yr.)*	To *(Mo., Yr.)*
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/92	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
1	American Bar Association, Antitrust Section, Chicago, IL	Professional organization	Vice Chair, Section I Committee*	08/2003	Present
2	American Bar Association, Antitrust Section, Chicago, IL	Professional organization	Editorial Board, ALD VI*	12/2003	Present
3	U.S. Small Business Administration, Washington, DC	Government Agency	National Advisory Council Member	03/2003	5/2005
4	Covington & Burling	Law Firm	Partner	10/1997	4/2004
5					
6			*Will resign upon confirmation		

Part II: Compensation in Excess of $5,000 Paid by One Source

Report sources of more than $5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

Do not complete this part if you are an incumbent, Termination Filer, or Vice Presidential or Presidential Candidate.

None ☐

	Source *(Name and Address)*	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State	Legal services
	Metro University (client of Doe Jones & Smith), Moneytown, State	Legal services in connection with university construction
1	Covington & Burling, Washington, DC	Services as a partner in the law firm
2	Alps Electric Co., Tokyo, Japan (client of C&B)	Legal services
3	Amarin Corporation, California (client of C&B)	Legal services
4	American Standard Inc., Piscataway, NJ (client of C&B)	Legal services
5	Blue Cross & Blue Shield of AL, Birmingham, AL (C&B client)	Legal services
6	Coalition of NCAA Div. IA Football Conferences (C&B client)	Legal svcs (Conf. USA, Mt. West, Sun Belt, Mid-American, and Western Athl.)

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None ☐

	Organization *(Name and Address)*	Type of Organization	Position Held	From *(Mo., Yr.)*	To *(Mo., Yr.)*
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/92	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
1					
2					
3					
4					
5					
6					

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None ☐

	Source *(Name and Address)*	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State	Legal services
	Metro University (client of Doe Jones & Smith), Moneytown, State	Legal services in connection with university construction
1	Dallas County (Iowa) Republican Party (C&B client)	Legal services
2	Expedia, Bellevue, WA (client of C&B)	Legal services
3	Federal Home Loan Mort. Corp., McLean, VA (client of C&B)	Legal services
4	Federal-Mogul Corporation, Southfield, MI (client of C&B)	Legal services
5	IAC, New York, NY (C&B client)	Legal services
6	Imerys, Georgia (C&B client)	Legal services

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None ☐

	Organization *(Name and Address)*	Type of Organization	Position Held	From *(Mo., Yr.)*	To *(Mo., Yr.)*
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/92	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
1					
2					
3					
4					
5					
6					

Part II: Compensation in Excess of $5,000 Paid by One Source

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None ☐

	Source *(Name and Address)*	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State	Legal services
	Metro University (client of Doe Jones & Smith), Moneytown, State	Legal services in connection with university construction
1	INFONXX, Inc., Bethlehem, PA (client of C&B)	Legal services
2	JLG Industries, Inc., McConnellsburg, PA (client of C&B)	Legal services
3	National Football League, New York, NY (client of C&B)	Legal services
4	National Pharmaceutical Council, Reston, VA (client of C&B)	Legal services
5	NPS, LLC, Foxboro, MA (client of C&B)	Legal services
6	Republican National Committee, Washington, DC (C&B client)	Legal services

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Part I: Positions Held Outside U.S. Government

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None ☐

	Organization *(Name and Address)*	Type of Organization	Position Held	From *(Mo., Yr.)*	To *(Mo., Yr.)*
Examples	Nat'l Assn. of Rock Collectors, NY, NY	Non-profit education	President	6/92	Present
	Doe Jones & Smith, Hometown, State	Law firm	Partner	7/85	1/00
1					
2					
3					
4					
5					
6					

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None ☐

	Source *(Name and Address)*	Brief Description of Duties
Examples	Doe Jones & Smith, Hometown, State	Legal services
	Metro University (client of Doe Jones & Smith), Moneytown, State	Legal services in connection with university construction
1	Republican Party of Colorado (client of C&B)	Legal services
2	Republican Party of New Mexico (client of C&B)	Legal services
3	Republican Party of Ohio (client of C&B)	Legal services
4	Robert Michael Duncan (client of C&B)	Legal services
5	Sotheby's, Inc., New York, NY (client of C&B)	Legal services
6	The Thomson Corporation, Canada (client of C&B)	Legal services

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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	555,614		Notes payable to banks-secured	0	
U.S. Government securities-add schedule	0		Notes payable to banks-unsecured	0	
Listed securities-add schedule	760,796		Notes payable to relatives	0	
Unlisted securities--add schedule	0		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 tax and interest	0	
Doubtful	0		Real estate mortgages payable-add schedule	656,178	
Real estate owned-add schedule	1,600,000		Chattel mortgages and other liens payable	0	
Real estate mortgages receivable	0		Other debts-itemize:	0	
Autos and other personal property	117,000				
Cash value-life insurance	0				
Other assets itemize:					
529 plans (Virginia)	10,251				
Covington & Burling Defined Benefit Pension Plan	61,602				
			Total liabilities	656,178	
			Net Worth	2,449,085	
Total Assets	3,105,263		Total liabilities and net worth	3,105,263	
CONTINGENT LIABILITIES	0		GENERAL INFORMATION		
As endorser, comaker or guarantor	0		Are any assets pledged? (Add schedule)	No	
On leases or contracts	0		Are you a 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				

SCHEDULES
LISTED SECURITIES

ACCOUNT	SECURITY	SYMBOL	SHARES	MARKET VALUE*
A.G. Edwards				
	Coca-Cola Company	KO	300	13,128
	Pepsico Incorporated	PEP	200	10,906
	Surebeam Corp	SURE	1,000	4
Ameritrade				
	Fidelity Mt. Vernon Str. Tr. Growth Co. Fund	FDGRX	417.983	24,343
	Vanguard Tax Exempt Funds	VWLTX	2,332.695	26,803
	Vanguard Index Funds 500 Fund	VFINX	573.836	64,752
	Carmax Inc.	KMX	1,000	31,860
	Covance Inc.	CVD	1,500	78,450
	Exactech	EXAC	4,000	55,200
	Fedex Corporation	FDX	125	10,180
	Novellus Systems Inc.	NVLS	150	4,022
	Pharsight Corp.	PHST	1,000	1,940
	Pioneer Funds Pioneer Fund Inv.	PFIOX	193.13	8,274
	Rowe T Price Small Cap Stock Fund	OTCFX	885.494	29,248
Vanguard 401(k)				
	Vanguard Prime Money Market Fund	VMMXX	102,715.300	102,715
	Vanguard Wellington Fund	VWELX	373.844	11,518
	Brandywine Fund	BRWIX	2,091.479	62,682
	Vanguard Total Bond Market Index Fund Investor Shares	VBMFX	3,396.152	34,743

*Most recent valuation available.

ACCOUNT	SECURITY	SYMBOL	SHARES	MARKET VALUE*
	Vanguard Extended Market Index Fund Investor Shares	VEXMX	149.910	4,929
	T. Rowe Price Mid-Cap Growth Fund Retail Class	RPMGX	345.725	18,341
	Vanguard Institutional Index Fund Institutional Shares	VINIX	1,101.426	122,049
	American Beacon International Equity Fund – Institutional Class	AAIEX	233.827	4,850
Ceridian 401(k)				
	Moderate Growth Portfolio		14,386.060	14,714
	Munder Series Trust: Munder Index 500 Fund: Class A Shares		351.320	8,737
Thrift Savings Plan				
	C Fund		472.4860	6,157
Virginia 529 Plans				
	Chesapeake Portfolio		800.534	10,251
	Total			760,796

REAL ESTATE

DESCRIPTION	ESTIMATED VALUE
Residence: McLean, VA	$1,600,000
Mortgage: GMAC Mortgage Corporation, P.O. Box 4622, Waterloo, IA 50704	

AFFIDAVIT

I, Thomas O. Barnett, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

9-9-05
(DATE)

Thomas O. Barnett
(NAME)

Sharon D. West
(NOTARY)

District of Columbia
Subscribed and sworn to before me, in my presence,
this 09 day of September, 2005
by Sharon D. West
District of Columbia Notary Public
My Commission Expires Oct 14 2007

SHARON D. WEST
Notary Public of District of Columbia
My Commission Expires October 14, 2007

Senator CORNYN. We will now turn to the opening statements of the panelists, and Mr. Kim—oh, I beg your pardon. Senator Hatch is here and has a statement he would like to make. As the immediate past Chair of the Judiciary Committee, we always do what Senator Hatch asks.

[Laughter.]

PRESENTATION OF WAN KIM, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE, BY HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. That has not been my experience.

[Laughter.]

Senator CORNYN. I was just speaking for myself personally, Senator.

Senator HATCH. You certainly are a very good friend, is all I can say.

I am sorry I am so late, but I had to go to a funeral and was put back in time, so thank you for giving me this opportunity, Mr. Chairman.

It is with great pleasure and with the highest regard that I introduce Wan Kim, a former member of our staff here on the Judiciary Committee who has been nominated to be the next Assistant Attorney General for Civil Rights for the Civil Rights Division at the Department of Justice.

Wan has served at the Justice Department as Deputy Assistant Attorney General in the Civil Rights Division for the last 2 years. In that capacity, he has supervised more than 120 attorneys in the Criminal, Education, and Housing Sections of the Civil Rights Division and has worked closely with the U.S. Attorneys' Offices from across the country.

He has also served as a Commissioner on the Brown v. Board of Education 50th Anniversary Commission and is a member of the U.S. delegation to the Organization for Security and Cooperation in Europe's Conference on Anti-Semitism in Berlin.

Wan graduated Phi Beta Kappa from Johns Hopkins University while serving in the United States Army. Wan went on to law school at the University of Chicago, where he was privileged to serve on the law review, or put another way, they were privileged to have him serve on the law review.

Wan clerked for D.C. Circuit Judge James Buckley, a wonderful man, as we all know, a respected Senator and a great judge. In addition, Wan has had 6 years of prosecutorial experience, including serving as the Special Attorney to the Attorney General in the prosecution of Timothy McVeigh and Terry Nichols for the Oklahoma City bombing, as well as years of experience as a civil litigator at Kellogg, Huber, Hansen, Todd and Evans, one of the premier litigation firms in town.

Although these achievements are certainly enough to impress anybody, they are even more remarkable when you consider Wan's humble beginnings. Wan's parents came to the United States with borrowed money, no education, and a strong desire to find a better life. Although Wan and his sister were left in the care of their grandparents in South Korea for a period of time, when Wan was

two months shy of his fifth birthday, they were reunited with their parents in Queens, New York. His family subsequently moved to Jersey City, where they purchased a small luncheonette and later sold the luncheonette to run a convenience store in Rahway near the train station. They all worked 7 days a week, 365 days a year. In fact, Wan jokes that one of his main motivations for joining the military was that it was easier than working in the family business.

[Laughter.]

Senator HATCH. I am pleased that Wan's parents are present today. To his parents, I would like to express how much I admire all the sacrifices that they have made on Wan's behalf. Let me see if I can do this. Let me say to you parents, [phrase in Korean]. Now, I know that I didn't do a very good job. This means to you parents that you worked hard and did a good job, or your hard efforts paid off.

Before I close, let me just take a moment to share with my colleagues my personal knowledge of Wan's qualifications. As some of you may recall, Wan served as counsel to this Committee during the 107th and 108th Congresses, working on criminal and civil rights legislation. Wan is a very bright and hard-working attorney. He is an excellent writer. His legal expertise and effective negotiations skills made him someone I could send into any situation, knowing that I would be well represented. Wan is definitely somebody, a person you would want on your team.

Most importantly, Wan is a good person, a father of two beautiful daughters. He takes time out of his busy schedule to make sure that his family can spend some quality time together. He is a person of integrity and a person whose commitment to public service shows how strongly he believes in doing what is right.

If confirmed, and I know he will be, Wan would be the first Korean American and the first naturalized American to serve as Assistant Attorney General for Civil Rights. But Wan does not want to be identified merely by his race or ethnicity. Rather, he wants to be judged on his qualifications. It is on that basis that I urge my colleagues to act quickly and favorably on his nomination.

One final word. I have had a lot of people who have worked with me on the Judiciary Committee and other Committees throughout my tenure in the Senate and I have to say that Wan is particularly special to me as not only a very intelligent and aggressive, hard-working, decent and wonderful person, but I think he is the right person at the right time for this Civil Rights Division and I know that he will do a terrific job. So I hope our Committee will mark him up and put him out as soon as we possibly can, and, of course, get this work that he needs to do down there going as fast as we can.

Thank you, Mr. Chairman, for your patience, and thank you, Wan, for being willing to serve in the government, and thanks to your folks for raising such a wonderful young man, and your wife and baby. Thanks.

Senator CORNYN. Thank you, Senator Hatch, and I will assure everyone that when Senator Hatch encourages us to mark him up and send him out as soon as we can, that is a good thing.

[Laughter.]

Senator HATCH. That is a good thing.

Senator CORNYN. That is a positive thing.

At this time, I will recognize Mr. Kim for an opening statement.

Mr. KIM. Thank you, Mr. Chairman. Thank you, members of the Judiciary Committee, for holding this hearing. I just want to make a few thank-yous and then move on. I have a prepared statement, Mr. Chairman, that I wish to move into the record.

Senator CORNYN. Without objection.

Mr. KIM. First of all, I would like to thank the Committee for holding this hearing.

Second of all, I would very much like to thank Senator Hatch for supporting me, for supporting kindness over the years which has really far outmeasured the little service that I was able to provide for him during the course of a year or so.

I would also like to thank Senator Corzine and Senator Lautenberg for supporting my nomination.

Of course, I would like to very much thank the President and the Attorney General for this honor of having been nominated for this important position. I am grateful beyond measure for that support.

And last but certainly not least, and in fact, the most, I would like to thank my family, my wife and my children and my parents and my in-laws, for their support over the years.

Thank you, Mr. Chairman.

Senator CORNYN. Thank you, Mr. Kim.

[The prepared statement of Mr. Kim appears as a submission for the record.]

Senator CORNYN. Mr. Bradbury?

Mr. BRADBURY. I just have a few thank-yous, Mr. Chairman. Mr. Chairman, Senator Kennedy, distinguished members of this Committee, first, I want to thank this Committee for giving me the opportunity to come before you today. It is the highest honor of my professional career to appear before this Committee.

I am also deeply grateful to Senator Smith for his kind presentation. I thank the President for the trust and confidence he has placed in me and for the honor of his nomination. I also thank the Attorney General for his support, for his leadership, and for his friendship.

Mr. Chairman, I would like to thank my mother, Cora Bradbury, without whom I could never be here today. Unfortunately, she passed away in 2003. Otherwise, I know she would be the proudest person in the hearing room.

And last, I would like to thank my family. They are my biggest supporters and the biggest source of my joy and pride. I especially want to thank my wife, Hilde, for her love, her devotion, her support, her sacrifices, and her wisdom.

Thank you, Mr. Chairman.

Senator CORNYN. Thank you.

Ms. Wooldridge?

Ms. WOOLDRIDGE. Thank you, Mr. Chairman and members of the Committee. I took the opportunity to write down some remarks in case I was not capable of a complete sentence today, so if you will indulge me for a moment.

I would like to begin by thanking the President and the Attorney General for this nomination. I am sobered by the confidence that

that nomination has demonstrated their confidence in me. If I am confirmed, I will do everything to merit that trust.

I thank you for holding this hearing today, particularly Senator Specter, who is not with us yet, and of course to Dan Lungren, who has now probably made it impossible for me to swing a club without whiffing, since he has now bragged about me publicly.

I am deeply aware of the responsibilities that I will have if I am confirmed to be the Assistant Attorney General for the Environment and Natural Resources Division. As you know, through the litigation in the Federal and State courts, the Division is responsible to safeguard and enhance the American environment, to acquire and manage lands and natural resources, and to protect and manage Indian rights and property.

The Division has approximately 700 people, including 425 attorneys. Currently, as Solicitor of the Department of the Interior, I manage over 420 attorneys and support staff and administer a budget of $60 million. I am the chief legal officer and my job is to see that the Secretary and the Department's bureaus carry out their mission, which is much akin to the mission of the Division. I am told, in fact, that the Department of Interior is some 30 to 40 percent of the Division work that I will, if confirmed, be taking responsibility for.

Prior to my service at Interior, I was a civil litigator in both private and public practice, and for about 5 years, as Mr. Lungren has told you, I was his special assistant where I was responsible to him in many cases for his exercise of prerogatives to bring affirmative enforcement litigation against people accused of breaking the law. While these cases were civil in nature, these cases gave me the experience in what I believe is the most profound responsibility of the public servant, that is the decision to apply the power of the sovereign against persons or entities believed to have violated the law.

While this type of decision should not be done lightly, I believe it must be done consistently and impartially and firmly. The question whether to prosecute violations of our environmental laws is one that is often faced by members of the Environment and Natural Resources Division and I do look forward to working with them, the career prosecutors and particularly the U.S. Attorneys with whom we partner in bringing those cases.

I thank you very much for your attention and should this Committee support the nomination by positively—I am sorry—and the Senate vote to confirm me, I do pledge that I will carry out my responsibility with dedication and integrity. Thank you.

Senator CORNYN. Thank you very much, Ms. Wooldridge.

Mr. Barnett?

Mr. BARNETT. Thank you, Mr. Chairman and thank you, members of the Committee. I am deeply honored and, in many respects, awed to have been nominated by the President to be the Assistant Attorney General in charge of the Antitrust Division.

I first want to thank Senator Allen for having taken the time to introduce me today. I also want to thank my family and in particular my wife, Alexa, without whose support and patience I certainly could not be here today.

But more generally, I just want to make a brief statement about the antitrust laws in the U.S. economy. In my view, the strength

and vitality of the U.S. economy is one of the great wonders of the world and I believe that one of the principal foundations of that strength are the nation's antitrust laws. Accordingly, I approach the responsibilities of running the Antitrust Division very seriously and I commit to this Committee and to the American people that, if confirmed, I will apply all of my abilities to the effective, efficient, and fair enforcement of those laws. Thank you.

Senator CORNYN. Thank you very much.

We will now go to a round of questions. I would like to start by asking Mr. Kim, two of the people who introduced you made note of the fact that your family immigrated to the United States, your parents did, and that they have dreamed the American dream for you and your family. I was just wondering if you could share with us, is there anything about your family's experience or your personal experience in life you think that will have a particular poignancy or application, given the fact that you will be entrusted with enforcing the civil rights laws of the United States?

Mr. KIM. Mr. Chairman, thank you for that question, and I think the answer in a word is yes. My family immigrated to the country. My sister and I immigrated separately a few years afterwards, after my mother and father were able to become established financially. I remember distinctly going to school, not speaking a word of English. I remember, once learning English, as an 8-year-old boy, quizzing my parents on the citizenship that they were about to take. I understand quite personally how important it was to my success that the nation's laws guaranteed me an equality of opportunity, a chance to succeed by working hard and by taking advantage of what America has to offer, which is a chance, an equal chance to everyone on a non-discriminatory basis.

If confirmed as Assistant Attorney General, it would be one of my personal goals to make sure that every American citizen, every American person, has the same chance to succeed that I did, and that is a chance that is grounded in many respects upon the nation's Federal civil rights laws.

Senator CORNYN. Thank you. I now want to turn to the issue of human trafficking, an issue you and I discussed in your courtesy visit in my office. I have been pleased by the commitment made by the Department of Justice to make prosecution of human trafficking laws a priority. This is really a moral evil. I believe that it is equivalent to modern-day slavery.

I have introduced legislation in the Senate that will help strengthen and enhance the punishment of people who engage in this scourge and I hope to be able to work with you and General Gonzales and the Department, as well as my colleagues, to make sure that you have all the tools that you need in order to successfully prosecute those who would ply in human slavery.

Can we be assured that you will continue the aggressive approach to prosecuting human trafficking laws if you are confirmed?

Mr. KIM. Absolutely. Mr. Chairman, first, let me thank you for your personal leadership on this issue. You have taken great time out of your personal schedule to make sure that our work on this issue has been recognized, that your interest on that issue has been known, and that has been a great aid to us in doing the work that we do in this area.

Certainly, this administration has spoken and proven its commitment to enforcing the laws against human trafficking. The President had made clear it is one of his priorities. The Attorney General has made this clear. And the work that we have done in the Civil Rights Division has made this clear.

We have more than tripled the number of human trafficking prosecutions brought in this administration as compared to the previous administration and these cases, once you start delving into the facts of these cases, you realize that you are looking at some of the most victimized persons ever and some of the worst, most odious, and most horrific criminal defendants ever. And it is because of these cases, the fact that we can bring relief to so many victims and put away so many horrible offenders, that the administration will continue to work hand-in-hand with Congress and to the maximum extent permitted by law to continue the work in combatting human trafficking.

Senator CORNYN. Thank you very much.

Mr. Bradbury, you have been nominated as Assistant Attorney General for the Office of Legal Counsel, a critical job of assisting the Attorney General in his function as legal advisor to the President and executive branch. Could you tell us a little bit about what your priorities are? What can we expect from you, if confirmed?

Mr. BRADBURY. Thank you, Mr. Chairman. They are really fairly simple. The Office of Legal Counsel is, unlike many other components in the Department, not a policy shop. We don't do policy in the Office of Legal Counsel. We are a pure law operation. So I don't bring any political agenda or ideological agenda or goals in a political or policy-driven sense.

My goals really relate to the provision of legal advice. That is the essential function of the office. My goals are to do that as efficiently as I can, to hire the best people with open minds who don't bring preconceived agendas to their work but have the highest qualifications to objectively analyze constitutional and statutory questions that the office gets, and to provide advice in an efficient way to the President, to the Attorney General, to the Departments of the executive branch.

I think it is important that that advice be clear, that it limit itself to addressing only the issues that are necessary for the question presented, and that it do so in a clear way so that the policymakers who rely essentially on that advice to inform their policy decisions can understand it, that it can be persuasive, and that they can take it as a solid given that they then work from. It is a critical input to policy decisions across the government, but it is not itself a policy-driven enterprise, and so that is the perspective I bring to the Office of Legal Counsel.

Senator CORNYN. Mr. Bradbury, a lot of attention has been focused in Congress and across America, really, to the issue of detention and interrogation of detainees in the global war on terror. An August 1 OLC memo written by Jay Bybee discussed the anti-torture statute, and that was revised in an opinion on December 30, 2004, revising the Bybee memo's interpretation of the statute.

Would you explain to the Committee what involvement you had in the preparation of that second memo, if any?

Mr. BRADBURY. Thank you, Mr. Chairman. Yes. Obviously, I cannot discuss internal deliberations in the office, but I will say that I was not in the Department of Justice back in 2002. I was in private practice. My second stint in the Office of Legal Counsel began in April of last year, 2004, when I came in to be the Principal Deputy Assistant Attorney General. So I was not at all involved in the Bybee memo of August 2002.

I was, at the time of the issuance of the December 30, 2004, memo, the recent reinterpretation of the Federal prohibition on torture, I was the Principal Deputy in the office and the Principal Deputy's function is to assist the head of the office in reviewing and approving the opinions of the office, and so in that sense, I did have that participation.

I will say that I fully agree with the December 2004 interpretation of that statute by the office. It is the binding, the authoritative interpretation of the office. And, of course, I will apply that interpretation in any advice that the office may give, and any advice we do give will be fully consistent with that opinion.

Senator CORNYN. Thank you for clarifying that.

Observing the early bird rule, we now turn to Senator Kohl for any questions he may have.

Senator KOHL. Thank you, Mr. Chairman.

Mr. Barnett, I have a few questions for you. The American consumers are suffering from record high prices in gas, as you know, in many places across our country, higher than $3 a gallon. Immediately after the Hurricane Katrina disaster, gas prices were even higher, reaching as high as $6 a gallon in the Atlanta area.

We all recognize that gasoline prices and markets were affected by disruptions in supply caused by the hurricane damage, but we also wonder if these sharp price hikes were justified solely by market conditions or perhaps other factors, such as collusion, anti-competitive practices, or price gouging.

I recognize that the Federal Trade Commission ordinarily investigates antitrust issues related to oil and gasoline rather than the Justice Department. However, the Justice Department is solely responsible for prosecuting criminal antitrust violations.

So I would like to ask you, Mr. Barnett, what steps has the Justice Department taken to investigate possible criminal antitrust violations regarding distribution or sale of gasoline in recent months, and more importantly, will you make such investigation a priority if you are confirmed at the Antitrust Division?

Mr. BARNETT. Thank you, Senator. I certainly agree with you that the situation with gas pricing in the United States is a very serious situation, that I am a consumer along with most other Americans and I can see what is happening, as well. I agree with you, it should be a priority.

The Antitrust Division is monitoring the situation. Our Criminal Deputy has been assigned to and is a participant in the Post-Katrina Interagency Task Force to investigation fraud and abuse and we are particularly looking for signs of collusive activity that we might pursue criminally. We have also reached out to various other agencies to dialog with them about any information that they may come up with that could give us leads in that direction.

As you indicate, the Federal Trade Commission does have as a practical matter principal responsibility for civil enforcement in this industry. We do maintain very good communications with the Federal Trade Commission, and to the extent that their efforts identify any sign of collusive activity, we can and will vigorously prosecute any—investigate and/or prosecute any such action that we find.

Senator KOHL. Are you saying that in order for you to move forward, you need first to have the FTC take action or make comments or suggestions or what? How does that work?

Mr. BARNETT. No, Senator. I am sorry if I left you with that impression. What I meant to say, that was an additional source of information for us and we are certainly confident that if the FTC sees signs of collusive activity, that they will refer that information to us.

In addition, as I say, we are part of the Katrina Task Force. We are dialoguing with other agencies. We have designated two of our chiefs in our field offices to have responsibility to look for collusive activity, our Dallas and our Atlanta field offices, and to—of course, they have people working underneath them to see if we can ferret out any such information. I can commit to you, Senator, that if I am confirmed, this will be a priority.

Senator KOHL. I appreciate that, and I would just like to ask you, as an observer, as we all are, of the scene, the oil companies are making record profits. They never made as much money as they are making now. At the same time, American consumers are paying record high prices for gasoline, which is what gives them their profits. Doesn't that make you wonder whether or not the American consumer is paying a lot more than they should be paying? After all, we are looking at an industry in which the principals are making more money than they have ever made before, while at the same time consumers are paying more money than they have ever paid before. Understanding that you have got to do your work as an investigator, isn't your sense of probability in terms of what might be happening piqued, to say the least?

Mr. BARNETT. Yes, Senator, a situation of a sudden price increase is something that gets an antitrust enforcer's attention quite quickly. This is, in the first instance, I know it is an area that the Federal Trade Commission has a very active program in. They monitor 20 wholesale markets, 360 retail markets on a weekly basis. They currently have an open investigation, is my understanding, on this specific issue.

As I say, we are also looking for evidence of anything that would fall into the criminal realm, which is the realm that we prosecute in the oil and gas industry, and we are focused on that, and if confirmed, I will certainly continue that focus.

Senator KOHL. Thank you. One other question before my time runs out. In the last year, we have seen a tremendous amount of consolidation in the telecom industry. The biggest deals were SBC's acquisition of AT&T and Verizon's acquisition of MCI, as you know. These deals, if approved, will result in the most fundamental reshaping of the telecom market since the Justice Department broke up the AT&T monopoly more than 20 years ago, and we held two

hearings on these mergers in our Committee, that is to say myself and Senator DeWine, last spring.

Many industry analysts believe that we are moving to a telecom world in which consumers will basically have a choice of only two companies for their telecom services, the regional Bell company offering a bundle of services and a local cable company offering a similar group of services.

Mr. Barnett, do you believe this result is likely, and at the end of consolidation, should we be concerned about this possibility, that is to say, just two choices, and will consumers be forced to pay a price for the fact that these mergers are resulting in a marked lessening of competition?

Mr. BARNETT. Thank you, Senator. I certainly agree, the telecommunications industry, the phone industry, is an extraordinarily important one for the American people. It affects all of us very directly.

We are acutely aware of the transactions that you referred to. They are pending investigations, so I think I need to be somewhat cautious about discussing them in too much detail. But I can tell you that we have devoted substantial resources to investigating those transactions. I know that we have received and reviewed well over a million pages of documents. We are taking those issues quite seriously.

The way we are approaching those transactions is to work as hard as we can to understand what the facts are, to delve into the way the markets work, and on the basis of that information, to make our best assessment as to whether or not there is a substantial lessening of competition in any relevant market. If we find that to be the case, we will certainly pursue it appropriately.

Senator KOHL. I thank you, Mr. Barnett, and I thank you, Mr. Chairman.

Senator CORNYN. Thank you.

Senator DeWine?

Senator DEWINE. Thank you, Mr. Chairman. I don't want the rest of you to think we are ignoring you, but I am the Chairman of the Antitrust Subcommittee and Senator Kohl and I work closely together—he is the ranking member—so we are going to pick on Mr. Barnett here for a few more minutes.

Mr. Barnett, you and I talked a short time ago about the fact that today, we have over 100 countries with antitrust agencies, over 100 antitrust agencies in the world today. This means that merging companies need to comply with really a whole array of different antitrust standards, procedures in various countries while they do business, even for mergers between two American companies. It is a big issue for them and we hear a lot about it.

What are U.S. companies likely to face in the future procedurally and substantively as they attempt to deal with the antitrust laws of other countries, and what role will the Antitrust Division in our country play in ensuring that American companies are treated fairly by other nations, and what steps is the Antitrust Division taking to create some uniformity in the procedural requirements imposed by the various antitrust authorities throughout the world?

Mr. BARNETT. Senator, I agree that the international arena is one of the most important areas that we address. It is a global

economy and we deal, as you say, with 100 or so antitrust regimes around the country. It creates complexities for us as well as for the private sector.

We—if confirmed, I can assure you that it will continue to be a priority for the Antitrust Division. This is really a continuation of the policy of the people who preceded me, and most recently Hugh Pate, who was personally engaged on these issues and, I think, made substantial progress.

I would hope, if I have the opportunity to do so, to continue working on several levels, through international organizations such as the OECD or the International Competition Network, where through dialog we can create what we call soft convergence. The ICN, as just one example, has put out merger best practices, merger recommendations guiding other regimes as to what information they should ask for and what types of procedures they should use in their merger review. Earlier this summer, at the annual conference, there was information suggesting that almost 50 countries had modified their laws and regulations to conform more closely with those recommendations.

We will continue with those dialogs on a multilateral basis. In addition, we engage in bilateral discussions. We have annual meetings with the European Commission, with the Japanese Fair Trade Commission, with the Canadians, with the Mexicans, as well as working groups with Taiwan and other countries.

We will continue to devote resources to persuading and encouraging those countries to adopt sound economic principles in their antitrust enforcement, to adopt procedures that minimize burdens, because we believe at the end of the day that will help consumers across—not only American consumers, but consumers in those countries, as well.

Senator DEWINE. Let me turn to another antitrust issue. We hear from people who talk to us about how long the Antitrust Division's investigations take, not a new issue. It goes without saying the Division—we understand the Division must thoroughly examine the issues and you must take as long as necessary to get all the facts and to make the decision.

On the other hand, it is always a concern if investigations go for a long period of time. The very fact of the investigation itself, the delay in a decision can really start having an impact on the marketplace. The process itself starts to have an impact on competition.

How do you think the Antitrust Division is doing in terms of balancing these two concerns? How do you think you are getting along, and what steps, if any, do you plan to take to ensure that investigations last long enough to get to the bottom of the issue, but no longer than that?

Mr. BARNETT. Thank you, Senator. We do recognize that the process has cost and can, in effect, have a drag on businesses moving forward. I am glad to report that there have been steps taken in recent years, originally implemented, there have been some initiatives by Charles James with some additions by Hugh Pate, to more closely monitor investigations at the managerial level to try and make sure that we understand from staff where things are,

where they are going, identifying ways to short-circuit, if you will, an investigation to get to a bottom-line conclusion.

My impression is that we have made substantial progress in that regard, but to quote a good friend of mine, Bill Kovasik, the only best practice here is to continually strive for better practices, and if confirmed, that is what I would continue to do.

Senator DEWINE. Good. Thank you very much. Thank you, Mr. Chairman.

Senator CORNYN. Thank you, Senator DeWine.

Senator Kennedy?

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

Senator KENNEDY. Thank you, Mr. Chairman. If I could, I would like to have my full statement printed in the record in an appropriate place.

Senator CORNYN. Without objection.

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

Senator KENNEDY. Mr. Kim, congratulations. Congratulations to all of you.

Mr. Kim, we are going to have the extension of the Voting Rights Act coming up next year. We are beginning already to try and work through and develop the support for it. Can we have your unequivocal enthusiastic support in terms of getting an extension of the Voting Rights Act?

Mr. KIM. Senator, first of all, thank you for your kind words. I appreciate that.

Second, the Attorney General has stated, Senator, that the Department of Justice is committed to working with Congress on reauthorizing the Voting Rights Act and you certainly have my support, along with the Attorney General's support.

Senator KENNEDY. This is a very high priority. I expect to introduce the reauthorization with the Chairman of the Committee, Senator Specter, very soon. I know that Congressman Sensenbrenner is working on this issue. It is a matter of enormous importance. We want to work with you and the Department extensively on this and make sure that we get it done right.

Now, one area of particular concern has been the Division's enforcement on the voting rights. This August, we celebrated the 40th anniversary of the Voting Rights Act of 1965, one of the most important and effective civil rights statutes. Private citizens can bring the suits under the Act, too, but the Justice Department enforcement is critical to its effectiveness. But unfortunately, in recent years, the Department has cut back on its enforcement actions. This year, the Division has filed only two cases, racial or ethnic discrimination against minority voters. In 2004, it didn't file any cases at all, not one. And in 2003, it filed one case. In 2002, only two. That is not a very satisfactory record in light of the continuing problem of discrimination against minority voters across the country.

So if you are confirmed, what will you do to see that the Department will more vigorously enforce the specific prohibitions in the Voting Rights Act against discrimination?

Mr. KIM. Thank you for that question, Senator. To begin, I believe that the work of the Voting Rights Section has been very vigorous. Certainly with respect to enforcing Section 203 of the Voting Rights Act, it is my understanding that——

Senator KENNEDY. It has been. I will give you that.

Mr. KIM [continuing]. Under this administration, we have brought more lawsuits than in the previous 25 years combined.

Senator KENNEDY. OK.

Mr. KIM. Also, last year, with regard to the 2004 elections, we launched the most vigorous monitoring effort ever, putting more people in more States and more polling stations than at any time in history.

So the Voting Rights Section has not been sitting on its hands, Senator, but let me say this. At heart, I consider myself to be a nuts-and-bolts litigator. I spent nearly my entire career at the Justice Department, both as a career attorney and as a political appointee, and with the sections that I have supervised and had the privilege of supervising over the past 2 years now, I have, when I came to the section, tried to look through how they brought their cases, what cases were pending, what cases had they brought, and tried to jump-start smoothing out the litigation process. And in all the sections that I have so far been afforded the luxury of supervising and the privilege of supervising, the litigation statistics have gone up.

I will bring, Senator, I pledge to you, that same focus to bear with all of the other sections if I am confirmed by the Senate, and certainly one of those sections would be the Voting Rights Section.

Senator KENNEDY. I certainly acknowledge with regard to the bilingual provisions, but not with regard to the racial and ethnic discrimination. Last year, for example, the Department was extremely busy in going to court to oppose voters' interest in several court cases, which is unprecedented.

For example, the Division opposed attempts by Michigan NAACP and others to ensure that all the provisional ballots cast by eligible Michigan voters were counted in the 2004 election. The Division argued that the Help America Vote Act's creation of the provisional ballot did not give private citizens any legal rights that they could enforce in court. In fact, the Department was supporting attempts by certain States not to count the votes of certain eligible voters.

But the Congress passed the provisional ballot requirement precisely because we are so concerned about the violation of the 2000 election, and fortunately, the Division's argument was rejected by every court that heard the cases. So you had a lot of activity, but not dealing with what the real purpose of the Voting Rights Act was about.

Mr. KIM. Senator, I was not involved in that piece of litigation, but it is my understanding that we made two distinct arguments with respect to the Sixth Circuit litigation that you mentioned. The substantive argument was that under the Help America Vote Act, the provisional ballots were counted in accordance with the rules of the State jurisdictions, and that argument was accepted by the Sixth Circuit.

The argument that you refer to with respect to standing, that the individual litigants did not have a cause of action under HAVA, be-

cause HAVA—Congress under HAVA imposed sole jurisdiction to enforce it upon the Attorney General, that argument was rejected because the Sixth Circuit did agree that 1981 provided for collateral relief even though HAVA did not.

So, Senator, I respectfully would say that we——

Senator KENNEDY. Well, the fact remains that in the recent times, why the Voting Act was passed dealt with racial and ethnic discrimination. That is why the Voting Rights Act was passed. We have had a long exchange on this with Judge Roberts and everyone else, about the 1982 Act and why it was extended, the effects test and the intents test, and the record is out there.

I want to be very clear that what has been the record by the Justice Department and the Civil Rights Division over the recent years in terms of the enforcement has not been good. If your testimony is that you are satisfied with it, then I want to hear about it, and you have just lost my vote, quite frankly, because I think it is so blatant and flagrant about the failure to act on it, and standing on its face, I can give you the figures on it. And if you can give some justification and rationale why there has been such a dramatic drop on it when there has been such a need for it, I am glad to hear it.

Mr. KIM. Senator, what I was hoping to say—and perhaps I misled you and I apologize for that—is that I am committed to vigorously enforcing all the laws. I believe that what I was trying to respond to was some specific questions that you raised. I think there is room for improvement across the Division, certainly in the Voting Rights Section and certainly in all of the other sections that I have not had the privilege of supervising at this point. If confirmed, I would bring the same rigor and intensity that I have brought to the sections that I currently supervise to the Voting Section, and, again, I believe that there is always room for improvement.

Senator KENNEDY. Well, if you want to provide additional information of what you might do in that area, I would be very grateful to you for it.

If you are confirmed, will you continue to observe the bright line separation between the Civil Rights Division role of enforcing civil rights and also protecting ballot access and the Criminal Division's role in preventing voter fraud and other crimes associated with the elections?

Mr. KIM. Senator, I am sorry, but I don't have the answer to that question because I am not simply aware of what that line is. I would have to consult with the career staff and people in the Criminal Division to better understand what those rules are right now.

Senator KENNEDY. Well, the basic point is actually the Civil Rights Division has been keeping the civil rights enforcement work separate from the criminal enforcement work. I met last year with the Criminal and Civil Rights Divisions on the matter, and all of them gave assurance that the administration had a bright line rule that the Civil Rights Division personnel cannot be used to look into voter fraud. The principal reason is that if Division personnel are looking for fraud or investigating criminal voting matters, minority communities would be reluctant to cooperate with them in civil

rights investigations. That has been a policy in the Civil Rights Division. I don't know whether you are familiar with it. Do you see it now?

Mr. KIM. Senator, I certainly appreciate what you are saying. I am not familiar with the policy.

Senator KENNEDY. All right. Fair enough.

Mr. KIM. Certainly what——

Senator KENNEDY. You will take a look at it, will you?

Mr. KIM. Absolutely.

Senator KENNEDY. And it seems to me that it makes a good deal of sense and is something that you would like to try and see.

There is a letter here that I will ask be put in the record.

Senator CORNYN. Without objection.

Senator KENNEDY. I am over my time. Thank you, Mr. Chairman.

Senator CORNYN. Senator Durbin?

Senator DURBIN. Thank you very much, Mr. Chairman. My thanks to the panel, to all. And, Mr. Kim, congratulations to you.

Mr. KIM. Thank you, Senator.

Senator DURBIN. I am told by my staff that your nomination is significant in three respects: you would be the first Korean American in charge of the Justice Department Civil Rights Division; the first immigrant to lead the Civil Rights Division; and the first former staffer to Senator Orrin Hatch to lead the Civil Rights Division. So historic on three counts. And it is an important Division, which I am sure you agree.

The issue of race and civil rights, it has been said, is the unfinished business of America, and I would like to speak to one aspect of that unfinished business and the activities of the Civil Rights Division.

On August 26th of this year, the Civil Rights Division approved a new voting law in the State of Georgia relative to the requirement of an ID. Senator Obama from my State, my colleague, has introduced a resolution, which I have joined with 22 others in cosponsoring, critical of that law and the Civil Rights Division approval of the law.

The New York Times said of this new law, "In 1966, the Supreme Court held the poll tax was unconstitutional. Nearly 40 years later, Georgia is still charging people to vote, this time with a new voter ID law that requires many people without driver's licenses, a group that is disproportionately poor, black, and elderly, to pay $20 or more for a State ID card to vote. Georgia went ahead with this even though there is not a single place in the entire city of Atlanta where the cards are being sold." In the words of the New York Times, this law is "a national disgrace."

