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S. HRG. 110–138, pt.3

# CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

## HEARINGS

BEFORE THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

JANUARY 22, FEBRUARY 12, FEBRUARY 21, APRIL 3, MAY 1, 2008

**PART 3**

**Serial No. J–110–8**

Printed for the use of the Committee on the Judiciary

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00001 Fmt 6011 Sfmt 6011 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

# CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00002 Fmt 6019 Sfmt 6019 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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U.S. GOVERNMENT PRINTING OFFICE

47–450 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00004 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

# CONTENTS

**January 22, 2008**

STATEMENT OF COMMITTEE MEMBER


Page

Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, prepared statement ..... 172
Whitehouse, Hon. Sheldon, a U.S. Senator from the State of Rhode Island ..... 4
prepared statement ..... 176


PRESENTERS


Larson, John B., a U.S. Representative from the State of Connecticut presenting Kevin J. O'Connor of Connecticut, to be Associate Attorney General, Department of Justice ..... 1


STATEMENTS OF THE NOMINEES


Katsas, Gregory G., of Massachusetts, to be Assistant Attorney General Civil Division, Department of Justice ..... 58
Questionnaire ..... 59
O'Connor, Kevin J., of Connecticut, to be Associate Attorney General, Department of Justice ..... 5
Questionnaire ..... 7


QUESTIONS AND ANSWERS


Responses of Gregory G. Katsas, to questions submitted by Senators Leahy, Kennedy, and Grassley ..... 146
Responses of Kevin J. O'Connor, to questions submitted by Senators Leahy, Kennedy, Feingold, and Grassley ..... 116


SUBMISSIONS FOR THE RECORD


Larson, John B., a U.S. Representative from the State of Connecticut, statement ..... 170
Lieberman, Hon. Joseph I., a U.S. Senator from the State of Connecticut ..... 175


**February 12, 2008**

STATEMENTS OF COMMITTEE MEMBERS


Feinstein, Hon. Dianne, a U.S. Senator from the State of California ..... 179
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, prepared statement ..... 461
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania ..... 187


PRESENTERS


Alexander, Hon. Lamar, a U.S. Senator from the State of Tennessee presenting Gustavus Adolphus Puryear, IV, Nominee to be U.S. District Judge for the Middle of Tennessee ..... 180
Barrasso, Hon. John, a U.S. Senator from the State of Wyoming presenting Richard H. Honaker, Nominee to be U.S. District Judge for the District of Wyoming ..... 183




VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00005 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

Page

Chambliss, Hon. Saxby, a U.S. Senator from the State of Georgia presenting James Randal Hall, Nominee to be U.S. District Judge for the Southern District of Georgia ..... 181
Corker, Hon. Bob, a U.S. Senator from the State of Tennessee presenting Gustavus Adolphus Puryear, IV, Nominee to be U.S. District Judge for the Middle of Tennessee ..... 180
Enzi, Hon. Michael B., a U.S. Senator from the State of Wyoming presenting Richard H. Honaker, Nominee to be U.S. District Judge for the District of Wyoming ..... 182
Isakson, Hon. Johnny, a U.S. Senator from the State of Georgia presenting James Randal Hall, Nominee to be U.S. District Judge for the Southern District of Georgia ..... 186
Lincoln, Blanche L., a U.S. Senator from the State of Arkansas presenting Brian Stacy Miller, Nominee to be U.S. District Judge for the Eastern District of Arkansas ..... 184
Pryor, Hon. Mark, a U.S. Senator from the State of Arkansas presenting Brian Stacy Miller, Nominee to be U.S. District Judge for the Eastern District of Arkansas ..... 185

STATEMENTS OF THE NOMINEES

Hall, James Randal, Nominee to be U.S. District Judge for the Southern District of Georgia ..... 188
Questionnaire ..... 189
Honaker, Richard H., Nominee to be U.S. District Judge for the District of Wyoming ..... 216
Questionnaire ..... 217
Miller, Brian Stacy, Nominee to be U.S. District Judge for the Eastern District of Arkansas ..... 307
Questionnaire ..... 308
Puryear, Gustavus Adolphus, IV, Nominee to be U.S. District Judge for the Middle of Tennessee ..... 251
Questionnaire ..... 252

QUESTIONS AND ANSWERS

Responses of Richard Honaker, to questions submitted by Senators Kennedy, Biden, Feinstein, Durbin and Cardin ..... 364
Responses of Gustavus Puryear, IV, to questions submitted by Senators Leahy, Kennedy and Feingold ..... 393

SUBMISSIONS FOR THE RECORD

Anselmi, Mark D., Rock Springs, Wyoming, letter ..... 433
Barrett, Richard, Attorney at Law, Richard J. Barrett, P.C., Cheyenne, Wyoming, letter ..... 434
Brimmer, Clarence A., District Judge, Cheyenne, Wyoming
November 7, 2006, letter ..... 435
April 3, 2007, letter ..... 436
Brown, Jacqueline K., Attorney at Law, Family Law Center, LLC, Casper, Wyoming, letter ..... 437
Bluemel, Joseph B., Attorney at Law, Kemmerer, Wyoming, letter ..... 438
Casper, Stacy E., Attorney, Casper Law Office, LLC, Casper, Wyoming, letter 439
Casper Star Tribune, March 28, 2007, letter to the editor ..... 440
Cotton, C. John, Esq., Attorney at Law, Gillette, Wyoming, letter ..... 441
Chapman, Frank R., Attorneys and Counselors at Law, Chapman Valdez, Casper, Wyoming, letter ..... 443
Daily Rockert-Miner, April 3, 2007, letter to the editor ..... 445
Enzi, Michael B., a U.S. Senator from the State of Wyoming, letter ..... 446
Fitzgerald, James E., Attorney, Fitzgerald Law Firm, Cheyenne, Wyoming, letter ..... 447
Fox, Kate M., Attorneys at Law, Davis & Cannon, Cheyenne, Wyoming, letter ..... 448
Gonda, Jeffrey J., Attorney, Lonabaugh and Riggs, LLP, Sheridan, Wyoming, letter ..... 449
Hickey, Paul J., Attorney, Hickey & Evans, LLP, Cheyenne, Wyoming, letter . 451
Hursh, John R., Attorney & Counselor at Law, Central Wyoming Law Associates, P.C., Riverton, Wyoming, letter ..... 453

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00006 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

Page

Johnson, Alan B., District Judge, District of Wyoming, Cheyenne, Wyoming:
October 26, 2006, letter ..... 454
October 26, 2006, letter ..... 455
Kirven, Timothy J., Attorneys at Law, Kirven and Kirven, P.C., Buffalo, Wyoming, letter ..... 457
Kunz, Brent R., Attorney, Hathaway & Kunz, P.C., Cheyenne, Wyoming:
November 8, 2006, letter ..... 458
February 8, 2008, letter ..... 460
Lewis, Rebecca A., Attorney, Pence and MacMillan, LLC, Steamboat, Colorado, letter ..... 463
Levy, Bruce P., M.D., Chief Medical Examiner, State of Tennessee, Department of Health, Nashville, Tennessee, statement and attachment ..... 465
McKellar, William M., Esq, Attorneys & Counselors at Law, McKellar, Tiedeken & Scoggin, LLC, Cheyenne, Wyoming, letter ..... 501
Messenger, Michael S., Attorney at Law, Messenger & Jurovich, P.C., Thermopolis, Wyoming, letter ..... 503
Osborn, Mitchell E., Attorney at Law, Mitchelle E. Osborn, Cheyenne, Wyoming, letter ..... 504
Rhodes, Diana, Esq., Attorney at Law, Rhodes Law Firm, P.C., Cheyenne, Wyoming, letter ..... 505
Rochelle, Ann M., Attorney, Shively, Taheri & Rochelle, P.C., Casper, Wyoming, letter ..... 506
Rosenthal, Michael, Hathaway & Kunz, P.C., Cheyenne, Wyoming, letter ..... 508
Schuster, Robert P., P.C., Attorney at Law, Robert P. Schuster, P.C., Jackson, Wyoming, letter ..... 509
Shively, Robert M., Attorney, Shively, Taheri & Rochelle, P.C., Casper, Wyoming, letter ..... 511
Simpson, Alan K., (Retired) Wyoming State Senator, Cody, Wyoming, letter ... 513
Sullivan, Michael J., Attorney at Law, Rothgerber Johnson & Lyons LLP, Casper, Wyoming, letter ..... 515
Woodard, Rhonda Sigrist, Woodard & White, a Professional Corporation, Cheyenne, Wyoming, letter ..... 516
Woodhouse, Gay V., President Wyoming State Bar, Cheyenne, Wyoming, letter ..... 518
Wyoming Legislative Service Office, Dan J. Pauli, Director, Cheyenne, Wyoming, letter ..... 519

**February 21, 2008**

STATEMENT OF COMMITTEE MEMBER

Cornyn, Hon. John, a U.S. Senator from the State of Texas, prepared statement ..... 1042
Feinstein, Hon. Dianne, a U.S. Senator from the State of California, prepared statement ..... 1046
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont ..... 521
prepared statement ..... 1051
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania, prepared statement ..... 1053

WITNESSES

Warner, Hon. John, a U.S. Senator from the State of Virginia ..... 524

STATEMENTS OF THE NOMINEES

Anderson, Stanley Thomas, Nominee to be U.S. District Judge for the Western District of Tennessee ..... 527
Questionnaire ..... 612
Haynes, Catharina, of Texas Nominee to be U.S. Circuit Court Judge for the Fifth Circuit ..... 528
Questionnaire ..... 531
Mendez, John A., Nominee to be U.S. District Judge for the Eastern District of California ..... 527
Questionnaire ..... 573

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00007 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

Page

QUESTIONS AND ANSWERS

Responses of Catharina Haynes to questions submitted by Senators Leahy, Kennedy, Feinstein and Cardin ..... 653

SUBMISSIONS FOR THE RECORD

Alexander, Hon. Lamar, a U.S. Senator from the State of Tennessee, statement ..... 1039
Warner, Hon. John, a U.S. Senator from the State of Virginia, statement ..... 1056

**April 3, 2008**

STATEMENT OF COMMITTEE MEMBER

Kohl, Hon. Herb, a U.S. Senator from the State of Wisconsin ..... 1063
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, prepared statement ..... 1262
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania ..... 1064

PRESENTERS

Bond, Hon. Christopher S., a U.S. Senator from the State of Missouri presenting David Gregory Kays, Nominee to be U.S. District Judge for the Western District of Missouri presenting Stephen N. Limbaugh, Jr., Nominee to be U.S. District Judge for the Eastern District of Missouri ..... 1067
McCaskill, Hon. Claire, a U.S. Senator from the State of Missouri presenting David Gregory Kays, Nominee to be U.S. District Judge for the Western District of Missouri and Stephen N. Limbaugh, Jr., Nominee to be U.S. District Judge for the Eastern District of Missouri ..... 1068
Warner, Hon. John, a U.S. Senator from the State of Virginia: Presenting Mark S. Davis, Nominee to be U.S. District Judge for the Eastern District of Virginia and David J. Novak, Nominee to be U.S. District Judge for the Eastern District of Virginia, and Elisebeth C. Cook, Nominee to be Assistant Attorney General for the Office of Legal Policy, Department of Justice ..... 1064
Webb, Hon. Jim, a U.S. Senator from the State of Virginia presenting Mark S. Davis, Nominee to be U.S. District Judge for the Eastern District of Virginia and David J. Novak, Nominee to be U.S. District Judge for the Eastern District of Virginia ..... 1066

STATEMENTS OF THE NOMINEES

Cook, Elisebeth C., Nominee to be Assistant Attorney General for the Office of Legal Policy, Department of Justice ..... 1069
Questionnaire ..... 1071
Davis, Mark S., Nominee to be U.S. District Judge for the Eastern District of Virginia ..... 1097
Questionnaire ..... 1098
Kays, David Gregory, Nominee to be U.S. District Judge for the Western District of Missouri ..... 1135
Questionnaire ..... 1136
Limbaugh, Stephen N., Jr., Nominee to be U.S. District Judge for the Eastern Distrit of Missouri ..... 1200
Questionnaire ..... 1201
Novak, David J., Nominee to be U.S. District Judge for the Eastern District of Virginia ..... 1170
Questionnaire ..... 1171

QUESTIONS AND ANSWERS

Responses of David J. Novak to questions submitted by Senator Specter ..... 1256

SUBMISSIONS FOR THE RECORD

Warner, Hon. John, a U.S. Senator from the State of Virginia, prepared statements:
Elisebeth Collins Cook ..... 1265
Mark S. Davis ..... 1269

Page

Warner, Hon. John, a U.S. Senator from the State of Virginia, prepared statements—Continued
David J. Novak ..... 1277
Webb, Hon. Jim, a U.S. Senator from the State of Virginia, prepared statement ..... 1283

**May 1, 2008**

STATEMENTS OF COMMITTEE MEMBERS

Cardin, Hon. Benjamin L., a U.S. Senator from the State of Maryland ..... 1290
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, prepared statement and letters ..... 1425
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania ..... 1290

PRESENTERS

Bayh, Hon. Evan, a U.S. Senator from the State of Indiana presenting William T. Lawrence, Nominee to be U.S. District Judge for the Southern District of Indiana ..... 1295
Kyl, Hon. Jon, a U.S. Senator from the State of Arizona presenting G. Murray Snow, Nominee to be U.S. District Judge for the District of Arizona ..... 1289
Lugar, Hon. Richard, a U.S. Senator from the State of Indiana presenting William T. Lawrence, Nominee to be U.S. District Judge for the Southern District of Indiana ..... 1294
Warner, Hon. John, a U.S. Senator from the State of Virginia presenting G. Steven Agee, Nominee to be U.S. Circuit Court Judge for the Fourth Circuit ..... 1296
Webb, Hon. Jim, a U.S. Senator from the State of Virginia presenting G. Steven Agee, Nominee to be U.S. Circuit Court Judge for the Fourth Circuit ..... 1297

NOMINEES

Agee, G. Steven, Nominee to be U.S. Circuit Court Judge for the Fourth Circuit ..... 1298
Questionnaire ..... 1300
Lawrence, William T., Nominee to be U.S. District Judge for the Southern District of Indiana ..... 1336
Questionnaire ..... 1337
Snow, G. Murray, Nominee to be U.S. District Judge for the District of Arizona ..... 1376
Questionnaire ..... 1377

SUBMISSIONS FOR THE RECORD

Warner, Hon. John, a U.S. Senator from the State of Virginia, prepared statement ..... 1447
Webb, Hon. Jim, a U.S. Senator from the State of Virginia, prepared statement ..... 1452

ALPHABETICAL LIST OF NOMINEES

Agee, G. Steven, Nominee to be U.S. Circuit Court Judge for the Fourth Circuit ..... 1298
Anderson, Stanley Thomas, Nominee to be U.S. District Judge for the Western District of Tennessee ..... 527
Cook, Elisebeth C., Nominee to be Assistant Attorney General for the Office of Legal Policy, Department of Justice ..... 1069
Davis, Mark S., Nominee to be U.S. District Judge for the Eastern District of Virginia ..... 1097
Hall, James Randal, Nominee to be U.S. District Judge for the Southern District of Georgia ..... 188
Haynes, Catharina, of Texas Nominee to be U.S. Circuit Court Judge for the Fifth Circuit ..... 528
Honaker, Richard H., Nominee to be U.S. District Judge for the District of Wyoming ..... 216

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00009 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

Page

Katsas, Gregory G., of Massachusetts, to be Assistant Attorney General Civil Division, Department of Justice ..... 58
Kays, David Gregory, Nominee to be U.S. District Judge for the Western District of Missouri ..... 1135
Lawrence, William T., Nominee to be U.S. District Judge for the Southern District of Indiana ..... 1336
Limbaugh, Stephen N., Jr., Nominee to be U.S. District Judge for the Eastern District of Missouri ..... 1200
Mendez, John A., Nominee to be U.S. District Judge for the Eastern District of California ..... 527
Miller, Brian Stacy, Nominee to be U.S. District Judge for the Eastern District of Arkansas ..... 307
Novak, David J., Nominee to be U.S. District Judge for the Eastern District of Virginia ..... 1170
O'Connor, Kevin J., of Connecticut, to be Associate Attorney General, Department of Justice ..... 5
Puryear, Gustavus Adolphus, IV, Nominee to be U.S. District Judge for the Middle of Tennessee ..... 251
Snow, G. Murray, Nominee to be U.S. District Judge for the District of Arizona ..... 1376

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00010 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

# NOMINATIONS OF KEVIN J. O'CONNOR, OF CONNECTICUT, NOMINEE TO BE ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE; AND GREGORY G. KATSAS, OF MASSACHUSETTS, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

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**TUESDAY, JANUARY 22, 2008**

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

The Committee met, pursuant to notice, at 2:02 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Sheldon Whitehouse, presiding.

Present: Senators Cardin and Specter.

Senator WHITEHOUSE. The hearing will come to order.

My name is Sheldon Whitehouse, Senator from Rhode Island. I'll be chairing this hearing.

And we have with us the Honorable John Larson, who represents the State of Connecticut in Congress. And I will allow the Congressman to say a few words on behalf of one of the nominees, and then I will make an opening statement. Then I will call the two nominees forward together to be sworn, to give their opening statements, and then have such questions and answers as may transpire. So, that's what we'll do.

Congressman Larson, the floor is yours.

## PRESENTATION OF KEVIN J. O'CONNOR, NOMINEE TO BE ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, BY HON. JOHN B. LARSON, A U.S. REPRESENTATIVE FROM THE STATE OF CONNECTICUT

Representative LARSON. Thank you very much, Senator. I would like to say, on behalf of United States Senators Dodd and Lieberman, and I take both great pride and honor in being here and getting to introduce Kevin O'Connor to this committee.

I'm proud to introduce Kevin O'Connor. He has brought honor and distinction to every endeavor he's been associated with. This is a proud moment for him, Kathleen, their children, and the entire O'Connor family, several of whom are assembled here this afternoon. It's a proud moment for the State of Connecticut and, I daresay, a proud moment for these United States.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00011 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

Our local paper, the paper of record in the State of Connecticut, the Hartford Current, wrote of Mr. O'Connor's nomination: "In Kevin O'Connor, the White House has someone whose record and integrity promise to help restore confidence and stability to the agency." I couldn't agree more.

In his 5 years as United States Attorney for Connecticut, his office successfully prosecuted numerous public officials, both Republicans and Democrats, for corruption and bribery charges. Mr. O'Connor has been adamant in enforcing our civil rights laws. He has protected our children from predators by successfully implementing the Project Safe Childhood program that combats online sex crimes against children.

He has won a conviction in a Federal civil rights trial against the former mayor of Waterbury, Connecticut for sexually abusing two minor children, and he sent a clear message that racial discrimination has no place in the State of Connecticut, or this country, with the prosecution of racially motivated crimes.

Mr. O'Connor personally prosecuted a man who plead guilty to violating Federal civil rights laws by accosting a colleague and making racially derogatory comments. As U.S. Attorney, he successfully tried criminal cases, argued two cases before the U.S. Court of Appeals for the Second Circuit. He has appeared in court on behalf of the United States on numerous other matters.

But he also took his job and responsibility outside of the courtroom and onto the streets by implementing a Project Safe Neighborhoods program. He worked to reduce gun crime, because there is no better way to lower our crime rate than to prevent criminal behavior before it begins.