Now, there was a group that came together under the leadership of former Secretary of State James Baker and former President Carter, and they were critical of this law as well.

Mr. Kim, what was your involvement in the decision to approve the Georgia voter ID law?

Mr. KIM. Senator Durbin, I had no involvement in that decision. I have had the privilege at the Department of Justice to work in many capacities. Since I have been in the Civil Rights Division, I

have supervised three litigating sections. I have never had the privilege of supervising the Voting Rights Section.

Senator DURBIN. Do you agree with the Department of Justice decision to approve the Georgia law?

Mr. KIM. Senator Durbin, as I understand the factual analysis involved, the issue is one of retrogression, and that is the issue that is the legal standard defined by Section 5. It is the legal standard that has been enunciated upon time and time again by the Supreme Court. I understand the factual submissions in this case were in the thousands of pages. I have not had the chance to review it myself. I certainly have no reason to believe that that factual determination was wrong in this case, but I cannot tell you that—I cannot resolve that answer without actually personally going through and reviewing all those materials.

Senator DURBIN. Does it give you pause to realize that in the State of Georgia there is not a single place in the entire city of Atlanta where a voter can buy an ID card; that the ID cards that are being offered to voters cost $20 for a 5-year card, $35 for 10 years; that the cards are only sold in 58 locations in a State with 159 counties; that the Secretary of State Kathy Cox has said the vast majority of fraud complaints in Georgia involve absentee ballots, which are unaffected by the new law; and Ms. Cox goes on to say she is unaware of a single documented case in recent years of fraud through impersonization of a voter at the polls? Does that give you any pause in considering whether the Civil Rights Division of the United States Department of Justice should have approved and precleared this law?

Mr. KIM. Senator Durbin, all of the considerations that you raise should be factors in the analysis, I agree. My understanding is, again, having been briefed upon this for the purposes of this hearing, that there were other considerations as well, not only intensive factual analysis but facts which included that there was a waiver of fees permitted for people who could establish indigency; that there would be mobile stations allowed and brought into places like the city of Atlanta to distribute these identification cards.

Again, the issue is a legal one and a factual one, and that is one of retrogression.

Senator DURBIN. Yes, it is true, citizens can swear they are indigent and be exempt from the fee, but it is also true that many are reluctant to swear to it because they risk a criminal penalty.

I think that I don't understand the thinking of Mr. Tanner. Are you familiar with Mr. John Tanner, who was involved in this?

Mr. KIM. He is a distinguished 30-year veteran of the Civil Rights Division, sir. Yes, I am very familiar with him.

Senator DURBIN. Do you believe he made a good-faith effort to listen to the arguments against preclearance made by civil rights groups?

Mr. KIM. Senator, I know John Tanner, not as well as I hope to. I believe he is an accomplished professional, dedicated career servant, and I believe that all of the people in the Civil Rights Division act in good faith, until and unless I am presented with evidence to dispute that.

Senator DURBIN. I don't know Mr. Tanner so I can't reflect on his career or what he has done. This decision is troubling, to put a new

obstacle in the path of voters, one that costs them money, that recalls those horrid days of our past with the poll tax and obstacles thrown in the paths primarily of the poor, the elderly, and minority populations, for a reason which is not apparent to anyone. There is no voter fraud involved here, according to their own Secretary of State. It is an obstacle primarily to the poor, minorities, and the elderly, which I think we all know—well, I won't get into that.

Let me just say this, Mr. Kim. I am troubled about another aspect of the Civil Rights Division voting rights enforcement. The Bush administration has not brought a single voting rights lawsuit alleging racial discrimination against African Americans. I find this disturbing. Even more troubling is the fact that earlier this year the Justice Department filed its first case ever under the Voting Rights Act alleging discrimination in voting against white voters. The case was brought against a county in Mississippi, a State with, as we might know, a long history in this field.

How do you explain the fact that this administration has filed lawsuits under Section 2 of the Voting Rights Act on behalf of whites but not African Americans?

Mr. KIM. Senator, certainly the Voting Rights Act and the laws against discrimination protect all American. I am often put in the position, when I was a prosecutor, of putting on witnesses who happen to have criminal culpability themselves and often getting the reaction of some that would say, Why would you use those people as witnesses? And my answer, as many people who have served as prosecutors would be, was, "I take my witnesses where I find them, and if I can substantiate what they say, then I would certainly believe that they are credible witnesses, and that's for a jury to decide."

Senator DURBIN. I think it is——

Mr. KIM. The point, Senator, is simply that I have not supervised the Voting Rights Section, but my understanding is we look for cases, we look for facts to support legal theories, and we bring those cases where we find them. And I pledge to do that across the board.

Senator DURBIN. Well, I hope you will, because I think taking your witnesses where you find them is one thing, but it all depends on where you are looking.

Mr. KIM. Senator, I pledge to look across the board.

Senator DURBIN. Thank you.

I might also add that the same appears to be true in the employment discrimination context. The Bush administration's Civil Rights Division has not filed a single pattern or practice employment discrimination case on behalf of African Americans. By contrast, your division has filed several cases on behalf of white people claiming to be the victims of employment discrimination.

Mr. KIM. Senator, again, I apologize. I am not as well attuned with the facts of those sections, but I could certainly supplement the record if necessary to talk about those cases, because, again, I don't have as much information with regard to those sections to say whether I could sit here and——

Senator DURBIN. And I want to give you a chance to do just that.

Mr. KIM. I appreciate that.

Senator DURBIN. I hope you will. I will send you some additional questions.

Mr. KIM. Thank you, Senator.

Senator DURBIN. Thank you, Mr. Chairman.

Senator CORNYN. Thank you, Senator Durbin.

Since it appears there is continuing interest in some more questions, let me turn to Ms. Wooldridge. Ms. Wooldridge, you have been the Solicitor of the Department of the Interior since 2004, and in that capacity, you have been, in effect, the chief legal officer of that Cabinet-level agency and responsible for managing nearly 400 lawyers and 18 offices nationwide and providing counsel to the Secretary on a number of substantive legal issues. How would you compare and contrast your current position with the one that you now stand nominated to fill?

Ms. WOOLDRIDGE. Senator, thank you for——

Senator CORNYN. I might ask, how do you think that has prepared you, if, in fact, it has, for your new job?

Ms. WOOLDRIDGE. Well, Senator, thank you for the question. I think in some ways in my own head—and I probably shouldn't say it publicly, but I think of the job to which I am being nominated as sort of my current job on steroids in that we have a great deal of the caseload that is within the Department of Justice ENRD is the Interior caseload. We have similar missions. But I would speak specifically to my job and tell you that—and I appreciated the question about the goals that Mr. Bradbury would have in coming into his office, because the goals coming into the Solicitor's job turned out to not be the goals that I needed to pay most attention to once I got there, and that is that we did have 18 offices, we have about between 350 and 375 lawyers. We also have no calendaring system, no case matter tracking systems, no recordkeeping systems, no way for the Solicitor to track the advice that is given in one part of the country for consistency with another part of the country.

So when I came in, my mission immediately fell to actually trying to manage the office and give people the resources and the tools that they need to have a fully functioning professional legal office. And I think we have made a great number of strides in that direction.

If that is similar to the job I am going to, I am hopeful that that is not the case, because it is very difficult for our lawyers to be able to—we weren't even hooked up to the Internet so they couldn't sit and do legal research at their desks, that sort of thing. So I am hopeful that those won't be the kinds of cases, though I am fully capable of spending my time in the management area.

My goals, if you will, for moving into the new job seem sort of corny, but, in fact, what I really hope that when I leave—sort of a hindsight test, that I have made sure that the resources are there for the attorneys to do the job they need to do, that the morale is good amongst the career staff, that I have a reputation for fairness and for listening, the courage to make hard decisions, and that I have fulfilled my obligation to the laws and the Constitution.

Senator CORNYN. Thank you very much. That is all the questions I have at this time.

Senator Kohl, do you have any followup questions?

Senator KOHL. Thank you, Mr. Chairman.

Mr. Barnett, I would like to turn to the issue of media consolidation. Some believe that there is nothing special about mergers and acquisitions in the media marketplace and that they should be treated much like any other merger. For example, former Antitrust Division Chief Charles James said at his confirmation hearing in 2001 that the only thing that mattered in reviewing a media merger to him was the "economic consequences of the transaction."

Now, I don't agree with that. I believe that mergers in the media are different because they affect competition in the marketplace of ideas which are so central to our democracy. In the words of the great Justice Holmes, "The best test of truth is the power of thought to get itself accepted in competition of the market."

I believe that diversity in ownership is essential to ensuring that such competing views are heard. Therefore, I believe that we must give mergers in the media special and more exacting scrutiny than when we review mergers in other industries which do not affect the free flow of information.

I am interested in your opinion, Mr. Barnett. Is the conventional view of antitrust review of media mergers which are focused solely on economic factors, such as ad rates, correct in your opinion? Or do you believe that the Justice Department should consider a media merger's impact on diversity of news and information and not limit analysis to a merger's likely effect on advertising rates? What is your point of view?

Mr. BARNETT. Well, Senator, I completely agree with you that a healthy and robust marketplace of ideas is exceptionally important in our Republic, and I am a strong believer in those First Amendment values.

With respect to mergers, we have to approach it under the laws that have been enacted by Congress, as interpreted by the courts, and I believe that typically leads us to trying to preserve a multitude of participants in the marketplace. And I would have hoped that there would be a correlation between having multiple participants with a diversity of views. I can't necessarily guarantee that different owners will have a particular viewpoint. But what I can tell you is I agree with the fundamental value and goal, and that I will apply the antitrust laws to the best of my ability to maintain a range of ownership as required by the antitrust laws.

Senator KOHL. All right. One other question. I believe that vigorous antitrust enforcement is essential to ensuring that competition flourishes in our economy and consumers reap the benefits in lower prices and highest quality.

In the first couple of years of the Bush administration, when the Antitrust Division was headed by Charles James, I and others became concerned about the diminished antitrust enforcement activity at the Antitrust Division. Statistics showed alarming declines in both the Division's civil, non-merger, and criminal enforcement during that period.

More recently, your immediate predecessor, Hugh Pate, was in my judgment a committed and highly talented Antitrust Division head who I believe restored the Division's proud tradition of aggressive antitrust enforcement.

How would you describe yourself, Mr. Barnett, in terms of your antitrust enforcement philosophy? Is there any change in approach

or philosophy of antitrust enforcement we can expect from that followed by your immediate predecessor, Hugh Pate, should you be confirmed as head of the Antitrust Division? Would you say that you compare philosophically more closely to Hugh Pate or more closely to Charles James, and in what respect?

Mr. BARNETT. Well, thank you, Senator. I have to say that one of the many happy aspects of my joining the Division last year was the opportunity to work with Hugh Pate. He is an extraordinarily talented individual, and in my own view, I would do well to try and follow in his footsteps. I believe that he has had the right enforcement priorities. He placed a strong emphasis on anti-cartel enforcement, and indeed, in the last fiscal year, we had one of our best years in terms of over $300 million in fines and individuals being put in jail for engaging in price-fixing and other cartel activity.

That would continue to be, if confirmed, my top enforcement priority. I would continue also to focus on merger enforcement and on non-merger enforcement, and I agree with you the last several years I think the Division has brought a number of non-merger cases, and that is an area that we would continue to pursue.

So the short answer to your question is I agree with Hugh Pate's philosophy and will, I believe, if confirmed, work to carry that philosophy forward.

Senator KOHL. I appreciate your answer, Mr. Barnett, and I thank you, Mr. Chairman.

Senator CORNYN. Thank you, Senator Kohl.

Senator Kennedy?

Senator KENNEDY. Thank you, Mr. Chairman. Just a final few questions.

Mr. Barnett, in the pharmaceutical area, we have seen the increasing concentration of brand names and increasing concentration of generic companies and increasing costs, rising a good deal higher than the rate of inflation. Is this the Antitrust Division's interest? Or should the Federal Trade Commission ought to be concerned about this?

Mr. BARNETT. Well, Senator, I think, as you know, there is technically concurrent jurisdiction, but as a matter of historical practice, the Federal Trade Commission has taken the lead in enforcing civil enforcement in the pharmaceutical industry.

Senator KENNEDY. OK. We might be working with you as well as we are looking at this avian flu, the health committees are, and trying to get more rapid response, trying to get companies together to try and deal with this and try and look at it in terms of also antitrust and what we might have to do on this. This might be an area that you give some thought to. I don't know whether you have got—I have got limited time here, but this is something that I think down the line—I don't know whether you have given any kind of thought to what might be permissible and what might not be permissible in terms of having companies being able to get together to pool resources to advance research in terms of vaccines or antiviral kinds of products.

Mr. BARNETT. Thank you, Senator. I will be brief because I know your time is short. We are active on a range of health care-related issues beyond pharmaceuticals. With respect to avian flu and that issue, I have given that some thought recently, and it is my belief

that there is no antitrust impediment to creating the kinds of programs that would be necessary to prepare the country to defend itself against a flu pandemic. The antitrust laws are flexible enough to address that, and that is certainly the approach that we would take.

Senator KENNEDY. That is interesting, because when we had the initial bioterrorism bill, we had provisions in there for certain kinds of exemptions, and actually those provisions were struck because of concerns of the Antitrust Division. But that was some time ago.

Let me come to Ms. Wooldridge. I am interested in your Department, how you juggle the protections of Indian rights, for example, Indian water rights versus all the other kinds of priorities that you have in representing the Federal Government. What are the kinds of instructions you give to U.S. Attorneys when you have a conflict in terms of land and water and fowl and other kinds—the whole range. I have not prepared a great deal, but it is an area I have been interested in because it always appeared to me for many years that the Native Americans usually ended up on the short end in terms of the protections, water rights, mineral rights, other kinds of factors. Just in your own experience, what can you tell us that might be encouraging to Native Americans about your service?

Ms. WOOLDRIDGE. Well, thank you, Senator, for the question. I think I get the gist of it, so let me tell you what my experience has been.

Since being with the Department in 2001, I have been the Secretary's counselor for Indian water rights as well as the other jobs that I have been undertaking. And both the Department of Justice, the Environment and Natural Resources Division, and the Department of the Interior, particularly as it is the trustee for Native Americans, works pretty aggressively to try to promote economic development and self-determination in how we handle lawsuits that are—this may be getting too technical, but it is the general stream adjudications to establish water rights, particularly in our Western U.S. And the Department of Justice represents the tribes in those cases, in bringing those to establish those rights. The tribes often are willing or have a desire to see those rights work for them, not just as establish water rights but to enable them to actually turn the value of that right into an ability to pursue other economic interests.

So it is something that I have dealt with for the last four and a half years, and I think we have a very good record of actually getting to some of those settlements. We had a very large settlement of almost the entire State of Idaho in developing the Nez Perce rights and Gila River rights in Arizona. We are making substantial progress in new Mexico, although we kind of have fits and starts in that.

So we have some 18 negotiating teams out there trying to develop those rights and to defend and enforce and establish those rights for those tribes.

Senator KENNEDY. Good. Well, thank you very much. It is enormously important and it has not always been given the kind of priority that it should have.

Mr. Chairman, thank you very much.

Senator CORNYN. Thank you, Senator Kennedy.

Without objection, we will put into the record a letter from Senator Corzine supporting the nomination of Wan Kim. Senator Corzine could not be here today because he had to be in New Jersey.

We will also place in the record letters of support for Mr. Kim from the Fraternal Order of Police, the National Asian Pacific Bar Association, and the National Asian Pacific Legal Consortium.

We will also make part of the record Senator Warner's statement on behalf of Mr. Barnett, without objection.

Ladies and gentlemen, on behalf of the Judiciary Committee, let me thank you for your appearance here today.

We will leave the record open until 5 p.m. next Thursday, October 13th, for members to ask questions in writing. So be looking for those, and as fast as you can get them back, the more quickly we can mark up these nominations and hopefully get your nominations to the floor and get you confirmed.

So, with that, thank you very much for being here, and this hearing is adjourned.

[Whereupon, at 4 p.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

DEPARTMENT OF JUSTICE
Antitrust Division

THOMAS O. BARNETT
Acting Assistant Attorney General

Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2401 / (202) 616-2645 (Fax)
E-mail: antitrust@usdoj.gov
Web site: http://www.usdoj.gov/atr

October 19, 2005

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

Dear Mr. Chairman:

Enclosed are my responses to the written questions of Senators Kohl, Feinstein, and Durbin in connection with my nomination to be Assistant Attorney General, Antitrust Division.

If I can be of any further assistance, please let me know.

Yours sincerely,

Thomas O. Barnett

Enclosure

cc: Honorable Patrick J. Leahy

Responses to Senator Kohl's Follow-up Questions for Thomas Barnett

QUESTION 1. Many commentators wonder if the government's civil antitrust remedies are adequate. In civil antitrust cases, the government is limited to a remedy that is supposed to end the conduct constituting the antitrust violation, rather than obtain the profits the wrongdoer illegally gained. There is no ability for the government to obtain civil fines or disgorgement of illegally obtained gains. One case giving rise to such concerns was the result in the Microsoft case. Although a unanimous Court of Appeals ruled that Microsoft illegally maintained its monopoly, and as a result, effectively destroyed one of its principal competitors, Netscape, the only remedy in the settlement were certain restraints on Microsoft's conduct for five years. There was no requirement that profits illegally obtained be disgorged, nor was any civil fine possible.

Do you believe that the government's civil remedies are adequate? Would it be desirable to give the government the ability to obtain disgorgement of illegally obtained gains, or to impose civil fines when it prevails in civil antitrust cases?

ANSWER

The proper level of deterrence associated with fines and recoveries is an area which increasingly has become a topic of discussion in the antitrust bar. Although I believe the Division has been effective in using currently available tools to provide important protections for consumers, I recognize that additional tools in our arsenal might, in particular instances, be useful. For example, certain other legal systems have civil fine authority for government enforcement. At the same time, those systems typically do not provide for private treble damage recovery, which is a fundamental aspect of our system of enforcement (for example, it has recently been reported that Microsoft paid $4.6 billion to settle private antitrust claims stemming from the DOJ case referenced in your question). Any consideration of this issue would need to encompass potential concerns about double recoveries as well as the potential for chilling private incentives for pursuing antitrust actions. The congressionally-established Antitrust Modernization Commission has stated that it currently is studying this issue, and I look forward to its report and conclusions. I would welcome the opportunity to work with you on consideration of this issue. At this time, I have reached no conclusions regarding the advisability of civil fines for government antitrust enforcement other than that the question warrants serious study.

QUESTION 2. Given the increasing globalization of the world's economy and the increasing numbers of mergers of American companies that affect the European market, international antitrust enforcement is more and more important. Some are concerned that American business transactions have not been treated fairly, and that decisions of European antitrust authorities may sometimes have been motivated by protectionist

sentiments, and are based on differing legal standards. This concern was highlighted several years ago, when the European Union decided to block the GE/Honeywell merger after the Antitrust Division had approved it, and more recently last year when the EU obtained relief against Microsoft that was much more far-reaching that the U.S. antitrust settlement.

Several years ago, then Commissioner Mario Monti assured me that EU decisions affecting American business would be decided based on neutral competition principles, and that he was working hard to promote harmonization between his agency and the United States antitrust agencies. I was encouraged to read recently that the new EU Competition Commissioner, Nellie Kroes, said the EU would adopt a new approach and would evaluate mergers using the same standards as U.S. antitrust authorities. Nonetheless, I believe we must remain vigilant regarding these issues.

What's your view of these issues? Do you believe that European antitrust authorities are properly scrutinizing mergers and other antitrust issues involving American companies? What is your reaction to Commissioner Kroes's speech? What steps will the Antitrust Division take under your direction to better harmonize its antitrust review with the European antitrust authorities?

ANSWER

Antitrust enforcement should be based on rigorous legal and economic analysis with the goal of promoting consumer welfare by preserving competition. Antitrust laws should not be used to defend a country's own home companies or exclude competitors from other nations. The EU has embarked on an aggressive modernization program to reform its competition enforcement system and has made substantial progress in that regard. For example, DG Comp has appointed an economist to a high level position and expanded the number of its economists. It also has adopted internal measures to enhance the factual and legal development and review for its enforcement actions. More recently, I was pleased by Commissioner Kroes' speech stating her enforcement view of the EC's merger standards, particularly the consumer welfare focus of antitrust enforcement. If confirmed, I would continue to work with our counterparts in Europe and elsewhere to advance a common understanding of the proper standards for antitrust enforcement.

The Department has made it a priority aggressively to pursue international coordination and cooperation and substantive and procedural convergence, and I would intend to continue this important work. The Antitrust Division is actively working in many different fora to achieve international consensus on sound antitrust enforcement, including the International Competition

Network and the Organization for Economic Cooperation and Development. The Division also works on a bilateral level with many foreign antitrust authorities, including the EC, both generally and on specific matters. I believe the Division should continue aggressively to pursue these efforts.

QUESTION 3. **There has been a tremendous amount of consolidation in the agricultural sector of the economy in recent years. There have been many mergers among food processors, slaughterhouses, grain elevators, wholesalers, and numerous other agribusiness companies. These mergers have caused a great deal of concern among our farmers, since family farmers have less and less bargaining power with respect to the large agribusiness companies. Many family farmers believe that consolidation among large agribusiness firms have made it increasingly difficult for them to survive.**

What is your view – have the antitrust laws been adequately enforced with respect to agriculture? And will you assure us that enforcement of antitrust laws in the agricultural sector of the economy will be a priority of the Antitrust Division?

ANSWER

I take concerns expressed by farmers about competitive problems very seriously. The Antitrust Division has pursued a number of enforcement actions in the agricultural sector in recent years, including challenging mergers involving dairy processing, sugar beets, and corn wet milling as well as challenging a conspiracy to monopolize regarding mushrooms. In addition, the Division has a Special Counsel for Agriculture who augments the work of Antitrust Division staff in monitoring the agricultural sector for possible antitrust violations and in reaching out to members of the agricultural community for their input. While I lack a sufficient basis to comment on whether there should have been more enforcement prior to my time at the Antitrust Division, I can say that I am committed to protecting competition in the agricultural sector of our economy.

QUESTION 4. **We have long been concerned with the continuing rise in cable TV rates. Year after year, consumers continue to suffer rate increases several times the rate of inflation. Many believe that a major reason that cable rates continue to rise is because the dominant cable TV companies face little competition in their local areas.**

In recent years new cable competitors – the so-called "overbuilders" -- have built

systems to challenge the incumbent cable companies, and recently the phone companies have announced that they will begin to provide a video product. But over the last few years we have been hearing about allegations by cable competitors that they have been the victims of allegedly predatory practices designed to drive them out of the market by the large, incumbent cable TV companies. These practices allegedly include incumbents offering drastically reduced, below-cost pricing of premium programming only in the areas where these upstart competitors operate.

Several years ago, I asked then Antitrust Division head Charles James at an oversight hearing if the Division was investigating these allegations of predatory conduct directed against the overbuilders. He responded that the Division was beginning to take a look at the issue. But we continue to hear reports of allegedly predatory pricing in this industry.

Mr. Barnett, what is the status of this issue today at the Antitrust Division? Has the Division opened any new investigations or reached any conclusions?

ANSWER

While I have not been personally involved in this issue, I understand that the Antitrust Division received complaints from overbuilders a number of years ago. The Division requested additional information from industry participants to more thoroughly review these concerns. My understanding is that, after reviewing that information and other information available, the Division concluded that government antitrust enforcement of these predation claims was not warranted at that time. If anyone has information that indicates a potential violation of the antitrust laws in the cable industry, I encourage them to bring it to the Antitrust Division. I can commit that the Division would consider all such information and take appropriate action.

QUESTION 5. In 2003, the Supreme Court decided the landmark Verizon v. Trinko antitrust case. That case held that merely pleading violations of the Telecom Act did not suffice to bring an antitrust case. Some commentators are concerned with language in this decision that appears to imply that antitrust laws may be displaced whenever we are dealing with a pervasively regulated industry. These commentators are concerned regarding the implications for antitrust enforcement in many other pervasively regulated industries, including transportation, energy, and health care, to name a few.

Responses to Senator Kohl's Follow-up Questions for Thomas Barnett

Should we be worried about the effect of the Trinko decision for other regulated industries? Are courts likely to follow the Trinko precedent in other industries and reject antitrust claims? Are there any legislative proposals you would suggest to address this concern?

ANSWER

I do not understand the Trinko decision to reverse the longstanding judicial doctrine that implied repeal of the antitrust laws is disfavored, and I would expect this doctrine to be applied to other regulated industries. Indeed, despite the regulated nature of the telecommunications industry, the Court did not hold in Trinko that the antitrust laws were repealed. In this regard, I note that the Second Circuit recently agreed with the Antitrust Division's assessment that the securities laws did not impliedly repeal certain antitrust claims in Billing v. Credit Suisse First Boston Ltd., 2005 WL 2381653, ____ F.3d ___, (2d Cir. 2005), notwithstanding extensive regulation of the activity by the SEC. The principal thrust of the Trinko decision was that the existence of a regulatory regime does not change the antitrust standards that should apply to that industry. The antitrust analysis of the competitive effects of a merger or certain conduct should take into account the regulatory framework as a factual matter, but the same antitrust legal standards should continue to apply. To the extent that a lower court were to construe Trinko to find an implied repeal of the antitrust laws in another regulated industry, I would thoroughly evaluate the best steps to take at that time. With respect to legislative proposals, I would recommend that Congress consider on a case-by-case basis whether to include an antitrust savings clause in legislation that substantially revises an industry's regulatory scheme, as it did with the 1996 Telecommunications Act.

Responses to Senator Feinstein's Follow-up Questions for Thomas Barnett

QUESTION 1. Many industries reach a certain level of maturity and then inevitably go through a period of consolidation. We have seen that occur in business sectors involving telecommunications, airlines and aerospace. The high technology industry appears to be entering a period of consolidation, particularly after the boom years of the Internet bubble, with too many firms chasing too few customers.

Do you agree or disagree? Can you offer your views on where the technology industry is in terms of consolidation?

I ask because merger review at the beginning of a consolidation phase is obviously different than merger review at the end. If we set the standards too high too early in an industry's consolidation (i.e. set precedent) we can potentially influence not just the consolidation, but the competitiveness, of an entire industry.

Do you agree or disagree? What are your views on these issues?

ANSWER

I agree that many industries cycle through periods of expansion and consolidation over the course of their existence. Periods of consolidation can be caused by a variety of factors, including technological changes, industry maturation, market cycles, or quantitative or qualitative shifts in consumer demand, among others. Given recent trends in certain high technology businesses, it is not surprising that there would be current merger interest among many firms in that industry. It is unlikely that the entire high technology industry is in the same portion of these cycles or that the markets that are in consolidation are in that phase for the same reasons. For example, some markets may be moving toward consolidation because the products have matured and scale efficiencies in manufacturing have become more important. In some markets, customers might now prefer to purchase integrated products from a single supplier rather than multiple products from several suppliers. In other markets, large research and development expenditures might be supported better through consolidation. This list is illustrative and does not identify all possible causes of a trend toward consolidation.

I appreciate your concern about how setting precedent can, if done incorrectly, affect the competitiveness of an entire industry. This potential is a serious concern. Accordingly, merger review can and does account for changes in industries over time, including especially the possibility of different factual circumstances at different times. Thus, a merger that is not problematic at one time due to lack of industry concentration may raise serious competitive issues at a later date if the industry is substantially more concentrated at that time. Similarly, a merger that would be problematic at one time may not raise competitive concerns at a later date due to changed circumstances, such as new entry or new technology that is rendering the previous

technology obsolete. Each merger must be judged on its own facts and circumstances at the time it is reviewed.

QUESTION 2. **The DC Circuit was fairly clear in its decision in the Microsoft matter that regulators should stay away from product design determinations and leave those decisions to the market. I also refer you to the public comments made by the previous Assistant Attorney General for the Antitrust Division, Hew Pate, criticizing the European Commission's (EC) Microsoft decision, which is currently under appeal. He stated that the EC decision intrudes on product design.**

Regarding mergers in the technology field, can you give us your view on questions regarding product design?

I would think that you would agree that this should not be limited to antitrust enforcement in monopolization cases. These issues tend to arise more often in technology markets, given the malleable nature of intellectual property, and also come up in merger enforcement cases involving high-technology firms.

Can you give us your thoughts on these issues?

ANSWER

The Antitrust Division generally would not be likely to get involved in questions of product design in connection with its merger enforcement activities. We would take action against a merger only if we determined that the merger would create a competitive problem. In determining an appropriate remedy to address the competitive problem, the Antitrust Division follows its Guide to Merger Remedies, released in 2004. The Guide makes clear that a structural remedy, as opposed to a conduct remedy, is the remedy of choice. The speed, certainty, cost, and efficacy of a remedy are important measures of its potential effectiveness. Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market. Structural remedies ensure that the Antitrust Division will not be involved in the day-to-day decisions of a company's operations (including product design), a task for which enforcement officials are not generally well-suited. This is the Antitrust Division's policy with respect to mergers in all industries, including high technology industries.

Responses to Senator Durbin's Follow-up Questions for Thomas Barnett

QUESTION 1. Although antitrust law is intended to benefit the consumer through lower prices, higher quality, and greater innovation, most consumers are barred from directly obtaining relief under federal antitrust laws under the "direct purchaser" doctrine set forth in the Supreme Court's *Illinois Brick* decision. What are your views on the direct purchaser requirement where many consumers are now bringing such claims in state claims under state antitrust laws?

Answer

The Supreme Court limited the remedies available to indirect purchasers under federal law in Illinois Brick Co. v. Illinois, 431 U.S. 7 (1977). The Court earlier had ruled that defendants generally could not defend against antitrust actions by arguing that the plaintiff had passed through higher prices to the plaintiff's customers. Hanover Shoe v. United Machinery Corp., 392 U.S. 481 (1968). This decision gave direct purchasers a greater incentive and ability to bring antitrust claims, but raised potential problems with double counting damages or allocating damages between direct and indirect purchasers. The Court avoided these problems in the *Illinois Brick* decision by limiting the federal antitrust remedies available to indirect purchasers. In the aftermath of that decision, many states enacted legislation that allows indirect purchasers to recover damages for violations of state antitrust laws.

Some antitrust commentators have raised concerns with these indirect purchaser laws relating to potential multiple recoveries and over-recovery. On the other hand, there is a concern that some consumers may not be able to recover damages if not allowed to pursue such actions. I understand that the congressionally-established Antitrust Modernization Commission is currently undertaking a review of this issue. The Commission's review may shed light on the actual effect of state laws in this regard. This is an important issue, and I look forward to the Commission's report and conclusions on this topic.

QUESTION 2. The DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property reject any presumptions that a patent affords market power in a tying case. This position was reiterated recently by the Antitrust Division in the amicus brief filed in the *Illinois Tool Works v. Independent Ink* case that is currently pending in the Supreme Court. Is it your position that just because there is no presumption of market power, tying might still be anticompetitive where a patent or copyright is involved? For example, if a firm with a high market share in database software required customers that wanted its database software or wanted upgrades or support also to buy its application software that ran with that database, would you believe that such activity would be anticompetitive if it foreclosed competing application software providers?

Responses to Senator Durbin's Follow-up Questions for Thomas Barnett

Answer

The Division's long-standing position that a patent affords no presumption of market power in a tying case is based on sound economics – that even patented products can, and often do, face competition with numerous other alternatives. Merely because a presumption should not apply in those circumstances, however, does not preclude the normal application of the antitrust laws. Pursuant to the DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property, the Division would be likely to challenge a tying arrangement if "(1) the seller has market power in the tying product, (2) the arrangement has an adverse effect on competition in the relevant market for the tied product; and (3) efficiency justifications for the arrangement do not outweigh the anticompetitive effects." That is the analysis I would apply to any particular factual situation, including the hypothetical in your question.

QUESTION 3. Do you support any further restriction on the right of private plaintiffs to receive treble damages for successful private antitrust enforcement? More broadly, under what circumstances will you continue the past practice of advocating restrictions on private antitrust suits as *amicus curiae*?

Answer

If confirmed, I intend to evaluate antitrust matters, including the possibility of filing *amicus curiae* briefs, based on the application of the law and sound economic principles as applied to the facts and circumstances before me at the time for my decision. I have no agenda to restrict the rights of private antitrust enforcement.

QUESTION 4. The Antitrust Modernization Commission is currently studying what exemptions to the antitrust laws should be modified or repealed. What recommendations, if any, do you have for the Commission as to those exemptions that most require outright repeal or hard scrutiny as to whether they have outlived their intended purpose?

Answer

Competition among businesses, each attempting to be successful in selling its products, leads to the best quality products, the lowest prices, and the highest level of innovation. The

antitrust laws ensure that businesses will not stifle this competition to the detriment of the consumer. The importance of antitrust to our economy has been recognized repeatedly by the Supreme Court. The Court has stated that price agreements are illegal under the antitrust laws because they are a threat to "the central nervous system of the economy," United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940), and recognized that the antitrust laws represent "fundamental national economic policy." Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966). The Court has further explained as follows: "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the preservation of our fundamental personal freedoms." United States v. Topco Associates, Inc., 495 U.S. 596, 610 (1972).

As a consequence of the importance of the antitrust laws to the nation's economic policy, exceptions to the antitrust laws should be made sparingly. Indeed, antitrust exemptions should be enacted only in rare instances in which the fundamental free market values underlying the antitrust laws are outweighed by a clearly paramount policy objective. Even in those rare instances, any antitrust exemption should be crafted as narrowly as possible.

As noted in your question, the Antitrust Modernization Commission is studying the question of exemptions to the antitrust laws. I would recommend that the Commission collect and analyze information regarding the interests served by existing exemptions, the impact of such exemptions, and the justification for maintaining the exemption. This information should be useful to Congress, which ultimately decides whether and when to grant or repeal an antitrust exemption. I would be happy to work with you and other members of Congress in this regard.

QUESTION 5. **Currently, almost all cases brought by the Antitrust Division are criminal. Do you believe this is healthy or would you consider changing the allocation of criminal and civil cases being brought by the Division?**

Answer

Enforcement of the antitrust laws, both criminally and civilly, is critical to the American economy. I do believe that criminal antitrust violations should be a priority for the Antitrust Division. Criminal antitrust conduct creates no potentially redeeming efficiencies and is essentially stealing from consumers. The long-standing history, through Democratic and Republican Administrations, has been for the number of criminal cases brought by the Antitrust Division to exceed the number of civil cases brought by the Division. Nevertheless, I would

caution that merely looking at the number of civil versus criminal filings may not tell the true story of antitrust enforcement. One civil case can have a larger effect than an individual criminal case in particular circumstances. Further, certain large civil cases may take an extraordinary amount of resources. In this regard, the Antitrust Division devotes approximately two-thirds of its resources to civil matters and only one-third to criminal matters. I would have no plans to change this allocation of resources.

QUESTION 6. As Assistant Attorney General, would you speak out for consumers against anti-dumping cases and support legislative efforts to reform the international trade laws in this regard?

Answer

If confirmed, I intend to work within and as part of the Administration as an advocate on behalf of consumers in all areas, including international trade matters. Competition advocacy is an important role for the Antitrust Division. As the "Magna Carta" of our free enterprise system, the antitrust laws represent a fundamental economic policy of protecting consumer welfare by promoting competition. I would seek opportunities to convey to other governmental entities the importance of this policy and the benefit of the Division's experience in protecting consumer welfare.

QUESTION 7. What plans, if any, would you propose to make enforcement of the antitrust laws more transparent to the public?

Answer:

Transparency is an important objective in antitrust enforcement. It helps the public, businesses, and foreign enforcers understand our enforcement standards, promotes predictability in enforcement, encourages international convergence on sound enforcement standards, and increases public confidence in enforcement decisions.

The Antitrust Division has taken a number of important steps in recent years to increase transparency in its own enforcement work, as well as to promote transparency internationally. I would be committed to continuing those efforts. Steps taken recently include a Policy Guide to Merger Remedies published last fall, publication of statements explaining why the Division is

closing a particular antitrust investigation, and promotion of transparency at the International Competition Network, which has adopted transparency as one of its eight Guiding Principles for Merger Notification and Review Procedures.

Steps already underway for the future include a joint Antitrust Division and Federal Trade Commission Commentary on the Horizontal Merger Guidelines, which will draw from investigations conducted over the last decade or so to explain how the Merger Guidelines have been applied to various factual situations, and a joint Antitrust Division and the FTC workshop later this month on competition in the real estate industry.

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

October 24, 2005

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

Dear Mr. Chairman:

Enclosed are responses to questions arising out of the appearance of Steve Bradbury, the nominee to be Assistant Attorney General for the Office of Legal Counsel, before the Committee on October 6, 2005. We hope that you will find this information helpful in the consideration of this nomination. Please do not hesitate to contact the Department if we can be of further assistance in connection with this or any other matter.

Sincerely,

William E. Moschella
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Senator Grassley's Questions for Steven G. Bradbury

1. Do you believe the *qui tam* provisions of the False Claims Act are unconstitutional? If so, what is the basis of your belief?

ANSWER: No, I believe the *qui tam* provisions of the False Claims Act are constitutional. As the Committee is aware, I authored a short article in 1996 arguing to the contrary. The positions I argued in 1996 reflected the conclusions previously reached by the Office of Legal Counsel. *See Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207 (1989). Since then, however, I have come to conclude that the positions I argued in 1996 are incorrect. Those positions have since been rejected by the courts, as discussed below, and by the Office of Legal Counsel, *see The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 142-43 n.52 (1996) (disagreeing with and superseding the 1989 OLC opinion cited above). I am persuaded now that *qui tam* actions under the False Claims Act are consistent with the Constitution, as discussed more fully below.

2. Do you accept the U.S. Supreme Court's reasoning in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 539 U.S. 765 (2000)? If not, why?

ANSWER: Yes. The Court in *Vermont Agency* rejected a position I argued in 1996 and concluded that a *qui tam* relator satisfies the standing requirements of Article III of the Constitution under the traditional rule that an assignee (here, the relator) may sue on a claim for injury suffered by the assignor (here, the United States). I accept that reasoning.

3. Do you accept the reasoning of the Fifth Circuit (en banc) in *Riley v. St. Luke's Episcopal Hospital*, 2001 WL 568727 (5th Cir. May 25, 2001)? If not, why?

ANSWER: I accept all of the court's conclusions and part of its reasoning. The Fifth Circuit in *Riley* reached two conclusions. First, it concluded that the *qui tam* provisions of the False Claims Act do not violate the Take Care Clause of Article II of the Constitution because they preserve an adequate opportunity for the Attorney General to intervene and exercise substantial control over the ultimate course of the litigation on behalf of the United States. *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753-57 (5th Cir. 2001) (en banc). I accept that conclusion and reasoning. Second, the court concluded that the *qui tam* provisions do not violate the Appointments Clause of Article II because *qui tam* relators are not employees of the federal Government and thus cannot be "Officers of

the United States" for purposes of the Appointments Clause. *Id.* at 757-58. I agree with the court's conclusion that *qui tam* relators are not "Officers of the United States" who must be appointed in accordance with the Appointments Clause; however, I find the reasoning of the Fifth Circuit on this point unsatisfactory. Rather, I would rest the conclusion that *qui tam* relators are not "Officers of the United States" for Appointments Clause purposes on the ground that their authority is limited to a specific case and is sufficiently temporary. *See, e.g., United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 758 (9th Cir. 1993) (rejecting Appointments Clause challenge to False Claims Act in part because "the relator's responsibility only extends to a single case"), *cert. denied*, 510 U.S. 1140 (1994); *see also Auffmordt v. Hedden*, 137 U.S. 310, 326-27 (1890) (concluding that person at issue did not hold an office for purposes of the Appointments Clause because "[h]e is selected for the special case. He has no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case.").

4. If you are confirmed, will you use your office in any way to advance your views on the unconstitutionality of the *qui tam* provisions of the False Claims Act?

ANSWER: As discussed above, I no longer hold the view that the *qui tam* provisions of the False Claims Act are unconstitutional. Therefore, the answer to the question is no.

5. Have you addressed any issue concerning the False Claims Act since you have been at the Office of Legal Counsel? If so, please explain your involvement.

ANSWER: No.

6. If you are confirmed, will you fully support the False Claims Act and its *qui tam* provisions?

ANSWER: Although I cannot give specific assurances on particular legal issues, I can envision no situation in which I would have occasion to call into question the False Claims Act or its *qui tam* provisions.

Questions for Steven G. Bradbury from Senator Patrick Leahy

1. You have served a year as an attorney in the Office of Legal Counsel (OLC) and now another year and a half as either the Principal Deputy Assistant Attorney General or Acting Assistant Attorney General in the office. Have there been any instances in which the legal advice you have given in any those roles has constrained or has run in any way counter to the administration's pursuit of desired policies? If so, when?

ANSWER: Yes, there have been a number of instances when I have given such advice. One example of such advice is a now-published opinion in which I advised the Deputy Secretary of Commerce that, contrary to its desired policy, the Department of Commerce could not pay for the travel expenses of foreign fellows in connection with an International Trade Administration conference in the United States. *See Use of Appropriations to Pay Travel Expenses for an International Trade Administration Fellowship Program*, 2004 WL 3519776 (Oct. 7, 2004).

2. The Assistant Attorney General for OLC has traditionally been responsible for drafting the legal opinions of the Attorney General, assisting the Attorney General in his or her function as a legal advisor to the President and all executive branch agencies, and providing his or her own written opinions and oral advice in response to requests from the Counsel to the President. OLC is also responsible for providing legal advice to the executive branch on all constitutional questions and for reviewing legislation for constitutionality. Do you believe that the OLC plays or should play any other roles, such as setting forth the legal foundation of the Administration's actions?

ANSWER: To one degree or another, all of OLC's functions follow from its core missions of assisting the Attorney General in providing legal advice to the President and the various agencies and departments of the Executive Branch and serving as general legal advisor to the Attorney General and the Department of Justice. In addition to providing formal and informal legal advice on all manner of questions facing the Executive Branch, as described in the question, OLC may be asked from time to time to take on miscellaneous tasks. These may include, for example, assisting the litigating components of the Justice Department in ensuring that legal arguments reflect the best understanding of the law; assisting policymakers in refining proposed statutory or regulatory language; and providing testimony or other communications to Congress to explain the legal analysis or conclusions of the Department and the Executive Branch. OLC has performed such tasks under both Republican and Democratic administrations.

3. In December 2004, 19 former Office of Legal Counsel Attorneys, who had served in both Democratic and Republican administrations, set forth 10 Principles to Guide the Office of Legal Counsel. Number 6 says that "OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure."

That principle is consistent with traditional practice in OLC, which, until recently leaned toward publication of more of its opinions rather than fewer. Since 2001, however, the number of published OLC opinions has dropped significantly. From 1993 through 2000, the average number of opinions published per year was 31, but from 2001 through 2004, that yearly average dropped to 13. How can you explain that change?

ANSWER: I agree that OLC should lean toward publication of more of its opinions rather than fewer. During my tenure at OLC, the rate of publication has increased and the period of time between opinion signature and opinion publication has decreased. In 2005 alone, OLC has already released 42 opinions for publication on its Web site. *See* http://www.usdoj.gov/olc/whatsnew.htm (last visited on Oct. 18, 2005). More than 80 percent of those opinions were signed during this Administration. In part for confidentiality reasons, there has historically been a period of time in most cases between when an opinion is signed and when that opinion is considered for publication. Because the publication review process has generally been completed for opinions signed in the years 1993-2000 but is still ongoing for opinions signed in the years 2001-2004, fewer of these more recently signed opinions have been published at this time.

4. Do you support disclosing OLC memoranda and opinions to the American public, insofar as such disclosure would not raise national security concerns?

ANSWER: In 1993, Walter Dellinger, who was at that time the nominee to serve as Assistant Attorney General for the Office of Legal Counsel, provided the following response to a question from Senator Grassley:

> **I share [the Attorney General's] commitment [to a basic policy of openness in government]. Openness promotes public confidence that the government is making its decisions through a process of careful and thoughtful reasoning. At the same time, I recognize that, in some types of cases, there are considerations weighing against the release of opinions. Some categories of documents, such as opinions on matters classified for reasons of national security, are especially sensitive. In addition, opinions may reflect legal advice given as part of the government's deliberative process, and protection of some of these opinions may be necessary to ensure that decisionmakers are willing to seek candid legal advice before they act. Opinions resolving inter-agency disputes are likely to be strong candidates for disclosure. Although government decisionmaking requires a certain measure of confidentiality, the government should not reflexively seek secrecy.**

I agree with this statement of Assistant Attorney General Dellinger. During my tenure at OLC, as noted above in response to question 3, the rate of publication

of OLC opinions has increased and the time between opinion signature and opinion publication has decreased. As noted above, thus far during the current calendar year, OLC has released 42 opinions for publication on its Web site. This publication practice, however, does not diminish the interest that the Government may have in preserving the confidentiality of other nonpublic OLC opinions. As *Principles to Guide the Office of Legal Counsel* recognizes, "[t]here nonetheless will exist some legal advice that properly should remain confidential." Maintaining the confidentiality of OLC legal advice is often essential to the functioning of the Department, the President, and the Executive Branch. As Assistant Attorney General Dellinger noted, if OLC were unable to maintain confidentiality, decisionmakers might not seek its advice precisely when it is most needed.

5. Another of those 10 Principles asserts that "OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible view of the law." The authors go on in detail about "systems and processes" that "can help maintain high legal standards, avoid errors, and safeguard against tendencies toward potentially excessive claims of executive authority." Do you agree with the authors' views?

ANSWER: Yes, I agree that OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible view of the law. I believe it is imperative that our opinions be clear, accurate, thoroughly researched, and soundly reasoned. The value of an OLC opinion depends on the strength of its analysis. Over the years, OLC has earned a reputation for giving candid, independent, and principled advice—even when that advice may be inconsistent with the desires of policymakers. The quality and objectivity of OLC opinions have served the Executive Branch well, even if those opinions sometimes constrain executive actions. I am committed to following the practices and policies that have long guided and will continue to guide OLC attorneys in preparing the opinions of the Office.

6. Can you assure this Committee that you will follow these guidelines? Specifically, will you insist on requests for advice in writing? Will you refrain from offering legal advice regarding executive branch action that already has occurred? And will you subject the advice you give to multiple layers of scrutiny and approval, including the "two deputy rule"? Are there any aspects of this principle that you do not now follow?

ANSWER: The guidelines set forth in *Principles to Guide the Office of Legal Counsel* generally reflect operating principles that have long guided OLC in both Republican and Democratic administrations. With respect to the question's more specific inquiries, I agree with all of the relevant statements contained in *Principles to Guide the Office of Legal Counsel*, which states: "[w]henever possible, agency requests should be in writing"; "OLC should typically provide legal advice in

advance of executive branch action"; and "[o]rdinarily OLC legal advice should be subject to multiple layers of scrutiny and approval; one such mechanism used effectively at times is a 'two deputy rule.'" These guidelines are consistent with OLC's current practices.

7. The August 1, 2002 "Bybee Memo" was not repudiated by the Department of Justice or anyone else until June 2004, when it was leaked to the press and made public. (A) When did you first read the August 1, 2002 memo? (B) Did you take issue with the findings of this memo? (C) Did you or anyone else at OLC seek to revise and reissue the memo prior to its public release in June 2004?

ANSWER: I was not in the Government in 2002 and was not involved in the preparation of the August 1, 2002, memorandum. I do not recall having known about or read the August 1, 2002, memorandum until the existence of the memorandum was first made public by the Washington Post and other media outlets in or around June 2004. I disagree with the analysis in that memorandum, which has been withdrawn and subsequently replaced by a memorandum dated December 30, 2004. I agree with the December 30, 2004, memorandum's analysis of the anti-torture statute, including those portions of the December 30, 2004, memorandum's analysis that disagree with or modify the analysis of the August 1, 2002, memorandum. Because I do not recall having known about or read the August 1, 2002, memorandum until June 2004, when it was first made public, I do not recall having been in a position to seek to revise and to reissue the memorandum prior to that time. I am not aware of whether anyone else at OLC sought to revise and reissue the memorandum prior to June 2004.

8. Although the December 30, 2004 Levin memo explains that it "supersedes the August 2002 Memorandum in its entirety," it does not address the Bybee memo's conclusion that the President has authority as commander-in-chief to override domestic and international laws prohibiting torture and to immunize from prosecution anyone who commits torture under his order. Instead the Levin memo evades the discussion, characterizing the arguments as "unnecessary" and "inconsistent" with the President's statement in July 2004 condemning torture.

(A) Did you agree with the Bybee memo's interpretation of the President's powers as commander-in-chief?

ANSWER: No. I do not agree with the analysis in that portion of the August 2002 memorandum.

(B) Since the Levin memorandum did not directly address the commander-in-chief authority, are the conclusions in the Bybee memorandum still valid?

ANSWER: No. The August 1, 2002, memorandum was publicly withdrawn in June 2004, and the December 30, 2004, opinion expressly "supersedes the August 2002 memorandum *in its entirety*" (emphasis added). The December 30, 2004, opinion is now the authoritative interpretation of OLC.

(C) If not, what is the Office of Legal Counsel's current interpretation of the President's authority as commander-in-chief to override domestic and international laws and to immunize from prosecution anyone who commits torture under his order? Please base your answer on the laws and treaties of the United States, not on public comments made by the President.

ANSWER: The President, like all officers of the Government, is not above the law. He has a sworn duty to preserve, protect, and defend the Constitution and faithfully to execute the laws of the United States, in accordance with the Constitution. I do not expect that OLC will be called upon to address any authority of the President as Commander in Chief to override laws prohibiting torture and to authorize torture.

The Executive Branch, during both Democratic and Republican administrations, has long taken the view, affirmed by decisions of the Supreme Court, that statutes that unduly encroach on the President's constitutional authorities, including his core Commander in Chief authority, are unconstitutional. *See, e.g., Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182 (1996) (opinion of Assistant Attorney General Dellinger); *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200-01 (1994) (opinion of Assistant Attorney General Dellinger); *see also Morrison v. Olson*, 487 U.S. 654, 685-96 (1988). Whether, in exceptional cases, the President has the power to authorize actions that would otherwise contravene an applicable statute where such actions are necessary to fulfill his constitutional duty to protect the Nation—in other words, whether such a statute would be unconstitutional if applied in particular circumstances to frustrate the President's ability to protect the Nation pursuant to his Commander in Chief authority—is a difficult and weighty question. The President's independent constitutional powers, including his powers as Commander in Chief, have never been fully defined and cannot be in the abstract, because their contours depend on the exigencies of particular events in an unpredictable and dangerous world. In the words of Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, the President's independent constitutional powers may "depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." 343 U.S. 579, 637 (1952) (Jackson, J., concurring). *See also Request of the Senate for an Opinion as to the Powers of the President "in Emergency or State of War,"* 39 Op. A.G. 343, 347 (1939) (opinion of Attorney General Murphy) (The President's "constitutional powers have never been specifically defined, and in fact cannot be,

since their extent and limitations are largely dependent upon conditions and circumstances.").

Accordingly, I would not attempt to define in the abstract the limits of the President's constitutional powers. The President has clearly stated that the United States will not engage in torture under any circumstances, and this clear statement removes any possible need for us to explore this hypothetical question in the context of 18 U.S.C. §§ 2340-2340A. That is why the December 30, 2004, opinion describes the discussion of the Commander in Chief power in the August 1, 2002, memorandum as, among other things, "unnecessary."

9. The December 2004 memorandum only addresses the prohibition against torture as defined by the Convention Against Torture (CAT) and 18 U.S.C. §§ 2340-2340A. Although the CAT does not require signatory states to criminalize cruel, inhuman or degrading acts not amounting to torture, it does require states to undertake to prevent such acts within territory under their jurisdiction. What steps do you believe are required under the December 2004 memorandum and the CAT to prevent such acts?

ANSWER: The December 30, 2004, memorandum does not address steps that are required to prevent cruel, inhuman or degrading treatment within the meaning of the Convention Against Torture. That memorandum addresses legal standards applicable under the anti-torture statute, 18 U.S.C. §§ 2340-2340A, which pertains to torture, not to "cruel, inhuman or degrading treatment."

The United States is committed to complying with all of its obligations under the Convention Against Torture. Article 16 of the CAT provides that each state party "shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." The CAT itself, in Article 16, specifies the particular undertakings that are required of each state party: They are the undertakings set forth in Articles 10, 11, 12, and 13 of the CAT, substituting "cruel, inhuman or degrading treatment or punishment" for the references to "torture" in each of those articles. An additional consideration affecting the undertakings required of the United States is that, pursuant to the reservation required by the Senate, the United States is bound by its obligations under Article 16 "only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution."

10. At his confirmation hearing on January 6, 2005, Judge Gonzales frequently stated that it is U.S. policy not to engage in torture. He failed to make a similar unequivocal statement about cruel, inhuman or degrading treatment. In written follow-up questions, Judge Gonzales was asked whether it is legally permissible for U.S. personnel to engage

in cruel, inhuman, or degrading treatment that does not rise to the level of torture. He replied that, because of a Senate reservation to the CAT, "the Department of Justice has concluded that under Article 16 there is no legal prohibition under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas."

(A) While at OLC, did you participate in interpreting the Senate reservation to Article 16 of the CAT?

ANSWER: Discussion of my participation, if any, in formulating particular legal advice on specified topics would be inconsistent with the confidential nature of the Government's deliberative process, the protection of which is necessary to ensure that decisionmakers are willing to seek candid legal advice before they act. The Department's position with respect to the Senate reservation to Article 16 of the Convention Against Torture is set forth in a letter dated April 4, 2005, from Assistant Attorney General William Moschella to Senators Leahy, Feinstein, and Feingold. That letter reflects OLC's views.

(B) Do you agree with Attorney General Gonzales's statement that there is "no legal prohibition under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas?"

ANSWER: The Attorney General's statement is further explained in the letter dated April 4, 2005, from Assistant Attorney General William Moschella to Senators Leahy, Feinstein, and Feingold, which sets forth the Department's position with respect to Article 16 of the CAT. As question 9 recognizes, among other things, Article 16 of the CAT by its own terms applies only in territory that is under the jurisdiction of the United States, and for that reason alone it would not reach aliens who are detained overseas, outside that territory.

Questions for Steven G. Bradbury, Nominee to be Assistant Attorney General for the Office of Legal Counsel, from Senator Edward M. Kennedy

Interrogation Policy

As I'm sure you know, Congress has passed a statute that prohibits U.S. officials serving abroad from committing torture. Congress enacted this law to carry out our obligations under the Convention Against Torture.

For nearly two and a half years -- from August 2002 until December 2004 -- the Executive Branch of our government operated under the assumption that it was not bound by this anti-torture law. The Office of Legal Counsel issued an official opinion stating that the President and everyone acting under his "Commander-in-Chief" authority was free to ignore this law. It states, "Any effort to apply [the anti-torture statute] in a manner that interferes with the . . . detention and interrogation of enemy combatants . . . would be unconstitutional." It wasn't rejected by the Department of Justice until the end of last year.

I understand that you had an opportunity to comment on the December 2004 OLC opinion that supplanted the Bybee Torture Memorandum.

1) Question:

Did you comment on the new opinion? If so, what were your thoughts about the analysis in the original opinion? Did you agree with it?

ANSWER: I came to the Office of Legal Counsel from private practice in April 2004 and was serving as the Principal Deputy Assistant Attorney General in the Office at the time the December 30, 2004, memorandum was issued. The Principal Deputy is responsible for providing primary assistance to the head of the Office in preparing and approving opinions of the Office, and I did so in connection with the December 30, 2004, memorandum. I agree with the interpretation of the anti-torture statute set forth in the December 30, 2004, memorandum, which disagreed in significant respects with the analysis in the August 1, 2002, memorandum. The interpretation in the December 30, 2004, opinion is the binding, authoritative interpretation of the Office, and I will ensure that any OLC advice in this area remains consistent with the December 30, 2004, memorandum.

The new opinion did not address one of the more egregious aspects of the Bybee Memorandum – the issue of Commander-in-Chief override. I'm interested in your views on executive power. At the most basic level, the American public should know whether you agree that no one – not even the President – can break the laws of this country.

2) Question:

You've had a chance to read the Bybee Memorandum. Do you agree or disagree

with its conclusion that Congress lacks authority to pass a law prohibiting Executive Branch officials from committing torture during time of war? Please answer the question directly and do not rely on representations by the President that the United States will treat prisoners humanely.

ANSWER: The August 1, 2002, memorandum reasoned that "[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President." I disagree with that view.

Office of Legal Counsel – Openness – March 2003 Yoo Memorandum to the Pentagon

In December 2004 19 attorneys formerly with the Office of Leal Counsel signed a document titled "Principles to Guide the Office of Legal Counsel." A copy of the document is attached to these questions.

3) Question:

Do you agree with each of the Principles? If you disagree with any of the Principles, please describe in detail the basis of your disagreement.

ANSWER: Yes, I agree with the Principles, though, as explained in my answers to questions 4 and 5 below, I would elaborate upon Principle 6 in a manner that may differ slightly from the document's elaboration. I believe that the document reflects operating principles that have long guided OLC in both Republican and Democratic administrations. It is imperative that OLC's opinions be clear, accurate, thoroughly researched, and soundly reasoned. The value of an OLC opinion depends on the strength of its analysis. Over the years, OLC has earned a reputation for giving candid, independent, and principled advice—even when that advice may be inconsistent with the desires of policymakers. I reaffirm the longstanding principles that have guided and will continue to guide OLC attorneys in preparing the opinions of the Office.

4) Question:

Principle #6 states that "OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or non-disclosure." If you agree with the statement, please list the "strong reasons" which would justify delay or non-disclosure.

ANSWER: In 1993, Walter Dellinger, who was at that time the nominee to serve as Assistant Attorney General for the Office of Legal Counsel, provided the following response to a question from Senator Grassley:

> **I share [the Attorney General's] commitment [to a basic policy of openness in government]. Openness promotes public confidence that the government is making its decisions through a process of careful and thoughtful reasoning. At the same time, I recognize that, in some types of cases, there are considerations weighing against the release of opinions. Some categories of documents, such as opinions on matters classified for reasons of national security, are especially sensitive. In addition, opinions may reflect legal advice given as part of the government's deliberative process, and protection of some of these opinions may be necessary to ensure that decisionmakers are willing to seek candid legal advice before they act. Opinions resolving inter-agency disputes are likely to be strong candidates for disclosure. Although government decisionmaking requires a certain measure of confidentiality, the government should not reflexively seek secrecy.**

I agree with this statement from Assistant Attorney General Dellinger. As noted below in response to question 5, during my tenure at OLC, the rate of publication of OLC opinions has increased and the period of time between opinion signature and opinion publication has decreased. In 2005 alone, OLC has already released 42 opinions for publication on its Web site. This publication practice, however, does not diminish the interest that the Government may have in preserving the confidentiality of other nonpublic OLC opinions. As *Principles to Guide the Office of Legal Counsel* recognizes, "[t]here nonetheless will exist some legal advice that properly should remain confidential." Maintaining the confidentiality of OLC legal advice is often essential to the functioning of the Department, the President, and the Executive Branch.

Under this Administration, the number of opinions published by OLC has substantially decreased. From 1993-2000, the average number of opinions published per year was 31. Under Bush, the annual average is 13. This remarkable drop is troubling. It suggests that OLC is not being as open with its opinions as it should be.

5) Question:

What standards would you use to determine whether an OLC opinion gets timely published?

ANSWER: I share a commitment to a basic policy of openness in government. During my tenure at OLC, the rate of publication of OLC opinions has increased and the time between opinion signature and opinion publication has decreased. Thus far in calendar year 2005 alone, OLC has released 42 opinions for publication on its Web site. *See* http://www.usdoj.gov/olc/whatsnew.htm (last visited on Oct. 18, 2005). More than 80 percent of those opinions were signed

during this Administration. In part for confidentiality reasons, there has historically been a period of time in most cases between when an opinion is signed and when that opinion is considered for publication. Because the publication process has generally been completed for opinions signed in the years 1993-2000 but is still ongoing for opinions signed in the years 2001-2004, fewer of these more recently signed opinions have been published at this time.

At the time they are issued, most OLC opinions consist of confidential legal advice for senior Executive Branch officials. Maintaining the confidentiality of OLC opinions is often necessary to preserve the deliberative process of decision-making within the Executive Branch and attorney-client relationships between OLC and other executive offices; in some cases, the disclosure of OLC advice also may interfere with federal law enforcement efforts. Moreover, it is vital that OLC be able to maintain confidentiality at times, precisely so that senior Executive Branch officials seek OLC's advice when it is most needed. At the same time, many OLC opinions address issues of general interest and merit publication in due course. In such cases, and when consistent with the legitimate confidentiality interests of the President and the Executive Branch, it is the policy of our Office to publish OLC opinions. This publication program is in accordance with a directive from the Attorney General to OLC to publish selected opinions on an annual basis for the convenience of the Executive, Legislative, and Judicial Branches of the Government, the professional bar, and the general public.

I have specific concerns about a March 14, 2003 OLC opinion by John Yoo which seems to conclude that the President can authorize violations of the Uniformed Code of Military Justice. It seems to say that the President can override Congress's authority to criminalize abusive treatment of detainees.

Several Senators from the Judiciary and Armed Services Committees have asked for the Yoo Memo, but the Administration has refused to provide it even in a classified form. No adequate explanation has been given to justify withholding it.

6) Question:

Will you give this Committee the March 2003 Yoo Memo? If not, why not? If it became the basis for American policy, doesn't this Committee and the country have the right to assess whether the Administration wrongly expanded his authority?

ANSWER: Decisions to disclose confidential and classified legal advice, such as the March 14, 2003, memorandum to which the question refers, are made through consultations among the agencies whose programmatic interests are at stake, the Attorney General, and, as appropriate, the National Security Council, and are subject to the ultimate authority of the President. I will also note that the March 14, 2003, memorandum has been withdrawn. In December 2003, OLC

advised the Department of Defense not to rely on that memorandum. Separately, the Department of Justice determined that each of the 24 interrogation techniques approved by the Secretary of Defense for use with detainees at the Guantanamo Bay Naval Base was lawful when used in accordance with the limitations and safeguards specified by the Secretary. The Department's reasoning on the legality of these 24 interrogation techniques has been provided to Congress in testimony presented to the House Permanent Select Committee on Intelligence.

Second Amendment

You are listed as the primary author of an August, 2004 Memorandum to the Attorney General providing support for the Justice Department's new interpretation of the Second Amendment. That interpretation, originally reflected in a May 17, 2001 letter from former Attorney General John Ashcroft to the National Rifle Association, represented a departure from the Department's prior position, maintained for over 70 years, that the Second Amendment guarantees a right to be armed only in connection with service in a "well regulated militia". Instead, the Department's current view is that the Amendment guarantees an individual right to possess guns for reasons entirely divorced from service in a well regulated militia.

Your 2004 Memorandum recognizes that the federal appeals courts for the First, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits have rejected the "individual rights" view of the Second Amendment now endorsed by the Justice Department. Indeed, the only federal appeals court opinion adopting the individual rights view is that of the Fifth Circuit in *United States* v. *Emerson*, 279 F.2d 203 (5th Cir. 2001), joined by only two judges of a three-judge panel. Since the *Emerson* ruling, five federal circuit courts (the Fourth, Sixth, Seventh, Ninth and Tenth Circuits) have considered the issue again and have rejected the individual rights view endorsed by the Fifth Circuit in *Emerson*.

7) Question:

Since the Justice Department has relied primarily on the *Emerson* decision to support its new Second Amendment position, do you believe the Department should reconsider its position? If not, how many federal courts would need to reject the individual rights view for the Department to reconsider its position?

ANSWER: The Office of Legal Counsel's August 2004 memorandum on the Second Amendment, in reaching its conclusion that the Amendment protects an individual right, relies on numerous sources of authority. It relies primarily on a detailed analysis of the text of the Second Amendment (including its preface), read in historical context and in light of similar language and related provisions in the Constitution. It also examines at length "the Anglo-American right to arms as it existed at the time of the Founding and informed the adoption of the Second

Amendment" and considers the "early interpretations" of the right to keep and bear arms in the United States by leading commentators, various courts, and the Reconstruction Congresses. These three bases are reflected in the memorandum's organization—Parts II, III, and IV, respectively.

In addition, Part I of the memorandum includes an analysis of the Supreme Court's decision in *United States v. Miller*, 307 U.S. 174 (1939), explaining that *Miller* "did not resolve" the question whether the Second Amendment secures an individual right, but that it does "appear[ ] to be inconsistent with a collective-right view" and that in some respects it suggests an individual-right view rather than a "quasi-collective-right" view. Part I goes on to note, among other things, that several Supreme Court decisions since *Miller* "appear to accept the individual-right view, at least in *dicta*," that the Office of Legal Counsel held the individual-right view as late as the Eisenhower and Kennedy Administrations, that Congress and President Reagan expressly endorsed the individual right view in enacting the Firearm Owners' Protection Act of 1986, and that "the preponderance of modern scholarship appears to support the individual-right view." The memorandum does at the end of Part I summarize *Emerson* in one short paragraph, but at the same time it explains the Ninth Circuit's decision in *Silveira v. Lockyer*, 312 F.3d 1052 (2002), rejecting *Emerson*.

I am not aware of any legal developments since I co-signed the memorandum in August 2004 that would provide cause for the Office to reconsider its position. The reasoning of any future decisions of federal courts concerning the Second Amendment certainly would be relevant to this question, as would—of course—any decision of the Supreme Court on the question.

8) Question:

Does it trouble you that the Justice Department, by adopting the individual rights view, has made it more likely that criminal defendants accused of violating federal gun laws will succeed in attacking their indictments or convictions by arguing that those laws violate the Second Amendment?

ANSWER: As the introduction to the OLC memorandum reiterates, the Attorney General on November 9, 2001, issued a memorandum to all U.S. Attorneys in which, while endorsing the individual-right view of the Second Amendment, he made clear that the Second Amendment right allows for "reasonable restrictions" designed "to prevent unfit persons from possessing firearms or to restrict possession of firearms particularly suited to criminal misuse." He added that the Department of Justice "can and will continue to defend vigorously the constitutionality, under the Second Amendment, of all existing federal firearms laws."

The introduction to the OLC memorandum adds that "nothing in this memorandum is intended to address or call into question the constitutionality, under the Second Amendment, of any particular limitations on owning, carrying, or using firearms," and in the course of its analysis the memorandum notes longstanding limitations on the scope of the right. Finally, the *Emerson* case itself rejected the Second Amendment challenge to the federal law at issue.

9) Question:

Why did the Justice Department embrace the individual rights theory, despite its almost universal rejection by the federal courts, when to do so would threaten to make successful prosecutions of federal gun law violations more difficult?

ANSWER: Regarding the reasons that the Office of Legal Counsel has endorsed the individual-right interpretation of the Second Amendment, please see my response to question 7. Regarding the continuing ability of the Department successfully to prosecute violations of the federal gun laws, please see my response to question 8.

10) Question:

The May 17, 2001 letter from Attorney General Ashcroft to the National Rifle Association first revealed the Justice Department's dramatic change in its 70-year-old position on the meaning of the Second Amendment Do you believe it was appropriate for the Attorney General to reveal this policy change for the first time in a letter to a special interest group, particularly one that has repeatedly sought to use the Second Amendment to strike down gun laws that the Attorney General is sworn to defend?

ANSWER: I was in private practice in 2001 and was not involved in any way in the Attorney General's decision to announce his views on the Second Amendment in a letter to the NRA. I do not know why he did so, apart from the fact that the letter, as it indicates, was responding to a direct inquiry on this subject. However, I have no reason to question the Attorney General's actions. I am aware that in the Clinton Administration, Solicitor General Waxman stated the Justice Department's views on this question in a similar manner, *see* Letter from Seth Waxman, Solicitor General, to Robert D. Grace (Aug. 22, 2000), and Attorney General Gonzales, while Counsel to the President, reiterated Attorney General Ashcroft's 2001 position in a letter of September 23, 2004, to Senator Murkowski—after OLC had signed its memorandum on the Second Amendment but before OLC publicly released that memorandum in December 2004.

QUESTIONS OF SENATOR RICHARD J. DURBIN

Steven G. Bradbury, Nominee to be Assistant Attorney General, Office of Legal Counsel

1. As you know, Jay Bybee, then-Assistant Attorney General, Office of Legal Counsel (OLC), authored an August 1, 2002 opinion entitled, "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340 – 2340A" (hereinafter Bybee torture memo).

Among other things, the Bybee torture memo concludes that the torture statute does not apply to the detention and interrogation of enemy combatants pursuant to the President's Commander-in-Chief authority. The memo asserts, "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."

On December 30, 2004, OLC issued a memo replacing the Bybee torture memo (hereinafter replacement torture memo). You were OLC's Principal Deputy Assistant Attorney General at that time and you acknowledged at your hearing that you participated in reviewing and approving this memo.

The replacement torture memo explicitly repudiated much of the Bybee torture memo's legal analysis, but it was silent on the Commander-in-Chief power. The memo stated that, "Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture." However, since the Bybee torture memo addressed this issue, it seems important to set the record straight.

a. Would the torture statute be unconstitutional if it conflicted with an order issued by the President as Commander-in-Chief?

ANSWER: The federal prohibition on torture, 18 U.S.C. §§ 2340-2340A, is constitutional, and I believe it does apply as a general matter to the subject of detention and interrogation of detainees conducted pursuant to the President's Commander in Chief authority. The statement to the contrary from the August 1, 2002, memorandum, quoted above, has been withdrawn and superseded, along with the entirety of the memorandum, and in any event I do not find that statement persuasive. The President, like all officers of the Government, is not above the law. He has a sworn duty to preserve, protect, and defend the Constitution and faithfully to execute the laws of the United States, in accordance with the Constitution.

The Executive Branch, during both Democratic and Republican administrations, has long taken the view, affirmed by decisions of the Supreme Court, that statutes that unduly encroach on the President's constitutional authorities, including his core Commander in Chief authority, are unconstitutional. *See, e.g., Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182 (1996) (opinion of Assistant Attorney General Dellinger); *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200-01 (1994) (opinion of Assistant

Attorney General Dellinger); *see also Morrison v. Olson*, 487 U.S. 654, 685-96 (1988). Whether, in exceptional cases, the President has the power to authorize actions that would otherwise contravene an applicable statute where such actions are necessary to fulfill his constitutional duty to protect the Nation—in other words, whether such a statute would be unconstitutional if applied in particular circumstances to frustrate the President's ability to protect the Nation pursuant to his Commander in Chief authority—is a difficult and weighty question. The President's independent constitutional powers, including his powers as Commander in Chief, have never been fully defined and cannot be in the abstract, because their contours depend on the exigencies of particular events in an unpredictable and dangerous world. In the words of Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, the President's independent constitutional powers may "depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." 343 U.S. 579, 637 (1952) (Jackson, J., concurring). *See also Request of the Senate for an Opinion as to the Powers of the President "in Emergency or State of War,"* 39 Op. A.G. 343, 347 (1939) (opinion of Attorney General Murphy) (The President's "constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances.").

Accordingly, I would not attempt to define in the abstract the limits of the President's constitutional powers. The President has clearly stated that the United States will not engage in torture under any circumstances, and this clear statement removes any possible need for us to explore this hypothetical question in the context of 18 U.S.C. §§ 2340-2340A. That is why the December 30, 2004, opinion describes the discussion of the Commander in Chief power in the August 1, 2002, memorandum as, among other things, "unnecessary."

b. Does the torture statute apply to the detention and interrogation of detainees pursuant to the President's Commander-in-Chief authority?

ANSWER: Yes, as discussed above in response to question 1(a).

c. Can you assure me that, if you are confirmed, you will not, under any circumstances, advise the Attorney General or anyone else that the torture statute does not apply to the detention and interrogation of detainees pursuant to the President's Commander-in-Chief authority?

ANSWER: As discussed above, I believe that the federal prohibition on torture applies to interrogations conducted pursuant to the President's Commander in Chief authority. Further, given the President's clear directive that the United States will neither commit nor condone torture under any circumstances, I do not expect that OLC will be called upon to address any asserted conflict between this statutory prohibition and the President's duty to defend the Nation.

2. According to media reports, Jay Bybee authored an opinion on the legality of specific interrogation techniques in August 2002, during the same time frame as the Bybee torture memo. It reportedly authorizes the use of specific abusive interrogation methods, including mock execution and "waterboarding" or simulated drowning.

Chairman Specter, I and other members of the Judiciary Committee have asked the Justice Department to provide this opinion to members of the Committee. The Justice Department has refused to do so.

In a February 1, 2005 letter to Chairman Specter, the Justice Department stated that the opinion was "appropriately provided by the client agency in a classified setting to the relevant oversight committee." This presumably refers to the Intelligence Committee.

a. If the opinion was provided to the Intelligence Committee, why can it not be provided to the Judiciary Committee?

ANSWER: Decisions to disclose confidential legal advice—particularly advice involving the most sensitive matters of national security, such as advice relating to the sources and methods of intelligence gathering—are made through consultations among the agencies whose programmatic interests are at stake, the Attorney General, and, as appropriate, the National Security Council, and are subject to the ultimate authority of the President. Disclosures to Congress of sensitive information about intelligence matters are traditionally made by the relevant agencies to the Intelligence Committees through the usual oversight process.

b. Is the opinion still binding?

ANSWER: Because advice relating to the subject of specific interrogation practices would involve some of the most sensitive national security information, the disclosure of which could compromise intelligence sources and methods, I am not in a position to discuss any specific legal advice that OLC may have given in this area. Nevertheless, as stated in the December 30, 2004, memorandum, we have reviewed the Office's prior opinions relating to the treatment of detainees and do not believe that any conclusions concerning specific treatment practices would be different under the standards set forth in the December 30, 2004, memorandum. I will ensure that any OLC advice in this area remains consistent with the December 30, 2004, memorandum.

3. According to a February 4, 2005 letter from Daniel Levin, then-Acting Assistant General, OLC, to William Haynes II, General Counsel of the Department of Defense, which was released to the Senate Armed Services Committee, OLC has withdrawn the March 14, 2003 Memorandum from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to William Haynes, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the

United States (hereinafter Yoo opinion).

a. Please provide a copy of this opinion.

ANSWER: Decisions to disclose confidential and classified legal advice, such as the March 14, 2003, memorandum to which the question refers, are made through consultations among the agencies whose programmatic interests are at stake, the Attorney General, and, as appropriate, the National Security Council, and are subject to the ultimate authority of the President. As noted in the question, the March 14, 2003, memorandum has been withdrawn. In December 2003, OLC advised the Department of Defense not to rely on that memorandum. Separately, the Department of Justice determined that each of the 24 interrogation techniques approved by the Secretary of Defense for use with detainees at the Guantanamo Bay Naval Base was lawful when used in accordance with the limitations and safeguards specified by the Secretary. The Department's reasoning on the legality of these 24 interrogation techniques has been provided to Congress in testimony presented to the House Permanent Select Committee on Intelligence.

b. When did OLC withdraw this opinion?

ANSWER: In December 2003, OLC advised the Department of Defense that the March 14, 2003, memorandum should not be relied upon. The withdrawal of the memorandum was later confirmed in the February 4, 2005, letter to Mr. Haynes from Mr. Levin.

c. Why did OLC withdraw this opinion?

ANSWER: I had not yet joined OLC when the Office informed the Department of Defense in December 2003 that the March 14, 2003, memorandum should not be relied upon. In addition, the reasons for its withdrawal are part of the deliberative process of the Office and the Executive Branch.

4. The revised torture memo indicates that OLC reviewed the Bybee opinion on specific interrogation techniques and the Yoo opinion and agreed with their conclusions. The memo states, "[W]e have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum."

a. Do you agree with the conclusions of the Bybee opinion on specific interrogation techniques?

ANSWER: Because advice relating to the subject of specific interrogation practices would involve some of the most sensitive national security information, the disclosure of which could compromise intelligence sources and methods, I am not in a position to discuss

any specific legal advice that OLC may have given in this area. As stated in the December 30, 2004, memorandum, we have reviewed the Office's prior opinions relating to the treatment of detainees and do not believe that any conclusions concerning specific treatment practices would be different under the standards set forth in the December 30, 2004, memorandum.

b. Do you agree with the conclusions of the Yoo opinion?

ANSWER: The statement in the December 30, 2004, memorandum—that we have reviewed the Office's prior opinions relating to the treatment of detainees and do not believe that any of their conclusions on treatment practices would be different under the standards set forth in the December 30, 2004, memorandum—does not refer to the withdrawn March 14, 2003, memorandum, which did not address specific treatment practices. In any event, the March 14, 2003, memorandum has been withdrawn in its entirety by OLC.

5.

a. In your personal opinion, is it legally permissible for U.S. personnel to subject a detainee to waterboarding (simulated drowning)? Is it inhumane?

b. In your personal opinion, is it legally permissible for U.S. personnel to subject a detainee to mock execution? Is it inhumane?

c. In your personal opinion, is it legally permissible for U.S. personnel to physically beat a detainee? Is it inhumane?

d. In your personal opinion, is it legally permissible for U.S. personnel to force a detainee into a painful stress position for a prolonged time period? Is it inhumane?

ANSWER: The following responds to questions 5(a)-(d). Let me preface my response by noting generally that I believe it would not be appropriate for me to render a judgment in the abstract on legal issues, particularly ones that might come before the Office of Legal Counsel in the discharge of its responsibilities. Undoubtedly, there are specific practices that are legally prohibited, but my ability to deliver objective legal advice regarding any specific policy proposals that may arise could be compromised if I publicly address such matters in advance and in the abstract. It is fundamental to the functioning of the Office, in my view, that we maintain the ability to render independent, objective, and unbiased legal advice in carrying out our responsibilities, and I therefore cannot express judgments personally that might appear to commit the Office to one particular conclusion. In addition, it would not be appropriate for me to purport to give a definitive, considered legal judgment without the support of a thorough legal analysis and detailed information about the proposed treatment. With these caveats in mind, I will outline the general considerations that would inform my judgments in these areas.

Depending on the facts and circumstances of particular cases, various statutes, executive orders, directives, and other Executive Branch guidance could potentially be relevant to the types of conduct referenced in the question. Relevant statutes might include the Uniform Code of Military Justice, which applies to members of the Armed Forces everywhere and prohibits, among other things, assault, cruelty and maltreatment, and dereliction of duty; various federal criminal statutes that apply in the special maritime and territorial jurisdiction of the United States, such as the federal assault statute, 18 U.S.C. § 113; the Military Extraterritorial Jurisdiction Act, *id.* § 3261 *et seq.*, which applies to certain persons in the company of the Armed Forces who engage in conduct outside the United States that would constitute a felony if committed within the special maritime and territorial jurisdiction; the War Crimes Act, *id.* § 2441, which imposes criminal liability for certain "grave breaches" of the Geneva Conventions in circumstances where those Conventions apply; and the federal prohibition on torture, *id.* §§ 2340-2340A, which makes it a crime to commit, or to conspire to commit, torture under color of law anywhere outside the United States. Various treaties, including the Convention Against Torture and the Geneva Conventions, may also be relevant.

The conduct at issue will violate the federal anti-torture statute where the circumstances, taken as a whole, indicate that individuals are acting with the required intent to cause severe physical or mental pain or suffering within the meaning of the statute, as interpreted in OLC's opinion of December 30, 2004. Those issues will necessarily turn on all of the relevant facts, which would generally include, for example, the details of the particular conduct in question, its severity, and in certain circumstances its duration.

In approaching the meaning of "humane treatment," I believe it would be appropriate to look to the customary laws of war. Humane treatment, in my view, refers to a baseline standard for the treatment of detainees in an armed conflict. I would expect that standard to include the basic provision of adequate food, drinking water, shelter and clothing, and medical treatment. I would also expect that it would incorporate widely accepted prohibitions from the customary laws of war, including prohibitions against willful killing, mutilation, rape, torture, and forms of inhuman treatment, such as subjecting prisoners to biological experiments.

6. When the United States ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Senate filed a reservation to define cruel, inhuman or degrading treatment. This reservation states that the United States is bound to prevent "cruel, inhuman or degrading treatment" to the extent that phrase means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the U.S. Constitution.

During his confirmation hearing, Attorney General Alberto Gonzales said, "as a direct result of the reservation the Senate attached to the CAT, the Department of Justice has concluded that

under Article 16 there is no legal prohibition under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas."

In OLC's revised torture memo, you cite Abraham Sofaer as an authority on the interpretation of the CAT. Mr. Sofaer who was the State Department's Legal Adviser in 1985-90, was the Reagan Administration official who handled the ratification of the CAT. He said, "I disagree with the merits and wisdom of the conclusion reached by the Department of Justice and cited in the response of Judge Gonzales concerning the geographic reach of Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."

a. Do you agree with Attorney General Gonzales or Mr. Sofaer?

ANSWER: I agree with the views of the Attorney General, as explained in the letter dated April 4, 2005, from Assistant Attorney General Moschella to Senators Leahy, Feinstein, and Feingold. The April 4, 2005, Moschella letter states the Department's position with respect to Article 16 of the CAT, and that letter reflects OLC's views. Among other things, Article 16 of the CAT by its own terms applies only in territory that is under the jurisdiction of the United States, and for that reason alone it would not reach aliens who are detained overseas, outside that territory.

b. Has OLC rendered any opinion on the CAT provision on cruel, inhuman, or degrading treatment? If yes, please provide a copy of this opinion.