I know this firsthand from working with him and seeing the level of commitment, understanding, the passion that he brings to his job and the coordinated involvement he brings to problem solving, things that I know serve him, and this Nation, well.

He also took on companies in our State whom he believed were violating the Clean Water Act. They were found guilty of dumping sewage into our waterways and falsifying records. In addition to obtaining two of the largest criminal penalties in New England history for their convictions, he also went further and secured commitments from the companies to clean up their acts and improve their environmental compliance efforts.

Mr. O'Connor recently served with distinction as Chief of Staff for the Attorney General. He assumed this position during a difficult time for the Department and the U.S. Attorney community. He helped maintain consistency during the transition between Acting Attorney General and Attorney General Michael Mukasey. He stepped up to the job by instituting a process that both helped fix the Department's problems and ensured its continued integrity.

His previous experience includes a stint as a partner in one of Connecticut's largest law firms. He also enforced our Nation's security laws while working for the U.S. Securities & Exchange Commission, and he teaches law at the University of Connecticut and George Washington University. He has been an active and involved member of our community, serving on boards with distinction, and most of all bringing his great energy and enthusiasm to all of those endeavors.

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00012 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

As an Associate Attorney General, I am confident that he will continue to enforce the Nation's laws and continue to show the strong and impartial commitment to the rule of law.

I am honored to introduce Kevin O'Connor for your consideration of his nomination to the position of Associate Attorney General, for which he is eminently qualified and, like everything else that he has done, will distinguish himself on behalf of this great Nation that he has sworn to serve.

I thank you for affording me the honor to introduce this outstanding candidate.

Senator WHITEHOUSE. Thank you, Congressman Larson. I appreciate that you have made the trip—quite a long trip, it seems, from your side of the Capitol to ours—to speak on behalf of Mr. O'Connor. I appreciate it.

Representative LARSON. Let's hope we can continue to close that chasm that exists there. Thank you very much, Senator. I appreciate the opportunity.

Senator WHITEHOUSE. I'm very grateful to have our Ranking Member, the distinguished Senator from Pennsylvania, Senator Specter, here.

Senator.

Senator SPECTER. Well, thank you, Mr. Chairman. I wanted to join in welcoming Congressman Larson and thank him for his opening remarks. I'd welcome the nominees for key positions in the Department of Justice. Kevin J. O'Connor, to be Associate Attorney General, the number three position. I thank Senator Leahy, the Chairman, and you for moving ahead with these important nominations.

We're trying very hard to get the Department of Justice up to full speed. We have lots of important work to do. The Department had a rugged year last year, without saying anything further. Attorney General Mukasey is in charge, bringing in a new team. We want to make an appropriate analysis here and get these people confirmed at the earliest possible time so that they can move ahead full steam.

I am pleased to see the excellent resumes of these two nominees. Kevin James O'Connor, with honors from University of Notre Dame, high honors from Connecticut Law School, on the Law Review. Real qualifications. He clerked for a Federal judge and was U.S. Attorney. He worked in the Department of Justice as Associate Deputy Attorney General and Chief of Staff to the Attorney General. So, those are very fine credentials. He knows his field. A prosecuting attorney's job is something that Senator Whitehouse and I have some—I have modest experience, he has extensive experience.

Senator WHITEHOUSE. Also modest.

Senator SPECTER. And I'm especially pleased to see Mr. Katsas has worked for Judge Becker. That's an education all by itself. Judge Becker was Chief Judge of the Circuit in the Federal District Court from 1970 to 1982. He served on the Third Circuit until his untimely death 2 years ago. He was a very good friend of mine, and one of the great, great jurists in the history of the Federal courts.

Mr. Katsas has a great record, Princeton cum laude and Harvard Law School, cum laude, executive editor of the Harvard Law Re-

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00013 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

view, and extensive experience at the Department of Justice. So, it's good to move ahead with these quality nominees. I'm reserving judgment, gentlemen, until we hear you testify and take a close look at your record, but it seems to me you're in very good shape.

And preliminarily, let me say that I will not be here too long because there are several hundred Pennsylvanians waiting to talk to me. This is January 22nd, as you may have noted on your calendar, the day of Roe v. Wade, which brings a large group to the steps of the Supreme Court and a large group to most Senators' offices.

Thank you very much, Congressman Larson, for coming over.

Representative LARSON. My pleasure. Thank you, Senator.

Senator WHITEHOUSE. Thank you, Congressman Larson.

Go ahead and take your seats, gentlemen. Today the committee will hear from two witnesses, Kevin O'Connor, nominated to be the Associate Attorney General, and Gregory Katsas, nominated to be the Assistant Attorney General in charge of the Civil Division.

Mr. O'Connor is currently the U.S. Attorney for the District of Connecticut. He has previously served as Chief of Staff to Attorney General Alberto Gonzales and as Associate Deputy Attorney General. Prior to joining the Department of Justice, he had an impressive career in both the private and public sectors.

The position to which Mr. O'Connor has been nominated is a vital one. The Associate Attorney General is the number three official at the Department of Justice, responsible for supervising a number of important offices, including the Antitrust, Civil, Civil Rights, and Environment & Natural Resources Divisions.

Mr. Katsas is currently both the Acting Associate Attorney General and the Principal Deputy Associate Attorney General. From 2001 to 2006, he served as the Deputy Attorney General of the Civil Division, where he supervised much of the division's appellate work, so he is well familiar with the workings of the very important division he has been nominated to.

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

Senator WHITEHOUSE. Before proceeding with the witnesses' opening statements, I would like to make two observations. First, this hearing marks another important step in the effort to restore the Department's credibility after the disastrous tenure of Alberto Gonzales, which ended with vacancies throughout the Department's upper ranks.

Indeed, the nominees before the committee today are the ninth and tenth, respectively, to have confirmation hearings before this committee since Mr. Gonzales stepped down, a list which includes nominees to be Attorney General, Deputy Attorney General, Associate Attorney General, and three Assistant Attorneys General.

I commend Chairman Leahy for his determination to help fill these vacancies so that Attorney General Mukasey can have a leadership team intact so the Department's credibility can be restored.

Chairman Leahy has provided a statement, which I ask to have put in the record. Without objection, the Chairman's statement will be part of the record.

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

Senator WHITEHOUSE. Whether the Department's credibility can be restored depends in large part on whether these nominees are committed to operating in a manner different from the approach of the Gonzales Justice Department in which they both served. Second, this hearing is a reminder of the vital role of congressional oversight of the Department of Justice.

It was thanks to this committee's hard work last year that the American people learned of U.S. Attorneys fired for political reasons, of a hiring process corrupted by politics, and a policy that allowed hundreds of people at the White House to have case-specific conversations with dozens of DOJ lawyers.

Attorney General Mukasey has taken preliminary steps to right the ship, but as we all know, there is much more to be done. Congress will play an instrumental role in ensuring that progress continues to be made, which brings us to today's hearing. We look forward to the testimony of both Mr. O'Connor and Mr. Katsas.

We need independent voices in the leadership of the Department of Justice, people who will make decisions based on the law, not on politics, people who will stand up to political pressure from the White House, and people who understand and value the time-honored traditions of the Department of Justice that have helped guide it for many decades and made it great. These are the measures by which we will judge your nominations. I look forward to your testimony, and would call on you for your opening remarks.

Senator Specter, would you like to make further opening remarks?

Senator SPECTER. No thank you, Mr. Chairman.

Senator WHITEHOUSE. Would the witnesses please stand and be sworn?

[Whereupon, the witnesses were duly sworn.]

Senator WHITEHOUSE. Please be seated.

Mr. O'Connor, will you proceed first?

## STATEMENT OF KEVIN J. O'CONNOR, OF CONNECTICUT, NOMINEE TO BE ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. O'CONNOR. Good afternoon, and thank you, Mr. Chairman, for, No. 1, agreeing to chair this hearing, and Senator Specter, for being here as well. I want to thank the President and the Attorney General for having the confidence in me to nominate me for this very important position at a very important time.

I also want to thank Congressman Larson for his kind words and efforts to be here today. I had the good fortune of having been an opponent of his in a prior election. You can probably see, from his remarks, why I lost and he won. He is an outstanding public servant and it means a lot to me and my family that he took the time to be here. So, I want to thank him as well.

I'd also like to thank my family, many of whom join me here today.

Senator WHITEHOUSE. Why don't you take a few minutes and introduce them if you would? We'd be delighted to see who they are

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and have you have the opportunity to introduce them to the committee.

Mr. O'CONNOR. Thank you, Senator, for that.

I'd introduce my wife, Kathleen, and my son James, who is for now is acting very well on her lap. My three daughters are color-coordinated so we don't lose them in the room, Erin, Anne and Mary. Behind them are my in-laws, Bill and Caryl Plunkett, and behind my wife are my parents, Mary and Dennis O'Connor. I also have two of my brothers here today, Michael and John O'Connor, and Michael brought his sons, Brandon and Michael, as well. I have numerous other friends and family from West Hartford, but also from my U.S. Attorney Office and the Department who are here as well.

I will not indulge upon your time and your patience by going through all of them, but I want to thank them as well.

Senator WHITEHOUSE. Well, you are all very welcome here. I appreciate that you've taken time out of your schedules to come, and I appreciate how well the young O'Connor children are behaving. You are setting a very good example.

Please proceed.

Mr. O'CONNOR. Thank you.

I want to be very brief in my opening statement and just simply say that it's an honor to serve. I feel privileged to have served this country and the people of Connecticut for the last five-plus years as United States Attorney. And should I be confirmed by the Senate, I would view it as the highest honor of my professional career to continue in service of the Department of Justice.

I have come, over the past 5 years, to admire and respect so greatly all of the men and women of the Department of Justice, all—more than 100,000 of them, and I feel privileged every day I get to come to work and work alongside them. So it is a deep honor to me and to my family to be here today.

Again, I thank this committee for moving as quickly as it has with my nomination, and I thank you for your time this afternoon.