ANSWER: The Justice Department has addressed Article 16 of the Convention Against Torture in the letter dated April 4, 2005, from Assistant Attorney General Moschella, to Senators Leahy, Feinstein, and Feingold. That letter reflects OLC's views. Further discussion of OLC's participation, if any, in giving legal advice on specified topics would be inconsistent with the confidential nature of the Government's deliberative process, the protection of which is necessary to ensure that decisionmakers are willing to seek candid legal advice before they act.

c. Do you believe that U.S. personnel can legally engage in cruel, inhuman, or degrading treatment under any circumstances?

ANSWER: The United States has committed itself to complying with all of its obligations under the Convention Against Torture. All U.S. personnel are bound to abide by these obligations, and no U.S. personnel may, under any circumstances, engage in acts of cruel, unusual and inhumane treatment or punishment prohibited by the Constitution. As noted in the April 4, 2005, letter from Assistant Attorney General Moschella, Article 16 is limited in its reach. It imposes obligations on the United States only "in any territory under its jurisdiction." Furthermore, pursuant to the reservation required by the Senate, the United States is bound by its obligations under Article 16 "only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and

inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution." Additional legal constraints, such as those I discuss in response to question 5, may also impose relevant limitations. Regardless of the precise scope of U.S. obligations under Article 16, however, the Attorney General has stated that it is our policy to abide by the substantive constitutional standard incorporated into Article 16 even if such compliance is not legally required, regardless of whether the detainee in question is held in the United States or overseas.

d. Can you assure me that, if you are confirmed, you will not advise the Attorney General or anyone else that U.S. personnel are legally permitted to engage in cruel, inhuman or degrading treatment?

ANSWER: If confirmed, I would uphold the Department's commitment to enforce the law. I would not advise the Attorney General or others that U.S. personnel are permitted to engage in cruel, inhuman or degrading treatment prohibited by law.

7. The President's February 7, 2002 memorandum on "Humane Treatment of al Qaeda and Taliban Detainees" states, "As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."

a. Has OLC rendered any opinion on the meaning of humane treatment? If yes, please provide a copy of this opinion.

ANSWER: Discussion of the Office's participation, if any, in rendering particular legal advice on specified topics would be inconsistent with the confidential nature of the Government's deliberative process, the protection of which is necessary to ensure that decisionmakers are willing to seek candid legal advice before they act. The Secretary of Defense, in authorizing 24 interrogation techniques for use with al Qaeda and Taliban detainees held at the Guantanamo Bay Naval Base, reiterated the President's stated policy "that US Armed Forces shall continue to treat detainees humanely." OLC, in the words of Mr. Levin's February 4, 2005, letter to Mr. Haynes, approved these techniques as "authorized for continued use" under certain conditions. In addition, I have in response to question 5 above explained that the customary laws of war provide guidance regarding the humane treatment of detainees.

b. The directive to treat all detainees humanely applies only to the U.S. Armed Forces. Are U.S. personnel other than members of the U.S. Armed Forces required to treat all detainees humanely?

ANSWER: All U.S. government personnel must comply with the Constitution and all applicable laws and Executive Branch policies and procedures. As stated in response to

question 6(c) above, the Attorney General has stated that it is our policy to abide by the substantive constitutional standard incorporated into Article 16 of the CAT.

c. The President's memorandum states, "our values ... call for us to treat detainees humanely, including those who are not legally entitled to such treatment." It also states that the U.S. Armed Forces shall treat detainees humanely "as a matter of policy." Which detainees is the United States not legally required to treat humanely? Can the President determine, as a matter of policy, that U.S. personnel are not required to treat detainees humanely?

ANSWER: The presidential memorandum that the question quotes addresses the applicability of the Geneva Convention Relative to the Treatment of Prisoners of War ("GPW") to al Qaeda and Taliban detainees. As the President made clear, our Nation has been and will continue to be a strong supporter of each of the Geneva Conventions, including GPW. The Geneva Conventions, including GPW, however, do not apply to all armed conflicts, nor do the Geneva Conventions provide protections to all persons regardless of circumstances and conditions. Common article 2 of the Conventions, including GPW, states that the Conventions apply only to "cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties," "cases of partial or total occupation of the territory of a High Contracting Party," and cases in which a "Power[] in conflict . . . accepts and applies the provisions" of Geneva. The President can determine, and has determined, that GPW does not apply to our conflict with al Qaeda. Al Qaeda is an international terrorist group, not a state, and therefore is not and cannot be a "High Contracting Party" to the Convention. Al Qaeda also does not recognize GPW or comply with the principles it embodies. It conducts its operations in flagrant violation of the laws and customs of war, including by targeting innocent civilians. There are important policy reasons, in addition to its sound legal basis, that support the President's determination. For example, combatants will have no incentive to comply with GPW if they receive the Convention's benefits without honoring its obligations. With respect to our conflict with the Taliban, the President can determine, and has determined, that GPW does apply, but that Taliban detainees do not qualify for "prisoner of war" status because they do not satisfy the requirements set forth in Article 4 of GPW. For example, they do not conduct their operations in accordance with the laws and customs of war (by, for example, attacking civilian targets of no military value), they do not have a fixed distinctive sign recognizable at a distance, and they are not commanded by persons responsible for their subordinates.

October 19, 2005

Honorable Arlen Specter
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter:

Attached are my responses to written questions from members of the Senate Judiciary Committee.

I thank you again for the opportunity to appear before the committee and to provide additional information through the attached written responses.

Sincerely,

Wan J. Kim

Cc: Honorable Patrick Leahy
Ranking Member,
Committee on the Judiciary

Written Answers for Questions Presented to Wan Joo Kim
Nominee to be Assistant Attorney General for Civil Rights
October 18, 2005

Some longtime current and former career lawyers have recently complained that growing tension between career attorneys and political appointees has created an unpleasant work environment in the Civil Rights Division, and that because the dialogue between career and political appointees has been stifled, morale is at an all-time low. Historically, major decisions such as the initiation of a large civil investigation, the empanelling of a grand jury, or the determination to file a lawsuit have been approved by a political appointee based on recommendations and input from career staff. Career employees say that under this administration, career attorneys who try to debate an issue or offer alternative approaches are viewed as disloyal.

Some of these career attorneys have left the Department after serving in the Civil Rights Division as supervisors and lead trial attorneys for over 20 years, alleging that there is an unprecedented breakdown in communication. For example, attorney Joe Rich, who served with the Department of Justice for 37 years, indicates that career attorneys have in recent years been barred from attending strategy meetings, and that there is little give and take between career attorneys and political appointees, although such open debate has long been considered important to the process.

Do you believe there's been a breakdown in communication between the career attorneys and the political appointees in the Civil Rights Division?

Answer: Having been a career attorney at the Justice Department for most of my professional life, I am sensitive to, and appreciative of, the concerns of career attorneys. As a Deputy Assistant Attorney General for the past two years, I have worked hard to ensure open access and open lines of communications. To this end, I have met weekly or biweekly with the management of each section that I supervise – the Educational Opportunities, Housing and Civil Enforcement, and Criminal Sections – in addition to more frequent and regular communications by phone and email. I also have had numerous meetings with career attorneys to discuss individual cases.

I believe that I have fostered a positive dialogue in the sections that I supervise. My goal is to create an environment of hard work, mutual respect, open dialogue and professionalism. If confirmed, I would continue to do so across the entire Division.

Do you agree that it important for political appointees to receive the benefit of the career staff's expertise and experience?

Do you think the career attorneys and the political appointees should both be included in strategy and policy meetings?

Do you think it is important to include career attorneys in the decision making process?

Answer: Having been a career attorney at the Justice Department for most of my professional life, I know first-hand the value of the expertise and experience that career attorneys provide. I have always believed that a wide variety of opinions and input is necessary to make an informed decision. In my two years with the Division, I have regularly relied upon the advice of career management in the sections that I supervise. It is difficult for me to imagine doing otherwise. As a Deputy Assistant Attorney General, I meet regularly with career attorneys and affirmatively seek their advice and counsel. If confirmed, I will continue to practice this policy of inclusion.

One career attorney, William Yeomans, who left the Department after serving with distinction for over 25 years, believes that the Department is more politicized than ever before. As an example of this, he indicates that hiring, which formerly involved both career staff and political appointees, now is almost entirely done by political appointees with little or no input from career employees, and that to be hired one must have a particular political ideology.

How would you respond to these assertions?

Answer: During my tenure as Deputy Assistant Attorney General, my hiring recommendations have been based solely on the strength of an applicant's qualifications. I have never considered any "particular political ideology" as a requirement for employment as a career attorney. Indeed, career employees have played a central role in every career attorney whom I have recommended to be hired. If confirmed, I will continue to hire only highly qualified and motivated attorneys.

In your opinion, is there a place in the Civil Rights Division for those attorneys who were hired by previous Democratic administrations as well as those hired during Republican administrations?

Answer: Every attorney in the Civil Rights Division will be evaluated based on the work that he or she performs, not when he or she happens to have been hired. I firmly believe that career attorneys should not be treated differently just because they have been hired during different administrations.

Will you make improving morale a top priority if you are confirmed as the new AAG for the Civil Rights Division?

Answer: It is very important to me that the employees at the Civil Rights Division enjoy their work. As a personal matter, I have always greatly enjoyed working for the Justice Department; it is why I have spent nearly a decade here. Working as a Justice Department attorney is a unique and rewarding career, and I hope that every

attorney shares my level of enthusiasm. As a management matter, I believe that there is a connection between morale and productively. If confirmed, I will work very hard to constantly improve the morale of all employees at the Civil Rights Division.

QUESTIONS OF SENATOR RICHARD J. DURBIN
Wan Kim, Nominee to be Assistant Attorney General, Civil Rights Division

1. For the past two years, you have supervised the Civil Rights Division's Criminal Section, which has hate crime prosecution authority, and you have delivered speeches about hate crime law enforcement. In a speech that you gave in Berlin on April 28, 2004, you stated: "There is widespread consensus in the United States that crimes motivated by hate require special attention." You also quoted then-Attorney General Ashcroft, who said: "Just as the United States will pursue, prosecute, and punish terrorists who attack America out of hatred for what we believe, we will pursue, prosecute, and punish those who attack law-abiding Americans out of hatred for who they are."

   A. **Question**: Do you believe – personally and as a matter of public policy – that the Justice Department should pursue, prosecute, and punish those who attack law-abiding Americans out of hatred for who they are, if that hatred is based on their sexual orientation? Please explain.

Answer: I am opposed to all forms of criminal violence, and I strongly agree with the President when he stated, during his inaugural address, "that everyone belongs, that everyone deserves a chance, [and] that no insignificant person was ever born." As an employee at the Department of Justice, I am sworn to enforce the laws passed by Congress, an obligation I take very seriously.

   B. **Question**: Senator Hatch testified that you worked on criminal and civil rights issues during your employment with him, so you are familiar with the Local Law Enforcement Enhancement Act. This bill has been passed, in different years, by both houses of Congress, but has not yet become a law. Do you favor its passage? I realize that the Justice Department has not taken an official position on this bill, but I am asking for your opinion, not the Justice Department's.

Answer: I am opposed to all forms of criminal violence, and I strongly agree with the President when he stated, during his inaugural address, "that everyone belongs, that everyone deserves a chance, [and] that no insignificant person was ever born." As an employee at the Department of Justice, I am sworn to enforce the laws passed by Congress, an obligation I take very seriously. The Administration has not taken an official position on the legislation, and it would be inappropriate for me to comment further.

2. You have been a federal prosecutor for most of your career and have much more experience in criminal law, where the standard of proof is "beyond a reasonable doubt," than in civil matters, where the burden of proof is the less demanding "preponderance of the evidence" standard. As head of the Civil Rights Division, most of the work you would supervise would be civil matters, not criminal matters.

   Question: What can you say to assure the Judiciary Committee that you recognize the difference between these two different burdens of proof and will not demand more evidence than is necessary in approving civil lawsuits.

Answer: Both as an attorney in private practice for two years and as a Deputy Assistant Attorney General for two more, I have been involved in numerous civil matters that employ the preponderance of the evidence standard. I also was exposed to this standard of proof as a prosecutor, where it is regularly used, for example, at pretrial detention hearings, evidentiary hearings, and sentencing hearings. I believe that my career as a criminal and civil litigator has given me a full appreciation of all the typical standards of proof, from reasonable suspicion and probable cause, to preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt.

3. You have served on a commission to commemorate the 50th anniversary of *Brown v. Board of Education*, and you oversee the work of the Educational Opportunities Section within the Civil Rights Division.

   A. **Question**: Do you believe that the *Brown* case was correctly decided? Do you consider the *Brown* case to be settled law in America? Please explain your answers.

Answer: I respect each and every decision of the Supreme Court, and if confirmed, would enforce them whenever necessary. Based on my service on the *Brown v. Board of Education* commission, I heartily share the President's views, in speaking on the anniversary of that decision, that "segregation [can] never be squared with the ideals of America." The Supreme Court's unanimous decision in *Brown v. Board of Education* has been valid for more than 50 years. I believe that decision to be settled law. As a personal matter, it is doubtful that my father would have chosen to immigrate to the United States had the Supreme Court's decision in *Brown* not overruled prior decisions such as *Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding segregation of Chinese students).

   B. **Question**: In the landmark case *Plyler v. Doe*, the Supreme Court held that the children of illegal immigrants are entitled to a public education. Do you believe that *Plyler v. Doe* was correctly decided? Do you believe it is settled law? Please explain your answers.

Answer: I respect each and every decision of the Supreme Court, and if confirmed, would enforce them whenever necessary. The Supreme Court's decision in *Plyer v. Doe* has been valid for nearly a quarter-century. I believe that decision to be settled law.

4. You stated in your Senate questionnaire: "The Educational Opportunities Section likewise opened more investigations, by far, than in any of the previous eight years."

   Question: Please indicate how much investigations were opened by that section each year for the past eight years, and provide a short summary of each investigation. Please also indicate how many lawsuits were filed by the Educational Opportunities Section each year for the past eight years, and provide a short summary of each case.

Answer: The Educational Opportunities Section has opened the following number of investigations during the past 7 years: FY 2005 - 46; FY 2004 - 35; FY 2003 - 24; FY 2002 - 21; FY 2001 - 25; FY 2000 - 21; FY 1999 - 18. Prior to 1999 the Section did not maintain these statistics. However, employees personally familiar with the work of the Section during these years confirm that the number of recent investigations far outpace those brought in the previous eight years. It is my understanding that, pursuant to Department of Justice policy, it would be inappropriate to disclose publicly information regarding investigations that did not result in the filing of litigation. Much of the work done by the Educational Opportunities Section is monitoring compliance with longstanding school desegregation orders, including seeking additional relief. A list of lawsuits filed by the Section since FY 1999 follows (records prior to FY 1999 were not available):

United States v. Board of Education of the City of New York (E.D. N.Y.). The United States filed suit pursuant to Title IV of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974 against the New York City Board of Education regarding a high school in Brooklyn, New York where Asian-American students were severely and persistently harassed on the basis of their national origin, and, in addition, the Board failed to provide appropriate services to overcome language barriers that impeded participation of the students in the instructional program. The case was resolved through a favorable consent decree.

Hearn and United States v. Muskogee Public Sch. Dist (E.D. Okla.). The United States intervened in this lawsuit alleging that school officials discriminated against Nashala Hearn on the basis of religion when they suspended her twice for wearing to school a religious headscarf or hijab. The Division entered into a consent decree with all parties on May 20, 2004, in which the school district agreed to permit Nashala to wear the hijab, and agreed to amend its dress code policy to allow exceptions for religious reasons.

AB and United States v. Rhinebeck Central School District and Thomas Mawhinney (S.D. N.Y.). The Division working with the United States Attorney's office intervened in this sexual harassment case brought against the Rhinebeck Central School District and the former high school principal Thomas Mawhinney. The United States alleges that the school district violated Title IX of the Education Amendments of 1972. The case is ongoing.

Hoffman v. South Dakota High School Athletic Assn and United States (D. S.D.). The United States intervened in this lawsuit to support the SDHSAA and its consent decree entered in another case, *Pederson and United States v. South Dakota HSAA*. The plaintiffs were challenging the consent decree. The challenge was denied.

MA v. Newark v. Public Schools & New Jersey (D. N.J.). The United States intervened in this lawsuit in which New Jersey raised a constitutional challenge to the Individuals with Disabilities Education Act ("IDEA"), claiming that the Eleventh Amendment afforded it immunity against a private lawsuit to enforce the IDEA. The United States argued that New Jersey had agreed to comply with the IDEA and waive its sovereign immunity when it accepted federal IDEA funds to defray the cost of educating students with disabilities. In the alternative, the United States argued that Congress validly abrogated state sovereign immunity pursuant to the Fourteenth

Amendment. The district court allowed the United States to intervene and accepted both of its arguments.

Pederson and United States v. South Dakota High School Athletic Association (D. S.D.). The United States intervened in this Title IX and Equal Protection lawsuit alleging that the defendant's violated federal law with respect to their scheduling of girls sports. The case was resolved through a consent decree.

Madison and United States v. Sullivan County Board of Education (E.D. Tenn.). The United States intervened in this lawsuit alleging that the school officials were deliberately indifferent to the severe and pervasive harassment of African-American students on the basis of their race. The case was resolved through a consent decree.

Aaron L. v. Lemahieu (D. Haw.). The United States intervened in this lawsuit to defend the constitutionality of a Section 504 of the Rehabilitation Act of 1973, and IDEA, with particular focus on the validity of the provisions of the statutes that require states to waive Eleventh Amendment immunity in exchange for receiving federal financial assistance. The United States was successful.

Owen v. L'Anse Area Schools (W.D. Mich.). The United States intervened in this Title VII case alleging that the defendants had subjected a teacher to religious discrimination by its failure to address severe and pervasive harassment on the basis of religion. The case was resolved through a settlement agreement.

Lovins v. Pleasant Hills School District (W.D. Mo.) The United States intervened in this Title IX and Equal Protection case and alleged that the school districts violated federal law with respect to the peer-on-peer harassment on the basis of sex of a student. The case was resolved by a consent decree.

White v. Engler (E.D. Mich.) The United States intervened to address the constitutional challenge to Title VI, and addressed plaintiff's right to bring a private action, and whether they must exhaust administrative remedies.

Robinson v. State of Kansas (D. Kan.) The United States intervened to address the constitutionality of the abrogation of the State's Eleventh Amendment immunity under Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973.

Trahan and United States v. Lafayette Parish School District (W.D. La.). The United States intervened in this school desegregation case alleging that the defendant school district had not eliminated the vestiges of the prior dual system. The case is ongoing.

Congress of Hispanic Educators and United States v. Denver Public Schools (D. Colo.). The United States intervened in this lawsuit under Title VI of the Civil Rights Act of 1964, upon referral from the Department of Education, and under the Equal Educational Opportunities Act of 1974 alleging that the district failed to provide appropriate service to its non and limited

English proficient students to overcome language barriers. The case was resolved through a consent decree.

Asbury v. Missouri Department of Elementary and Secondary Education (E.D. Mo.) The United States intervened in this lawsuit to defend the constitutionality of Section 504 of the Rehabilitation Act of 1973 and IDEA. The Division argued that Missouri choose to waive its Eleventh Amendment immunity when it accepted federal funds.

Other notable resolutions obtained since 2001 include: the Mississippi higher education desegregation case where the court approved a $503 million settlement agreement; the desegregation case involving the Chicago School District where the Division entered into a comprehensive consent decree with the third largest school district in the country; the Yonkers, New York case where the Division obtained a settlement agreement that designates $300 million to the Yonkers Public Schools; and the Tennessee higher education desegregation case where the court approved a consent decree that designates $75 million to improving higher education.

5. In 2003, in the case *Grutter v. Bollinger*, the Supreme Court held that the University of Michigan law school's use of race was a constitutional and appropriate use of affirmative action. The Justice Department filed a brief in that case arguing that the University of Michigan law school's use of race was unconstitutional.

   A. **Question**: Do you agree with the position advocated by the Justice Department in *Grutter v. Bollinger* case, or with the Supreme Court's opinion in that case? Please explain.

Answer: The Department of Justice filed its brief in this case in 2002. I joined the Civil Rights Division in August 2003. I understand that the United States argued, and the Supreme Court agreed, that race conscious higher education admissions programs should be permitted only if they are narrowly tailored to further a compelling governmental interest. After undertaking an in-depth factual analysis, the Supreme Court agreed that student body racial diversity in higher education was a compelling state interest. With respect to narrow tailoring, the Supreme Court found that the Michigan undergraduate program was not narrowly tailored and, at the same time, concluded that the law school program at the same university was narrowly tailored. I respect these decisions of the Supreme Court, and if confirmed, would enforce them whenever necessary.

   B. **Question**: Please provide information about all work performed by the Civil Rights Division (investigations, court filings, etc.) regarding the use of race by universities or secondary schools in the aftermath of *Grutter v. Bollinger* and *Gratz v. Bollinger*.

Answer: The Department of Education has the primary responsibility for enforcing various non-discrimination laws and regulations pertaining to higher education. If I am confirmed, I will work with the Department of Education to apply the principles set forth in these decisions to any investigation or litigation regarding the questioning of a university admissions policy. Those

principles make clear that race-conscious methods can be a permissible part of higher education admissions practices, so long as they are narrowly tailored to achieve a diverse student body.

6. You stated in your Senate questionnaire that "in CY 2004, the Housing and Civil Enforcement Section nearly doubled the number of pattern or practice filings from the previous year, in addition to favorably resolving a record number of these cases."

Question: Please indicate all pattern or practice suits filed by that section each fiscal year for the past eight years, and provide a brief description of each lawsuit, the identity of the defendant, the nature of the claim, the date of suit, and the resolution of the suit.

Answer: The Housing and Civil Enforcement Section filed 24 pattern or practice cases in CY 2004, nearly double the 13 that was filed in CY 2003. In CY 2004, the Section also obtained consent decrees in 29 pattern or practice cases. The requested list of pattern or practice cases as organized by Fiscal Year follows:

FY 1997

Case Name	Statute	Brief Description	Filed date	Resolved Date
US V. FOREST HILLS REALTY MGMT, ET AL.	FHA	Rental discrimination based upon race; resolved by consent decree.	11/1/1996	4/30/1997
US V. FIRST NAT'L BK OF DONA ANA CO.	ECOA FHA	Lending discrimination based upon national origin; resolved by consent decree.	1/28/1997	1/28/1997
US V. CITY OF MILWAUKEE	FHA	Land use and zoning discrimination based upon race and national origin; resolved by consent decree.	2/4/1997	5/31/2001
US V. THE MONEY TREE	ECOA	Lending discrimination based upon age and source of income; resolved by consent decree.	2/4/1997	2/4/1997
US V. LORANTFFY CARE CENTER	FHA	General housing discrimination based upon race; resolved by judgment for defendant.	2/5/1997	4/29/1998
US V. LAGNEAUX D/B/A EVELYN'S PLACE	Title II	Public accommodation discrimination based upon race; resolved by consent decree.	2/7/1997	2/7/1997
US V. JANSMA, ET AL. (TOWN & COUNTRY)	FHA	Rental discrimination and harassment based upon race, sex and familial status; resolved by consent decree.	2/27/1997	4/22/1998
US V. NATIONWIDE MUTUAL INSURANCE CO.	FHA	Insurance discrimination based upon race and national origin; resolved by consent decree.	3/10/1997	3/10/1997
US V. BIG D ENTERPRISES (OAK MANOR)	FHA	Rental discrimination based upon race and familial status; resolved by judgment for United States.	3/14/1997	5/11/1998
US V. C & A ENTERPRISES, INC. (IMAGES)	Title II	Public accommodation discrimination based upon race; resolved by consent decree.	3/27/1997	1/27/1998
US V. CITY OF FRESNO	FHA	Land use and zoning group home discrimination based upon disability; resolved by consent decree.	4/14/1997	4/24/1997
US V. TOWN OF MILFORD HOUSING AUTHORITY	FHA	Land use and zoning and rental discrimination based upon race and national origin; resolved by consent decree.	4/24/1997	10/5/1998

US V. TWSHP OF CHELTENHAM; ZONING BD	FHA	Land use and zoning group home discrimination based upon disability; resolved by consent decree.	6/11/1997	1/6/1998
US V. CHANDLER ASSOC., ET AL. (PLEASANT)	FHA	Rental discrimination based upon race and familial status; resolved by consent decree.	6/18/1997	6/18/1997
US V. ERNSTOFF, ET AL. (WESTFIELD MANOR)	FHA	Rental discrimination based upon race; resolved by judgment for defendant.	6/18/1997	12/30/1999
US V. ALBANK, FSB	ECOA FHA	Lending discrimination based upon race and national origin; resolved by consent decree.	8/13/1997	8/13/1997
US V. APARTMENT & HOME HUNTERS, INC.	FHA	Rental discrimination based upon race and familial status; resolved by consent decree.	9/18/1997	2/2/1999

FY 1998

Case Name	Statute	Brief Description	Filed date	Resolved Date
US V. BONLAR LOAN CO. & LARRY METNICK	ECOA	Lending discrimination based upon marital status; resolved by consent decree.	10/17/1997	10/17/1997
US V. WILLIAMS, ET AL. (PARK ARMS APTS.)	FHA	Rental discrimination based upon national origin; resolved by consent decree.	11/14/1997	6/18/1999
US V. HARLAN, ET AL.	FHA	Rental discrimination based upon national origin; resolved by consent decree.	11/17/1997	8/16/1999
US V. CHOICE PROPERTY CONSULTANTS, INC.	FHA	Rental discrimination based upon race, national origin and familial status; resolved by consent decree.	11/18/1997	5/7/1999
US V. A.T. MARAS CO./SOUTH POINTE CONDO	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	11/24/1997	12/8/1997
US V. ACORN GLEN (JDL MANAGEMENT)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	11/24/1997	6/11/1999
US V. CLEARVIEW (EAGLE RIDGE II)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	11/24/1997	6/15/1999
US V. COUNTRY OAKS TOWNHOMES	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	11/24/1997	7/21/1998
US V. HARTZ/LINDEN GRP (EAGLE RIDGE)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	11/24/1997	10/26/1998
US V. HILLCREST VILLAGE	FHA	Rental discrimination based upon race; resolved by consent decree.	12/8/1997	4/9/1998
US V. LEXINGTON VILLAGE APARTMENTS	FHA	Rental discrimination based upon race; resolved by consent decree.	12/8/1997	4/9/1998
US V. ROCK SPRINGS VISTA DEVELOPMENT	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	12/15/1997	11/29/1999
US V. HAGADONE AND GOFF (LAKE VILLA)	FHA	Rental discrimination based upon familial status; resolved by consent decree.	12/24/1997	7/9/1999
US V. RICHMOND 10-72; WEDGEWOOD VILLAGE	FHA	Rental discrimination based upon race; resolved by consent decree.	1/16/1998	10/15/1998
US, ET AL. V. SPRINGDALE (DELANEY)	FHA	Rental discrimination based upon race; resolved by consent decree.	2/18/1998	5/22/1998
US V. P.F. CRAWFORD; CRAWFORD LUMBER CO.	FHA	Harassment based upon sex; resolved by judgment for United States.	3/30/1998	11/16/1999
US V. INLAND EMPIRE BLDRS, INC. ET AL.	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	3/31/1998	9/1/1999
US V. DAMRON (BRUNER TRAILER PARK)	FHA	Rental discrimination and harassment based upon race and sex; resolved by consent decree.	4/28/1998	2/16/1999
US V. FIRST REAL ESTATE CORP., ET AL.	FHA	Sales discrimination based upon race; resolved by consent decree.	5/14/1998	5/14/1998
US V. PARTIN (SOUTH PRAIRIE CREEK RV PK)	FHA	Rental discrimination based upon familial status; resolved by consent decree.	6/4/1998	6/11/1998
RECAP & US V. CITY OF MIDDLETOWN, ET AL.	FHA	Land use and zoning group home discrimination based upon disability; resolved by judgment for defendants.	6/17/1998	9/26/2000

US V. K-P DEVELOPERS, INC. (OAK MEADOWS)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	7/21/1998	7/21/1998
US V. VERNON D/B/A MONTEREY MANOR APTS	FHA	Rental discrimination based upon race and familial status; resolved by consent decree.	7/22/1998	8/31/1999
US V. CITY OF LAKE STATION	FHA	Land use and zoning discrimination based upon race; resolved by consent decree.	8/26/1998	3/26/2001
US V. RANCH DEVELOP., INC. (SARATOGA)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	8/26/1998	9/2/1998
US V. CITY OF TOLEDO/CITY COUNCIL	FHA	Land use and zoning group home discrimination based upon disability; resolved by consent decree.	9/2/1998	3/25/1999
US V. KRUEGER	FHA	Harassment based upon sex; resolved by consent decree.	9/8/1998	6/30/1999

FY 1999

Case Name	Statute	Brief Description	Filed date	Resolved Date
US V. CORRIB CONSTR/KLLM ARCH (GLENMOOR)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	10/20/1998	3/1/1999
US V. DREMCO, INC./LINDEN GRP (CLARIDGE)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	10/20/1998	10/20/1998
US V. HEARTHSIDE HOMES (BROKEN ARROW)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	10/20/1998	10/20/1998
US V. KIRK CORP/BALSAMO (GLENEAGLE TWH)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	10/20/1998	10/20/1998
US V. NEJAM PROPERTIES	FHA	Rental discrimination based upon race; resolved by consent decree.	11/18/1998	2/18/2000
US V. CAMDEN PROPERTY TRUST (OASIS)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	2/1/1999	1/31/2001
US V. PRESTONWOOD PROP. (STILLMEADOW)	FHA	Harassment based upon sex; resolved by consent decree.	3/8/1999	9/14/2000
US V. ASSOCIATES NATIONAL BANK	ECOA	Lending discrimination based upon national origin; resolved by consent decree.	3/29/1999	1/8/2001
US V. OPTIMA, INC. (COROMANDEL)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	4/22/1999	4/22/1999
US V. FRANKLIN ACCEPTANCE CORPORATION	ECOA	Lending discrimination based upon marital status and source of income; resolved by consent decree.	5/12/1999	5/12/1999
US V. GARDEN HOMES MGMT CORP., ET AL.	FHA	Rental discrimination based upon race and familial status; resolved by consent decree.	6/7/1999	9/21/2001
US V. NASSAU COUNTY	FHA	Land use and zoning discrimination based upon race; resolved by consent decree.	6/14/1999	3/28/2000
US V. CREEKSIDE OF SPRING CREEK (ORCHARD HILL BLDG. CO.)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	7/1/1999	7/27/1999
US V. J&G CONSTRUCTION/LINDEN (MARTHA)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	7/1/1999	12/10/1999
US V. ONE PARK PLACE CONDOMINIUMS	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	7/1/1999	7/1/1999
US V. CITY OF CHICAGO HEIGHTS	FHA	Land use and zoning group home discrimination based upon disability; resolved by consent decree.	7/7/1999	8/21/2001
US V. BOSTON HOUSING AUTHORITY	FHA	Harassment based upon race; resolved by consent decree.	7/26/1999	12/8/1999
US V. L.T. JACKSON/L.T. JACKSON TRUST	FHA	Harassment based upon sex; resolved by judgment for United States.	8/9/1999	3/28/2002
US V. BYRON RICHARD (HYLITES LOUNGE)	Title II	Public accommodation discrimination based upon race; resolved by consent decree.	8/31/1999	2/25/2000
US V. DEPOSIT GUARANTY NAT'L BANK (DGNB)	ECOA FHA	Lending discrimination based upon race; resolved by consent decree.	9/29/1999	9/29/1999

FY 2000

Case Name	Statute	Brief Description	Filed date	Resolved Date
US V. SPRING VALLEY PROPERTIES, ET AL.	FHA	Rental discrimination based upon race; resolved by consent decree.	11/17/1999	3/15/2002
US V. MATUSOFF RENTAL CO.; MCCORD	FHA	Rental discrimination based upon race and familial status; case pending.	11/24/1999	
US V. FORD MOTOR CREDIT COMPANY	ECOA	Lending discrimination based upon marital status; resolved by consent decree.	12/9/1999	12/14/1999
US V. HBE CORP D/B/A ADAMS MARK HOTELS	Title II	Public accommodation discrimination based upon race; resolved by consent decree.	12/16/1999	11/6/2000
US V. SLEEPY HOLLOW ESTATES	FHA	Rental and sales discrimination based upon race and national origin; resolved by consent decree.	3/22/2000	3/29/2000
US V. DELTA FUNDING CORP.	ECOA FHA	Lending discrimination based upon race and sex; resolved by consent decree.	3/31/2000	4/8/2000
US V. SUMMER WIND TOWNHOMES/BIGELOW HOME	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	4/13/2000	2/14/2001
US V. ROBERT FRANSWAY	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	4/24/2000	3/5/2001
US V. CITY OF FAIRVIEW HTS	FHA	Land use and zoning discrimination based upon race and familial status; resolved by consent decree.	4/28/2000	9/18/2001
US V. STEVENS AND ANSTINE D/B/A KNOLLWOOD PARTNERS; HAMMOND	FHA	Rental discrimination based upon familial status; resolved by consent decree.	4/28/2000	10/25/2000
US V. L.B. MITCHELL FIELD ASSOC., L.P.	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	5/1/2000	4/23/2002
US V. MILLS, ET AL.	FHA	Harassment and retaliation based upon sex; resolved by consent decree.	6/7/2000	11/14/2001
US V. WELLSTON PROPERTIES (TRIPOLI)	FHA	Rental discrimination based upon race and familial status; resolved by consent decree.	7/31/2000	8/7/2000
US V. YODER/SHRADER MGMT CO., ET AL.	FHA	Rental discrimination based upon race, national origin and familial status; resolved by consent decree.	7/31/2000	8/14/2000
JOUHARI/HORTON V. WILSON	FHA	Retaliation based upon race; resolved by judgment for United States.	8/18/2000	12/4/2000
US V. ACTION LOAN COMPANY	ECOA	Lending discrimination (procedural violations); resolved by consent decree.	8/25/2000	8/25/2000
US V. STRIETER CORP.	FHA	Rental discrimination based upon disability; resolved by consent decree.	9/19/2000	11/2/2001

FY 2001

Case Name	Statute	Brief Description	Filed date	Resolved Date
US V. JACKSONVILLE HA AND CITY OF JACKSONVILLE	FHA	Land use and zoning discrimination based upon race; resolved by consent decree.	10/18/2000	11/8/2000
US V. PATEL D/B/A ECONOLODGE	Title II	Public accommodation discrimination based upon race; resolved by consent decree.	10/18/2000	10/20/2000
US V. CUNAT BROS., INC.	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	12/4/2000	3/13/2001
US V. QUALITY BUILT CONSTRUCT. F/K/A DAWN CONSTRUCTION (BREEZEWOOD CONDO)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	12/7/2000	2/11/2005
US V. ALDEN "BUBBER" WALLACE, III, ET AL.	FHA	Rental discrimination based upon race; resolved by consent decree.	12/21/2000	5/23/2002
US V. BD OF COUNTY COMMISSIONERS OF COUNTY OF MONTEZUMA	FHA	Land use and zoning discrimination based upon race and national origin; resolved by consent decree.	12/21/2000	8/6/2002
US V. RSC DEVELOPMENT GROUP (HUNT CLUB)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	1/9/2001	5/9/2002
US V. PACIFIC NORTHWEST ELECTRIC, INC., ET AL. (TED SIGMONT)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	1/11/2001	10/21/2003
US V. FOXCROFT PARTNERSHIP; BARRY; FOXCROFT MGMT AND CONSTRUCTION, INC.; AN	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	1/18/2001	5/3/2002
US V. FRED THOMAS D/B/A BEST WESTERN SCENIC MOTOR INN; STEPHEN THOMAS	Title II	Public accommodation discrimination based upon race and national origin; resolved by consent decree.	1/18/2001	9/27/2001
US V. ROSE CONSTRUCTION CO; OCCIDENTAL DVLMP; ET AL	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	1/18/2001	10/3/2005
US V. SATYAM, L.L.C. (COMFORT INN)	Title II	Public accommodation discrimination based upon race; resolved by consent decree.	1/18/2001	4/3/2002
US V. ALDRIDGE & SOUTHERLAND BUILDER, INC., ET AL.	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	1/19/2001	1/25/2001
US V. EARL WALKER, D/B/A THE KNIGHTS, FORMERLY CLUB 2000	Title II	Public accommodation discrimination based upon race; resolved by consent decree.	1/19/2001	6/21/2001
US V. ALLAN HORSLEY, ET AL. (THE ELMS)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	2/1/2001	1/16/2002
US V. VANDERPOOL, ET AL.	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	2/23/2001	4/18/2002

US V. PACIFIC PROPERTIES AND DEVELOPMENT CORP.	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	2/28/2001	2/28/2001
US V. CANAL STREET	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	3/16/2001	9/12/2002
US V. WINGO	FHA	Rental discrimination and harassment based upon race, national origin and sex; resolved by consent decree.	4/9/2001	8/5/2002
US V. MILAZZO; GREEN MEADOW APTS	FHA	Rental discrimination based upon race; resolved by consent decree.	4/12/2001	1/8/2002
US V. BLEAKLEY/LNL (RIDGEVIEW APTS)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	5/10/2001	1/28/2003
US V. MCCOLLUM D/B/A QUEENS POINT MANOR APTS.	FHA	Rental discrimination based upon familial status; resolved by consent decree.	6/1/2001	1/23/2003
US V. RALPH R. JOHNSON (CARRIAGE INN APARTMENTS)	FHA	Rental discrimination based upon race and familial status; resolved by consent decree.	6/27/2001	4/10/2002
US V. TAIGEN & SONS, INC. (CENTENNIAL TRAIL)	FHA	Design and construct discrimination based upon disability; case pending.	7/11/2001	
US V. HALLMARK HOMES; ARCHITECTS WEST AND KEVIN W. JESTER	FHA	Design and construct discrimination based upon disability; case pending.	8/22/2001	

FY 2002

Case Name	Statute	Brief Description	Filed date	Resolved Date
US V. SUNBURST MOBILE HOME VILLAGE, ET AL.	FHA	Rental discrimination based upon national origin; resolved by consent decree.	10/19/2001	11/27/2002
US AND MEMPHIS CENTER FOR INDEPENDENT LIVING V. MAKOWSKY CONSTRUCTION	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	11/9/2001	3/21/2005
US V. J. RICHARD GRANT, ET AL.	FHA	Design and construct discrimination based upon disability; case pending.	11/9/2001	
US V. THE CITY OF POOLER	FHA	Land use and zoning discrimination based upon race; resolved by consent decree.	11/13/2001	6/16/2003
US V. SAVANNAH PINES, LLC; HALLIT MANAGEMENT CO., ET AL.	FHA	General housing discrimination based upon disability; resolved by consent decree.	11/29/2001	4/30/2003
US V. JOHN BUCK COMPANY, CHURCH AND CHICAGO LTD PARTNERSHIP, AND HARRY WEES	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	12/5/2001	9/25/2002
US V. THOMAS DEVELOPMENT CO., TOWLE, F/D/B/A/ DESIGN RESOURCES, ET AL. (TUR	FHA	Design and construct discrimination and retaliation based upon disability; resolved by consent decree.	2/13/2002	3/11/2005
US V. TRINIDAD MALDONADO; MIDWAY MOBILE HOME PARK; CENTRO RENTAL, INC.	FHA	Rental discrimination and harassment based upon sex; resolved by consent decree.	2/13/2002	1/29/2003
US V. RAINTREE ASSOCIATES LIMITED PARTNERSHIP, ET AL. (DRAC)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	2/27/2002	3/7/2002
US V. BADEEN, ET AL. (ACAPULCO JOE'S)	Title II	Public accommodation discrimination based upon race and national origin; resolved by consent decree.	3/8/2002	3/11/2002
US V. LNL ASSOCIATES/ARCHITECTS, P.A.	FHA	Design and construct discrimination based upon disability; case pending.	4/16/2002	
US V. FREEWAY CLUB, INC. AND ROBERT WATKINS	Title II	Public accommodation discrimination based upon race; resolved by consent decree.	5/13/2002	5/22/2002
US V. FIRST SITE COMMERCIAL PROPERTIES, INC.; THE WOODS, LLC; TINERVAN; BLD	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	5/14/2002	5/14/2002
US V. CLAIBORNE	FHA	Rental discrimination and harassment based upon sex; resolved by consent decree.	5/21/2002	4/21/2004