[The biograhical information follows.]

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**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR NON-JUDICIAL NOMINEES**

**PUBLIC**

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

   **Kevin James O'Connor**

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

   **Associate Attorney General**

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

   **157 Church Street, 23rd Floor, New Haven, Connecticut 06510**

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

   **1967 - Hartford, Connecticut**

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

   **Kathleen O'Connor (Maiden Name: Kathleen Plunkett)**
   **Of Counsel**
   **McKenna, Long & Aldridge, LLP**
   **230 Park Avenue, 17th Floor**
   **New York, NY 10169**

   **Consultant**
   **Saoi, Ltd.**
   **84 West Park Place**
   **Stamford, CT 06901**

   **4 dependent children**

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

**August 1989 - May 1992: University of Connecticut School of Law, J.D., 1992**
**August 1985 - May 1989: University of Notre Dame, B.A., 1989**

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

**Employment:**

**United States Attorney for the District of Connecticut (2002 - Present)**
**157 Church Street, 23rd Floor**
**New Haven, CT 06510**

**United States Department of Justice**
**Chief of Staff to the Attorney General (April 2007 - November 2007)**
**950 Pennsylvania Avenue**
**Washington, DC 20530**

**United States Department of Justice**
**Associate Deputy Attorney General (January 2007 - April 2007)**
**950 Pennsylvania Avenue**
**Washington, DC 20530**

**Day, Berry & Howard (now Day Pitney, LLP)**
**Partner (2002); Counsel (1999 - 2001)**
**CityPlace I**
**Hartford, CT 06103**

**University of Connecticut School of Law**
**Instructor (1998-99; 2004-06)**
**55 Elizabeth St.**
**Hartford, CT 06105**

**Town of West Hartford**
**Corporation Counsel (1999- 2001)**
**50 South Main Street**

**West Hartford, CT 06107**
**Leboeuf, Lamb, Greene & MacRae (now known as Dewey LeBoeuf)**
**Associate (1997-99)**
**225 Asylum Street**
**Hartford, CT 06103**

**National Law Center**
**George Washington University**
**Adjunct Professor (1996-97)**
**720 20th St., N.W.**
**Washington, D.C. 20052**

**United States Securities & Exchange Commission**
**Division of Enforcement**
**Staff Attorney (1995-96); Senior Counsel (1996-97)**
**450 Fifth St., N.W.**
**Washington, D.C. 20549**

**Cahill, Gordon & Reindel**
**Associate (1993-95); Summer Associate (1991)**
**80 Pine Street**
**New York, NY 10005**

**Special Assistant District Attorney, Manhattan District Attorney's Office (1994-95) (Appointed by District Attorney Robert Morgenthau)**

**The Honorable William H. Timbers (Deceased)**
**Senior Circuit Judge**
**United States Court of Appeals for the Second Circuit**
**Law Clerk (1992-93)**
**40 Foley Square**
**New York, NY 10007**

**Sorokin, Sorokin, Gross, Hyde & Williams (Now known as Pullman & Comley)**
**Summer Associate (1990); Clerk (Summer 1989)**
**One Corporate Center**
**Hartford, CT 06103**

**Boppers (no longer in business)**
**Doorman (1989)**
**Union Place Hartford, CT 06103**

**Volunteer Service:**

**University of Notre Dame Monogram Club**
**Board Member (2001-04); Advisor (2007 - present)**
**Joyce Center, Room C113**
**Notre Dame, IN 46556**

**Hartford Hospital**
**Corporator (2001 - 2007)**
**80 Seymour Street**
**Hartford, CT 06012**

**Society of the Friendly Sons of St. Patrick, Hartford, CT**
**Vice President (2002)**

**Connecticut Commission on the Death Penalty**
**Chairman (2001-02)**

**Federal Bar Council**
**Trustee (2000-02)**
**370 Lexington Ave.**
**New York, NY 10017**

**WFSB Channel 3**
**Political Analyst (2000-02)**
**333 Capital Boulevard**
**Rocky Hill, CT 06067**

**GOP 1, Connecticut First Congressional District Republican Committee**
**Co-Chair**

**The Old State House Association, Inc.**
**Director (1998-2002)**
**800 Main Street**
**Hartford, CT 06103**

**Riverfront Recapture, Inc.**
**Director (1999-2002)**
**One Hartford Square West, Suite 100**
**Hartford, CT 06106**

**Foundation for the Advancement of Catholic Schools**
**Vice President (2001-02), Director (1999-2002)**
**467 Bloomfield Ave.**
**Bloomfield, CT 06002**

**John A. Rogers African American Cultural Society, Inc.**
**Board Member (1998-2001)**
**230 Scarborough St,**
**Hartford, CT 06105**

**United Cerebral Palsy of Greater Hartford**
**Board Member (1999-2001)**
**80 Whitney St.**
**Hartford, CT 06105**

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

**None**

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

**Designated "Connecticut Super Lawyer" (2006)**
**Central Connecticut Celtic Cultural Committee Person of the Year (2004)**
***Connecticut Law Tribune* Impact Award (2002)**
**Designated by City Council as City of Hartford Hero (2000)**
***Hartford Business Journal* "40 Under 40" Business Leadership Awards (1999, 2002)**
**Republican of the Year, Town of Wethersfield, CT (1998)**
**Hartford County Bar Association Scholarship (1992)**
**UCONN Law School Foundation Prize Award for Outstanding Service (1992)**
**Cornelius Wickersham Jr. Award for Excellence in the Study of Constitutional Law (1992)**
**American Jurisprudence Book Awards for Constitutional Law (1992), Business Organizations (1992) and Moot Court (1991)**
**Member Connecticut Law Review (1990-92)**
**Notes and Comments Editor (1991-92)**
**Member, Connecticut Moot Court Board (1990-92)**
**Winner, Alva P. Loiselle Moot Court Competition (1990)**
**Pi Sigma Alpha National Government Honor Society (1988-89)**

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.

**Federal Bar Council (Trustee 2000-02)**
**Connecticut Commission on the Death Penalty (Chair 2001-02)**

**Connecticut Bar Association**
**Hartford County Bar Association**
**Association of the Bar of the City of New York**
**New York State Bar Association**

11. Bar and Court Admission:

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

**Connecticut (December 1992)**
**New York (June 1993)**

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

**United States Supreme Court (2000)**
**United States Court of Appeals for the Second Circuit (1994)**
**United States District Court for the District of Connecticut (1993)**
**United States District Court for the Southern District of New York (1994)**
**United States District Court for the Eastern District of New York (1994)**
**All State Courts for Connecticut (1992) and New York (1993)**

12. Memberships:

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

**Wampanoag Country Club, West Hartford, CT (1997 - 2002)**
**The Hartford Club (1999 - 2001)**
**The 1892 Club, (1999 - 2001)**
**University of Notre Dame Monogram Club (Board Member 2001-04; Advisor 2007-present)**
**Society of the Friendly Sons of St. Patrick, Hartford, CT (Vice President 2002)**
**The Old State House Association, Inc. (Director 1998 - 2002)**
**Riverfront Recapture, Inc. (Director 1999 - 2002)**
**Foundation for the Advancement of Catholic Schools (Director 1999 - 2002; Vice President 2001-02)**



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**John A. Rogers African-American Cultural Society, Inc. (Board Member 1998 - 2001)**
**United Cerebral Palsy of Greater Hartford (Board Member 1999 - 2001)**
**GOP 1, Connecticut First Congressional District Republican Committee (Co-Chair)**

b. Please indicate whether any of these organizations listed in response to 12(a) above currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

**The Society of the Friendly Sons of St. Patrick exists for the sole purpose of hosting an annual dinner, attended by men only, around St. Patrick's Day in Wethersfield, CT.**

13. Published Writings and Public Statements:

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

**"Status Report From the Office of the United States Attorney" *Connecticut Bar Association's Federal Practice Section Newsletter,* Winter 2004**
**"Facts Don't Support Criticism of Patriot Act" *Hartford Courant,* September 11, 2003**
**"Cooking the Books: Can it Happen at Your Company?" *Hartford Business Journal*, March 18, 2002**
**"Investors Beware: The Risks of On-Line Trading are Growing" *Connecticut Law Tribune*, February 7, 2000 (Co-Author)**
**"When the Government Comes Knocking - How You Answer is Most Important"**
***Hartford Business Journal*, August 9, 1999**
**"Tobacco Legislation With Government Windfall is Immoral" *Journal Inquirer,* June 16, 1998**
**Note, *Rutan v. Republican Party of Illinois: Federal Court's Expanding Role in Political Patronage Employment Decisions*, 24 CONN. L. REV. 641 (1992)**
***Thirteen Years Later: The Impact of the UCCJA on Connecticut Courts*, 65 CONN. BAR J. 451 (1991)**

**In 1999 or early 2000, I authored an Op Ed that was published in *The Hartford Courant* in which I was supportive of federal campaign finance legislation. I have not been able to locate a copy of this Op Ed.**



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

**No responsive materials.**

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

**See Attached.**

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

**As a candidate for United States Congress in 1998, I gave numerous speeches. I have no copies or outlines of such speeches, but almost all, if not all, such speeches were delivered extemporaneously. As United States Attorney, I have given a large number of formal and informal speeches on a wide variety of topics. To the extent that I spoke from an outline or notes, I have attached copies of those outlines/notes hereto. On most occasions, I spoke extemporaneously.**

**Set forth below is a list of speeches that I have given and panel discussions in which I have participated as United States Attorney. Please note that I do not keep a running list of such events. In the course of responding to this questionnaire, I attempted to review my electronic calendar to retrieve such information. However, no such data exists prior to May 2007 as a result of the conversion of such data from the server to a blackberry device. Accordingly, this list is compiled from memory and a review of all paper files in the United States Attorney's Office.**

**February 19, 2003** **Group :Connecticut Bar Association**
**Subject: Sarbanes-Oxley**

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|---|---|
| **February 20, 2003** | **Group: Wilton League of Woman Voters & the Wilton Library<br>Subject: USA Patriot Act - Is Big Brother Watching You? Or, Is Uncle Sam Protecting Your Interests?** |
| **March 1, 2003** | **Group: CT Trial Lawyers Association<br>Subject: U.S. Attorney's Office Update** |
| **March 24, 2003** | **Group: UCONN Law School Class<br>Subject: Government Investigations** |
| **March 25, 2003** | **Group: Bridgeport Rotary Club<br>Subject: U.S. Attorney's Office Update** |
| **March 26, 2003** | **Group: Conference on Investigating & Prosecuting Crimes Against Children<br>Subject: Welcome and Opening remarks** |
| **March 27, 2003** | **Group: Public Forum on Sexual Trafficking of Women and Children<br>Subject: Update on Efforts of Federal Government** |
| **April 5, 2003** | **Group: Global Majority Retreat, Connecticut State University System, Connecticut Community Colleges<br>Subject: The Patriot Act** |
| **April 8, 2003** | **Group: Connecticut Anti Terrorism Task Force<br>Subject: Welcome and Opening Remarks: Understanding Islam and the Culture and Customs of Connecticut's Muslim Community** |
| **May 22, 2003** | **Group: Connecticut Law Enforcement Memorial Foundation<br>Subject: Remarks at Annual Memorial Service** |
| **June 17, 2003** | **Group: Northeast Regional Counter-terrorist Operations Program<br>Subject: Welcoming Remarks** |
| **June 18, 2003** | **Group: West Hartford Citizens for Peace & Justice<br>Subject: Public Forum on the US Patriot Act and Its Impact on Our Civil Liberties** |

**June 19, 2003** **Group: Greater Danbury Bar Association**
**Subject: Update on U.S. Attorney's Office**

**August 22, 2003** **Group: Camp DEFY campers and parents**
**Subject: Graduation Remarks**

**August 22, 2003** **Connecticut Bar Association**
**Subject: Remarks and Observations By Connecticut's Recently Appointed United States Attorney**

**September 10, 2003** **Group: National Troopers Coalition**
**Subject: US Patriot Act**

**October 14, 2003** **Group: Connecticut Civil Liberties Union, Northeast Chapter**
**Subject: US Patriot Act**

**October 14, 2003** **Group: Teikyo Post University Constitutional Law Class**
**Subject: Duties and Function of the U.S. Attorney**

**October 20, 2003** **Group: Department of Justice's Advanced Environmental Enforcement Seminar**
**Subject: Keynote Address**

**December 4, 2003** **Group: Federal Bar Council and Connecticut Bar Association's Federal Practice Section**
**Subject: Investigating and Defending Financial Scandals: Perspectives from the Justice Department, the SEC and the Defense**

**February 5, 2004** **Group: US Attorney's Office and General Public, Black History Month Celebration**
**Subject: Opening Remarks**

**February 12, 2004** **Group: Connecticut Bar Association**
**Subject: Business Torts and White Collar Crime: Knowing When the Line has been Crossed**

**March 11, 2004** **Group: Connecticut Bar Association**
**Subject: Environmental Enforcement**

**March 22, 2004** **Group: 2004 Freedom of Information Conference Program sponsored by the Freedom of Information Commission, State of Connecticut**
**Subject: Keynote Address**



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**April 22, 2004** **Group: Corporate Counsel College**
**Subject: Compliance Issues**

**May 4, 2004** **Group: Fairfield County Detective School**
**Subject: Graduation Remarks**

**May 11, 2004** **Group: West Haven Police Department's biennial awards ceremony**
**Subject: Congratulatory Remarks**

**May 19, 2004** **Group: Connecticut Police Chiefs Law Enforcement Memorial Foundation**
**Subject: Remarks at Annual Memorial Service**

**June 7, 2004** **Connecticut Bar Association**
**Subject: Cyberthieves in Corporate Vaults**

**September 8, 2004** **Group: Connecticut Police Chiefs Association**
**Subject: John M. Bailey Seminar on New Legal Developments**

**September 10, 2004** **Connecticut Bar Association's Federal Practice Section**
**Subject: Blakely v. Washington: What Does it Mean, Now and in the future?**

**September 22, 2004** **Group: Training Conference on Human Trafficking and Smuggling**
**Subject: Efforts of U.S. Attorney's Office**

**September 28, 2004** **Group: League of Women Voters of New Haven**
**Subject: The Patriot Act**

**October 1, 2004** **Group: Survivors of Homicide, Inc.**
**Subject: Evolution of the Criminal Justice System Throughout the Last Decade**

**October 4, 2004** **Group: Connecticut Securities Forum**
**Subject: Keynote Speech on Corporate Fraud**

**November 9, 2004** **Group: Public Forum on Identify Theft**
**Subject: Efforts of the U.S. Attorney's Office**

**November 10, 2004** **Group: Illing Middle School Class**
**Subject: Keeping Drugs and Guns off our Streets**



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**November 30, 2004 Group: Pratt & Whitney Law Department**
**Subject: Leading the Fight Against Illegal Export of Technically Sensitive Data**

**January 25, 2005 Group: St. Luke's High School**
**Subject: Human Trafficking**

**February 27, 2005 Group: Society of Professional Journalist, Connecticut Chapter**
**Subject: Covering the Courts in Connecticut**

**March 28, 2005 Group: UCONN Law School Government Investigations Class**
**Subject: The Federal Grand Jury**

**March 29, 2005 Group: Stamford Rotary Club**
**Subject: Fighting Federal Crime in Connecticut**

**April 7, 2005 Group: Greater Hartford African American Alliance**
**Subject: Curbing Violence in Hartford**

**April 12, 2005 Group: Public Forum Sponsored by Noank Baptist Church**
**Subject: Preventing Hate Crimes and Discrimination**

**April 28, 2005 Group: Greenwich Bar Association**
**Subject: The Patriot Act**

**May 2, 2005 Group: Milton Sorokin Symposium**
**Subject: The First Amendment - Freedom of Expression in Wartime**

**May 25, 2005 Group: Connecticut Police Chief's Law Enforcement Memorial Foundation**
**Subject: Remarks at Annual Memorial Ceremony**

**September 26, 2005 Group: University of New Haven**
**Subject: USA Patriot Act: Myth vs. Reality**

**September 28, 2005 Group: Public Forum Sponsored by New York University School of Law Republicans**
**Subject: Public Corruption**



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**September 29, 2005 Group: UCONN Masters Degree candidates in Homeland Security Leadership**
**Subject: The Patriot Act, law enforcement and civil liberties**

**September 29, 2005 Group: Seminar on Contemporary Slave Trade and Human Trafficking seminar**
**Subject: The Connecticut Perspective**

**September 30, 2005 Group: Connecticut Society of Governmental Accountants**
**Subject: Fighting Federal Crime in Connecticut**

**October 18, 2005 Group: Public Forum at Connecticut College**
**Subject: The Patriot Act**

**October 20, 2005 Group: Phillips Metropolitan CME Church**
**Subject: Remarks at Law Enforcement Appreciation Day**

**November 9, 2005 Group: UCONN Law School**
**Subject: Hot Topics in Corporate & Securities Law**

**November 22, 2005 Group: Connecticut Juvenile Justice Commission**
**Subject: Opening Remarks at Children, Youth & the Police Seminar**

**November 23, 2005 Group: Federal Bar Council's Annual Thanksgiving Luncheon**
**Subject: Emcee**

**December 1, 2005 Group: 2005 Gang Investigators' Training Conference**
**Subject: Welcoming Remarks**

**January 18, 2006 Connecticut Bar Association's Financial Institution Section**
**Subject: Crimes Affecting Financial Institutions**

**March 17, 2006 Group: Knights of St. Patrick Annual Dinner**
**Subject: Guest Speaker on Irish Heritage**

**March 30, 2006 Group: Federal, State and Local Law Enforcement**
**Subject: Identity Theft and Fraud**

**April 6, 2006 Group: Norwalk Community College**
**Subject: The Patriot Act**

| | |
|---|---|
| **April 7, 2006** | **Group: The Hartford Golf Club**<br>**Subject: Fighting Federal Crime in Connecticut** |
| **April 10, 2006** | **Group: Connecticut Bar Institute, Inc.**<br>**Subject: Government Investigations and White Collar Criminal Defense** |
| **April 19, 2006** | **Group: Charter Oak Federal Credit Union**<br>**Subject: The Importance of SARs** |
| **May 17, 2006** | **Group: "Crossing the Lines: Protecting Our Children" conference sponsored by the New England U.S. Attorney's Offices**<br>**Subject: Opening Remarks** |
| **May 23, 2006** | **Group: Ansonia Police Department's Annual Awards Ceremony**<br>**Subject: Congratulatory Remarks** |
| **May 24, 2006** | **Group: Connecticut Police Chiefs Law Enforcement Memorial Foundation**<br>**Subject: Remarks at Annual Memorial Service** |
| **July 12, 2006** | **Group: 2006 Blue Ribbon Hedge Fund Symposium**<br>**Subject: SEC Examinations of Hedge Funds** |
| **August 24, 2006** | **Group: InFraguard 2006 National Conference**<br>**Subject: Prosecuting Organized Gangs** |
| **September 11, 2006** | **Group: Albertus Magnus College**<br>**Subject: The Patriot Act** |
| **September 14, 2006** | **Group: UCONN Masters Degree candidates in Homeland Security Leadership**<br>**Subject: U.S. Attorney's Office Update** |
| **September 19, 2006** | **Group: Public Forum Sponsored by South Asian Bar Association of Connecticut**<br>**Subject: Hate Crimes and South Asians in America: A Community Discussion** |
| **September 27, 2006** | **Group: Connecticut Prepared Conference**<br>**Subject: Emergency Preparedness Efforts** |
| **September 29, 2006** | **Group: Connecticut Gang Prevention Summit**<br>**Subject: Opening Remarks** |