US V. HABERSHAM PROPERTIES, INC. D/B/A CRESCENT COURT APARTMENTS	FHA	Rental discrimination based upon race; resolved by consent decree.	6/5/2002	5/18/2004
US V. BLAKELY HOUSING AUTHORITY	FHA	Rental discrimination based upon race; resolved by consent decree.	6/10/2002	3/21/2005
US V. FIDELITY FEDERAL BANK, FSB	ECOA	Lending discrimination based upon national origin, religion, sex, age, marital status and source of income; resolved by consent decree.	7/8/2002	7/8/2002
US V. HAL CARTER, ET AL.	FHA	Rental discrimination based upon race and familial status; resolved by consent decree.	7/8/2002	4/5/2004
US V. FALCON DEVELOPMENT CORPORATION, ET AL. (SERENADE CONDO)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	7/30/2002	8/2/2002
US V. VEAL	FHA	Harassment based upon sex; resolved by judgment for United States.	7/30/2002	5/13/2004
US V. GUSTAFSON	FHA	Group home discrimination based upon disability; resolved by consent decree.	8/12/2002	12/21/2002
US V. MEADOWS OF JUPITER LTD., ET AL. (MALLARDS COVE)	FHA	Rental discrimination based upon race and familial status; resolved by consent decree.	8/27/2002	11/20/2003
US V. EDWARD ROSE & SONS; ET AL.	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	9/1/2002	9/30/2005
US V. THE CITY OF AGAWAM; THE AGAWAM BD OF APPEALS	FHA	Land use and zoning discrimination based upon race and national origin; resolved by consent decree.	9/17/2002	1/11/2005
US V. SAN FRANCISCO HOUSING AUTHORITY	FHA	Harassment based upon race, national origin and religion; resolved by consent decree.	9/18/2002	1/16/2004
US V. FAIR PLAZA ASSOCIATES, ET AL. (EL PUEBLO APARTMENTS)	FHA	Rental discrimination based upon race and familial status; resolved by consent decree.	9/19/2002	2/5/2004

FY 2003

Case Name	Statute	Brief Description	Filed date	Resolved Date
US V. BARRETT PROPERTIES (PLAYERS CLUB APT)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	10/9/2002	10/21/2002
US V. RESURRECTION RETIREMENT COMMUNITY, INC.	FHA	Rental discrimination based upon disability; resolved by consent decree.	10/17/2002	10/22/2002
US V. CAMP RIVERVIEW, INC. D/B/A CAMP RIVERVIEW, ET AL.	Title II	Public accommodation discrimination based upon race and national origin; resolved by consent decree.	10/21/2002	3/9/2004
US V. CITY OF JOHNSTOWN	FHA	Land use and zoning group home discrimination based upon disability; resolved by consent decree.	10/21/2002	7/16/2004
US V. CITY OF PAYETTE	FHA	Land use and zoning group home discrimination based upon disability; resolved by consent decree.	10/21/2002	9/15/2003
US V. BLUEBERRY HILL ASSOCIATES, L.P., ET AL	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	10/23/2002	2/18/2004
US V. WILMARK DEVELOPMENT COMPANY, ET AL.	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	11/7/2002	11/29/2004
US V. BONANZA SPRINGS, LLC	FHA	Rental discrimination based upon race, disability and familial status; case pending.	12/12/2002	
US V. BRAY	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	12/18/2002	10/6/2004
US V. MID-AMERICA BANK	ECOA FHA	Lending discrimination based upon race and national origin; resolved by consent decree.	12/30/2002	1/8/2003
US V. DAVID R. BEAUDET	FHA	Harassment based upon sex; resolved by consent decree.	2/19/2003	12/13/2004
US V. HAWTHORNE GARDENS ASSOCIATES, ET AL.	FHA	Rental discrimination based upon familial status; resolved by consent decree.	2/20/2003	5/6/2004
US V. YANOFSKY D/B/A SOUTH BANK APARTMENTS	FHA	Rental discrimination based upon familial status; resolved by consent decree.	2/20/2003	8/2/2004
US V. SPYDER WEB ENTERPRISES, LLC (SUBLET.COM)	FHA	Rental discrimination based upon race, national origin, sex and familial status; resolved by consent decree.	4/4/2003	1/16/2004
US V. COMPTON PLACE ASSOCIATES (GARDEN COMMUNITIES)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	4/11/2003	8/6/2003
US V. S-SIXTEEN LIMITED PARTNERSHIP (VILLAGE OF COLUMBIA)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	4/11/2003	3/14/2005
US V. KREISLER A/K/A BOB PETERSON, ET AL.	FHA	Rental discrimination based upon race; case pending.	7/9/2003	
US V. MAUI COUNTY	RLUIPA	Land use and zoning discrimination based upon religion; case dismissed.	7/10/2003	2/9/2005

US AND PRACH, ET AL. V. BOWEN PROPERTY MGMT CO.; SPOKANE HA; WESTFALL VILLA	FHA	Rental discrimination based upon national origin; resolved by consent decree.	7/18/2003	9/22/2005
US V. CITY OF LITTLE ROCK PLANNING COMMISSION	FHA	Land use and zoning discrimination based upon race; case dismissed.	9/30/2003	10/5/2004

FY 2004

Case Name	Statute	Brief Description	Filed date	Resolved Date
US V. JOHN KOCH	FHA	Rental discrimination and harassment based upon sex; resolved by judgment for United States.	10/2/2003	12/9/2004
US V. BRIGGS OF SAN ANTONIO, INC. D/B/A FAT TUESDAY	Title II	Public accommodation discrimination based upon national origin; case dismissed.	10/3/2003	11/23/2004
US V. BLACK WOLF, INC., (MOUNTY'S RESTAURANT)	Title II	Public accommodation discrimination based upon race; resolved by consent decree.	11/19/2003	11/20/2003
US V. TORINO CONSTRUCTION CORP., ET AL.	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	1/9/2004	1/12/2004
US V. BOROUGH OF BOUND BROOK	FHA	Land use and zoning discrimination based upon national origin; resolved by consent decree.	3/10/2004	3/12/2004
US V. B & S PROPERTIES (FOSTER APARTMENTS)	FHA	Rental discrimination based upon race; resolved by consent decree.	4/15/2004	4/1/2005
US V. DISTRICT OF COLUMBIA C/O OFFICE OF CORPORATION COUNSEL	FHA	Land use and zoning group home discrimination based upon disability; case pending.	4/15/2004	
US V. CARTERET TERRACE, LLC (MERIDIAN SQUARE APTS)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	4/30/2004	8/17/2004
US V. CRACKER BARREL RESTAURANT	Title II	Public accommodation discrimination based upon race; resolved by consent decree.	5/3/2004	5/3/2004
US V. VLAHAKIS	FHA	Rental discrimination based upon familial status; resolved by consent decree.	5/5/2004	10/26/2004
TRUJILLO & UNITED STATES V. BD OF DIRECTORS OF TRIUMVERA TOWER CONDO ASSOC; STOLLBERG	FHA	Harassment based upon disability; resolved by consent decree.	5/13/2004	9/8/2004
US V. ERGS, INC., ET AL.	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	5/13/2004	7/12/2005
US V. FIFTH THIRD BANCORP (FINANCIAL CORP./OLD KENT BANK)	ECOA FHA	Lending discrimination based upon race; resolved by consent decree.	5/19/2004	5/19/2004
US V. SHARLANDS TERRACE, LLC, ET AL.	FHA	Design and construct discrimination based upon disability; case pending.	6/4/2004	
US V. DAVID MADRID D/B/A TRINITY HOUSING LIVING SERVICES	FHA	Harassment and retaliation based upon disability and sex; resolved by consent decree.	6/17/2004	5/25/2005
US V. TANSKI	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	6/21/2004	7/7/2005
US V. FIRST AMERICAN BANK	ECOA FHA	Lending discrimination based upon race and national origin; resolved by consent decree.	7/13/2004	7/19/2004

US V. FALCON DEVELOPMENT CO. NO 9501, LLC, ET AL.	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	8/26/2004	9/23/2004
US V. VANCOUVER HOUSING AUTHORITY	FHA	Rental discrimination based upon disability; resolved by consent decree.	9/24/2004	10/15/2004
US V. DEER RUN MANAGEMENT CO., INC. (LINDSEY)	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	9/29/2004	11/24/2004
US V. HOUSING AUTHORITY OF BALTIMORE CITY	FHA	Rental discrimination based upon disability; resolved by consent decree	9/29/2004	12/21/2004
US V. CITY OF HANFORD	FHA	Land use and zoning group home discrimination based upon disability; resolved by consent decree.	9/30/2004	10/14/2004

FY 2005

Case Name	Statute	Brief Description	Filed date	Resolved Date
US V. CITY OF JANESVILLE	FHA	Land use and zoning discrimination based upon race and national origin; resolved by consent decree.	11/5/2004	11/15/2004
US V. WEST CREEK, L.L.C. (PETTINARO CONST. CO.0	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	11/18/2004	1/6/2005
US V. WONES	FHA	Harassment based upon sex; case pending.	12/16/2004	
US V. COVENANT RETIREMENT COMMUNITY	FHA	Housing discrimination based upon disability; case pending.	12/20/2004	
US V. PACIFIC LIFE INSURANCE CO. (NEW FOREST)	FHA	Rental discrimination based upon disability; resolved by consent decree.	12/22/2004	12/22/2004
US V. DAWSON DEVELOPMENT CO. (PARK PLACE APARTMENTS)	FHA	Rental discrimination based upon race; case pending.	1/18/2005	
US V. CITY AND COUNTY OF HONOLULU	FHA	Design and construct discrimination based upon disability; case pending.	2/22/2005	
US V. BRYAN CONSTRUCTION	FHA	Design and construct discrimination based upon disability; case pending.	3/10/2005	
US V. SHANRIE CO. (NETEMEYER ENGINEERING ASSOCIATES, INC., ET AL.)	FHA	Design and construct discrimination based upon disability; case pending.	4/25/2005	
US V. CITY OF HOLLYWOOD	RLUIPA	Land use and zoning discrimination based upon religion; case pending.	4/26/2005	
US V. SARALAND BD OF ADJUSTMENT (OWENS GR HOME)	FHA	Land use and zoning group home discrimination based upon disability; case pending.	5/18/2005	
US V. STEVENS	FHA	Rental discrimination based upon race; case pending.	5/18/2005	
US V. VILLAGE OF AIRMONT	RLUIPA FHA	Land use and zoning discrimination based upon religion; case pending.	6/10/2005	
U.S. V THOMAS J. FISCHER	FHA	Harassment based upon sex; case pending.	8/12/2005	
US V. MUNICIPAL HOUSING AGENCY OF COUNCIL BLUFFS	FHA	Rental discrimination based upon disability; case pending.	9/1/2005	
US V. WALTER PERLICK FAMILY TRUST, ET AL.	FHA	Rental discrimination based upon familial status; case pending.	9/1/2005	
US V. SILVA	FHA	Sales discrimination based upon national origin; case pending.	9/6/2005	
US V. CEDAR PROPERTY MANAGEMENT	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	9/14/2005	9/29/2005
US V. VILLAGE OF SOUTH ELGIN	FHA	Land use and zoning group home discrimination based upon disability; case pending.	9/14/2005	
US V. ARLINGTON PARK, LLC AND CHURCHILL DOWNS, INC.	FHA	Rental discrimination based upon familial status; case pending.	9/30/2005	

US V. JOYNER, ET AL.; JHJ PARTNERSHIP; FARRIOR & SONS CONSTRUCTION (MERIDIA	FHA	Design and construct discrimination based upon disability; resolved by consent decree.	9/30/2005	10/11/2005
US V. TWINING VILLAGE	FHA	Housing discrimination based upon disability; resolved by consent decree.	9/30/2005	10/3/2005

7. You are a member of the Federalist Society. That organization's mission statement contains the following assertion: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society."

   Question: Do you agree with this statement? Why or why not?

Answer: I was not aware of this statement, and I do not believe that it fairly characterizes the University of Chicago Law School when I attended it. I do not have a sufficient basis of knowledge to determine whether it can accurately be applied to any other law school.

8. An October 6, 2005 National Public Radio story discussed letters sent in June 2005 by the Voting Section to Knox and Franklin Counties in Ohio. These letters stated that no violations of Section 2 of the Voting Rights Act had occurred during the 2004 presidential election, despite evidence of long lines at the polls and delays in voting caused by insufficient numbers of voting machines in polling places that served primarily African-American voters.

   The NPR story featured interviews with several former senior career attorneys in the Voting Section. These officials indicated that the June 2005 Ohio letters were unprecedented in their content and read like legal briefs for the counties. Specifically, the letters state definitively that "there was no violation" of Section 2 of the Voting Rights Act. A Justice Department spokesperson, Eric Holland, stated in the NPR story that the letters were not unusual in their contents, and he turned over, as evidence, a letter dated December 8, 2003, to Vista, California.

   A. **Question**: Do you agree that the June 2005 letters sent to Knox and Franklin Counties are similar in contents to the December 2003 letter to Vista, California? Please explain.

Answer: Even though I have never supervised the Voting Rights Section, I believe it is important to provide an explanation, where possible, of the results of important investigations. It is my understanding that the letters to Knox and Franklin Counties and Vista, California do so.

   B. **Question**: In light of the comments made on NPR by former Voting Section officials, please identify all previous instances in which the Civil Rights Division has sent a letter to a local government in which it indicated that the Justice Department was closing a Section 2 investigation and that there was no violation of Section 2.

Answer: I do not have a basis of knowledge for this information. It is my understanding that the Voting Rights Section does not maintain separate files of correspondence under Section 2 of the Voting Rights Act. If confirmed, I would provide an explanation, where possible, of the results of important investigations.

9. An October 6, 2005 National Public Radio story discussed allegations that political attorneys in the Civil Rights Division are diminishing the voices of career attorneys. In addition, a former Acting Assistant Attorney General for Civil Rights, William Yeomans, has recently published an article in *Legal Affairs* magazine entitled "An Uncivil Division" sounding a similar theme. Mr. Yeomans wrote the following:

"[T]he dialogue between career and political appointees has been stifled. Political appointees are not getting the benefit of the career staff's expertise and experience. Morale among career attorneys has plummeted.... Many attorneys were upset – stunned and frightened – by the working conditions that they face. One career manager proclaimed in exasperation: 'It's like working for Caligula!' He meant that he never knows what the rules are or when he will fall out of favor. The line between loyal disagreement and disloyal dispute is narrow. Another career manager said he felt lucky because he and his section seemed to be under the radar, and he estimated that he saw the political head of the division roughly once a year. He hoped that he could keep it that way and survive."

A. **Question**: What steps will you take to try and improve morale among career attorneys in the Division?

Answer: It is very important to me that the employees at the Civil Rights Division enjoy their work. As a personal matter, I have always greatly enjoyed working for the Justice Department; it is why I have spent nearly a decade here. Working as a Justice Department attorney is a unique and rewarding career, and I hope that every attorney shares my level of enthusiasm. As a management matter, I believe that there is a connection between morale and productively.

I believe that I have fostered a positive dialogue in the sections that I supervise. My goal is to create an environment of hard work, mutual respect, open dialogue and professionalism. If confirmed, I would continue to do so across the entire Division and start by making myself available to career attorneys to hear their concerns. If confirmed, I will work very hard to constantly improve the morale of all employees at the Civil Rights Division.

B. **Question**: Will you agree to have an open door policy – like some of your predecessors have had – in which career attorneys in the Civil Rights Division can come directly to you to discuss issues they believe are not being adequately addressed by political attorneys in the front office or by their section managers?

Answer: Having been a career attorney at the Justice Department for most of my professional life, I am sensitive to, and appreciative of, the concerns of career attorneys. As a Deputy Assistant Attorney General, I meet regularly with career attorneys and affirmatively seek their advice and counsel. I have worked hard to ensure open access and open lines of communications

and foster a positive relationship with career attorneys. To this end, I have met weekly or biweekly with the management of each section that I supervise – the Educational Opportunities, Housing and Civil Enforcement, and Criminal Sections – in addition to more frequent and regular communications by phone and email. I also have had numerous meetings with career attorneys to discuss individual cases. If confirmed, I will continue to practice this policy of inclusion.

C. **Question**: Please identify the number of attorneys who have departed the Civil Rights Division each fiscal year for the past eight years.

Answer: From FY 1995 to FY 2000, an average of 11.8% of attorneys departed the Civil Rights Division each year. This figure has dropped slightly to 11.375% from FY 2001 to FY2004. The numbers for the last eight fiscal years are: FY 1997 - 33 attorneys (12.8%); FY 1998 - 30 attorneys (11.5%); FY 1999 - 29 attorneys (11%); FY 2000 - 32 attorneys (11.8%); FY 2001 - 48 attorneys (15.3%); FY 2002 - 23 attorneys (6.7%); FY 2003 - 46 attorneys (13%); FY 2004 - 36 attorneys (10.5%).

10. Mr. Yeomans also wrote that in the year 2003, the AAG for Civil Rights abolished the Civil Rights Division's hiring committee, which had for many years selected attorneys through the "honor's program." The hiring committee had consisted of career attorneys and political appointees alike. In its place, a hiring system was set up in the Civil Rights Division so that attorneys are selected almost entirely by political appointees.

A. **Question**: Is it true that a hiring system has been set up so that attorneys are selected almost entirely by political appointees? If not, please explain the role that career attorneys play in hiring attorneys into the Civil Rights Division.

Answer: The Department of Justice has always been one of the most prestigious places for an attorney to practice law. The attorneys selected each year for the Attorney General's Honors Program reflect this fact. In 2002, former Attorney General John Ashcroft centralized the hiring process for honors program attorneys, to include more employees in the decision-making and to make the interview schedule more accommodating for applicants. The Attorney General implemented these changes throughout the Department of Justice, not just in the Civil Rights Division.

Under the prior system, applicants paid their own way to interview in various locations across the country. Sole discretion resided within a small group of career attorneys in the interview and selection process. As a former attorney hired through the honors program under the prior system, for example, I did not interview with any of my supervisors or co-workers, nor did I meet them before arriving to work at the Department of Justice.

The current system offers some improvements. The Department of Justice now pays for candidates to come to Washington, D.C., where they meet with each Division that selected them for an interview. Both political appointees and career attorneys participate, allowing more input - not less - into the hiring process. If confirmed, I will ensure that career attorneys continue to play a role in the process for hiring honors program attorneys.

B. **Question:** Are you willing to reinstate the hiring committee that was abolished in 2003? Are you willing to include career attorneys on the committee? Are you willing to give greater hiring authority to career managers in the ten different sections of the Civil Rights Division? Please explain.

Answer: As explained above, the Attorney General directed a hiring process for honors program attorneys throughout the Justice Department, which involves the participation of both career and political attorneys. If confirmed, I would continue to respect decisions made by the Attorney General.

During my tenure as Deputy Assistant Attorney General, my hiring recommendations have been based solely on the strength of an applicant's qualifications. I have never considered any ideology as a requirement for employment as a career attorney. Indeed, career employees have played a central role in every career attorney whom I have recommended to be hired. If confirmed, I will continue to hire only highly qualified and motivated attorneys for every section within the Division.

11. At your nomination hearing, you indicated that because you had not supervised the Civil Rights Division's Employment Litigation Section, you did not know why that section had filed no pattern or practice cases on behalf of African Americans since January 2001.

Question: Now that you have had time to look into this matter, please discuss the reasons why the Civil Rights Division has filed no pattern or practice employment discrimination cases on behalf of African Americans since January 2001.

Answer: I have never supervised the Employment Litigation Section. It is my understanding that the Employment Litigation Section has brought the following number of cases during the past 5 years, 8 of which alleged racial or ethnic discrimination: FY 2005 - 6; FY 2004 - 11; FY 2003 - 5; FY 2002 - 4; FY 2001 (starting 1/20/01) - 0. I also understand that since January 2001, the Employment Litigation Section has successfully prosecuted the State of Delaware for employment practices that had a disparate impact upon African-Americans, unsuccessfully prosecuted the City of Garland, Texas, for employment practices that had a disparate impact upon African-Americans, and is currently conducting a major investigation of a Northeastern fire department for practices that have a disparate impact upon African-Americans and Hispanics.

As a general matter, I would, if confirmed, engage in a top-to-bottom review of each section to determine how best to fully, fairly and actively enforce the laws passed by Congress. The three sections of the Civil Rights Division that I have supervised for the past two years have shown an increased record of litigation productivity. If confirmed, I would vigorously enforce the employment discrimination laws, including those involving a pattern or practice of discrimination.

12. It has been publicly reported that attorneys in the Civil Rights Division's Appellate Section have recently been asked to work on cases involving appeals by illegal immigrants who are being deported by the U.S. government. I realize there is a backlog

of deportation appeals within the Justice Department, and that the Office of Immigration Litigation is unable to handle all of its appeals at this time. But I question whether it is appropriate for the Civil Rights Division to work on such cases, given that deporting undocumented individuals is not a traditional civil rights function.

A. **Question:** How much longer do you anticipate Civil Rights Division attorneys will work on deportation appeals? Can you give a commitment as to when Civil Rights Division attorneys will no longer have to work on such cases?

Answer: In November 2004, and again in June 2005, the Deputy Attorney General commissioned every component of the Justice Department to assist the Civil Division's Office of Immigration Litigation to timely address the growing number of immigration appeals. As with every other component, the Civil Rights Division has assisted meeting the Justice Department's obligation to enforce these laws. As the Deputy Attorney General directed: "An essential part of the Department's law enforcement responsibilities is the vigorous defense of decisions ordering criminal and other dangerous aliens removed from the United States. We also must ensure the full and fair implementation of our nation's asylum and other immigration laws. We have demonstrated a collective resolve that this workload will not be viewed as affecting only one component of the Department, but, rather, that the burden must be shared to be addressed effectively." I do not know how long the Division's attorneys will be involved in these law enforcement matters. However, I understand that Department leadership is working to identify more solutions to address this caseload consistent with our enforcement obligations under law. If confirmed, I will comply with the Deputy Attorney General's directives, while working to ensure the vigor of our traditional civil rights enforcement work.

B. **Question:** Are deportation appeals being assigned to attorneys only in the Appellate Section, or in other Civil Rights Division sections as well? Please provide information as to how many attorneys in the Division are working on one or more deportation appeal. Please also provide information about the number of Civil Rights Division attorney hours spent working on deportation appeals.

Answer: I have not been involved in the assignment of resources to comply with the Deputy Attorney General's direction and am not aware of any records that list the attorneys currently working on immigration appeals. According to available records, it is my understanding that during FY 2005, the Appellate Section filed 120 appellate briefs in the Office of Immigration Litigation, and that for the first three quarters of FY 2005 for which information is currently available approximately 38.8% of attorney hours in the Appellate Section of the Civil Rights Division have been spent on cases regarding the Immigration and Nationality Act. I understand that as the workload has increased, assignments needed to be made beyond just the employees in the Appellate Section, and that many attorneys, both career and political appointees, have been receptive to the new challenge and opportunity to participate at the federal appellate level.

C. **Question:** What percentage of attorney hours in the Appellate Section has been spent over the last year on deportation appeals?

Answer: While I have never supervised the Appellate Section, it is my understanding that for the three quarters of FY 2005 for which information is currently available, approximately 38.8% of attorney hours in the Appellate Section of the Civil Rights Division have been spent on cases regarding the Immigration and Nationality Act.

D. **Question**: How many briefs were filed in FY 2005 by the Appellate Section in total? How many of those were deportation appeal briefs? Please include in your tally any briefs drafted by the Civil Rights Division's Appellate Section, even if filed by the Civil Division.

Answer: It is my understanding that in FY 2005, the Appellate Section of the Civil Rights Division filed 193 briefs and substantive papers in the Supreme Court and in the courts of appeals. One hundred twenty of these filings were appellate briefs in the Office of Immigration Litigation. More than 87% of the decisions reaching the merits in civil rights cases were in full or partial accord with the Division's contentions. More than 88% of the decisions reaching the merits in immigration cases were in full or partial accord with the Division's contentions. The Division achieved comparable success in FY 2004: almost 89% of the decisions were in full or partial accord with our contentions.

E. **Question**: Are deportation appeals assigned on a voluntary or involuntary basis? Do Civil Rights Division attorneys have the option of not working on deportation appeals? If they do not have the option, will you commit to allowing Civil Rights Division attorneys to opt out of working on deportation appeals if they do not wish to work on such cases?

Answer: I have not been involved in the assignment of immigration litigation briefs. As a manager, I have always attempted to assign work consistent with the interests of employees and the needs of the United States. If confirmed, I would continue to do so.

13. The appellate section filed only 6 amicus briefs in 2004 – down from 22 amicus briefs that were filed in 1999.

Question: What is your explanation for the sharp drop in appellate amicus filings by this Administration's Civil Rights Division? Are you troubled by this trend? Why or why not?

Answer: I have never supervised the Appellate Section. I am informed that in the past fiscal year, the United States filed *amicus* briefs before the Supreme Court in three civil rights cases: *Johnson* v. *California*, 125 S. Ct. 1141 (2005) (finding strict scrutiny applies to government imposed racial classifications in the prison context); *Specter* v. *Norwegian Cruise Lines*, 125 S. Ct. 2169 (2005) (finding ADA applies to foreign-flag cruise ships in U.S. waters); and *Jackson* v. *Birmingham Board of Education*, 125 S. Ct. 1497 (2005) (finding private right of action for retaliation under Title IX). We prevailed in each. Moreover, the Civil Rights Division has a 90% rate of success in the federal courts of appeals with regard to its *amicus* filings during the past five years, as compared with just 60% during the previous administration. Pursuant to the

U.S. Attorney's Manual, the Civil Rights Division should consider numerous factors before deciding upon amicus participation:

8-2.170 Standards for *Amicus* Participation
A. Guidelines. Although guidelines cannot cover all possible cases, amicus participation by the Civil Rights Division ("the Division") should generally be limited to the following types of cases:

In which a court requests participation by the Division;
Which challenge the constitutionality of a federal civil rights statute; (cf. 28 U.S.C. § 2403(a));
Which involve the interpretation of a civil rights statute, Executive Order, or regulation that the Department of Justice (or another federal agency) is empowered to enforce;
Which raise issues the resolution of which will likely affect the scope of the Division's enforcement jurisdiction (e.g., cases involving the concept of state action under the Fourteenth Amendment);
Which raise issues that could affect in a significant way private enforcement of the statutes the Division enforces; and
Cases in which a special federal interest is clear and is not likely to be well-served by the private litigants.
There will, of course, be instances not fitting the above criteria in which *amicus* participation should nevertheless be considered.

B. Other Factors. In addition to these necessarily general standards, there are other factors that should be considered in determining whether to make a recommendation for *amicus* participation. These include:
The importance of the issue to be addressed, the level of the court in which it is posed, and the probable impact of its resolution;
The probability of the Division being able to contribute substantially to the resolution of the case (e.g., competence of private counsel, state of the record, timeliness);
The wisdom of *amicus* participation as distinguished from intervention; and
The availability of Division resources.

These decisions are necessarily made on a case-by-case basis. If confirmed, I would comply with these requirements with an eye towards vigorously enforcing all of the civil rights laws.

14. According to the *Legal Affairs* article by Mr. Yeomans: "Recently, one attorney with sterling credentials, who was hired into the division in the Clinton Administration, was told that she would be transferred involuntarily out of the appellate section. Another, also hired in that administration, was told that she would no longer be permitted to work on civil rights cases."

Question: Are these allegations true? If so, please provide an explanation for these personnel decisions. How many attorneys in the Civil Rights Division have been told they can no longer work on civil rights cases? What type of work have these attorneys been asked to perform? Please explain.

Answer: I have never supervised the Appellate Section, and was not involved in these purported matters. Consistent with the requirements of the Privacy Act and Department of Justice policy, it would be inappropriate to comment publicly on personnel matters. As a manager, I have asked every attorney to employ his or her skills and best efforts to vigorously enforce our nation's civil rights laws, and have evaluated employees solely upon the quality of their work. If confirmed, I would continue to do so.

Written Questions from Sen. Russ Feingold for Mr. Wan Kim
Nominee for Assistant Attorney General of the
Civil Rights Division, Department of Justice

1. In his first State of the Union speech in 2001, President Bush said he had asked the Attorney General to "develop specific recommendations to end racial profiling." On June 17, 2003, the Department issued *Guidelines Regarding the Use of Race by Federal Law Enforcement Agencies*. These guidelines are an important step toward ending racial profiling, but there are some significant shortcomings. The guidelines do not create an enforcement mechanism, do not apply to state or local agencies, and do not address profiling based on national origin or religion.

    a. If confirmed, what enforcement mechanism would you provide to victims of racial profiling by federal law enforcement officers?
    b. What steps would you take to ensure state and local law enforcement agencies do not engage in racial profiling?
    c. What do you believe needs to happen for this country to fulfill the President's desire to "end racial profiling," and how do you intend to further that goal?

Answers:

(a) I join the President in condemning racial profiling. Racial profiling is discrimination, and it taints the entire criminal justice system. The Department of Justice issued the federal racial profiling guidelines in June 2003 after much careful study and consideration. Federal law enforcement officials are required to adhere to the guidelines, and federal law enforcement agencies are required to ensure such compliance. The guidelines themselves do not provide for a separate cause of action for victims. If confirmed, I would work to ensure compliance with the existing guidelines and carefully consider whether additional recommendations would be appropriate.

(b) If confirmed, I would ensure that credible allegations of racial profiling were treated in accordance with the requirements of Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, which prohibits state and local law enforcement agencies from engaging in a pattern or practice of conduct that deprives persons of their constitutional or statutory rights. I also would ensure that the Civil Rights Division is ready and willing to work cooperatively with local law enforcement by providing training and technical assistance on the federal guidelines issued by the Department of Justice as well as the issue of racial profiling itself, including working with the Office of Justice Programs to ensure the availability of training and technical assistance for state and local law enforcement agencies.

(c) The use of racial stereotypes as the basis for law enforcement action is wrong, unconstitutional and a taint on the entire criminal justice system. All law enforcement officials, as well as the general public, should be aware of these facts. As an employee at the Department of Justice, I am sworn to uphold the Constitution, the laws passed by Congress, and the Justice Department's rules and regulations. If confirmed, I will use every tool at my disposal to vigorously enforce all of the rules that prohibit racial profiling.

2. On January 22, 2003, the Department of Justice signed a Memorandum of Agreement with the Village of Mount Prospect, Illinois Police. This agreement states: "The Village and the MPPD shall prohibit police officers from exercising their police powers in a manner that unlawfully discriminates against individuals based on race, color, national origin, or ethnicity."

   The consent decree prohibits racial profiling on a broader basis than the federal guidelines by including color and national origin. If confirmed, what would you do to ensure that federal law enforcement officers are held to the same standard regarding racial profiling as the Mount Pleasant Police?

Answer: The federal guidelines specifically address only race and ethnicity, while this Memorandum of Agreement addresses "race, color, national origin, or ethnicity." But like the Memorandum of Agreement, which proscribes "unlawful[] discriminat[ion]," the federal guidelines in no way sanction any unlawful discrimination on the basis of race, color, national origin or ethnicity. Unlawful discrimination by any law enforcement agency on the basis of any these factors would offend the Constitution, and if confirmed, I would police such transgressions vigorously. If confirmed, I would work to ensure compliance with the existing federal guidelines and carefully consider whether additional recommendations would be appropriate.

3. You have spent most of your career working for the Department of Justice, but you have now been nominated to fill a political position.

   a. What impact would your experience as an attorney within DOJ have on your management and oversight of career attorneys if you are confirmed?
   b. If confirmed, how would you enforce the tradition of public service within your division?
   c. How would you foster this tradition through the hiring process?
   d. What experiences do you think are most valuable to succeed as a career attorney within the Division?
   e. Ideally and practically, what should the relationship be between political appointees and career attorneys within the Division?

Answers:

(a) Having been a career attorney at the Justice Department for most of my professional life, I am sensitive to, and appreciative of, the concerns of career attorneys. As a Deputy Assistant Attorney General for the past two years, I have tried to manage the career attorneys in a respectful and cooperative manner, such as listening to their legal arguments, making timely decisions and providing clear guidance. If confirmed, I would continue to work with career attorneys in an environment of mutual respect.

(b) I believe that it is important for all lawyers to engage in public service. I spent almost all of my professional career working in government, and also have served in the United States Army Reserve and National Guard for many years. I serve currently as a director of a non-profit organization, and as an alternate hearing member on the D.C. Bar Board of Professional Responsibility. If confirmed, I would encourage all Justice Department employees to consider doing even more public service than our work in the government requires.

(c) During my tenure as Deputy Assistant Attorney General, my hiring recommendations have been based solely on the strength of an applicant's qualifications. I believe that a demonstrated commitment to public service is a positive qualification for employment at the Department of Justice.

(d) I believe that each applicant for employment needs to be considered on his or her own merits, and in light of the specific needs of a particular section. As a general matter, however, I have found that many outstanding Justice Department attorneys often have a great deal of intelligence, dedication, humor, wisdom, modesty and patience. I look for such qualities in a prospective employee.

(e) Having been a career attorney at the Justice Department for most of my professional life, I know first-hand the value of the expertise and experience that career attorneys provide. I have always believed that a wide variety of opinions and input is necessary to make an informed decision. In my two years with the Division, I have regularly relied upon the advice of career management in the sections that I supervise. It is difficult for me to imagine doing otherwise. As a Deputy Assistant Attorney General, I meet regularly with career attorneys and affirmatively seek their advice and counsel. If confirmed, I will continue to practice this policy of inclusion.

4. In a recent article in the magazine *Legal Affairs*, William Yeomans, a career DOJ attorney who worked in the Civil Rights Division for over 20 years, suggests that a strong divide has developed between political appointees and career attorneys within the Civil Rights Division. He writes that decisions have been made by

appointees without input from career attorneys and that there has been a "declining morale and talent drain" within the Division.

a. Do you believe that the divide that Mr. Yeomans describes exists in the Division?
b. Have you witnessed or been made aware specifically of any such problems? If so, please describe generally any incident you have seen or about which you have heard.
c. If confirmed, how will you address tensions between career attorneys and political appointees?

Answers:

(a) Having been a career attorney at the Justice Department for most of my professional life, I am sensitive to, and appreciative of, the concerns of career attorneys. I believe that claims of a "strong divide" between political appointees and career attorneys or a "declining morale and talent drain" are overstated. Indeed, a lower percentage of attorneys have departed the Civil Rights Division during the past four years. From FY 1995 to FY 2000, an average of 11.8% of attorneys departed the Civil Rights Division each year; this figure has dropped slightly to 11.375% from FY 2001 to FY 2004.

(b) As a Deputy Assistant Attorney General for the past two years, I have worked hard to ensure open access and open lines of communications and foster a positive relationship with career attorneys. To this end, I have met weekly or biweekly with the management of each section that I supervise – the Educational Opportunities, Housing and Civil Enforcement, and Criminal Sections – in addition to more frequent and regular communications by phone and email. I also have had numerous meetings with career attorneys to discuss individual cases. I believe that I have fostered a positive dialogue in the sections that I supervise.

(c) My goal is to create an environment of hard work, mutual respect, open dialogue and professionalism. If confirmed, I would ensure open access and open lines of communications and foster a positive relationship with career attorneys across the entire Division. I would start by making myself available to career attorneys throughout the Division to hear their concerns.

5. Mr. Yeomans' article also discusses changes in attorney hiring. He writes that in 2003, the former Assistant Attorney General of the Division made the decision to abolish the hiring committee that traditionally reviewed applications for the Attorney General's Honors Program within the Civil Rights Division. This committee had been compromised of career attorneys. Since 2003, political appointees have handled the hiring of new attorneys through the Honors Program.

Mr. Yeomans states that this creates situations where new employees arrive for work without ever having met with their new colleagues or bosses.

a. Do you think this change has affected morale within the Division?
b. If confirmed, what changes, if any, would you make to the hiring process?
c. Do you believe that career attorneys should once again be involved in the committee that makes hiring decisions for the honors program?

Answer: The Department of Justice has always been one of the most prestigious places for an attorney to practice law. The attorneys selected each year for the Attorney General's Honors Program reflect this fact. In 2002, former Attorney General John Ashcroft centralized the hiring process for honors program attorneys, to include more employees in the decision-making and to make the interview schedule more accommodating for applicants. The Attorney General implemented these changes throughout the Department of Justice, not just in the Civil Rights Division.

Under the prior system, applicants paid their own way to interview in various locations across the country. Sole discretion resided within a small group of career attorneys in the interview and selection process. As a former attorney hired through the honors program under the prior system, for example, I did not interview with any of my supervisors or co-workers, nor did I meet them before arriving to work at the Department of Justice.

The current system offers some improvements. The Department of Justice now pays for candidates to come to Washington, D.C., where they meet with each Division that selected them for an interview. Both political appointees and career attorneys participate, allowing more input - not less - into the hiring process. If confirmed, I will ensure that career attorneys continue to play a role in the process for hiring honors program attorneys.

6. Mr. Yeoman's article also addresses the treatment of career attorneys. He states:

> Personnel practices have been revamped to foster the removal of attorneys viewed as insufficiently loyal and replace them with attorneys selected because of ideology.

a. Do you agree that this has happened? What impact do you think this has had on the Civil Rights Division?
b. Will you commit to revising personnel practices in the Division so that attorneys are selected and retained based on qualifications and performance, not ideology?

Answer: During my tenure as Deputy Assistant Attorney General, my hiring recommendations have been based solely on the strength of an applicant's qualifications. I have never considered any "ideology," political or otherwise, as a requirement for employment as a career attorney. Indeed, career employees have played a central role in every career attorney whom I have recommended to be hired. If confirmed, I will

continue to hire only highly qualified and motivated attorneys without regard to any particular "ideology."

7. A study by the non-partisan Transactional Records Access Clearinghouse ("TRAC") showed a decrease in the number of cases, both criminal and civil, brought by the Civil Rights Division during the Bush Administration. In an interview on National Public Radio in November of last year, you stated that you believed the data and analysis of this study were flawed. While the study found the number of cases brought by the Civil Rights Division decreased and complaints to the Division remained constant, you stated that the number of cases filed increased and the number of complaints decreased. You also indicated that you would like to sit down with TRAC and review how it came up with its conclusion.

    a. Did you ever have a meeting with TRAC to address the discrepancies between its analysis and your views?
    b. Have you or the Department independently studied this issue? What conclusions did you reach?
    c. If confirmed, how will you address the public perception that the Civil Rights Division is not as effective in combating discrimination as it should be?

Answers:

(a) The Civil Rights Division has offered to meet with representatives from TRAC, but TRAC has never accepted.

(b) The Civil Rights Division routinely monitors the number of complaints and prosecutions in the Criminal Section. We also have carefully studied TRAC's report and evaluated its conclusions. We have concluded that, as an empirical matter, the Department has maintained a constant level of criminal civil rights prosecutions, despite an overall decline in complaints in recent years. In fact, we have provided TRAC with detailed lists of every criminal civil rights case brought in the past nine years. These lists fully substantiate our vigorous record of criminal civil rights prosecutions – including recently bringing the largest number of such cases ever filed in a single year.

(c) If confirmed, I would work vigorously to ensure that the hard work and many impressive accomplishments of the dedicated professionals who work in the Civil Rights Division are known. Even well-intentioned reports may cast an erroneous perception that the Civil Rights Division is not effectively combating discrimination – a particularly unfair result in the Criminal Section, where the Division has both added substantial resources and raised the bar in enforcement activity. While there is always room for improvement, I am proud to work in the Civil Rights Division, and if confirmed, would make my enthusiasm for our important work known.

8. After you expressed your concerns about TRAC's data, TRAC studied how the Civil Rights Division collects data about complaints and cases. In a second study, TRAC "found serious flaws in how the Civil Rights Division tracks the enforcement of federal civil rights laws and the extent of U.S. civil rights problems." During the study, TRAC contacted Nelson D. Hermilla, Chief of the Division's FOI/Privacy Acts Branch. In a letter to TRAC, Mr. Hermilla stated:

> [T]here currently is no way to obtain either an exact number of complaints that the Criminal Section declined to investigate nor to obtain a complete breakdown by type of complaint from the data base because, e.g., citizen calls are not tracked in the Inter-Active Case Management System (ICM). Any manual tallies on complaint calls might include four or many more calls on the same factual circumstances (or 'matter') by different individuals and the tallies may include repeat callers and writers. As yet, the computer has no way of identifying whether or not a person is complaining about the same incident or even that the same person has written in numerous times about the same matter; therefore, the Division counts all letters and calls as a complaint received.
>
> A copy of that letter is attached.

   a. Do you agree that data collection is a problem that needs to be addressed within the Division?
   b. If confirmed, what would you do to ensure that more complete and accurate data on the Division's activities can be collected?

Answers:

(a) The Civil Rights Division makes it a priority to collect and maintain accurate data. As electronic information systems become more sophisticated, the Division continues to evaluate, explore and enhance its capability to keep accurate track of every record among its thousands of complaints, investigations, pending cases and closed matters. In the paragraph quoted above, the Division was responding to TRAC's interest in obtaining "electronic" data on the "sources" of complaints. While the Division historically maintains careful and accurate records of each complaint received, all of those records are not then transferred into electronic format. If confirmed, I would work with the Division's professional staff to determine whether it would be feasible and appropriate to do so.

(b) The Division's highly professional Information Technology staff is constantly exploring ways to bring all data collection into a more easily retrievable format. If confirmed, I would work with these professionals to ensure that collecting and maintaining accurate data remains a priority. I also would

examine the feasibility of using more electronic or computer systems to capture and store even more information than currently recorded.

9. The TRAC report on data collection found, "The bottom line: despite claims to the contrary by the Civil Rights Division, case-by-case information drawn from the separate systems of the courts and the prosecutors showed a real decline in cases actually filed in court against different kinds of violators."

    a. What is your response to their conclusion?
    b. If confirmed, what would you do to reverse the decline in cases filed in all sections of the Civil Rights Division?

Answers:

(a) I respectfully but firmly disagree. TRAC has never provided specifics to support its allegation of what, in TRAC's view, the data "appears to show," nor has it accepted the Division's offer for a meeting to discuss its allegations. With no specifics or explanations, it is difficult to know how TRAC arrived at its conclusions. It is simply incorrect for anyone to purport that there has been "a real decline in the cases," a claim that is squarely rebutted by the detailed lists of every criminal civil rights case brought in the past nine years that we have provided to TRAC.

(b) Many components of the Civil Rights Division have filed more civil rights cases, conducted more civil rights investigations, and resolved more civil rights matters in the past five years than before. I believe that we can do even more. As a general matter, I would, if confirmed, engage in a top-to-bottom review of each section to determine how best to fully, fairly and actively enforce the laws passed by Congress. The three sections of the Civil Rights Division that I have supervised for the past two years have shown an increased record of litigation productivity. If confirmed, I would vigorously enforce all of the civil rights laws.

Written Questions of Senator Edward M. Kennedy
To Wan J. Kim, Nominee to be Assistant Attorney General for Civil Rights

VOTING RIGHTS ACT ENFORCEMENT

1. At your nomination hearing, Senator Durbin asked whether you personally agreed with the recent decision of the Civil Rights Division to pre-clear new voter ID requirements of the State of Georgia under Section 5 of the Voting Rights Act. You answered that you were not sufficiently familiar with the circumstances to respond. Now that you have had an opportunity to review the information on that decision, please state whether or not you agree with it.

Answer: I have never supervised the Voting Rights Section, and I was not involved in this decision. It is my understanding that this was a careful and lengthy undertaking. The submission was received on June 13, 2005 and supplemental submissions were received thereafter. A team of seven career professionals from the Voting Rights Section carefully reviewed these submissions and conducted numerous analyses before making a determination on this matter on August 26, 2005. Unfortunately, I have not had a similar opportunity to conduct such a rigorous review. I have no reason to doubt the reasoned and good-faith analysis of those who did. As an employee of the Department of Justice, it would be inappropriate for me to comment further on a settled matter. I note, however, that private litigation regarding these voter identification requirements has been brought, which the Voting Rights Section is monitoring to determine whether additional facts should become available. If confirmed, I will carefully monitor the progress of that litigation.

2. During the hearing, I asked what you would do to improve the Division's very low rate of enforcement under Section 2 of the Voting Rights Act. You indicated that you believe there is room for improving the Division's enforcement across the board, and that you would seek to do so, including in the Voting Section. Please state what affirmative steps you will take, in each Section of the Division, to improve enforcement.

Answer: Even though I have never supervised the Voting Rights Section, as a general matter I would, if confirmed, engage in a top-to-bottom review of each section to determine how best to fully, fairly and actively enforce the laws passed by Congress. The three sections of the Civil Rights Division that I have supervised for the past two years have shown an increased record of litigation productivity. If confirmed, I would vigorously enforce the voting rights laws, including those involving a violation of Section 2 of the Voting Rights Act.

3. I also asked whether you would maintain the traditional rule of this Administration and past Administrations of keeping the Division's enforcement of citizens' voting rights separate from the Department's criminal enforcement work. Last year I met with officials in both the Criminal and Civil Rights Divisions on this issue. All of them gave me assurances that the Administration has a bright line rule that

Civil Rights Division personnel cannot be used to look into voter fraud. The principal reason is that if Division personnel are looking for fraud or investigating criminal voting matters, minority communities will be reluctant to cooperate with them in civil rights investigations. During your hearing, you testified that you were not aware of this traditional separation between the work of the Civil Rights Division and the enforcement of voter fraud provisions. Now that you have had an opportunity to review the Department's practices on this issue, will you assure the Committee that, if confirmed, you will maintain the separation between the Civil Rights Division's role of enforcing voting rights and protecting ballot access, and the Criminal Division's role in preventing voter fraud and other crimes associated with elections?

Answer: The Civil Rights Division is responsible for enforcement of the Voting Rights Act and other federal voting rights statutes, while the Criminal Division is responsible for the enforcement of criminal election crime statutes. I will adhere to this traditional separation, which is incorporated in the United States Attorney's Manual, and has always been construed to apply to all of the criminal voting statutes:

> USAM 9-85.200 Federally Protected Activities (18 U.S.C. § 245)
>
> No prosecution of an offense described in 18 U.S.C. § 245 (Federally Protected Activities) may be undertaken by the United States except upon the certification of the Attorney General or Deputy Attorney General that in his or her judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice. The function of certification may not be delegated. See 18 U.S.C. § 245(a)(1). The anti-riot provision, 18 U.S.C. § 245(b)(3), and violations of 18 U.S.C. § 245(b)(1), insofar as it relates to matters not involving discrimination or intimidation on grounds of race, color, religion, or national origin, are assigned to the Criminal Division and requests for certification relating to them should be sent to the Criminal Division.
>
> When the offense involves voting, and race is *not* an issue, prosecutors should contact the Public Integrity Section of the Criminal Division. When the offense involves voting and race is an issue, prosecutors should contact the Criminal Section of the Civil Rights Division.

4. There is currently much discussion of the use of photo IDs at the polls as a means of preventing voter fraud, although there is no evidence that photo identification requirements are effective in combating fraud. As you know, voter ID provisions are included in the Help America Vote Act. Would you agree that it's inappropriate to divert Division resources from expanding ballot access and ensuring equal opportunity in voting in order to investigate whether states have complied with those ID provisions?

Answer: As a general matter, the Department of Justice is charged with enforcing all of the laws that Congress has enacted. It is my understanding that the Civil Rights Division has not filed lawsuits to enforce the voter identification provisions of the Help

America Vote Act, nor have we received credible and specific allegations of such violations.

5. Please specify, by year, how many total investigations the Voting Section has conducted since 2001, and for each investigation, please state:

a. whether the investigation is currently pending, or if not, at what stage of investigation or litigation it was closed (i.e., after informal investigation, after formal investigation, after suit was filed, after trial, after appeal);
b. the jurisdiction investigated;
c. the subject matter of the investigation and the statutory authority under which it is or was conducted, including whether or not the investigation involves a claim of potential discrimination against minority voters under Section 2 of the Voting Rights Act;
d. the racial, ethnic, or language minority group whose rights may have been affected by potential violations;
e. the total number of hours spent by career attorneys in the Voting Section on the investigation.

Answer: It is my understanding that, pursuant to Department of Justice policy, it would be inappropriate to disclose publicly information regarding investigations that do not result in the filing of litigation. I am also informed that the Voting Section does not officially record investigation numbers. However, I understand that, since 2001, the Voting Rights Section has filed or obtained relief in the following cases: United States v. City of Charleston (D. S.C.); United States v. Crockett County, TN ((W.D. Tenn.); United States v. Berks County, PA (E.D. Pa.); United States v. Osceola County, FL (M.D. Fla.); United States v. Alamosa County, CO (D. Colo.); United States v. Blaine County, MT (D. Mont.) United States v. Ector County, TX (W.D. Tex.); United States v. City of Boston, MA (D. Mass.); United States v. City of Azusa, CA (C.D. Cal.); United States v. City of Paramount, CA (C.D. Cal.); United States v. City of Rosemead, CA (C.D. Cal.); United States v. Westchester County (S.D. N.Y.); United States v. San Benito County (N.D. Cal.); United States v. San Diego County (S.D. Cal.); United States v. Ventura County (C.D. Cal.); United States v. Brentwood Union Free School District (E.D. N.Y.); United States v. Suffolk County (E.D. N.Y.); United States v. Yakima County (E.D. Wash.); United States v. Orange County (M.D. Fla.); United States v. Miami-Dade County (S.D. Fla.); United States v. Pulaski County (E.D. Ark.); United States v. State of New York (N.D.N.Y.); United States v. State of Tennessee (M.D. Tenn.); United States v. City of St. Louis (E.D. Mo.); United States v. State of Georgia (N.D. Ga.); United States v. State of Pennsylvania (M.D. Pa.); United States v. State of Oklahoma (W.D. Okla.); United States v. State of Texas (W.D. Tex.). More specific details of these cases are available on the Voting Rights Section's website: http://www.usdoj.gov/crt/voting/litigation/caselist.htm.

EMPLOYMENT DISCRIMINATION

1. Since 2001, the Civil Rights Division has filed relatively few cases alleging a pattern or practice of employment discrimination. Under Presidents Reagan, Bush 41,

and Clinton, the Division filed an average of 13 employment discrimination cases a year, most of which were "pattern or practice" cases. But under this Administration, the average is only four cases a year. In the first four years, the Division filed only 5 pattern or practice cases, and only two alleged racial or ethnic discrimination. One of those cases was developed and filed by the U.S. Attorney's office in Manhattan, not by the Division itself. If you are confirmed as Assistant Attorney General, what will you do to see that the Civil Rights Division improves its record of vigorously pursing claims of pattern or practices of employment discrimination?

Answer: I have never supervised the Employment Litigation Section. It is my understanding that the Employment Litigation Section has brought the following number of cases during the past 5 years, 8 of which alleged racial or ethnic discrimination: FY 2005: 6; FY 2004 11; FY 2003 5; FY 2002 4; FY 2001 (starting 1/20/01) 0.

As a general matter, I would, if confirmed, engage in a top-to-bottom review of each section to determine how best to fully, fairly and actively enforce the laws passed by Congress. The three sections of the Civil Rights Division that I have supervised for the past two years have shown an increased record of litigation productivity. If confirmed, I would vigorously enforce the employment discrimination laws, including those involving a pattern or practice of discrimination.

2. One of the Department's most important means of preventing job discrimination is by "disparate impact" analysis. Even though an employer uses an apparently neutral employment practice, if that practice has a disparate effect based on race, sex, religion, or other prohibited factors, then the employer has to show that the practice is required by business necessity and that there are no less discriminatory ways of achieving the purpose. Congress added the disparate impact provisions to Title VII in 1991, because it was the only way to address some of the most serious barriers to employment. If you are confirmed, you will vigorously pursue disparate impact cases?

Answer: Yes.

3. In 2004, the Department shifted the responsibility for enforcing the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) to the Civil Rights Division's Employment Litigation Section, which also enforces Title VII. USERRA provides important protection for men and women in our armed forces, including reservists, and requires fair and equal treatment in the workplace. It's vitally important that both Title VII and USERRA Act are effectively enforced, and that the Employment Litigation Section's new enforcement responsibilities under USERRA in no way divert the Section from continuing its core mission of preventing job discrimination based on religion, national origin, race, and gender. If you are confirmed, how will you ensure that the Division will increase its Title VII enforcement and also actively pursues its responsibilities under the USERRA for members of our armed forces?

Answer: It is my understanding that the Employment Litigation Section has been assigned the responsibility for enforcing USERRA. I am informed that the Section has hired more personnel so that it can meet this new obligation while maintaining its vigorous enforcement of Title VII. I am committed to the active and vigorous enforcement of all of the laws passed by Congress. If confirmed, I will carefully monitor the workload and productivity of the Employment Litigation Section to ensure that it effectively enforces all of the statutes assigned to it.

4. Please specify, for each year since January 2001, the number of Employment Litigation Section investigations formally authorized by the Civil Rights Division, and for each investigation:

a. the date the investigation was authorized;

b. whether the investigation is currently pending, and if not, at what stage of the investigation it was closed (i.e., after formal investigation, after suit was recommended, after suit was filed, after trial, after appeal);

c. the subject matter of the investigation and the statutory authority under which it was conducted, including whether the investigation involved a potential pattern or practice of employment discrimination;

d. whether the investigation involved claims of discrimination based on race, ethnicity, gender, color, or religion, and the demographic identity of the potential victims; and

e. the total number of hours spent by career attorneys in the Employment Litigation Section on the investigation and/or litigation.

Answer: It is my understanding that, pursuant to Department of Justice policy, it would be inappropriate to disclose publicly information regarding investigations that do not result in the filing of litigation. This is especially true in the context of Title VII of the Civil Rights Act of 1964, which prohibits governmental officials from making public any charges prior to the filing of a complaint. However, I am informed that the Employment Litigation Section has opened the following number of investigations since FY 2001: FY 2005 - 65; FY 2004 - 80; FY 2003 - 35; FY 2002 - 43; FY 2001 - 38. I am also informed that, since January 20, 2001, the Employment Litigation Section has filed the following Title VII cases: United States v. State of Ohio (S.D. Ohio); United States v. Pontiac, Michigan Fire Department (E.D. Mich.); United States v. Weimar Independent School District (W.D. Tex.); United States v. City of Cairo, Illinois (S.D. Ill.); United States v. Escambia County Board of Education (S.D. Ala.); United States v. City of Elsa, Texas (S.D. Tex.); United States v. New York MTA and NYC Transit Auth. (E.D.N.Y.); United States v. City of Gallup (D.N.M.); United States v. Los Angeles Metropolitan Transit Auth. (C.D. Ca.); Jane Doe and United States v. District of Columbia (D. D.C.); Jane Doe II and United States v. District of Columbia (D.D.C.); Jane Doe III and United States v. District of Columbia (D.D.C.); Lemons and United States v. Pattonville Fire

District (E.D. Mo.); United States v. University of New Mexico (D.N.M.); Bond and United States v. City of Baltimore Department of Public Works (D. Md.); United States v. University of Medicine and Dentistry of New Jersey (D.N.J.); United States v. City of Erie (W.D. Pa.); United States v. Greenwood Community School Corp. (S.D. Ind.); United States v Town of W. Terre Haute (S.D. Ind.); United States v. University of Guam (D. Guam); United States v. Regents of the University of California (E.D. Ca.); United States v. Prince Georges County Fire Department (D. Md.); United States v. Indiana Department of Transportation (S.D. Ind.); United States v. City of Fort Lauderdale (S.D. Fla.); United States v. Zuni Public School District (D.N.M.); United States v. Northwestern New Mexico Regional Solid Waste Authority (D.N.M.). I am also informed that, since January 20, 2001, the Office of the United States Attorney for the Southern District of New York has filed two Title VII cases authorized by the Civil Rights Division: United States v. New York City Department of Parks and Recreation (S.D.N.Y.) and United States v. City of New York Housing Authority (S.D.N.Y.). Lastly, since the Civil Rights Division obtained USERRA enforcement responsibility in September 2004, the Employment Litigation Section has filed the following cases under that statute: McCullough v. City of Independence Fire Department (W.D. Mo.); United States v. Indiana Department of Correction (S.D. Ind.); Anthony Lincoln v. First Express (D.N.J.); Villalobos v. Gulfstream Academy of Aeronautics, Inc. (S.D. Fla.); Charles W. Goodreau v. Bridgestone/Firestone North American Tire, LLC (M.D. Tenn.); Benito A. Colon Ortiz v. International Ethical Laboratories, Inc. (D.P.R.). More specific details on most of these cases are available on the Employment Litigation Section's website: http://www.usdoj.gov/crt/emp/papers.html.

5. In your view, do the numbers reflected in response to question 4, above, indicate a need for more vigorous enforcement in a particular area within the Employment Litigation Section's purview?

Answer: I have never supervised the Employment Litigation Section. Out of respect for the Senate's role in giving advice and consent on my nomination, I have not consulted with the career staff of the Employment Litigation Section to discuss its past or pending cases. If confirmed, I would explore what the Employment Litigation Section, and every other Section in the Civil Rights Division, could do better.

APPELLATE LITIGATION

1. Traditionally, the Civil Rights Division's Appellate Section has filed considerably more *amicus* briefs than is currently the case. One reason seems to be that the Section is currently bogged down litigating immigration cases normally handled by the Office of Immigration Litigation in the Department of Justice. I understand that the shift was intended to help the Department clear a backlog, and was supposed to last for only a few months, but that it has continued for much longer than originally anticipated.

a. If you're confirmed, will you seek to end the transfer of non-civil rights cases to the Civil Rights Division, particularly the immigration cases currently taking up so much time in the Appellate Division?

b. It appears that some of these immigration cases are now being handled by attorneys in the other Sections of the Civil Rights Division in addition to the Appellate Section. Please confirm whether this is so, and identify the number of attorneys in each Section who are currently handling such cases. Will you work to ensure that resources from other Sections in the Division aren't diverted to these non-civil rights issues?

Answer

(a) In November 2004, and again in June 2005, the Deputy Attorney General commissioned every component of the Justice Department to assist the Civil Division's Office of Immigration Litigation to timely address the growing number of immigration appeals. As with every other component, the Civil Rights Division has assisted meeting the Justice Department's obligation to enforce these laws. As the Deputy Attorney General directed: "An essential part of the Department's law enforcement responsibilities is the vigorous defense of decisions ordering criminal and other dangerous aliens removed from the United States. We also must ensure the full and fair implementation of our nation's asylum and other immigration laws. We have demonstrated a collective resolve that this workload will not be viewed as affecting only one component of the Department, but, rather, that the burden must be shared to be addressed effectively." If confirmed, I will comply with the Deputy Attorney General's directives, while working to ensure the vigor of our traditional civil rights enforcement work.

(b) I have not been involved in the assignment of resources to comply with the Deputy Attorney General's direction. I understand that as the workload has increased, assignments needed to be made beyond just the employees in the Appellate Section, and that many attorneys, both career and political appointees, have been receptive to the new challenge and opportunity to participate at the federal appellate level. I also understand that Department leadership is working to identify more solutions to address this caseload consistent with our enforcement obligations under law.

2. The Civil Rights Division recently filed a brief in a case where a school district was challenging the constitutionality of the Individuals with Disabilities Education Act, Fitzgerald v. Camdenton R-III School District. The district court invited the Division to participate, because the constitutionality of a federal statute was at issue. But the Division apparently waited months before filing a brief, which didn't even address the question of whether the statute is constitutional.

a. Did you have any involvement in the decision not to defend the constitutionality of the IDEA?

b. Do you have any concerns about whether the Act is constitutional?

c. If you are confirmed, will you respond promptly to notification from the courts that the constitutionality of a civil rights statute is at issue?

d. Do you have any concern about the constitutionality of any statute the Division enforces? Can you assure the Committee that you will defend the constitutionality of civil rights statutes that are challenged in federal courts?

Answer:

(a) I was not involved in this matter. It is my understanding that consistent with bedrock principles of statutory interpretation, the Division argued that the case could be decided on statutory grounds; therefore, it was not necessary for the court to reach the constitutional claims. I also understand that the court focused exclusively on the statutory interpretation question addressed by the United States at oral argument, and did not raise any questions regarding the statute's constitutionality.

(b) I have not been involved in any issues regarding the constitutionality of the IDEA. If confirmed, I would adhere to the Department of Justice's long-standing policy of defending the constitutionality of all federal statutes, including the Individuals with Disabilities Education Act, whenever a reasonable argument can be made.

(c) Yes.

(d) Litigants have raised constitutional challenges to many of the statutes enforced by the Civil Rights Division, but I am not aware of any serious arguments regarding the constitutionality of any of the civil rights statutes that I have examined. If confirmed, I would adhere to the Department of Justice's long-standing policy of defending the constitutionality of all federal statutes whenever a reasonable argument can be made.

TITLE IX

1. Title IX of the Education Amendments of 1972 – the landmark law barring sex discrimination in education, including in athletic programs – has made a huge difference in the lives of girls and young women across the country. Since Title IX was enacted, the number of girls and women participating in sports has increased dramatically – from 32,000 to more than 150,000 at the college level, and to nearly 3 million at our nation's high schools. Despite these benefits, and despite the fact that women's athletic programs continue to lag behind men's programs by every measurable criterion, Secretary of

Education Margaret Spellings issued an "Additional Clarification" of long-standing Department of Education athletics policies that would permit schools to deny women opportunities to participate in sports based on the results of a single on-line survey. Under the clarification, schools are also allowed to assume that a lack of response shows a lack of interest in additional sports opportunities, even though many students may not read or respond to email surveys.

a. Do you believe that the playing field is now level enough for male and female athletes in our nation's colleges and high schools?

b. Do you believe that the three-part test for compliance with Title IX, or any part of it, requires institutions to implement quotas or otherwise violate the law?

c. Do you believe that the "Additional Clarification" comports with the requirements of Title IX for equal opportunity?

d. Do you believe that the "Additional Clarification" represents a change in the standards set forth in prior Department of Education policies governing equal opportunity in athletics?

Answer:

(a) Since its enactment, Title IX has produced significant advancements in athletic opportunities for women and girls across the nation. As the father of two young girls, I support Title IX's goal of requiring a non-discriminatory opportunity to participate in athletic and other programs.

(b) The Department of Education has primary jurisdiction to interpret and apply Title IX. As I understand it, the Department of Education recently reaffirmed the 1979 policy interpretation, which provides a three-prong test for Title IX compliance, and that nothing in Title IX or this test requires that an institution cut teams in order to comply with the requirements.

(c) The Department of Education has primary jurisdiction to interpret and apply Title IX. I am not familiar with the "Additional Clarification" or the process by which it was developed. If confirmed, I would work cooperatively with the Department of Education to vigorously enforce the requirements of Title IX. As the Department of Justice speaks with one voice on policy matters, it would be inappropriate for me to comment further.

(d) The Department of Education has primary jurisdiction to interpret and apply Title IX. I am not familiar with the "Additional Clarification," the process by which it was developed, or the standards that may have existed prior to it. If confirmed, I would work cooperatively with the Department of Education to vigorously

enforce the requirements of Title IX. As the Department of Justice speaks with one voice on policy matters, it would be inappropriate for me to comment further.

2. Most states have high school athletic associations to which schools in the state must belong if they have a sports program. These associations control virtually every aspect of their member schools' athletic programs, from player eligibility requirements to the number of games and practices to the season in which each sport is played. In recent years, a number of lawsuits have been brought against high school athletic associations, raising claims of sex discrimination in violation of Title IX, the Constitution, and various state laws.

In 2001, the Supreme Court ruled that the Tennessee Secondary School Athletic Association (and consequently others like it) is a state actor subject to the Constitution's requirements. In a case brought against the Michigan High School Athletic Association alleging sex discrimination for scheduling six girls' sports and no boys' sports in nontraditional and disadvantageous seasons, both a federal district court and the Sixth Circuit Court of Appeals have held that the Association is a state actor (per the Supreme Court's decision) and has violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The Sixth Circuit did not reach the Title IX question, but the federal district court held that The Association is also subject to Title IX on the grounds that it exercises "controlling authority" over federally funded member schools' athletics programs, even if it does not itself receive federal funds, and that its scheduling of girls' seasons violates Title IX. The Department of Justice participated as *amicus curiae,* supporting the plaintiffs' arguments under both Title IX and the Constitution in the district court. This past May, the Supreme Court remanded the case to the Sixth Circuit to consider whether Title IX is meant to be the exclusive remedy, or whether plaintiffs may simultaneously pursue a Section 1983 claim based on the same underlying conduct.

a. Do you believe that athletic associations are subject to Title IX on the ground that they exercise controlling authority over the athletics programs of their federally funded member schools?

b. Do you believe that Title IX was meant to provide an exclusive remedy for a plaintiff's claims, so that a simultaneous cause of action under Section 1983 should be precluded?

Answer:

(a) This brief was filed before I arrived at the Civil Rights Division. It is my understanding that the Division's *amicus curiae* brief in *Communities for Equity* v. *Michigan High School Athletic Ass'n* supported the parents of female student-athletes and an organization of parents and students. These parties had sued the Michigan High School Athletic Association (MHSAA) under the Equal Protection Clause of the Fourteenth Amendment, Title IX, and Michigan law, alleging that MHSAA discriminates against female athletes and curtails their

opportunities to participate in athletics by scheduling girls' sports seasons in Michigan in non-traditional or disadvantaged seasons. The district court found that MHSAA's sports seasons violates the Equal Protection Clause, Title IX, and state law, and entered a remedial plan. On appeal, the Division argued that MHSAA is a state actor and that its sports seasons schedule constitutes intentional discrimination in violation of equal protection. The Division also argued that MHSAA's seasons schedule violates Title IX and that MHSAA is subject to Title IX under a ceded controlling authority theory, which provides that when a recipient cedes virtually all controlling authority over a program receiving federal financial assistance to another entity, and that entity subjects an individual beneficiary to discrimination under the program, the entity ceded authority violates Title IX. On July 27, 2004, the Sixth Circuit affirmed the district court's judgment with regard to the equal protection claim, agreeing with plaintiffs and the Division, as *amicus curiae*, that MHSAA is a state actor and that its sports seasons schedule constitutes intentional discrimination in violation of equal protection, and therefore declined to rule on the Title IX and state law claims. The court further held that it lacked jurisdiction to consider MHSAA's appeal of the district court's rejection of MHSAA's proposed compliance plan because MHSAA failed to amend its Notice of Appeal to include that order.

(b) This past May, the Supreme Court remanded this case to the Sixth Circuit to consider whether Title IX is meant to be the exclusive remedy, or whether plaintiffs may simultaneously pursue a Section 1983 claim based on the same underlying conduct. On May 31, 2005, MHSAA filed a petition for initial hearing en banc in the Sixth Circuit. MHSAA sought initial hearing en banc "because a panel reviewing this case on remand would likely be bound by a prior circuit panel decision that is circuit precedent on the issue that the Supreme Court has directed this Court to reconsider." Pet. 1. Citing *Lillard* v. *Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996), MHSAA acknowledged (Pet. 7) that "[t]he Sixth Circuit has already considered this question, and issued a published opinion holding that Title IX does not bar a plaintiff from bringing a § 1983 claim." On August 3, 2005, the Sixth Circuit denied MHSAA's petition for initial hearing en banc. Thus, the controlling law in the Sixth Circuit is that Title IX was not meant to provide an exclusive remedy for plaintiffs' claims against MHSAA, and that a simultaneous cause of action under Section 1983 is not precluded.

3. On March 9, 2004, the Department of Education issued proposed regulations to revise the long-standing regulations that govern Title IX's application to single-sex education. Current law, as reflected in these long-standing regulations, sets clear and vital safeguards to ensure that single-sex programs serve a suitably important governmental interest, do not reinforce gender-based stereotypes that for decades have limited educational opportunities for girls and women, and assure the equality of programs for the excluded gender. The proposed regulations would eviscerate those safeguards, allowing programs based on vague and untested generalizations about the

learning styles and educational needs of boys and girls, parental or student bias, or arguments that avoid a school's civil rights responsibilities.

a. The proposed regulations stated that although 30 years ago it was reasonable to presume that single sex classes would lead to discrimination against girls, "the situation has [now] changed dramatically" and "schools are now far more equitable in their treatment of female students." As a result, the regulations assert, "additional flexibility is warranted . . . and will not compromise educational opportunities." Do you agree with these statements? Do you believe that discrimination against girls continues to be a problem in education?

b. Do you believe that it is legal to create single-sex programs based solely on requests from parents?

c. Do you believe it would be legal to create single-sex programs bases solely on a school administrator's judgment that single-sex programs would serve an educational need? Would it be appropriate to do so based only on a desire to create a diversity of educational offerings? What, in your view, are the lawful bases on which such programs can be created?

d. What safeguards must a school or school district have in place to ensure that any single-sex programs meet the requirements of the law?

e. What is the appropriate standard for assessing whether those excluded from single-sex classes or schools have equality of educational opportunity in the programs that are available to them?

Answer: As noted above, the Department of Education has primary jurisdiction to interpret and apply Title IX. It is my understanding that the proposed regulations have not yet been adopted. If confirmed, I would work cooperatively with the Department of Education to vigorously enforce the requirements of Title IX.

THE ROLE OF FEDERAL CONSENT DECREES IN CIVIL RIGHTS CASES

1. Throughout its history, the Civil Rights Division has sought to resolve claims of discrimination in appropriate cases by negotiating consent decrees with defendants. These decrees have been an important resource for the Division, enabling it to obtain relief for victims of discrimination without the need for protracted litigation, and to enforce settlements in court when necessary to ensure just results. The Division currently enforces numerous such consent decrees. Do you agree that consent decrees are a vital and important part of federal civil rights enforcement?

Answer: I have supervised dozens of cases during the past two years that the Civil Rights Division has resolved with a consent decree. Consent decrees have proven

to be a valuable tool in the Justice Department's enforcement of federal civil rights law, and I expect that the Department will continue to employ consent decrees when appropriate to resolve civil rights cases. Consent decrees can reduce the costs of litigation, result in more prompt relief coming, and allow the parties to tailor appropriate remedies.

2. Legislation is currently pending in the Senate (S. 489) that would enable state and local governments to seek termination of any consent decree to which they are parties, including those negotiated with the Civil Rights Division, within four years after the decree was entered, regardless of whether the decree itself provided that it would be effective for a longer period of time. The bill would also permit state and local governments to terminate a consent decree immediately after the senior-most state or local official who signed the decree left office, even if the state and local governments had failed to fulfill their obligations under the decree. The legislation would apply retroactively to all existing decrees with state or local governments.

a. Over the years, many Civil Rights Division consent decrees seeking to resolve a pattern or practice of employment discrimination have provided for a continuation of the court's jurisdiction for more than 4 years, to provide adequate time to fully correct systemic discrimination in complex employment practices. If the Division finds that a state or local government has systematically violated the civil rights of a large number of persons, and that it has demonstrated bad faith, do you believe that the Division should be able to seek a consent decree of more than 4 years to correct problems of discrimination?

b. Do you agree that this proposed legislation would severely undermine the Division's ability to conduct effective civil rights enforcement in cases involving entrenched, system-wide discrimination?

Answer:

(a) It is my understanding that the Department of Justice has not yet taken a position on the pending legislation. I note that the bill excludes from its provisions one important area of the Civil Rights Division's responsibilities: school desegregation cases. As the Department of Justice speaks with one voice on policy matters, it would be inappropriate for me to comment further.

(b) While I am not able to comment on the proposed legislation, I believe that it is aimed at addressing problems created by the private enforcement of federal rights through litigation, rather than by the Department's enforcement of those rights. Therefore, I do not believe that the concerns that apparently motivate this legislation apply to claims brought by the Department of Justice to vindicate federal rights. Of course, if Congress enacted the law and extended its coverage to claims brought by the United States, then the Civil Rights Division would litigate pursuant to its terms. If the violation of federal law the Division sought to

remedy continued to exist after four years, we would seek to retain the consent decree and be prepared to litigate the case accordingly. If the violation no longer continued to exist after four years, then we would not litigate a motion filed under the law. The Civil Rights Division is sensitive to the burdens imposed by consent decrees, and we seek them only to remedy violations of federal law. Whenever those violations cease to exist, we are prepared to vitiate the consent decree entered into for the purpose of remedying the specific violations. That is our practice today, and I expect it will be our practice were Congress to enact this legislation.

October 27, 2005

The Honorable Edward M. Kennedy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Richard J. Durbin
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Kennedy and Durbin:

Attached are my additional responses to the questions in your letter dated October 24, 2005. I very much appreciate the opportunity to provide additional information through the attached written responses. As a general matter, please be aware that where your questions sought historical information regarding Sections of the Civil Rights Division that I have never had the privilege of managing, I have diligently endeavored to obtain that information from those professionals with the most knowledge of those areas. And where your questions sought to obtain my personal views on certain matters, I have diligently endeavored to provide as much information as possible consistent with the policies of the Department of Justice.

Again, I appreciate the opportunity to provide this additional information to you for your consideration.

Sincerely,

Wan J. Kim

cc: The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate

Questions from Senator Kennedy

Voting:

4. There is currently much discussion of the use of photo IDs at the polls as a means of preventing voter fraud, although there is no evidence that photo identification requirements are effective in combating fraud. As you know, voter ID provisions are included in the Help America Vote Act. Would you agree that it's inappropriate to divert Division resources from expanding ballot access and ensuring equal opportunity in voting in order to investigate whether states have complied with those ID provisions?

Answer: As a general matter, the Department of Justice is charged with enforcing all of the laws that Congress has enacted. It is my understanding that the Civil Rights Division has not filed lawsuits to enforce the voter identification provisions of the Help America Vote Act, nor have we received credible and specific allegations of such violations.

Expanding ballot access and ensuring equal opportunity in voting are part of the core mission of the Civil Rights Division. If confirmed, I will continue the commitment of the Division to preserve ballot access and equal voting opportunity, and to ensure that the Division enforces all of the statutes for which it is responsible fairly and even-handedly. Out of respect for the Senate's role in giving advice and consent on my nomination, I have not consulted with the career staff of the Voting Rights Section to discuss its past or pending cases, determine areas of improvement or formulate enforcement priorities. I regard such consultations as a prerequisite to informed decision-making. If confirmed, I would consult with the career staff of the Voting Rights Section to review all of their enforcement efforts across-the-board, including the appropriate enforcement of the voter identification provisions of the Help America Vote Act.

5. Please specify, by year, how many total investigations the Voting Rights Section has conducted since 2001, and for each investigation, please state:

a. whether the investigation is currently pending, or if not, at what stage of investigation or litigation it was closed (i.e., after informal investigation, after formal investigation, after suit was filed, after trial, after appeal);
b. the jurisdiction investigated;
c. the subject matter of the investigation and the statutory authority under which it is or was conducted, including whether or not the investigation involves a claim of potential discrimination against minority voters under Section 2 of the Voting Rights Act;
d. the racial, ethnic, or language minority group whose rights may have been affected by potential violations;
e. the total number of hours spent by career attorneys in the Voting Rights Section on the investigation.

Answer: Although I have never supervised the Voting Rights Section, and thus have no first-hand knowledge of the questioned matters, I have consulted further with those professionals most knowledgeable of the work conducted by the Section.

I am informed that the Voting Rights Section's Interactive Case Management (ICM) information systems collect data regarding the current number of open investigations and the number of investigations opened and closed by fiscal year and authority. The data is summarized below. These numbers should be viewed with considerable caution, however, since they do not reflect all of the matters examined and investigated by the Voting Rights Section. Central to the lack of precision has been the historical absence of bright line clarity in determining whether there has been an actual violation of federal voting rights law, and, accordingly, which matters should be included in the ICM system. After each major election, the Voting Rights Section receives and begins inquiries into large numbers of complaints. A high proportion of these do not develop into actual investigative matters that are assigned a Department of Justice number and recorded in the ICM system. In many cases, the Section's initial inquiries end when the Section is able to obtain a prompt, voluntary resolution of the matter. In other cases, the Section determines that the matter was handled promptly and decisively by local election officials; that it affects a purely state law matter; that it involves potential federal criminal violations and should be referred accordingly; or that the allegations lack the corroboration or credibility necessary to open a formal investigation. In other cases, a series of separate allegations may merge into a single investigation under one or more provisions of the Voting Rights Act, or other federal voting law. Under these circumstances, there historically has been a lack of uniformity in reporting matters within ICM.

During fiscal years 2001-2005, the number of matters of all types opened is set forth below:

FY 2001 - 64
FY 2002 - 68
FY 2003 - 147
FY 2004 - 47
FY 2005 - 37

Comparable data for fiscal years 1991-2000 follows:

FY 1991 - 27
FY 1992 - 93
FY 1993 - 86
FY 1994 - 74
FY 1995 - 37
FY 1996 - 49
FY 1997 - 54
FY 1998 - 50
FY 1999 - 63

FY 2000 - 65

During the period 2002-2005, data for number of matters closed, regardless of year opened, are set forth below:

FY 2002 - 29
FY 2003 - 84
FY 2004 - 19
FY 2004 - 22

Data for previous years is not available. As the fluctuations in these numbers make clear, I am informed that these numbers alone are not an accurate proxy for all of the work undertaken by the Voting Rights Section.

The Voting Rights Section has vigorously enforced Section 2, even while setting records in its enforcement of other important provisions of the Voting Rights Act, including sections 4(e), 4(f)(4), 203 and 208. Section 2 cases filed and/or tried by the Voting Rights Section in recent years include:

United States v. City of Boston, MA (D. Mass.)
On July 29, 2005, the United States filed a complaint against the City of Boston under Sections 2 and 203 of the Voting Rights Act alleging that the city's election practices and procedures discriminate against members of language minority groups, specifically persons of Spanish, Chinese, and Vietnamese heritage. The City has agreed to settle the case and the settlement is pending approval by the court.

United States v. Osceola County (M.D. Fla.)
On July 18, 2005, the United States filed a complaint alleging that the at-large system for electing the county Board of Commissioners violates Section 2 of the Voting Rights Act. Although Hispanics comprise nearly one-third of the county's electorate, the county has never elected a Hispanic candidate to the Board under the at-large system or to any county-wide office. The complaint alleges that the existing electoral system operates to dilute Hispanic voting strength, and that Osceola County has adopted and maintained the at-large method of election with a discriminatory purpose.

United States v. Ike Brown and Noxubee County (S.D. Miss.)
In this complaint, the United States alleges that the practices of local election and party officials violated Section 2 of the Voting Rights Act, and that officials have coerced, threatened, and intimidated voters in violation of Section 11(b) of the Act. The United States entered into a consent decree with the Noxubee County superintendent of general elections, administrator of absentee ballots, registrar, and the county government in which they agreed to stop a wide range of discriminatory and illegal voting practices. This consent decree was approved by the district court; the remaining defendants did not enter the consent decree, and litigation of the claims will follow.

United States v. Berks County (E.D. Pa.)

The United States alleged in its complaint that the county discriminated against Hispanic voters through hostile treatment at the polls, through failure to provide adequate language assistance, and by not permitting Hispanic voters to bring assistors of their choice into the polling place, violating Sections 2, 4(e), and 208 of the Voting Rights Act. The court granted a preliminary injunction on March 18, 2003, and permanent relief on August 20, 2003. Both decisions resulted in increased protection for Hispanic voters. Since the court entered its decision, the Department has monitored elections, utilizing federal observers pursuant to a provision of the order, to ensure compliance with the court's order.

United States v. Alamosa County (D. Colo.)
In this case, the United States' complaint alleged the at-large method of election of the Alamosa County Board of Commissioners violated Section 2 of the Voting Rights Act because it diluted the voting strength of Hispanic voters. The case was tried in May 2003. On November 26, 2003, the court found for Alamosa County, entering an opinion finding that a Section 2 violation had not been proved.

United States v. Osceola County (M.D. Fla.)
The complaint filed by the United States in this case alleged that the county violated Section 2 of the Voting Rights Act by discriminating against Hispanic voters through hostile treatment at the polls and the failure to provide adequate language assistance. In addition, it alleged the county violated Section 208 of the Voting Rights Act by not permitting Hispanic voters to bring assistors of their choice into the polling places. On July 22, 2002, the parties entered a consent decree remedying the violations. Since the entry of the consent decree, the Department has monitored elections to ensure compliance with the consent decree.

United States v. Charleston County (D. S.C.)
The United States alleged in its complaint that the at-large method of electing members of the Charleston County Commission violated Section 2 of the Voting Rights Act by diluting the voting strength of African American voters. Prior to the beginning of trial, the court issued a ruling for the United States on its motion for partial summary judgment that the residential patterns within the county were such that a council district could be drawn in which minority voters would be a majority of the population and that African American voters were politically cohesive. Following trial, the court issued an opinion finding the county's method of election violated Section 2. The United States Court of Appeals for the Fourth Circuit affirmed the trial court's opinion. The opinion of the court of appeals is reported at 365 F.3d 341 (4th Cir. 2004).

United States v. Crockett County (W.D. Tenn.)
The United States alleged in its April 17, 2001 complaint that the method of electing the county's board of commissioners violated Section 2 of the Voting Rights Act because it diluted the voting strength of African American voters. This case was resolved with the filing of a consent decree, filed simultaneously with the complaint.

United States v. Blaine County (D. Mont.)