**October 13, 2006 Group: Connecticut Society of Governmental Accountants**
**Subject: Crime in Connecticut**

**October 4, 2006 Group: Center for First Amendment Rights**
**Subject: Libraries and the Patriot Act: ACLU v. Gonzales Revisited**

**October 4, 2006 Group: Public Forum Sponsored by CPTV**
**Subject: ACLU v. Gonzales Revisited**

**November 1, 2006 Group: Trinity College's Human Rights Lecture Series**
**Subject: The Global Impact of the War on Terror on Human Rights**

**November 8, 2006 Group: Second Annual William R. Davis Mock Trial Competition at UCONN Law School**
**Subject: Opening Remarks**

**November 14, 2006 Group: The Old Guard**
**Subject: Crime and the Patriot Act**

**November 15, 2006 Group: Connecticut Bar Association**
**Subject: The Patriot Act**

**November 29, 2006 Group: Hedge Fund Seminar Sponsored by Absolute Return**
**Subject: How the Investors in Durus Capital Management Took the Firm's Blowup into Their Own Hands and Averted Disaster**

**December 1, 2006 Group: West Hartford Squires**
**Subject: Fighting Federal Crime in Connecticut**

**December 4, 2006 Group: High School Coaches, Sponsored by Project Safe Neighborhoods**
**Subject: Importance of Role Models**

**January 17, 2007 Group: First Assistant United States Attorney's Conference**
**Subject: Drugs, OCDETF, Gangs and Organized Crime**

**February 8, 2007 Group: The Catholic Club Annual Dinner**
**Subject: Abraham Lincoln and Faith**



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**February 22, 2007 Group: Quinnipiac University School of Law's American Constitution Society**
**Subject: Terrorism and the U.S. Courts**

**May 3, 2007 Group: American Bar Association's Tort Trial & Insurance Practice Section Task Force on Corporate Governance**
**Subject: Corporate Governance**

**May 4, 2007 Group: Middlesex County Bar Association Law Day Luncheon**
**Subject: Liberty Under Law: Empowering Youth, Assuring Democracy**

**May 9, 2007 Group: Hedge Fund Seminar sponsored by Schulte Roth & Zabel**
**Subject: Hedge Fund Oversight and Regulation**

**May 18, 2007 Group: Gang Resistance Education and Training Graduation, Hartford, CT**
**Subject: Congratulatory Remarks**

**August 2, 2007 Group: Camp DEFY Graduation**
**Subject: Congratulatory Remarks**

**August 2, 2007 Group: Willimantic Weed & Seed Graduation**
**Subject: Congratulatory Remarks**

**August 15, 2007 Group: Gang Resistance Education and Training Northeast Regional Training Conference**
**Subject: Opening Remarks**

**October 31, 2007 Group: National Law Center Protects Seminar**
**Subject: Opening Remarks**

**November 16, 2007 Group: MarHedge Hedge Fund Conference**
**Subject: The Regulators' Perspective on Hedge Funds**

**December 6, 2007 Group: Hedge Fund Conference Sponsored by Absolute Return**
**Subject: Durus Capital Management Revisited**

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

**I do not keep a running list of interviews that I have given nor do I have any transcripts of such interviews. I have no records reflecting interviews that I gave as a candidate for United States Congress or as Corporation Counsel for the Town of West Hartford. As United States Attorney, I have had extensive, almost daily, interaction with members of the press and have no records to accurately list every single interaction or interview.**

**I have attached hereto copies of miscellaneous news clips retained by my office. This is not a complete set of all such clips but merely copies of those maintained by the Office.**

**I have also attached hereto copies of all press releases issued by my office during my tenure in which I am quoted.**

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

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

**United States Attorney for the District of Connecticut (2002-present) (Nominated by President Bush, confirmed by United States Senate)**
**Chief of Staff to the Attorney General of the United States (April 2007 - November 2007) (Appointed by Attorney General Gonzales; also served as Chief of Staff for Acting Attorney Generals Paul Clement and Peter Keisler and Attorney General Mukasey)**
**Associate Deputy Attorney General (January 2007 - April 2007) (Appointed by Attorney General Gonzales and Deputy Attorney General McNulty)**
**Corporation Counsel, Town of West Hartford, CT (1999 - 2001) (appointed by Town Council)**
**Republican Nominee for U.S. House of Representatives, First Congressional District, Connecticut 1998**
**Special Assistant District, Manhattan District Attorney's Office (1994-95) (Appointed by District Attorney Robert Morgenthau)**

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

**As discussed above, I was the Republican Party's nominee for United States House of Representatives in Connecticut's First Congressional District in 1998. I lost the general election to Congressman John B. Larson.**

**Since that time and prior to my service as United States Attorney, I worked on other political campaigns, including those of former Congresswoman Nancy Johnson, on whose Finance Committee I served, and President George W. Bush for whose 2000 presidential campaign I served as the First Congressional District Coordinator. I also served in 2000 as a co-chair of the Connecticut chapter of Lawyers for George W. Bush where I interacted with members of the legal community who were supportive of President Bush's campaign and helped host an event for lawyers supporting the campaign.**

**In 2000, I was briefly chair of then Lieutenant Governor M. Jodi Rell's exploratory gubernatorial campaign committee. I do not recall undertaking any activities on behalf of this committee which was abolished due to Ms. Rell's decision not to pursue a gubernatorial run at that time.**

**In 1999, I became chair of GOP 1, a political action committee in Connecticut's First Congressional District. My activities on behalf of this committee were very limited and ceased upon my becoming United States Attorney in 2002.**

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

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

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

**Yes, I served as a Law Clerk to the Honorable William H. Timbers on the U.S. Court of Appeals for the Second Circuit, from 1992 - 1993.**

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

**I have not practiced alone.**



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

**United States Attorney for the District of Connecticut (2002 - Present)**
**157 Church Street, 23rd Floor**
**New Haven, CT 06510**

**United States Department of Justice**
**Chief of Staff to the Attorney General (April 2007 - November 2007)**
**950 Pennsylvania Avenue**
**Washington, DC 20530**

**United States Department of Justice**
**Associate Deputy Attorney General (January 2007 - April 2007)**
**950 Pennsylvania Avenue**
**Washington, DC 20530**

**Day, Berry & Howard, LLP (now Day Pitney, LLP)**
**CityPlace I, Hartford, CT 06103**
**Partner, 2002**
**Associate, 1999 - 2001**

**University of Connecticut School of Law**
**55 Elizabeth St.**
**Hartford, CT 06105**
**Instructor (1998-99; 2004-06)**

**Town of West Hartford, Connecticut**
**50 South Main Street**
**West Hartford, CT 06107**
**Corporation Counsel, 1999-2001**

**LeBoeuf, Lamb, Greene & MacRae**
**225 Asylum St., Hartford, CT 06103**
**Associate, 1997 - 1999**

**National Law Center**
**George Washington University**
**720 20th St., N.W.**
**Washington, D.C. 20052**
**Adjunct Professor (1996-97)**



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**United States Securities & Exchange Commission**
**Division of Enforcement**
**450 Fifth St., N.W.**
**Washington, D.C. 20549**
**Senior Counsel, 1996 - 1997**
**Staff Attorney, 1995 - 1996**

**Cahill, Gordon & Reindel**
**80 Pine Street**
**New York, NY 10005**
**Associate, 1993-95**
**Summer Associate, 1991**

**Sorokin, Sorokin, Gross, Hyde & Williams**
**One Corporate Center**
**Hartford, CT 06103**
**Summer Associate, 1990**

b. Describe:

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

**Before becoming United States Attorney in 2002, I was in private practice and, before that, served in a variety of other public service and private sector legal positions. My private practice experience includes serving as a commercial litigation associate at two large, national law firms based out of New York City and then as Counsel and Partner at a large Connecticut law firm. My practice at all three firms centered on commercial litigation with some white collar criminal defense work.**

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

**My litigation clients in private practice included large and small public and private companies as well as individuals. While broad, my litigation practice focused to an extent on complex matters, including class action litigation. I also developed a practice, based on my experience with the S.E.C., of representing companies and individuals in connection with government investigations conducted by the S.E.C., the Connecticut Department of Banking, the Department of Justice and other state and federal agencies.**

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

**During my time in private practice, more than 75% of my time was spent on commercial litigation matters. I appeared in court or other forums on behalf of clients with some regularity but did not, based on the nature of my practice, spend a significant amount of time in court on trial.**

i. Indicate the percentage of your practice in:
1. federal courts; **50%**
2. state courts of record; **50%**
3. other courts.

ii. Indicate the percentage of your practice in:
4. civil proceedings; **95%**
5. criminal proceedings. **5%**

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

**Two.**

**In private practice, I tried one case in Connecticut state court to jury verdict. I tried the case with another lawyer at my firm.**

**As United States Attorney, I tried one case in federal court in Connecticut to jury verdict. I was assisted at trial by an Assistant United States Attorney.**

i. What percentage of these trials were:
1. jury; **100%**
2. non-jury. **0%**

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

**I have only appeared before the Supreme Court on two occasions, both of which involved my moving for the admission to the Supreme Court bar of a group of Assistant United States Attorneys in our office. The motions were granted on both occasions.**

16. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party

or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

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

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

**(1) United States v. Jowers, No. 3:04-cr-00038- AHN-1**

**Trial Judge: Alan H. Nevas, U.S. District Court, Bridgeport, CT**

**Summary of Case: In 2004, with the assistance of an Assistant United States Attorney, I prosecuted David Jowers for unlawful possession of a firearm by a convicted felon and contempt of court arising from his having absconded while under court supervision. My involvement in this case included representing the United States in the grand jury, in court at detention proceedings and at three day jury trial, after which Mr. Jowers was found guilty on both counts. I also represented the government at sentencing at which time Mr. Jowers received a 10 year term of imprisonment.**