In its complaint, the United States alleged that the at-large method of election for the Blaine County Commission violated Section 2 of the Voting Rights Act because it denied Native American residents an equal opportunity to participate in the political process and elect candidates of their choice. The district court issued decisions rejecting the county's challenge to the constitutionality of Section 2 and holding that the plan violated Section 2. The county appealed the district court's decisions on the constitutionality of Section 2 as well as its finding that the at-large election method violated federal law to the United States Court of Appeals for the Ninth Circuit. The court of appeals decision, which affirmed both findings, can be found at 363 F.3d 897 (9th Cir. 2004).

Section 2 issues also are addressed in the relief obtained by the Voting Rights Section in its cases under the minority language provisions of the Voting Rights Act, which are identified below; indeed, it is common for such cases to include Section 2 issues, such as disparate access to provisional ballots and rude treatment based on race or membership in a language minority group, as well as issues under Section 208 of the Act. These issues can affect voters beyond those protected by Section 203, as in Westchester County, New York, where an African American voter was mistreated and driven from the polls in tears. The Department promptly obtained the agreement of that county to locate the voter and provide her with transportation to the proper polling place so that she could cast her ballot, and also obtained relief in the consent agreement in the form of special training for all poll workers.

Cases filed by the Voting Rights Section since 2001 under the minority language provisions of the Voting Rights Act based on its investigations include those listed above (but note that the Blaine County case was filed prior to 2001 although its successful trial and appellate victory occurred after 2001), and the following cases, again in reverse chronological order:

United States v. Ector County, TX (W.D. Tex.)
On August 23, 2005, the United States filed a complaint alleging that Ector County, Texas violated Section 4(f)(4) of the Voting Rights Act. The complaint claimed that the county failed to provide an adequate number of bilingual workers to serve the county's Spanish-speaking population and failed to effectively publicize information to the Spanish-speaking community. The county entered into a consent decree agreement that was approved by the court.

United States v. City of Boston, MA (D. Mass.)
On July 29, 2005, the United States filed a complaint against the City of Boston under Sections 2 and 203 of the Voting Rights Act. The complaint alleges that the city's election practices and procedures discriminate against members of language minority groups, specifically persons of Spanish, Chinese, and Vietnamese heritage, so as to deny and abridge their right to vote in violation of Section 2. The suit also alleges that the City has violated Section 203 by failing to make all election information available in Spanish to voters who need it. A settlement agreement is pending approval by the court.

United States v. City of Azusa, CA (C.D. Cal.)

On July 14, 2005, the United States filed a complaint alleging that the City of Azusa violated Section 203 of the Voting Rights Act. The complaint claimed that the city failed to translate much of its election-related information into Spanish. The city entered into a consent decree that was approved by the court.

United States v. City of Paramount, CA (C.D. Cal.)
On July 14, 2005, the United States filed a complaint alleging that the City of Paramount violated Section 203 of the Voting Rights Act. The complaint claimed that the city failed to translate much of its election-related information into Spanish. The city entered into a consent decree that was approved by the court.

United States v. City of Rosemead, CA (C.D. Cal.)
On July 14, 2005, the United States filed a complaint alleging that the City of Rosemead violated Section 203 of the Voting Rights Act. The complaint claimed that the city failed to translate most of its election-related information into Spanish, Chinese, and Vietnamese or to provide bilingual assistance at polling sites in those languages. The city entered into a consent decree that was approved by the court.

United States v. Westchester County (S.D. N.Y.)
The United States filed a complaint alleging that the county had violated both Section 203 of the Voting Rights Act by failing to have an effective Spanish language election program and Section 302 of the Help America Vote Act by failing to post the information in polling places required by the section. On July 19, 2005, a three-judge court approved a consent decree resolving both claims.

United States v. San Benito County (N.D. Cal.)
The United States filed a complaint alleging that the county had violated both Section 203 of the Voting Rights Act by failing to have an effective Spanish language election program and Section 302 of the Help America Vote Act by failing to post the information in polling places required by that section and by failing to provide the requisite written information regarding the casting of a provisional ballot. The court approved a consent decree resolving both claims.

United States v. San Diego County (S.D. Cal.)
The United States filed a complaint alleging that the county's practices and procedures concerning Spanish heritage and Filipino voters violated Section 203 of the Voting Rights Act. The United States and the county agreed to a memorandum of agreement and a stipulated order, both of which were filed on June 23, 2004. The agreement provides for Spanish and Tagalog (Filipino) language election programs, and also a complete Vietnamese language program to serve a minority language group that narrowly missed the threshold for Section 203 coverage. The court signed the order, including an interlocutory order providing for the appointment of federal examiners and observers pursuant to Section 3 of the Act on July 7, 2004.

United States v. Ventura County (C.D. Cal.)

The United States filed a complaint alleging that the county violated Section 203 of the Voting Rights Act because it did not have sufficient bilingual poll officials and did not translate all election-related information into Spanish. On September 2, 2004, the court approved a consent agreement that requires the county establish an effective Spanish language election program.

United States v. Brentwood Union Free School District (E.D. N.Y.)
The United States alleged in its complaint that the Brentwood School District had violated Section 203 because it did not have sufficient bilingual election officials, did not translate all election-related information into Spanish, and failed to adequately train its election officials to prevent hostile treatment of Hispanic voters. On July 14, 2003, the court approved a consent agreement that requires the county establish an effective Spanish language election program.

United States v. Suffolk County (E.D. N.Y.)
The United States alleged in its complaint that the county violated Section 203 by not having sufficient bilingual election officials, not translating all election-related information into Spanish, and by failing to adequately train its election officials to prevent hostile treatment of Hispanic voters. On October 4, 2004, the court approved a consent agreement that requires the county establish an effective Spanish language election program.

United States v. Yakima County (E.D. Wash.)
In its complaint, the United States alleged that the county had violated Section 203 of the Voting Rights Act by not providing effective election-related materials, information, and assistance in Spanish to those persons who were limited English proficient. On September 14, 2004, the court approved a consent decree that requires the county to establish an effective Spanish language election program.

United States v. Orange County (M.D. Fla.)
The United States filed a complaint alleging that the county had violated both Sections 203 and 208 of the Voting Rights Act by failing to have an effective Spanish language election program and by failing to allow voters their assistors of choice. The court approved a consent decree that requires the county to provide a Spanish language election program and ensure that voters receive assistance.

United States v. Miami-Dade County (S.D. Fla.)
The United States filed a complaint against Miami-Dade County for failing to allow Creole-speaking Haitian voters to receive assistance in voting by persons of their choice, in violation of Section 208 of the Voting Rights Act. On June 17, 2002, the court approved a consent decree requiring the county to take steps to remedy the violations.

The cases listed above also include a majority of those ever filed under Section 208 of the Voting Rights Act by the Department of Justice, as well as all cases filed under the Help America Vote Act. Since 2001, moreover, the Voting Rights Section has filed the following cases under the National Voter Registration Act:

United States v. Pulaski County (E.D. Ark.)
In this complaint, the United States alleged that Pulaski County and its election officials violated several provisions of Section 8 of the National Voter Registration Act. Under a consent decree, the county officials agreed to take specific corrective actions in order to comply with the NVRA.

United States v. State of New York (N.D. N.Y.)
The United States alleged in its complaint that New York State and its public college and university system violate the National Voter Registration Act by failing to offer voter registration opportunities at those offices serving disabled students at the state's public universities and colleges, which the statute requires. The matter remains in litigation.

United States v. State of Tennessee (M.D. Tenn.)
The United States filed a complaint alleging that Tennessee violated several provisions of the National Voter Registration Act. On October 15, 2002, the court approved a consent decree that required state officials to take specific corrective actions to ensure full compliance with the "motor voter" and state agency registration requirements of the NVRA.

United States v. City of St. Louis (E.D. Mo.)
The United States filed a complaint alleging that the City of St. Louis violated provisions of the National Voter Registration Act governing removal of registrants from the voter registration rolls. On August 14, 2002, the court approved a consent decree that required election officials to implement uniform and nondiscriminatory rules governing the maintenance of an accurate and current voter registration list, including detailed election day procedures to ensure voters who appear on the inactive list are properly processed.

Since 2001, the Voting Rights Section also has filed the following cases under the Uniformed and Overseas Citizens Absentee Voting Act:

United States v. State of Georgia (N.D. Ga.)
The United States filed a complaint to address the late mailing of absentee ballots to overseas voters by Georgia counties in advance of the federal primary election. On July 20, 2004, the court granted preliminary relief by extending the deadline for receipt of absentee ballots from overseas voters. On July 25, 2005, the Court entered a Stipulation and Order of Dismissal as well as a Memorandum of Understanding.

United States v. State of Pennsylvania (M.D. Pa.)
The United States filed a complaint to address the late mailing of absentee ballots to overseas voters by Pennsylvania counties in advance of the federal primary election of April 27. The court granted preliminary relief requested by United States by extending the deadline for receipt of absentee ballots from overseas voters. The matter remains in litigation.

United States v. State of Oklahoma (W.D. Okla.)

The United States filed a complaint to enforce the rights of overseas voters in Oklahoma to vote by absentee ballot in the September 17, 2002 federal primary run-off election. The suit alleged that there was insufficient time after the August 27 primary election for overseas voters to receive, cast, and return absentee ballots by mail in time to be counted for the run-off election. On September 12, 2002, the court approved a consent decree that extended the deadline for receipt of absentee ballots from overseas voters. Oklahoma subsequently enacted legislation providing for permanent remedies, and the suit was then dismissed by agreement of the parties.

United States v. State of Texas (W.D. Tex.)
The United States filed a complaint to enforce the rights of overseas voters in Texas to vote by absentee ballot in the April 9, 2002 federal primary run-off election. The suit alleged that there was insufficient time after the March 12 primary election for overseas voters to receive, cast, and return absentee ballots by mail in time to be counted for the run-off election. On March 25, the court entered an Order requiring that the state accept the federal write-in ballot from overseas voters for the run-off election. The suit was dismissed by agreement of the parties after Texas enacted legislation providing for permanent relief.

The Voting Rights Section received many calls at its main office on election day, and additional calls came in to the attorneys stationed in counties in various states on election day in 2004. These calls were reviewed and screened by the Section and incorporated into investigations where appropriate. Anticipating a large volume of complaints based on past experience, in the days prior to the November 2, 2004 general election, the Voting Rights Section aggressively addressed matters across the United States to prevent potential problems implicating various provisions of the Voting Rights Act. Florida provides an example of such activity. There, the Voting Rights Section affirmatively reached out to citizen groups and others for information about potential federal law violations. Groups contacted by the Voting Rights Section included the NAACP, the Lawyer's Committee for Civil Rights Under Law, the Leadership Conference, People for the American Way, the ACLU, and the AFL-CIO and member unions, among others.

The Voting Rights Section was actively involved in a number of key complaints in Florida. For example, in order to address possible intimidation concerns, a Section attorney worked out protocols with sheriffs in Duval and Broward Counties to minimize a visible police presence at or near polling places. A Section attorney also met with political party/campaign leaders in both camps to discuss the appropriate circumstances for challenging voters. As a result, challenges thereafter were few and far between. Finally, a Section attorney worked out protocols in Duval and Broward Counties to avoid intimidation by poll watchers. In addition, the Section closely monitored a number of additional matters such as the flawed felon purge lists (ultimately not used) and the establishment of additional early voting sites (accomplished in many counties, including Duval and Volusia)

Consistent with the procedures set forth in response to Question 3, the Section referred reports of false or misleading fliers and telephone calls to voters to the Criminal Division. On election day, the Section dispatched career Civil Rights Division personnel to eight counties in Florida (Broward, Duval, Gadsden, Hillsborough, Miami-Dade, Orange, Osceola, Palm Beach) for the broadest Florida election coverage ever. Overall, the Civil Rights Division increased its monitoring to its highest level for a single election – 86 political subdivisions in 25 states with 822 federal observers and 251 Division personnel.

I am informed that that the Voting Rights Section did not use integrated computer tracking for investigations until October 2000. While the Voting Rights Section's management information systems track some raw numbers for attorney hours, this information is not audited and, in the judgment of those professionals most knowledgeable of these matters, is too inaccurate for submission to members of Congress. I am informed, for example, that an attorney might be investigating a complaint that covers three possible violations of the voting rights laws, but the computer records will only code and reflect an investigation in one area; that the system does not reflect the time spent by Section management on investigations; that teams of attorneys traveling for election monitoring have their time captured as work on the case, skewing the analysis of other important investigations that do not involve election monitoring. If confirmed, I will work with the Voting Rights Section and the information management systems professionals to determine what can be done to better and more accurately track attorney hours spent on all litigation matters.

I further am informed that the Voting Rights Section's information systems do not accurately track data regarding the date on which an investigation is authorized; the progress of an investigation or the stage at which an investigation is closed; the demographic identity of the potential victims or whether the investigation involves claims of discrimination based on race, ethnicity, gender, color or religion. If confirmed, I would work with both attorneys and information management systems professionals to determine whether it would be appropriate and feasible to expand the categories of information collected for the Section's investigations and cases.

Employment:

4. Please specify, for each year since January 2001, the number of Employment Litigation Section investigations formally authorized by the Civil Rights Division, and for each investigation:

a. the date the investigation was authorized;

b. whether the investigation is currently pending, and if not, at what stage of the investigation it was closed (i.e., after formal investigation, after suit was recommended, after suit was filed, after trial, after appeal);

c. the subject matter of the investigation and the statutory authority under which it was conducted, including whether the investigation involved a potential pattern or practice of employment discrimination;

d. whether the investigation involved claims of discrimination based on race, ethnicity, gender, color, or religion, and the demographic identity of the potential victims; and

e. the total number of hours spent by career attorneys in the Employment Litigation Section on the investigation and/or litigation.

Answer: It is my understanding that, pursuant to Department of Justice policy, it would be inappropriate to disclose publicly information regarding investigations that do not result in the filing of litigation. This is especially true in the context of Title VII of the Civil Rights Act of 1964, which prohibits governmental officials from making public any charges prior to the filing of a complaint.

I also am informed that, since January 20, 2001, the Employment Litigation Section has filed the following Title VII cases:

2001

U.S. v. New York City Housing Authority (S.D. N.Y.)

On May 31, 2001, a complaint, authorized by the Assistant Attorney General for the Civil Rights Division, was filed by the United States Attorney's Office for the Southern District of New York against the New York City Housing Authority, pursuant to Section 706 of Title VII. The complaint alleged that the complainants, female participants in the City's Work Experience Program (WEP), were subjected to a hostile work environment on the basis of race or sex, and that one of the complainants was retaliated against because of her complaints of sexual harassment.

2002

U.S. v. Northwest New Mexico Regional Solid Waste Authority (D. N.M.)

On March 20, 2002, we filed a complaint in the United States District Court for the District of New Mexico against the Northwest New Mexico Regional Solid Waste Authority (Authority), pursuant to Section 706 of Title VII. The complaint alleged that the Authority racially and sexually harassed Desbah Padilla, a Native American female, and other similarly situated females. The complaint also alleged that the Authority created a work environment that was so racially and/or sexually hostile that Ms. Padilla and other female employees were forced to resign from their jobs.

U.S. v. NYC Department of Parks and Recreation (S.D. N.Y.)

On June 19, 2002, a complaint, authorized by the Assistant Attorney General of the Civil Rights Division, was filed by the United States Attorney's Office of the Southern District of New York against the City of New York and the New York City Department of Parks and Recreation, pursuant to Section 707 of Title VII. The complaint alleged that the City of New York and its Parks Department engaged in a pattern or practice of discrimination against black and Hispanic employees in the Parks Department on the basis of their race and/or national origin in making promotion decisions.

U.S. v. Zuni Public School District (D. N.M.)

On August 23, 2002, we filed a complaint in the United States District Court for the District of New Mexico against the Zuni Public School District (District), pursuant to Section 706 of Title VII. The complaint alleged that the District subjected a female teacher to sexual harassment that created a hostile work environment and that adversely affected the terms, conditions and privileges of her employment, and that the District failed to take appropriate action to remedy the effects of the discriminatory treatment.

U.S. v. Fort Lauderdale (S.D. Fla.)

On September 9, 2002, we filed a complaint in the United States District Court for the Northern District of Florida against the City of Fort Lauderdale, Florida, pursuant to Section 706 of Title VII. The complaint alleged that the City violated Title VII by refusing to promote the charging party, a black male, to the position of Engineering Inspector I because of his race, and by subjecting the charging party to retaliatory harassment.

U.S. v. Indiana Department of Transportation (S.D. Ind.)

On September 25, 2002, we filed a complaint in the United States District Court for the Northern District of Indiana against the Indiana Department of Transportation (IDOT), pursuant to Section 706 of Title VII. The complaint alleged that the INDOT failed or refused to promote the charging party, a supervisory engineer who is a native of India, to a higher level supervisory position because of his national origin.

U.S. v. Prince George's County Fire Department (D. Md.)

On October 30, 2002, we filed a complaint in the United States District Court for the District of Maryland against Prince George's County, Maryland, pursuant to Section 706 of Title VII. The complaint alleged that the County discriminated against Sharon Flory, a female formerly employed as a fire technician in the County's Fire Department, by subjecting her to a hostile work environment based on her sex and also by retaliating against her for her complaints of sex discrimination.

2003

U.S. v. Regents of the University of California (E.D. Ca.)

On March 4, 2003, we filed a complaint in the United States District Court for the Eastern District of California against the Regents of the University of California, pursuant to Section 706 of Title VII. The complaint alleged that the Regents, at the University of California Davis Medical Center, engaged in unlawful retaliation against the charging party and a similarly situated individual after these individuals complained of conduct that they reasonably believed to be sexual harassment.

U.S. v. University of Guam (D. Guam)

On June 30, 2003, we filed a complaint in the United States District Court for the District of Guam against the University of Guam, pursuant to Section 706 of Title VII. The complaint alleged that 11 individuals who had filed charges against the University with the EEOC suffered discriminatory terms, conditions and privileges of employment and discharge, constructive discharge, or refusal to renew their contracts because of their national origin and/or race or in retaliation for complaining about what they reasonably believed to be employment discrimination prohibited by Title VII. The charging parties, individuals formerly employed in administrative and faculty positions with the University, are Filipino-American, African American, American Indian and Caucasian, and they alleged discrimination because they are non-Chamorro.

U.S. v. Town of West Terre Haute (S.D. Ind.)

On July 11, 2003, we filed a complaint in United States District Court for the District of Indiana against the Town of West Terre Haute, Indiana ("Town"), pursuant to Section 706 of Title VII. The complaint alleged that the Town discriminated against Jana Buchanan, a former 911 dispatcher with the Town's Police Department, by subjecting her to sexual harassment for a period of approximately two years, which created a hostile work environment and resulted in her constructive discharge. The complaint specifically alleged that the former head of the Police Department repeatedly subjected Ms. Buchanan to harassing and unwelcome conduct of a sexual nature, including, but not limited to, unwanted touching, obscene gestures, lewd comments about her sexual partners, crude comments about her body and threatening remarks. The complaint further alleged that the Town failed to investigate or take any action in response to Ms. Buchanan's complaints about the sexual harassment.

U.S. v. Greenwood Community School Corporation (S.D. Ind.)

On July 18, 2003, we filed a complaint in the United States District Court for the Central District of Indiana against the Greenwood Community School Corporation (Greenwood), pursuant to Section 706 of Title VII. The complaint alleged retaliation against the charging party, a current employee of the school district, because he previously had filed a charge of sex discrimination against Greenwood with the EEOC.

2004

U.S. v. City of Erie (W.D. Pa.)

On January 8, 2004, we filed a complaint in the United States District Court for the Western District of Pennsylvania against the City of Erie, Pennsylvania, pursuant to Section 707 of Title VII. The complaint alleged that the City engaged in a pattern or practice of gender-based employment discrimination against women in the hiring of entry-level police officers by using a physical agility test that resulted in disparate impact against women and did not otherwise meet the requirements of Title VII.

U.S. v. University of Medicine and Dentistry of New Jersey (D. N.J.)

On February 13, 2004, we filed a complaint in the United States District Court for the District of New Jersey against the University of Medicine and Dentistry of New Jersey (UMDNJ), pursuant to Section 706 of Title VII. The complaint alleged that the UMDNJ unlawfully failed to promote Tyrone Bodison, a senior housekeeper, to the position of housekeeping supervisor in retaliation for bringing an earlier Title VII claim against the UMDNJ.

Bond & U.S. v. City of Baltimore Department of Public Works (D. Md.)

On March 8, 2004, we filed a complaint in intervention in the United States District Court for the District of Maryland against the City of Baltimore, pursuant to Section 706 of Title VII. The complaint alleged that Sabrina Bond was subjected to sexual harassment by her supervisor and coworkers at the City's Department of Public Works (DPW) and that, despite receiving numerous complaints, the DPW failed to take appropriate action to remedy the situation.

U.S. v. University of New Mexico (D. N.M.)

On March 16, 2004, we filed a complaint in the United States District Court for the District of New Mexico against the University of New Mexico, pursuant to Section 706 of Title VII. The complaint alleged that the University violated Title VII by refusing to provide modified-duty assignments to three pregnant women, even though it provided modified-duty assignments to employees who were not pregnant. The complaint also alleged that the University terminated one of the three women after she announced that she was pregnant and had requested a modified-duty assignment.

Lemons & U.S. v. Pattonville FPD (E.D. Mo.)

On July 13, 2004, we filed a complaint in intervention in the United States District Court for the Eastern District of Missouri against the Pattonville-Bridgeton Fire Protection District (Pattonville FPD), pursuant to Section 706 of Title VII. The complaint in intervention alleged that Keith Lemons, the only black firefighter at the Pattonville FPD between 1989 and 2003, was the victim of racial harassment. The complaint also alleged that the Pattonville FPD constructively discharged Lemons.

Jane Doe I, II, III & U.S. v. District of Columbia (D. D.C.)

On August 5, 2004, we filed complaints in intervention in three cases in the United States District Court for the District of Columbia against the District of Columbia, pursuant to Section 706 of Title VII. The cases involved three female plaintiffs who alleged that they were discriminated against on the basis of their sex, in violation of Title VII. Our complaints in intervention sought: (1) compensatory damages on behalf of the plaintiffs and similarly situated individuals; and (2) to enjoin the District of Columbia from failing to or refusing to provide remedial, make-whole relief to the plaintiffs.

U.S. v. Los Angeles Metropolitan Transit Authority (C.D. Ca.)

On September 16, 2004, we filed a complaint in the United States District Court for the Central District of California against the Los Angeles Metropolitan Transportation Authority (MTA), pursuant to Sections 706 and 707 of Title VII. The complaint alleged that the MTA engaged in a pattern or practice of discrimination by failing or refusing reasonably to accommodate employees and applicants for employment who, in accordance with their religious observances, practices and/or beliefs, need accommodation because they are unable to comply with a requirement applied by MTA management that employees in the MTA's Operations Division be available to work weekends, on any shift, at any location. The complaint, also filed under Section 706 of Title VII, further alleged that the MTA discriminated against Henry Asher, a member of the Jewish faith and former bus operator trainee for the MTA, by failing or refusing reasonably to accommodate Mr. Asher's religious observance, practice and/or belief of observing the Sabbath from sundown on Friday until sundown on Saturday, and by subsequently discharging him from employment.

U.S. v. City of Gallup (D. N.M.)

On September 29, 2004, we filed a complaint in the United States District Court for the District of New Mexico against the City of Gallup, New Mexico, pursuant to Section 707 of Title VII. The complaint alleged that the City engaged in a pattern or practice of employment discrimination in hiring against American Indians based on race.

U.S. v. New York MTA and NYC Transit Authority (E.D. N.Y.)

On September 30, 2004, we filed a complaint in the United States District Court for the Eastern District of New York against the New York Metropolitan Transportation Authority (MTA) and New York City Transit Authority (NYCTA), pursuant to Section 707 of Title VII. The complaint alleged that the MTA and the NYCTA engaged in a pattern or practice of employment discrimination against Muslim and Sikh train and bus operators who wear religious head coverings, in violation of Section 707 of Title VII.

2005

U.S. v. City of Elsa (S.D. Tex.)

On February 1, 2005, we filed a complaint in the United States District Court for the Southern District of Texas against the City of Elsa, Texas, pursuant to Section 706 of Title VII. The complaint alleged that the City engaged in unlawful employment discrimination by removing Patricia Decanini's duties as bailiff and warrant officer because of her sex, and by retaliating against three former City employees for filing charges of discrimination as well as for opposing conduct that they reasonably and in good faith believed to be unlawful under Title VII.

U.S. v. Escambia County Board of Education (S.D. Ala.)

On March 1, 2005, we filed a complaint in the United States District Court for the Southern District of Alabama against the Escambia County, Alabama, Board of Education (Board), pursuant to Section 706 of Title VII. The complaint alleged that the Board engaged in unlawful employment discrimination by subjecting the charging party, a female formerly employed as a custodian at one of the Board's schools, to a sexually hostile working environment and by terminating her employment in retaliation for her complaining of what she reasonably believed to be sexual harassment against her.

U.S. v. City of Cairo (S.D. Ill)

On March 3, 2005, we filed a complaint in the United States District Court for the Southern District of Illinois against the City of Cairo, Illinois, pursuant to Section 706 of Title VII. The complaint alleged that the City engaged in unlawful employment discrimination by subjecting the charging party, Luettha Watkins, a former communications dispatcher in the City's police department, to sexual harassment by her supervisor, the assistant chief of police.

Benito A. Colon Ortiz v. International Ethical Laboratories, Inc. (D. P.R.)

On March 9, 2005, we filed a complaint in the United States District Court for the District of Puerto Rico against International Ethical Laboratories (IEL). The complaint alleged that IEL violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) by denying Benito A. Colon Ortiz reemployment rights upon his return from military service, and by discharging Mr. Colon.

Charles W. Goodreau v. Bridgestone/Firestone North America Tire, LLC (M.D. Tenn.)

On March 29, 2005 we filed a complaint in the United States District Court for the Middle District of Tennessee against Bridgestone/Firestone North America Tire Co. (Bridgestone). The complaint alleged that Bridgestone violated the Uniformed Services Employment and Re-employment Rights Act of 1994 (USERRA) by failing to advance Charles W. Goodreau on its progressive pay schedule during a period of approximately 15 months during which he was serving on active military duty.

Hugo J. Villalobos v. Gulfstream Academy of Aeronautics, Inc. (S.D. Fla.)

On April 18, 2005, we filed a complaint in the United States District Court for the Southern District of Florida against Gulfstream Academy of Aeronautics, Inc. Thomas L. Cooper, Thomas P. Cooper and Mark Ottosen. The complaint alleged that defendants violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) by denying Hugo Villalobos retention in employment and instead discharging him because of his military service.

Anthony K. Lincoln v. First Express, Inc. (D. N.J.)

On May 27, 2005, we filed a complaint in the United States District Court for the District of New Jersey against First Express, Inc. (First Express). The complaint alleged that First Express violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) by denying Anthony K. Lincoln prompt reemployment, and the wages he would have earned from such prompt reemployment after his completion of active military service in the uniformed services.

U.S. v. Weimar Independent School District (W.D. Tex.)

On June 23, 2005, we filed a complaint in the United States District Court for the Southern District of Texas against the Weimar Independent School District (Weimar ISD), pursuant to Section 706 of Title VII. The complaint alleged that Weimar ISD failed to hire the charging party for a high school principal position because of her race, African-American.

U.S. v. Pontiac, Michigan Fire Department (E.D. Mich.)

On July 26, 2005, we filed a complaint in the United States District Court for the Eastern District of Michigan against the City of Pontiac, Michigan, pursuant to Section 707 of Title VII. The complaint alleged that the City engaged in a pattern or practice of discrimination on the basis of race and gender by creating and maintaining dual hiring and promotional systems in its Fire Department. More specifically, the complaint alleged that, since 1984, the City has maintained collective bargaining agreements with Local 376, Fire Fighters Union, that require that the City use dual hiring and promotional eligibility lists, with one list including all candidates in rank order and a second list of only "minority" candidates, including women, in rank order.

Veryzer v. Mills & Murphy Software Systems, Inc. (M.D. Fla.)

On August 5, 2005, we filed a complaint in the United States District Court for the Middle District of Florida against Mills & Murphy Software System, Inc. (Mills). The complaint alleged that Mills violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) by terminating Jennifer A. Veryzer's employment due to her active military service in the Georgia Air National Guard, and by failing to re-employ her after completion of her active military service.

U.S. v. Indiana Department of Correction (S.D. Ind.)

On August 10, 2005, we filed a complaint in the United States District Court for the Southern District of Indiana against the Indiana Department of Correction, (IDOC). The complaint alleged that the IDOC violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) by, instead of allowing James L. AmRhein, reemployment rights and benefits and other employment benefits protected by USERRA when he returned from active military duty, suspending him from employment, terminating him with loss of pay and loss of seniority and related benefits, and refusing to pay AmRhein for the period he was not allowed to work due to his termination.

U.S. v. State of Ohio Environmental Protection Agency (S.D. Ohio)

On August 26, 2005, we filed a complaint in the United States District Court for the Southern District of Ohio against the State of Ohio, the Ohio Environmental Protection Agency and the Ohio Department of Administrative Services, pursuant to Sections 706 and 707 of Title VII. The complaint alleged both a pattern or practice of discrimination and discrimination against Greenwood, the charging party before the Equal Employment Opportunity Commission, on the basis of religion.

McCullough v. Independence Fire Department (W.D. Mo.)

On October 7, 2005, we filed a complaint in the United States District Court for the Western District of Missouri against the City of Independence, Missouri. The complaint alleged that the City violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) by requiring Wesley A. McCullough to provide official military orders or an official memorandum or letter to indicate that he was absent for military purposes, suspending him from employment, placing him on a six month probationary period, and refusing to pay McCullough for the period he was not allowed to work due to his suspension, and failing and refusing to clear his personnel file of wrongdoing in the matter.

Although I have never supervised the Employment Litigation Section, and thus have no first-hand knowledge of the questioned matters, I have consulted further with those professionals most knowledgeable of the work conducted by the Section. I am informed that the Employment Litigation Section's information systems collect data regarding the current number of open investigations and the number of investigations opened and closed by fiscal year and authority. Investigations based on § 706 of Title VII of the Civil Rights Act of 1964 involve potential claims of individual discrimination. Investigations based on § 707 of Title VII of the Civil Rights Act of 1964 involve potential pattern or practice claims. The column headed "Dual §706/§707" refers to both individual and pattern or practice claims of discrimination under §§ 706 and 707 of Title VII of the Civil Rights Act of 1964. The data is summarized below:

FY 2005

	§706	§707	Dual §706/§707	USERRA
Investigations Initiated	20	5	2	28
Investigations/Cases Closed	18	7	0	5
Lawsuits Authorized	4	1	1	9
Complaints/Motions to Intervene Filed	4	1	0	6
Settlement Agreements & Consent Decrees Entered	3	2	0	3

FY 2004

	§706	§707	Dual §706/§707
Investigations Initiated	33	47	0
Investigations/Cases Closed	37	10	3
Lawsuits Authorized	8	3	1
Complaints/Motions to Intervene Filed	7	3	1
Settlement Agreements & Consent Decrees Entered	5	1	0

FY 2003

	§706	§707	Dual §706/§707
Investigations Initiated	26	9	0
Investigations/Cases Closed	45	5	0
Lawsuits Authorized	5	0	0
Complaints/Motions to Intervene Filed	5	0	0

Settlement Agreements & Consent Decrees Entered	6	0	0

FY 2002

	§706	§707	Other
Investigations Initiated	43	0	1 (filed under Executive Order 11246)
Investigations/Cases Closed	46	14	
Lawsuits Authorized	7	1	
Complaints/Motions to Intervene Filed	5	1	1 (11th Amendment plaintiff-intervenor case)
Settlement Agreements & Consent Decrees Entered	13	1	1 (filed under the Small Business Act)

FY 2001

	§706	§707	§709	Other
Investigations Initiated	37	1		
Investigations/Cases Closed	21	7	19	
Lawsuits Authorized	7	1		
Complaints/Motions to Intervene Filed	6	1		4 (11th Amendment plaintiff-intervenor cases)
Settlement Agreements & Consent Decrees Entered	4	1		1 (filed under Executive Order 11246)

I am informed by those most knowledgeable of the work conducted by the Employment Litigation Section that the management information systems do not accurately track the number of hours spent by Section attorneys on an investigation or

litigation tasks, and that this information is too inaccurate for submission to members of Congress. I further am informed that the Employment Litigation Section's information systems do not track data regarding the date on which an investigation is authorized; the progress of an investigation or the stage at which an investigation is closed; the demographic identity of the potential victims or whether the investigation involves claims of discrimination based on race, ethnicity, gender, color or religion. If confirmed, I would work with both attorneys and information management systems professionals to determine whether it would be appropriate and feasible to expand the categories of information collected for the Section's investigations and cases, as well as to better track the time spent by Employment Litigation Section professionals in these matters.

TITLE IX

1. Title IX of the Education Amendments of 1972 – the landmark law barring sex discrimination in education, including in athletic programs – has made a huge difference in the lives of girls and young women across the country. Since Title IX was enacted, the number of girls and women participating in sports has increased dramatically – from 32,000 to more than 150,000 at the college level, and to nearly 3 million at our nation's high schools. Despite these benefits, and despite the fact that women's athletic programs continue to lag behind men's programs by every measurable criterion, Secretary of Education Margaret Spellings issued an "Additional Clarification" of long-standing Department of Education athletics policies that would permit schools to deny women opportunities to participate in sports based on the results of a single on-line survey. Under the clarification, schools are also allowed to assume that a lack of response shows a lack of interest in additional sports opportunities, even though many students may not read or respond to email surveys.

a. Do you believe that the playing field is now level enough for male and female athletes in our nation's colleges and high schools?

Answer: Since its enactment, Title IX has produced significant advancements in athletic opportunities for women and girls across the nation. As the father of two young girls, I support Title IX's goal of requiring a non-discriminatory opportunity to participate in athletic and other programs. I do not have a sufficient basis of knowledge to determine whether the "playing field is not level enough" in any of the thousands of "our nation's colleges and high schools." As an employee at the Department of Justice, I am sworn to uphold the law, an obligation I take very seriously. If confirmed, I will ensure that the Division vigorously pursues all credible allegations of Title IX violations, and files lawsuits to vindicate the requirements of Title IX wherever appropriate.

2. Most states have high school athletic associations to which schools in the state must belong if they have a sports program. These associations control virtually every aspect of their member schools' athletic programs, from player eligibility requirements to the number of games and practices to the season in which each sport is played. In recent years, a number of lawsuits have been brought against high school athletic associations,

raising claims of sex discrimination in violation of Title IX, the Constitution, and various state laws.

In 2001, the Supreme Court ruled that the Tennessee Secondary School Athletic Association (and consequently others like it) is a state actor subject to the Constitution's requirements. In a case brought against the Michigan High School Athletic Association alleging sex discrimination for scheduling six girls' sports and no boys' sports in nontraditional and disadvantageous seasons, both a federal district court and the Sixth Circuit Court of Appeals have held that the Association is a state actor (per the Supreme Court's decision) and has violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The Sixth Circuit did not reach the Title IX question, but the federal district court held that The Association is also subject to Title IX on the grounds that it exercises "controlling authority" over federally funded member schools' athletics programs, even if it does not itself receive federal funds, and that its scheduling of girls' seasons violates Title IX. The Department of Justice participated as *amicus curiae,* supporting the plaintiffs' arguments under both Title IX and the Constitution in the district court. This past May, the Supreme Court remanded the case to the Sixth Circuit to consider whether Title IX is meant to be the exclusive remedy, or whether plaintiffs may simultaneously pursue a Section 1983 claim based on the same underlying conduct.

a. Do you believe that athletic associations are subject to Title IX on the ground that they exercise controlling authority over the athletics programs of their federally funded member schools?

b. Do you believe that Title IX was meant to provide an exclusive remedy for a plaintiff's claims, so that a simultaneous cause of action under Section 1983 should be precluded?

Answer:

(a) This brief was filed before I arrived at the Civil Rights Division. It is my understanding that the Division's *amicus curiae* brief in *Communities for Equity* v. *Michigan High School Athletic Ass'n* supported the parents of female student-athletes and an organization of parents and students. These parties had sued the Michigan High School Athletic Association (MHSAA) under the Equal Protection Clause of the Fourteenth Amendment, Title IX, and Michigan law, alleging that MHSAA discriminates against female athletes and curtails their opportunities to participate in athletics by scheduling girls' sports seasons in Michigan in non-traditional or disadvantaged seasons. The district court found that MHSAA's sports seasons violates the Equal Protection Clause, Title IX, and state law, and entered a remedial plan. On appeal, the Division argued that MHSAA is a state actor and that its sports seasons schedule constitutes intentional discrimination in violation of equal protection. The Division also argued that MHSAA's seasons schedule violates Title IX and that MHSAA is subject to Title IX under a ceded controlling authority theory, which provides that when a

recipient cedes virtually all controlling authority over a program receiving federal financial assistance to another entity, and that entity subjects an individual beneficiary to discrimination under the program, the entity ceded authority violates Title IX. On July 27, 2004, the Sixth Circuit affirmed the district court's judgment with regard to the equal protection claim, agreeing with plaintiffs and the Division, as *amicus curiae*, that MHSAA is a state actor and that its sports seasons schedule constitutes intentional discrimination in violation of equal protection, and therefore declined to rule on the Title IX and state law claims. The court further held that it lacked jurisdiction to consider MHSAA's appeal of the district court's rejection of MHSAA's proposed compliance plan because MHSAA failed to amend its Notice of Appeal to include that order.

The Solicitor General ultimately approves the position of the Department of Justice in *amicus* filings. I support the settled decision to argue, as the Civil Rights Division did here, that the ceded controlling authority theory subjected MHSAA to liability under Title IX.

(b) This past May, the Supreme Court remanded this case to the Sixth Circuit to consider whether Title IX is meant to be the exclusive remedy, or whether plaintiffs may simultaneously pursue a Section 1983 claim based on the same underlying conduct. On May 31, 2005, MHSAA filed a petition for initial hearing en banc in the Sixth Circuit. MHSAA sought initial hearing en banc "because a panel reviewing this case on remand would likely be bound by a prior circuit panel decision that is circuit precedent on the issue that the Supreme Court has directed this Court to reconsider." Pet. 1. Citing *Lillard* v. *Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996), MHSAA acknowledged (Pet. 7) that "[t]he Sixth Circuit has already considered this question, and issued a published opinion holding that Title IX does not bar a plaintiff from bringing a § 1983 claim." On August 3, 2005, the Sixth Circuit denied MHSAA's petition for initial hearing en banc. Thus, the controlling law in the Sixth Circuit is that Title IX was not meant to provide an exclusive remedy for plaintiffs' claims against MHSAA, and that a simultaneous cause of action under Section 1983 is not precluded. If confirmed, I will ensure that the Civil Rights Division complies with binding circuit precedent, and would make this authority known to the Solicitor General, who ultimately approves the position of the Department of Justice in any *amicus* filing, in the event that this issue arises in other circuits.

Questions from Senator Durbin

5. In 2003, in the case *Grutter v. Bollinger*, the Supreme Court held that the University of Michigan law school's use of race was a constitutional and appropriate use of affirmative action. The Justice Department filed a brief in that case arguing that the University of Michigan law school's use of race was unconstitutional.

A. **Question**: Do you agree with the position advocated by the Justice Department in *Grutter v. Bollinger* case, or with the Supreme Court's opinion in that case? Please explain.

Answer: The Department of Justice filed its brief in this case in 2002. I joined the Civil Rights Division in August 2003. I understand that the United States argued, and the Supreme Court agreed, that race conscious higher education admissions programs should be permitted only if they are narrowly tailored to further a compelling governmental interest. After undertaking an in-depth factual analysis, the Supreme Court agreed that student body racial diversity in higher education was a compelling state interest. With respect to narrow tailoring, the Supreme Court found that the Michigan undergraduate program was not narrowly tailored and, at the same time, concluded that the law school program at the same university was narrowly tailored. I respect these decisions of the Supreme Court, and if confirmed, would enforce them whenever necessary. I strongly agree with the President when he stated that "diversity is one of the strengths of the country." As an employee of the Department of Justice, it would be inappropriate for me to comment further on these settled matters.

B. **Question**: Please provide information about all work performed by the Civil Rights Division (investigations, court filings, etc.) regarding the use of race by universities or secondary schools in the aftermath of *Grutter v. Bollinger* and *Gratz v. Bollinger*.

Answer: The Department of Education has the primary responsibility for enforcing various non-discrimination laws and regulations pertaining to higher education. The Civil Rights Division has received no credible allegations regarding the unlawful use of race by universities or secondary schools following *Grutter v. Bollinger* and *Gratz v. Bollinger*, and therefore has opened no investigations nor performed other work in this area. If I am confirmed, I will work with the Department of Education to apply the principles set forth in these decisions to any investigation or litigation regarding the questioning of a university admissions policy. Those principles make clear that race-conscious methods can be a permissible part of higher education admissions practices, so long as they are narrowly tailored to achieve a diverse student body.

7. You are a member of the Federalist Society. That organization's mission statement contains the following assertion: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society."

Question: Do you agree with this statement? Why or why not?

Answer: I was not aware of this statement, and I do not believe that it fairly characterizes the University of Chicago Law School when I attended it. I do not have a sufficient basis of knowledge to determine whether it can accurately be applied to any other law school

or the legal profession as a whole. As a general matter, I routinely interview graduates from some of the finest law schools in the country, and have no doubt that these attorneys have been trained to rigorously analyze legal issues with a keen appreciation for both sides of every argument.

9. An October 6, 2005 National Public Radio story discussed allegations that political attorneys in the Civil Rights Division are diminishing the voices of career attorneys. In addition, a former Acting Assistant Attorney General for Civil Rights, William Yeomans, has recently published an article in *Legal Affairs* magazine entitled "An Uncivil Division" sounding a similar theme. Mr. Yeomans wrote the following: (9.

An October 6, 2005 National Public Radio story discussed allegations that political attorneys in the Civil Rights Division are diminishing the voices of career attorneys. In addition, a former Acting Assistant Attorney General for Civil Rights, William Yeomans, has recently published an article in *Legal Affairs* magazine entitled "An Uncivil Division" sounding a similar theme. Mr. Yeomans wrote the following:

C. **Question**: Please identify the number of attorneys who have departed the Civil Rights Division each fiscal year for the past eight years.

Answer: From FY 1995 to FY 2000, an average of 11.8% of attorneys departed the Civil Rights Division each year. This figure has dropped slightly to 11.375% from FY 2001 to FY2004. The numbers for the last eight fiscal years are: FY 1997 - 33 attorneys (12.8%); FY 1998 - 30 attorneys (11.5%); FY 1999 - 29 attorneys (11%); FY 2000 - 32 attorneys (11.8%); FY 2001 - 48 attorneys (15.3%); FY 2002 - 23 attorneys (6.7%); FY 2003 - 46 attorneys (13%); FY 2004 - 36 attorneys (10.5%). In FY 2005, 63 attorneys departed the Civil Rights Division (17.75 %). I am informed that a number of these departures were a result of the separation incentives, also known as "buyouts," offered by the Department of Justice during FY 2005.

12. It has been publicly reported that attorneys in the Civil Rights Division's Appellate Section have recently been asked to work on cases involving appeals by illegal immigrants who are being deported by the U.S. government. I realize there is a backlog of deportation appeals within the Justice Department, and that the Office of Immigration Litigation is unable to handle all of its appeals at this time. But I question whether it is appropriate for the Civil Rights Division to work on such cases, given that deporting undocumented individuals is not a traditional civil rights function.

B. Question: Are deportation appeals being assigned to attorneys only in the Appellate Section, or in other Civil Rights Division sections as well? Please provide information as to how many attorneys in the Division are working on one or more deportation appeal. Please also provide information about the number of Civil Rights Division attorney hours spent working on deportation appeals.

Answer: I have not been involved in the assignment of resources to comply with the Deputy Attorney General's direction and am not aware of any records that list the attorneys currently working on immigration appeals. According to available records, it is my understanding that during FY 2005, the Appellate Section filed 120 appellate briefs in the Office of Immigration Litigation, and that for the first three quarters of FY 2005 for which information is currently available approximately 38.8% of attorney hours in the Appellate Section of the Civil Rights Division have been spent on cases regarding the Immigration and Nationality Act. I understand that as the workload has increased, assignments needed to be made beyond just the employees in the Appellate Section, and that many attorneys, both career and political appointees, have been receptive to the new challenge and opportunity to participate at the federal appellate level.

I am advised that approximately 35 attorneys in the Civil Rights Division are working or have worked on immigration appeals. I further am advised that it is estimated that approximately 8,000 hours of work on immigration appeals were recorded during the first three quarters of FY 2005.

D. Question: How many briefs were filed in FY 2005 by the Appellate Section in total? How many of those were deportation appeal briefs? Please include in your tally any briefs drafted by the Civil Rights Division's Appellate Section, even if filed by the Civil Division.

Answer: It is my understanding that in FY 2005, the Appellate Section of the Civil Rights Division filed 193 briefs and substantive papers in the Supreme Court and in the courts of appeals. One hundred twenty of these filings were appellate briefs in the Office of Immigration Litigation. More than 87% of the decisions reaching the merits in civil rights cases were in full or partial accord with the Division's contentions. More than 88% of the decisions reaching the merits in immigration cases were in full or partial accord with the Division's contentions. The Division achieved comparable success in FY 2004: almost 89% of the decisions were in full or partial accord with our contentions.

(Supplement to 12D - please provide the number of briefs filed each FY for the past 8 years by the Civil Rights Division's Appellate Section. For each year's tally, please indicate how many briefs involved civil rights matters and how many involved non-civil rights matters (such as deportation appeals).

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In November 2004, the Deputy Attorney General requested that all litigating divisions of the Department of Justice assist the Office of Immigration Litigation with federal immigration appeals. As a result, it is my understanding that FY 2005 is the only year in which the Division has filed appellate briefs in the Office of Immigration Litigation. It is also my understanding that these are the only briefs the Division has filed involving non-civil rights matters.

For the fiscal year indicated, the Appellate Section of the Civil Rights Division filed the following number of briefs and substantive papers in the Supreme Court and in the courts of appeals:

FY 2004 -- 86
FY 2003 -- 81
FY 2002 -- 83
FY 2001 -- 78
FY 2000 -- 118
FY 1999 -- 117
FY 1998 -- 124
FY 1997 -- 126
FY 1996 -- 125
FY 1995 -- 112
FY 1994 -- 83
FY 1993 -- 78
FY 1992 -- 86
FY 1991 -- 81
FY 1990 -- 75

E. Question: Are deportation appeals assigned on a voluntary or involuntary basis? Do Civil Rights Division attorneys have the option of not working on deportation appeals? If they do not have the option, will you commit to allowing Civil Rights Division attorneys to opt out of working on deportation appeals if they do not wish to work on such cases?

Answer: I have not been involved in the assignment of immigration litigation briefs. As a manager, I have always attempted to assign work consistent with the interests of employees and the needs of the United States. If confirmed, I would continue to do so.

In addition to the Civil Rights Division, every other litigating division in the Department, as well as U.S. Attorney's Offices across the country, have been required to handle immigration appeals in order to reduce the enormous backlog of those cases. The Civil Rights Division will be able to contribute its fair share of the effort to reduce this

backlog only if its management retains the flexibility to assign immigration appeals based on informed judgments about which attorneys can reasonably be expected to handle the additional workload without creating an undue negative impact on the important ongoing work of the Division.

13. The appellate section filed only 6 amicus briefs in 2004 – down from 22 amicus briefs that were filed in 1999.

Question: What is your explanation for the sharp drop in appellate amicus filings by this Administration's Civil Rights Division? Are you troubled by this trend? Why or why not?

Answer: I have never supervised the Appellate Section. I am informed that in the past fiscal year, the United States filed *amicus* briefs before the Supreme Court in three civil rights cases: *Johnson* v. *California*, 125 S. Ct. 1141 (2005) (finding strict scrutiny applies to government imposed racial classifications in the prison context); *Specter* v. *Norwegian Cruise Lines*, 125 S. Ct. 2169 (2005) (finding ADA applies to foreign-flag cruise ships in U.S. waters); and *Jackson* v. *Birmingham Board of Education*, 125 S. Ct. 1497 (2005) (finding private right of action for retaliation under Title IX). We prevailed in each. Moreover, the Civil Rights Division has a 90% rate of success in the federal courts of appeals with regard to its *amicus* filings during the past five years, as compared with just 60% during the previous administration. Pursuant to the U.S. Attorney's Manual, the Civil Rights Division should consider numerous factors before deciding upon amicus participation:

8-2.170 Standards for *Amicus* Participation
A. Guidelines. Although guidelines cannot cover all possible cases, amicus participation by the Civil Rights Division ("the Division") should generally be limited to the following types of cases:

In which a court requests participation by the Division;
Which challenge the constitutionality of a federal civil rights statute; (cf. 28 U.S.C. § 2403(a));
Which involve the interpretation of a civil rights statute, Executive Order, or regulation that the Department of Justice (or another federal agency) is empowered to enforce;
Which raise issues the resolution of which will likely affect the scope of the Division's enforcement jurisdiction (e.g., cases involving the concept of state action under the Fourteenth Amendment);
Which raise issues that could affect in a significant way private enforcement of the statutes the Division enforces; and
Cases in which a special federal interest is clear and is not likely to be well-served by the private litigants.
There will, of course, be instances not fitting the above criteria in which *amicus* participation should nevertheless be considered.

B. Other Factors. In addition to these necessarily general standards, there are other factors

that should be considered in determining whether to make a recommendation for *amicus* participation. These include:
The importance of the issue to be addressed, the level of the court in which it is posed, and the probable impact of its resolution;
The probability of the Division being able to contribute substantially to the resolution of the case (e.g., competence of private counsel, state of the record, timeliness);
The wisdom of *amicus* participation as distinguished from intervention; and
The availability of Division resources.

As the U.S. Attorney's Manual makes clear, these decisions are necessarily made on a case-by-case basis. While it would be inappropriate for me to commit to a certain number of *amicus* filings each year, I would, if confirmed, comply with these requirements with an eye towards vigorously enforcing all of the civil rights laws.

14. According to the *Legal Affairs* article by Mr. Yeomans: "Recently, one attorney with sterling credentials, who was hired into the division in the Clinton Administration, was told that she would be transferred involuntarily out of the appellate section. Another, also hired in that administration, was told that she would no longer be permitted to work on civil rights cases."

Question: Are these allegations true? If so, please provide an explanation for these personnel decisions. How many attorneys in the Civil Rights Division have been told they can no longer work on civil rights cases? What type of work have these attorneys been asked to perform? Please explain.

Answer: I have never supervised the Appellate Section, and was not involved in these purported matters. Consistent with the requirements of the Privacy Act and Department of Justice policy, it would be inappropriate for me to comment publicly on personnel matters. I have consulted even further with those professionals charged with ensuring compliance with the Privacy Act, and have been advised that additional disclosures on these personnel matters would be unlawful. As a manager, I have asked every attorney to employ his or her skills and best efforts to vigorously enforce our nation's civil rights laws, and have evaluated employees solely upon the quality of their work, not when he or she happens to have been hired. I firmly believe that career attorneys should not be treated differently just because they have been hired during different administrations. If confirmed, I would continue to practice these policies.

October 19, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Specter:

Enclosed are my responses to written questions submitted by Senator Leahy, Ranking Minority Member, following my confirmation hearing on October 6, 2005. I am forwarding a copy of this letter and the enclosed responses to Senator Leahy as well.

Sincerely,

Sue Ellen Wooldridge

Enclosure

cc: The Honorable Patrick Leahy
Ranking Minority Member

Written Questions and Answers for Senator Leahy from Sue Ellen Wooldridge
Nominee for Assistant Attorney General for Environment and Natural Resources

Q1. On October 13, 2004, you received a report from the Inspector General of the Department of the Interior, Earl Devaney, detailing the results of an OIG Investigation into the BLM-Robbins Settlement Agreement. The report was highly critical of Robert Comer, a one-time political appointee in the Solicitor's Office who was promoted to a career position in your office by then-Solicitor William Myers, and remains the Rocky Mountain Regional Solicitor. Mr. Devaney called Mr. Comer's role in the matter "disconcerting," explaining that Mr. Comer advanced a settlement agreement between rancher Harvey Robbins and the BLM "even after receiving written objections from DOJ, U.S. Attorney's Office. . . , and the BLM." The parts of the IG Report that were released publicly are replete with criticism of Mr. Comer and his judgment. Did you take any disciplinary action against Mr. Comer in response to the Robbins IG report? Why or why not? Given the Robbins IG report, do you think Mr. Comer should be entrusted to enforce grazing laws in the Rocky Mountain Region? Why or why not?

A1. I take seriously the professional responsibility required of public attorneys. I reviewed the OIG report of investigation, which did not require any specific action be taken with regard to Mr. Comer. Though I did not take formal disciplinary action against Mr. Comer, I did take the Report as an opportunity to counsel him. As it related to Mr. Comer, the primary issue concerning his conduct in the matter was his alleged failure to communicate effectively about his activities, both externally and internally. He was counseled in this regard, and there have been no further alleged incidents such as detailed in the report.

The Bureau of Land Management is responsible for enforcing the grazing laws, with the support and advice as requested from the Solicitor's Office. To the best of my knowledge, the Bureau has not voiced any concerns about Mr. Comer's advice or that of his subordinate attorneys relative to the grazing program.

Q2. The Los Angeles Times, in a 2002 article, quoted former Bureau of Indian Affairs official Wayne Smith as saying that you admonished him not to speak to anyone, including federal investigators, about the White House's interest in a dispute within an Indian tribe about whether to build a large casino. Specifically, he said you told him that if he discussed this matter, which involved expensive lobbying efforts by interests seeking to build the casino and apparent White House support for those efforts, he would be "gone in a heartbeat."

a. Is his claim true? What was your role in this matter?

b. Smith was fired not long after another Bureau of Indian Affairs official decided against the tribal faction seeking to build the casino. What was your role in his firing, if any? What was the reason for the firing?

A2. a. I did not and never have counseled anyone not to cooperate with federal investigat At a point in time, Mr. Smith became the subject of an internal investigation by the Office of the Inspector General. It was my information that the conduct being investigated was separate from any particular gaming matter pending before the Department. During that time period, I told Mr. Smith that an outside source (a person who had business before the Department on unrelated gaming issues) had told me that he (Mr. Smith) had disclosed to her internal administration deliberations. Mr. Smith confirmed that he had disclosed such deliberations; I told him that such conduct was inappropriate. Again, my admonition to him had nothing to do with any pending federal investigation.

b. I did not have a role in the decision to end Mr. Smith's employment with the Department.

Q3. If you are confirmed, your role will include overseeing cases against those who violate the nation's pollution control laws, defending environmental challenges to government programs and activities, bringing and defending cases concerning wildlife protection, and litigating cases concerning Native American rights and claims. In this role, you will have the capacity to help ensure the preservation of this country's natural resources and wildlife.

Pursuing this important objective will require taking steps to make sure that the principled decisions are made, and this decision-making must draw upon sound scientific processes. However, recent rule-making by the administration has undermined Clean Air Act provisions governing mercury, which is a toxic pollutant, and its release from power plants across the US. Those who have analyzed the Environmental Protection Agency's rule-making process in this instance, including the EPA Inspector General and the General Accounting Office, have suggested that the EPA mismanaged and manipulated scientific data and analysis in a way that benefits industry at the expense of the environment.

During your time at the Department of the Interior, and in particular in your work on issues of balancing the requirements of the Endangered Species Act and the interests of farmers in the Klamath Basin, you argued for outside peer review of Departmental scientific findings, regardless of which interests benefited most from the findings.

a. If confirmed as AAG, will you similarly advocate outside review of scientific findings, regardless of which way they point, in order to ensure that credible science and procedure is followed in rule-making practices?

b. You have emphasized that when tackling solutions to multi-faceted issues, it is important to work cooperatively in order to reach well-balanced solutions that satisfy legal requirements, but to also take into account the social, cultural, and environmental impacts of these legal decisions. If confirmed, do you think you can objectively select and oversee cases with the type of multi-faceted approach you have outlined and with a

dedication to maintaining the integrity of our environmental laws and regulations, rather than pursuing only the narrower industrial interests this administration often seems to advocate?

A3. a. As you know, the Environment and Natural Resources Division of the Department of Justice, unlike the Department of the Interior, does not engage in rulemakings. Nonetheless, I agree that where scientific understanding is central to government decision-making, quality science and sound research procedures are exceedingly important. If confirmed as AAG, I will encourage, as appropriate, the Division's client agencies to incorporate these principles and practices into their decision-making.

b. I agree wholeheartedly that when tackling solutions to multi-faceted issues, it is important to work cooperatively in order to reach well-balanced solutions, satisfy legal requirements, and if lawful, take into account the social, economic, cultural, and environmental impacts of decisions. If confirmed, I will be dedicated to maintaining the integrity of our environmental laws and regulations.

SUBMISSIONS FOR THE RECORD

STATEMENT OF SENATOR JOHN CORNYN
Before the United States Senate Committee on Judiciary
Assistant Attorney General Nominations
October 5, 2005

I want to thank Chairman Specter for scheduling today's hearing. This hearing involves four very important positions within the Department of Justice and is the first step towards getting these positions filled. If confirmed each of you will fill vital positions within our government. I hope we can get your nominations voted out of the Committee in the near term and through the Senate as soon as possible.

I will turn the floor over to the Ranking Member for any introductory remarks he may have.

INTRODUCE PANEL 1

[I would ask the members of our first panel to take their seats at the witness table.]

I want to welcome each of the nominees and their family to the Committee.

We have an impressive panel of nominees today. I will introduce each of you and then we will hear your opening statements.

Wan Kim (Civil Rights)

Wan Kim is the President's nominee to serve as the Assistant Attorney General for Civil Rights. The Civil Rights Division is responsible for enforcing federal statutes prohibiting discrimination, as well as the investigation and prosecution of human trafficking.

Mr. Kim was born in Seoul, South Korea. His family later immigrated to the United States. He attended the Johns Hopkins University, graduating Phi Beta Kappa and he later graduated from Law School at the University of Chicago.

Mr. Kim is a former Assistant United States Attorney in the District of Columbia office and is a former staffer for Senator Hatch on the Senate Judiciary Committee. If confirmed, I understand that Mr. Kim will be the first immigrant to serve as the Assistant Attorney General for Civil Rights.

Stephen Bradbury (OLC)

Stephen Bradbury is the President's nominee to serve as the Assistant Attorney General for the Office of Legal Counsel. The Office of Legal Counsel assists the Attorney General in his function as the legal advisor to the President and all of the executive branch agencies. OLC is also responsible for providing legal advice to the executive branch on all constitutional questions, including reviewing pending legislation for its constitutionality.

Mr. Bradbury is a graduate of the University of Michigan Law School. He clerked for the DC Circuit Court of Appeals for Judge James Buckley and later for Justice Clarence Thomas on the Supreme Court. He has been a partner at Kirkland & Ellis where his practice focused on civil litigation and administrative law.

Most recently Mr. Bradbury was appointed to serve as Principal Deputy Assistant Attorney General for OLC.

Sue Ellen Wooldridge (Environment)

Sue Ellen Wooldridge is the President's nominee to serve as the Assistant Attorney General for the Environment and Natural Resources Division. The Environment and Natural Resources Division prosecutes those who violate our Country's environmental laws.

She graduated from Harvard School of Law in 1987. She worked for the law firm Diepenbrock, Wulff, Plant & Hanegan in Sacramento, California where she handled commercial litigation matters in both the state and federal courts and later was a partner in the litigation firm Riegels Campos & Kenyond LLP.

Ms. Wooldridge has also served as a Special Assistant Attorney General for the California Department of Justice, Deputy Chief of Staff and Counselor to the Secretary of the United States Department of Interior, and most recently served as the Solicitor of the Department of Interior.

Thomas Barnett (Anti Trust)

Finally, Thomas Barnett is the President's nominee to serve as Assistant Attorney General for the Anti-Trust Division. The Anti-Trust Division promotes and protects the competitive process — and the American economy — through the enforcement of the antitrust laws.

Previously, Mr. Barnett served as Deputy Assistant Attorney General for civil enforcement for the Anti Trust Division. Prior to joining the Anti Trust Division, he was a partner in the Washington, D.C. office of Covington & Burling.

Welcome to you all. We will be pleased to hear your opening statements. And please limit your opening statement to no more than 5 minutes.

JON S. CORZINE
NEW JERSEY

COMMITTEES:
BANKING, HOUSING, AND URBAN AFFAIRS
BUDGET
FOREIGN RELATIONS

United States Senate
WASHINGTON, DC 20510-3004

502 SENATE HART OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-4744

ONE GATEWAY CENTER
11TH FLOOR
NEWARK, NJ 07102
(973) 645-3030

208 WHITE HORSE PIKE
SUITE 18-19
BARRINGTON, NJ 08007
(856) 757-5353

October 5, 2005

The Honorable Arlen Specter
Chairman
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Specter and Ranking Member Leahy:

It is with great pleasure and admiration that I support the nomination of Wan J. Kim, of my home state of New Jersey, to be the Assistant Attorney General for Civil Rights at the Department of Justice.

Mr. Kim's life is a testament to the American dream. Kim's father came to New York from South Korea in 1971, with only a few hundred dollars in his pocket and the dream of building a better life for his family. He spoke no English, and he took a job washing dishes. His wife joined him several months later, taking a position in a garment factory. In 1973, Wan Kim and his sister left their grandmother, who had been caring for them in South Korea, and reunited with their parents on United States soil. Wan Kim was five years old at the time.

The family soon moved to New Jersey, where Mr. Kim's parents purchased a luncheonette in Jersey City, and later a home in Union Township. Mr. Kim's parents worked seven days a week, three hundred and sixty five days a year, to provide an education and a life of opportunity for their children. Mr. Kim excelled in school, graduating as valedictorian of his high school class and serving this country in the Army Reserves. He received his bachelor's degree from Johns Hopkins University and his law degree from the University of Chicago Law School.

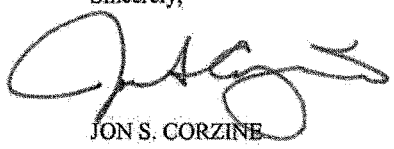
Following law school, Mr. Kim clerked for Federal Judge James L. Buckley on the D.C. Circuit Court. He then worked as a trial attorney in the Criminal Division of the Department of Justice, where he participated in the prosecution of the Oklahoma City bombing case. Mr. Kim later served as an Assistant United States Attorney for the District of Columbia, as counsel on the Senate Judiciary committee, and as a lawyer in private practice. Since August 2003, Mr. Kim has served as a Deputy Assistant Attorney General of the Civil Rights Division, where he is charged with oversight of the Criminal, Educational Opportunities, and Housing and Civil Enforcement sections.

If confirmed as Assistant Attorney General, Mr. Kim will be the nation's top civil rights law enforcement officer. In that capacity, he will be responsible for overseeing more than 300 attorneys nationwide and with ensuring the vigorous enforcement of this nation's civil rights laws -- including those relating to voting rights, employment discrimination, human trafficking, and police misconduct. Mr. Kim will enjoy the distinction of being the first Korean-American and the first naturalized citizen to assume that post.

The position to which Mr. Kim is nominated is one of vital importance to our nation. There are those who would weaken or narrow the authority of the Civil Rights Division, or remove it from Congressional oversight altogether. I disagree. The Department of Justice, and the Civil Rights Division in particular, must continue to carry out its indispensable role in safeguarding the civil rights of all Americans. The Department must hold firm in ensuring that no person, big or small, strong or weak, black or white, Latino or Asian, is treated with anything less than fairness, equality, and justice under our laws. To this end, it is essential that the powers of the Civil Rights Division and the oversight authority of this body be vigorous, and that the Division hire only the very best attorneys possible to carry out its mission.

There is no doubt that the Civil Rights Division will face many challenges in the years ahead. The office will require a leader with a firm commitment to civil rights and the resolve to place the considerable resources of the federal government behind the protection of those fundamental rights. Mr. Kim has an impressive record of public service and has earned the strong respect of his colleagues and the legal community. I am confident that Mr. Kim will do all he can to preserve and strengthen our civil rights protections, and that in so doing, he will continue to make his family, his home state of New Jersey, and his country proud.

Sincerely,



JON S. CORZINE

JUL 12 2005 11:36 FR NATL FOP 202 547 8190 TO 5142504 P.02/04



GRAND LODGE
FRATERNAL ORDER OF POLICE®

CHUCK CANTERBURY
NATIONAL PRESIDENT

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

12 July 2005

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

Dear Mr. Chairman,

I am writing to advise you of the support of the Fraternal Order of Police for the nomination of Wan J. Kim to be the next Assistant Attorney General for the Civil Rights Division at the U.S. Department of Justice.

Wan Kim's story is a remarkable one, which reaffirms the strong belief in the American Dream. Born in Seoul, South Korea to a family of modest means, his father had to borrow money to immigrate to the United States in 1971. In 1973, Wan Kim and his sister rejoined their parents in a small apartment, which they shared with another Korean family, in Queens, New York. He and his family later moved to New Jersey, where he graduated as the class valedictorian from high school. Mr. Kim went on to attend the Johns Hopkins University, where he was also a member of Phi Beta Kappa, and then graduated from Law School at the University of Chicago, where he was an Associate Editor of the Law Review.

Mr. Kim began his career at the Department of Justice through the Attorney Generals Honors Program, after serving as a law clerk to the Honorable James L. Buckley on the United States Court of Appeals for the District of Columbia Circuit. Mr. Kim was a trial attorney in the Terrorism and Violent Crime Section of the Criminal Division, and then a Special Attorney to the Attorney General in the prosecution of Timothy McVeigh and Terry Nichols for the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. After two years in private practice, Mr. Kim returned to the Department of Justice as an Assistant United States Attorney for the District of Columbia, where he investigated and prosecuted a wide range of criminal matters until he joined the Civil Rights Division as the Deputy Assistant Attorney General, where he supervises the Criminal, Educational Opportunities and Housing and Civil Enforcement Sections.

Since the beginning of this Administration, the F.O.P. and the Civil Rights Division have enjoyed an excellent working relationship built on the foundations of mutual respect, cooperation and a genuine desire to improve the profession of law enforcement. We believe that Wan Kim's leadership will enable our cooperative efforts with the Civil Rights Division to continue, benefitting our communities and the law enforcement agencies which serve them.

We believe that President Bush has made an excellent choice in Wan J. Kim, and know that he will make an outstanding Assistant Attorney General for Civil Rights. On behalf of the more than 321,000 members of the Fraternal Order of Police, I urge you and the Judiciary Committee to favorably consider his nomination. If I can provide any further recommendations for Mr. Kim, please do not hesitate to contact me or Executive Director Jim Pasco in my Washington office.

Sincerely,

Chuck Canterbury
National President

Statement of Senator Edward M. Kennedy
Hearing on the Nomination of Wan J. Kim to be
Assistant Attorney General for Civil Rights

Mr. Kim, welcome to the Committee, and I look forward to your testimony.

As you know, the Civil Rights Division has a vital role not just in coordinating the federal government's civil rights enforcement, but in all aspects of our policies on Civil Rights. It is responsible for ensuring compliance with the four cornerstones of federal law on these basic rights – the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and The Americans with Disabilities act of 1990, which have done so much to open doors of opportunity for minorities, women and the disabled.

In many types of cases, only the Civil Rights Division has the clout, the expertise, and the resources to act

effectively, particularly in cases particularly cases of wide-spread job discrimination, human trafficking, and police brutality.

If the Civil Rights Division isn't doing its job effectively, civil rights themselves are at risk. As a practical matter, certain types of discrimination go uncorrected if the Division fails in its duty, because private plaintiffs simply do not have the resources, the expertise, or in many cases, the information that would enable them to bring these cases.

Many of us are concerned that the Division is not living up to its responsibility today. It seems to have pulled back on its enforcement in some of the most important areas of civil rights. In the past five years, the Division has filed only <u>one</u> case involving a pattern or practice of job discrimination based on race or national origin. It's brought only 3 cases under the Section of the Voting Rights Act that prohibits

discrimination in the right to vote. The Appellate Section of the Division has filed very few friend-of-the-court briefs defending civil rights in our courts.

There seems to be a pattern of under-enforcement, and it's especially disturbing that the Division has used its resources in areas inconsistent with its civil rights mission. It's filed briefs to prevent citizens from asking a court to decide whether their provisional ballots should be counted in a federal election. It took the highly unusual step of filing a brief in Florida state court on an issue of state law that didn't even involve civil rights. Recently, it's been devoting a significant amount of time and attorneys to immigration cases referred from the Civil Division. We know there's a backlog of these cases, but if this practice continues, the Division's ability to fulfill its own mission civil rights will be undermined.

Finally, we've heard that the Division's hiring and other employment practices are increasingly politicized, with allegiance to groups such as the Federalist Society taking precedence over traditional criteria such as litigation experience and commitment to civil rights.

Obviously, these problems are serious, and they need to be given priority by the Division in the future. So I hope you'll be able to assure the Committee that you understand these problems and take them seriously. I look forward to your testimony during this hearing and to your responses on these important challenges.

WAN KIM - OPENING STATEMENT

Mr. Chairman, Senator Leahy, and Members of the Judiciary Committee, thank you for holding this hearing. I am grateful for this opportunity to appear before you. As a former staff member of the Judiciary Committee, I have a deep and abiding respect for the work that you do. I also would like to acknowledge the extraordinary support, mentorship, and kindness shown to me over the years by my former boss, Senator Hatch, who is a distinguished public servant and an extraordinary person.

It is my privilege to sit here today as the President's nominee to be Assistant Attorney General for the Civil Rights Division. I am humbled and honored by his choice, and profoundly grateful to the President and the Attorney General for my nomination. Most people, of course, never have the opportunity to appear before this historic and important institution. Fewer, still, who share my personal history can hope for such an illustrious audience. I was born in South Korea to a loving family of modest means. When I was two, my father struck off alone from South Korea to the United States. He hoped to find on these shores a better life for his family. He arrived in New York City with a few hundred dollars and no command of the English language. He stayed at a YMCA and worked washing dishes in a restaurant. Working hard and living frugally for several months, my father managed to save enough money to repay his debts and buy a plane ticket to New York for my mother. After she arrived, my mother spent many of her days in a factory hunched over a sewing machine, earning her pay based on the number of garments that she could assemble. With both of them working furiously, it took about another year for my sister and me to leave our amazing grandmother and the only home we'd ever known to rejoin our parents in America. My sister was seven; I was almost five.

My family, reunited, began our adventure in America by sharing one bedroom in a small two-bedroom apartment in Queens, New York; another Korean family occupied the other bedroom. Our tight-knit family moved from place to place searching for our share of the American dream. My parents worked long hours at minimum wage jobs for years until they were able to purchase a small sandwich shop, where they worked even longer hours. We eventually purchased a car and then a home. My parents believed wholeheartedly in the promise of America: if you work hard, and study even harder, you will have the opportunity to do well. My father had little formal education in South Korea. Both my sister and I went to college and graduate schools.

So my family has a good story to tell. But so do millions of American families. Our story is far from unique. And that is the true promise and grandeur of America.

As a young boy who struggled to learn English at school, it would have been impossible for me to imagine the transformation this country has permitted my family to make in the span of a single generation. I am about as old today as my father was when he immigrated to the United States, leaving his wife and two young children behind. And my two daughters are almost the

same age as my sister and I were when my dad made this journey. I do not believe that there is another country on the face of the earth where the son of an itinerant immigrant can sit before the nation's legislative body seeking its consent for such an important position of public trust.

I have dedicated much of my career to public service in a hopeless battle to repay, in small measure, the great debt that my family owes to this great country. When I was seventeen, I enlisted in the United States Army Reserve, obtaining a commission in the Infantry Corps four years later. And I have spent almost my entire legal career in government service, including nearly a decade at the Department of Justice. My years of service at the Department of Justice has instilled in me a deep appreciation for the role of professional and even-handed law enforcement, meted out without fear or favor. Every case should be decided solely on the facts and the law. That has always been my practice. I pledge no deviation from these principles so long as I am employed by the Department of Justice.

If confirmed by the Senate, I would be in a position of great responsibility. I am humbled by that knowledge. The Civil Rights Division of the Department of Justice has more than 700 professionals charged with enforcing the federal laws that protect all Americans by preventing discrimination in employment, housing, education, voting, public accommodations, on the basis of disability, and in many other important areas. Mastering the important breadth of the federal civil rights laws would be a challenge for anyone. It is one that I very much embrace. While I realize the enormity of the task, I believe that I am up to it. My parents are the hardest working people I have ever known, and they have shown me first-hand the value of sweat equity.

As a federal prosecutor for much of my career, I have investigated hundreds of matters, tried dozens of cases, and briefed and argued significant legal issues before the Courts of Appeals. As a Deputy Assistant Attorney General, I have deepened my knowledge and appreciation of our important civil rights laws, and enjoyed directly supervising the work of the Criminal, Housing and Civil Enforcement, and Educational Opportunities Sections. I am proud to have served alongside the talented and dedicated professionals in the Civil Rights Division for the past two years. If confirmed by the Senate, I would be privileged to continue to do so.

NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION

910 17th St., N.W., Suite 315
Washington, D.C. 20006

FOR IMMEDIATE RELEASE
July 14, 2005

CONTACT: Les Jin
(202) 775-9555

NAPABA APPLAUDS NOMINATION OF WAN J. KIM FOR ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS; ISSUES ENDORSEMENT

Washington, D.C. – The National Asian Pacific American Bar Association (NAPABA) endorsed Wan J. Kim for the position of Assistant Attorney General for Civil Rights at the U.S. Department of Justice. If confirmed, Mr. Kim would oversee the Civil Rights Division of the U.S. Department of Justice, becoming the nation's top civil rights law enforcement officer. Mr. Kim would become the first immigrant and the first Korean American to serve in the position.

Mr. Kim currently serves as Deputy Assistant Attorney General in the Civil Rights Division at the Department of Justice, supervising the Criminal, Educational Opportunities, and Housing and Civil Enforcement Sections. He has nearly ten years of experience as an attorney in the Department of Justice, first as a trial attorney in the Criminal Division, later as an Assistant U.S. Attorney for the District of Columbia, and most recently with the Civil Rights Division.

An active NAPABA member, Wan Kim serves on the Board of Directors of the Asian Pacific American Bar Association Education Fund, the Washington, D.C. NAPABA affiliate's charitable foundation that grants law student fellowships for public interest or government organizations that benefits the broader Asian Pacific American community or the local community.

"NAPABA is proud to support our friend and colleague Wan J. Kim for the position of Assistant Attorney General for Civil Rights," stated NAPABA Judiciary Committee Chair John C. Yang. "Wan's work experience and knowledge of challenges faced by Asian Pacific American and immigrant communities will make him effective and responsive in the protection of civil rights."

"As we approach the reauthorization of the Voting Rights Act and readdress the important issues of language access in the courts and at the polls, we look forward to working with Wan Kim to ensure that the Justice Department actively enforces the civil rights laws that allow communities of color, and consequently, all Americans, to have full access to justice in the United States," remarked NAPABA President Michael P. Chu.

"The significance of Wan Kim's nomination is clear: he will become the first immigrant to head the Civil Rights Division," noted NAPABA Executive Director Les Jin. "His first-hand experiences of the struggles of immigrant life give him a unique asset to enforce the civil rights laws of this land that exist to protect historically marginalized communities."

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The National Asian Pacific American Bar Association (NAPABA) is the national association of Asian Pacific American attorneys, judges, law professors and law students. NAPABA represents over 40,000 attorneys and 47 local Asian Pacific American bar associations. Its members represent solo practitioners, large firm lawyers, corporate counsel, legal service and non-profit attorneys, and lawyers serving at all levels of government. NAPABA continues to be a leader in addressing civil rights issues confronting Asian Pacific American communities. Through its national network of committees and affiliates, NAPABA provides a strong voice for increased diversity of federal and state judiciaries, advocates for equal opportunity in the workplace, works to eliminate hate crimes and anti-immigrant sentiment, and promotes professional development of minorities in the legal profession.

NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM

1140 Connecticut Ave NW
Suite 1200
Washington, DC 20036

TELEPHONE
202-296-2300

FACSIMILE
202-296-2318

WEBSITE
www.napalc.org

PRESS RELEASE

CONTACT: Adlai J. Amor
T: 202-296-2300 x135, E: aamor@napalc.org

NAPALC Supports Nomination of Wan J. Kim as Assistant Attorney General for Civil Rights

Washington, D.C., July 11, 2005 — The National Asian Pacific American Legal Consortium (NAPALC) today announced its support of the nomination of Wan J. Kim as assistant attorney general for civil rights at the U.S. Department of Justice. The Civil Rights Division is responsible for enforcing federal statutes prohibiting discrimination on the basis of race, sex, handicap, religion, and national origin.

"As a Korean American who came to this country as a young boy, Wan Kim understands the importance of upholding the civil rights of all Americans," said Karen K. Narasaki, president and executive director of NAPALC. Founded in 1991, NAPALC works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation.

"We look forward to working with Mr. Kim on ensuring that civil rights laws are strongly enforced throughout the country."

If confirmed by the U.S. Senate, Kim will be the chief civil rights law enforcement officer in the country and will oversee more than 300 attorneys nationwide. In his new position, Kim will enforce anti-discrimination laws including hate crimes, employment, disability and housing discrimination, voting rights, and police misconduct.

Kim is currently a deputy assistant attorney general for the Department of Justice's Civil Rights Division, overseeing the criminal, educational opportunities, and housing and civil enforcement sections. He is an experienced trial attorney, having served as an assistant United States attorney, a trial attorney in the criminal division, and as a lawyer in private practice.

Kim is also a board member of the Asian Pacific American Bar Education Fund, which awards fellowships to law students. He received his bachelor's degree from Johns Hopkins University and his J.D. from the University of Chicago Law School.

# # #

AFFILIATES

Chicago
Asian American Institute

Los Angeles
Asian Pacific American Legal Center

San Francisco
Asian Law Caucus

The National Asian Pacific American Legal Consortium (www.napalc.org) is a national civil rights organization dedicated to advancing and defending the civil rights of Asian Pacific Americans. The Asian American Institute (www.aaichicago.org) of Chicago is a pan-Asian not-for-profit organization whose mission is to empower the Asian American community through advocacy by utilizing research, education, and coalition building. The Asian Law Caucus (www.asianlawcaucus.org) of San Francisco is the oldest Asian Pacific American legal group in the nation. The Asian Pacific American Legal Center (www.apalc.org) is the only organization in Southern California dedicated to providing the Asian Pacific American community with multilingual, culturally sensitive legal services and civic education.

John Warner

SENATOR WARNER'S STATEMENT
TO THE JUDICIARY COMMITTEE ON
THE NOMINATION OF THOMAS O. BARNETT
TO SERVE AS ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST
DIVISION AT THE U.S. DEPARTMENT OF JUSTICE
OCTOBER 6, 2005

Chairman Specter, Senator Leahy, and my other distinguished colleagues on the Senate's Judiciary Committee, I thank you for holding this confirmation hearing.

Today, I am pleased to introduce a Virginian, Mr. Thomas Barnett, who has been nominated by President Bush to serve as Assistant Attorney General for the Antitrust Division at the United States Department of Justice.

As the Committee knows, this position is an important one. The Assistant Attorney General for the Antitrust Division is the chief representative for the division and is ultimately responsible for promoting its mission: to protect and promote the competitive process, and the American economy, through the enforcement of antitrust laws. In fulfillment of its mission, the division pursues both criminal and civil litigation to prohibit anti-competitive actions by business.

In my view, Thomas Barnett's background makes him well-qualified for this important position.

Thomas Barnett's academic record is impeccable. In 1985, he graduated *summa cum laude* from Yale University. The following year, he went on to receive a Master of Science degree in economics from the London School of Economics, as a Fulbright Scholar to the United Kingdom. Mr. Barnett did not stop there. In 1989, he graduated *magna cum laude* from Harvard Law School, where he was a John M. Olin Fellow in Law and Economics.

Upon graduation, Mr. Barnett clerked for the Honorable Harrison Winter of the United States Court of Appeals for the Fourth Circuit. Subsequent to completing his clerkship, in 1990, Mr. Barnett joined the well-respected law firm of Covington & Burling in Washington, D.C. Just seven years later he was selected as a partner at the firm.

At Covington & Burling, Mr. Barnett has served as the director of the firm's Antitrust and Consumer Protection Practice Group and provided counsel to a wide variety of clients in a wide-range of areas of the law. Mr. Barnett has worked extensively on corporate transactions and licensing arrangements in the airline, chemical, construction and defense industries, to name but a few. And, he also is highly experienced in antitrust litigation, government investigations, and antitrust issues concerning intellectual property.

In 2004, Mr. Barnett was nominated by President Bush to serve as Deputy Assistant Attorney General for the Antitrust Division. Today, he currently serves as the Acting Assistant Attorney General for the Antitrust Division.

In my view, Mr. Thomas Barnett clearly has extensive experience with the position to which he has been nominated to serve.

I look forward to the reviewing of the Committee's deliberations and look forward to the privilege of voting in support of this nominee.

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