**Counsel for the Defendant: Francis L. O'Reilly, O'Reilly & Shaw, 167 Old Post Road, Southport, CT 06490 (203) 319-0707**

**(2) Doe v. Gonzales, et al., Civil No. 3:05CV1256(JCH)**

**Judge: Janet C. Hall, United States District Court, Bridgeport, CT**

**Summary of Case: On August 9, 2005, the American Civil Liberties Union (ACLU) filed this case under seal in federal court. The plaintiffs, initially identified on the docket while the seal was in place as John Doe litigants only, were later identified when the seal was lifted as Library Connection, Inc. (Library Connection), the ACLU, and the American Civil Liberties Union Foundation (ACLUF). The plaintiffs' suit challenged the constitutionality of 18 U.S.C. § 2709, a component of the Patriot Act, which authorizes the FBI to issue "National Security Letters" (NSLs) requiring wire and electronic service providers to provide the Government with subscriber information and toll billing records, information, or electronic communication transactional records in connection with authorized counter-intelligence and counter-terrorism investigations. The plaintiffs specifically challenged the portion of § 2709 that prohibited disclosure to any person that the FBI had sought or obtained access to information or records through the use of an NSL. Plaintiff Library Connection, a service provider for a consortium of**

**libraries, had been served with an NSL as part of a counter-terrorism investigation. Library Connection wished to make known publically that it had been served with an NSL.**

**After full briefing by the parties, the district court heard oral argument on August 31, 2005, on plaintiffs' motion for a preliminary injunction. I represented the defendants at that oral argument. On September 9, 2005, the court issued a written ruling finding the non-disclosure provision of § 2709 unconstitutional and granting the preliminary injunction motion. See Doe v. Gonzales, 386 F. Supp. 2d 66 (D. Conn. 2005).**

**The defendants took an interlocutory appeal of the district court's preliminary injunction ruling to the United States Court of Appeals for the Second Circuit. The appellate court granted the defendants' motion to stay the preliminary injunction pending an expedited consolidated appeal of this case with another NSL case from the Southern District of New York. The plaintiffs in the Connecticut case filed an application with the Supreme Court to vacate the stay. On October 7, 2005, Justice Ginsburg, acting in her capacity as Circuit Justice for the Second Circuit, denied the application. See Doe v. Gonzales, 546 U.S. 1301 (2005).**

**While the expedited appeal was pending, the President signed into law the USA Patriot Improvement Reauthorization Act of 2005 and the USA Patriot Act Additional Reauthorizing Amendments Act of 2006. These acts substantially amended 18 U.S.C. § 2709, the provision at issue in this litigation. Using discretion granted by the new legislation, the FBI concluded that it no longer would oppose disclosure of the identity of plaintiff Library Connection in this case. Based on the FBI's decision, the Second Circuit dismissed the defendants' appeal from the district court's granting of a preliminary injunction, leaving the remaining issues in the case to be addressed in further proceedings in the district court. See Doe v. Gonzales, 449 F.3d 415 (2d Cir. 2006).**

**The parties were able to resolve the remaining issues in the case without further litigation. On September 19, 2006, the plaintiffs filed a notice of voluntary dismissal without prejudice; the notice was approved by the Court on September 20, 2006.**

**Counsel for the Plaintiffs: Ann Beeson, Jameel Jaffer, and Melissa Goodman of the ACLU, 125 Broad Street, 17th Floor, New York, NY 10004 (Tel.: 212-549-2601)**

**(3) United States v. Dos Reis, No. 03-1593, United States Court of Appeals for the Second Circuit; reported at 369 F.3d 143 (2d Cir. 2004).**

**Judges: McLaughlin, Jacobs and Covello (D.J. sitting by designation)**

**Summary of Case: In 2002, Defendant Dos Reis was arrested and charged with sexually abusing two young girls whom he lured through the internet. He strangled one of them to death and dumped her body in the woods. In 2003, he pleaded guilty and was subsequently sentenced to 25 years in prison. On appeal, the defendant contested the legality and severity of his sentence. After briefing and oral argument, the Second Circuit issued a written opinion affirming the sentence. An Assistant United States Attorney handled this matter in the district court but I assisted with the drafting of the appeal brief and argued the appeal.**

**Counsel for Defendant: James M. Lenihan and Peter Tilem, Lenihan & Tilem, 235 Main Street, White Plains, NY 10601 (914) 949-8855**

**(4) United States v. Judge, No. 3:07-cr-00114-JCH**

**Judge: Janet C. Hall, United States District Judge, Bridgeport, CT**

**Summary of Case: In 2007, the defendant pleaded guilty to federal civil rights charges arising from his treatment of an African American with whom he worked. Specifically, the defendant admitted to intimidating, by threat of force, the victim on more than one occasion in the workplace on account of the victim's race. The defendant was sentenced in 2007 to 6 months in prison and fined $3000. An Assistant United States Attorney handled the plea but, after the Assistant United States Attorney left the office, I handled the sentencing proceeding.**

**Counsel for the Defendant: Michael R. Hasse, Hasse & Associates, 89-90 Hempstead St., P.O. Box 35, New London, CT 06320 (860) 444-2711.**

**(5) Facchini v. Miller, et al., No. CV 99 0587686S, Connecticut Superior Court at Hartford**

**Trial Judge: Joseph Q. Koletsky**

**Summary of Case: From 1999 -2002, myself and one of my partners defended PricewaterhouseCoopers ("PwC") and one of its former partners in a lawsuit arising from the sale of a business for which PwC firm had served as auditor. The case proceeded to trial in late 2001, resulting in a verdict in favor of the plaintiff on two of the four counts submitted to the jury. Post-trial were filed by our clients seeking judgment notwithstanding the verdict and/or a new trial. After a one-day mediation, the case settled before the motions were adjudicated.**

**Counsel for the Plaintiff: Richard P. Weinstein, 29 South Main Street, Suite 207, West Hartford, CT 06107 (860) 561-2628**

**Counsel for Co-defendant Howard Miller: William H. Champlin, Tyler, Cooper & Alcorn, CityPlace I Hartford, CT 06103 (860) 725-6206**

**(6) Morse v. PricewaterhouseCoopers, LLP, et al., No. CV 99 0593405S, Connecticut Superior Court at Hartford.**

**Summary of Case: From 1999 - 2001, I defended PricewaterhouseCoopers ("PwC") and some of its employees in a defamation case arising from the receipt of an email by a PwC audit client containing allegedly defamatory statements by a PwC employee about the plaintiff. After significant discovery, the case settled during a court-mandated arbitration.**

**Counsel for the Plaintiff: Charles F. Basil, 160 Farmington Ave., Farmington, CT 06023 (860) 255-5005**

**(7) Terminix International v. Mastershield Pest Management, et al. Nos. CV 97 0139770S, CV 98 0145590S, CV 99 0152219S, Connecticut Superior Court, Judicial District of Waterbury**

**Judge: Robert L. Holzberg**

**Summary of Case: From 1999 - 2000, one of my partners and I represented the plaintiff in eight different actions filed against the defendant and numerous former employees of the plaintiff who left the plaintiff's employ to work for the defendant allegedly in violation of non-compete agreements with the plaintiff. Five of the actions settled and the three identified above proceeded to trial where they were settled with the court's intercession on the eve of jury selection.**

**Counsel for the Defendants: Paul Ruszczyk, 418 Highland Ave., Cheshire, CT 06410 (860) 699-9984**

**(8) Musumeci v. The Travelers Insurance Companies, No. X 03 CV 99 0499689S, Connecticut Superior Court, Complex Litigation Docket, at New Britain**

**Judge: Julia L. Aurigemma**

**Summary of Case: From 1999 - 2001, one of my partners and I represented the defendant insurer in a purported class action on behalf of all insureds who had their automobiles repaired with allegedly substandard aftermarket parts. The case proceeded through discovery and with preparation for a class certification hearing when the plaintiff, as a result of information obtained during discovery, elected to withdraw her claims and the case was dismissed.**

**Counsel for the Plaintiffs: James Johnson, 100 Park Ave., 12th Floor, New York, NY 10017 (212) 907-0859**

**Dennis Alex, 114 West Main Street, New Britain, CT 06051 (860) 225-7629**

**(9) Sacred Heart University v. City of Bridgeport, et al., No. 3:99 CV 1200**

**Judge: United States District Judge Dominic J. Squatrito, United States District Court, District of Connecticut**

**Summary of Case: In 1999, I along with one of my partners, represented the plaintiff in an action alleging state and federal constitutional law claims against the City as well as its Mayor for their efforts to prevent the plaintiff from occupying a newly-constructed student dormitory. The case proceeded in an expedited manner, resulting in a settlement whereby the dormitory was opened in a timely manner and the lawsuit subsequently withdrawn.**

**Counsel for Defendant City of Bridgeport: Mark T. Anastasi, 999 Broad Street Bridgeport, CT 06604 (203) 576-7647**

**Counsel for Defendant Joseph Ganim: John F. Droney, Jr., Levy & Droney, 74 Batterson Park Road, Farmington, CT 06034 (860) 676-3000**

**(10) Melanson v. Town of West Hartford, et al., Connecticut Appellate Court, No. A.C. 20399**

**Summary of Case: As Corporation Counsel for the Town of West Hartford, I represented the Town in tort claims asserted by a police officer who was accidentally shot by a fellow officer in the line of duty. Along with the Deputy Corporation Counsel, we successfully moved to dismiss the case in Superior Court on the grounds that the plaintiff's tort claims were barred by the exclusivity of Connecticut's workers compensation act. The plaintiff appealed and the decision was affirmed by the Appellate Court (Judges Lavery, Peters and Dranginis). The decision is reported at 61 Conn. App. 683 (2001). The plaintiff appealed to the Connecticut Supreme Court which denied the appeal. This decision is reported at 202 Conn. 904 (2001). I assisted with the preparation of the Town's briefs at the appellate level and argued the case before the Appellate Court.**

**Plaintiff's Counsel: Walter R. Hampton, Jr., Hampton Law Offices LLC, 185 Albany Turnpike, P.O. Box 1008, Canton, CT 06019. (860) 693-8800.**

**Counsel for Individual Defendants: Scott M. Karsten, Sack, Spector & Karsten, 836 Farmington Ave., Suite 221 West Hartford, CT 06119 (860) 233-8251.**

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 fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

**As my answers to prior questions demonstrate, since graduation from law school my career has involved a combination of public and private sector legal positions. I have also taught at two law schools and frequently volunteer to speak to law school classes and participate in various bar association-sponsored community events. In private practice, I have represented both large corporations and individuals. In public service, I have served as both a civil and criminal prosecutor and have gained extensive management experience. As United States Attorney, I supervise more than 100 employees and manage a budget of over $10 million. Notwithstanding my management responsibilities, as United States Attorney I have remained active in litigation, appearing in court on numerous occasions, trying one criminal case to jury verdict and arguing two appeals before the U.S. Court of Appeals for the Second Circuit. As Associate Deputy Attorney General, I coordinated various violent crime initiatives undertaken by the Department Of Justice. As Chief of Staff to the Attorney General, I oversaw day to day operations of the Attorney General's Office including supervision of more than 20 employees, managing the Attorney General's schedule and responding to a myriad of issues that arose on a daily basis.**

**I have never engaged in lobbying on behalf of any clients.**

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

**I have taught courses at two law schools. From 1996-97, I taught a Legal Research and Writing (First Semester) and Appellate Advocacy (Second Semester) class at the National Law Center at George Washington University. These were required courses for all first-year law students and focused on the basic skills for legal research, writing and oral advocacy. At the University of Connecticut School of Law, I served as an adjunct instructor in 1998-99 for the Lawyering Process class. This class was required for all first-year law students and also focused on the basic skills for legal research, writing and oral advocacy. In 2004, I co-taught, with Professor Leonard Orland, a course on Advanced Criminal Law and, in 2005**

**and 2006 I co-taught with Professor Orland and Leonard Boyle a course on Contemporary Issues in Criminal Law.**

**Attached are copies of the syllabus for the two courses I co-taught on Contemporary Issues in Criminal Law.**

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

**I currently participate in the federal government's Thrift Savings Plan. I have participated in similar plans while previously employed by other employers. When I left those employers, the money in such plans was transferred into an IRA account at Morgan Stanley.**

20. Outside Commitments During Service: 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.**

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

**A Financial Disclosure Statement is attached.**

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

**See attached Net Worth Statement.**

23. Potential Conflicts of Interest:

d. Identify any affiliations, pending litigation, financial arrangements, or other factors that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

**In the event of a conflict of interest, actual or apparent, I will consult with the Department of Justice ethics officials and abide by their advice.**

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

**In the event of a conflict of interest, actual or apparent, I will consult with the Department of Justice ethics officials and abide by their advice.**

24.. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each. If you are not an attorney, please use this opportunity to report significant charitable and volunteer work you may have done.

**I have been very active in volunteer work in my community, including active service on behalf of numerous non-profit organizations dedicated to various worthy and important causes, including service to the disadvantaged. Boards on which I have served include the John A. Rogers African-American Cultural Society, Inc., United Cerebral Palsy of Greater Hartford, the Foundation for the Advancement of Catholic Schools, the University of Notre Dame Monogram Club, The Old State House Association, Inc. and Riverfront Recapture, Inc. I also have served as a volunteer adjunct instructor at the University of Connecticut School of Law.**

**As a board member of various non-profit organizations in Connecticut, my activities involved fund-raising (until I became U.S. Attorney), governance, recruitment of new board members and various other matters. I served as the Chair of the Board's Governance Committee for both the Old State House and Riverfront Recapture. As Vice President of the Foundation for the Advancement of Catholic Schools, I organized the first annual Archbishop's St. Patrick's Day Breakfast in 2001. To date, the breakfast has raised over $100,000 for scholarships to Catholic High Schools.**

**KEVIN J. AND KATHLEEN P. O'CONNOR**

**Statement of Net Worth**

**Period Ended November 30, 2007**



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**The Professional Associates, P.C.**
Certified Public Accountants and Consultants

James F. Beardsley, CPA
Clement J. Pascarella, CPA
Robert R. Pascarella, CPA

Kevin J. and Kathleen P. O'Connor
94 Garfield Road
West Hartford, CT 06107

We have compiled the accompanying statement of Net Worth of Kevin J. and Kathleen P. O'Connor as of November 30, 2007, and the supplementary information, which is presented for supplementary analysis purposes, in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants. The statement of financial condition is intended to present assets at estimated current values and liabilities at estimated current amounts.

A compilation is limited to presenting in the form of financial statements and supplementary schedules information that is the representation of the individual whose financial statement is presented. We have not audited or reviewed the accompanying statement of financial condition and supplementary schedules and, accordingly, do not express an opinion or any other form of assurance of them. However, we did become aware of departures from accounting principles generally accepted in the United States of America that are described in the following paragraph.

As noted in the statement of Net Worth, the total real estate owned of $550,000 as of November 30, 2007, has been valued at estimated current value as determined by Mr. O'Connor which, in Mr. O'Connor's opinion, are conservative estimates. The procedures used to arrive at this value do not appear to be appropriate to determine the estimated current value of the assets in conformity with accounting principles generally accepted in the United States of America. The effects on the statement of financial condition of not applying appropriate procedures to determine the estimated current values of the investment are not reasonably determinable. In addition, Mr. O'Connor has elected to omit substantially all of the disclosures required by accounting principles generally accepted in the United States of America.

Because the significance and pervasiveness of the matters discussed above makes it difficult to assess their impact on the statement of Net Worth, users of this financial statement should recognize that they might reach different conclusions about the financial condition of Kevin J. and Kathleen P. O'Connor if they had access to a revised statement of financial condition prepared in conformity with accounting principles generally accepted in the United States of America, including the omitted disclosures. Accordingly, this statement of financial condition is not designed for those who are not informed about such matters.

We are not independent with respect to Kevin J. and Kathleen P. O'Connor.

*The Professional Associates, P.C.*

December 5, 2007



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**KEVIN J. AND KATHLEEN P. O'CONNOR**

**Statement of Net Worth**

November 30, 2007

| Assets | | Liabilities | |
|---|---|---|---|
| Cash on hand and in banks | $ 14,420 | Notes payable to banks | $ - |
| U.S. Government securities | - | Accounts and bills due | 6,000 |
| Listed securities | 161,558 | Unpaid Income Tax | - |
| Unlisted securities | 135,129 | Real estate mortgages payable | 241,000 |
| Accounts and notes receivable | - | Chrysler Credit (auto loan) | 13,000 |
| Due from relatives and friends | - | Estimated income taxes on the | |
| Due from others | - | difference between the estimated | |
| Doubtful | - | current value of assets and the | |
| Real estate owned | 550,000 | estimated current amounts of liabilities | |
| Real estate mortgages receivable | - | and their tax basis. | 100 |
| Autos and other personal property | 100,000 | | |
| Cash value-life insurance | 177 | Total Liabilities | 260,100 |
| Other Assets | 89,254 | **Net Worth** | 790,438 |
| Total Assets | $ 1,050,538 | | $ 1,050,538 |

| Contingent Liabilities | | General Information | |
|---|---|---|---|
| As endorser, comaker or guarantor | $0 | Are any assets pledged? (Add schedule) | No |
| | | Are you a defendant in any suits or legal | |
| On leases or contracts | $0 | action | No |
| Legal claims | $0 | Have you ever taken bankruptcy? | No |
| Provision for Federal Income Tax | $100 | | |
| Other special debt | $0 | | |

*See accountant's report.*

THE PROFESSIONAL ASSOCIATES, P C., CERTIFIED PUBLIC ACCOUNTANTS AND CONSULTANTS

**KEVIN J. AND KATHLEEN P. O'CONNOR**

**Supplementary Schedule of Listed Securities**

November 30, 2007

| Shares | Description | Type | Owner | Amount |
|---|---|---|---|---|
| 219 | Morgan Stanley Developing Grw Securities B | Retirement | Kevin | 6,830 |
| 567 | Van Kampen Equity and Income B | Retirement | Kevin | 5,048 |
| 603 | Federated Capital Appreciation B | Retirement | Kevin | 11,859 |
| 425 | Lord Abbett Mid Cap Value B | Retirement | Kevin | 8,619 |
| 184 | Van Kampen Int'l Growth B | Retirement | Kevin | 4,232 |
| 1,098 | Allianceber International Value A | Retirement | Kathleen | 25,221 |
| 35 | Cohen & Steers Realty Shares Inc. | Retirement | Kathleen | 2,485 |
| 330 | Fidelity Advanced Mid Cap A | Retirement | Kathleen | 8,524 |
| 966 | American Growth Fund of America F | Retirement | Kathleen | 33,901 |
| 99 | Lazard Emerging Markets Open | Retirement | Kathleen | 2,554 |
| 1,401 | Pheonix Multi-Sector S/T BD A | Retirement | Kathleen | 6,543 |
| 780 | Davis New York Venture A | Retirement | Kathleen | 30,177 |
| 619 | Pimco Total Return A | Retirement | Kathleen | 6,658 |
| 274 | RS Partners A | Retirement | Kathleen | 8,907 |
| | Total Listed Securities | | | $ 161,558 |

*See accountant's report.*



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47450.077

**KEVIN J. AND KATHLEEN P. O'CONNOR**

**Supplementary Schedule of Unlisted Securities**

November 30, 2007

| Shares | Description | Type | Owner | Amount |
|---|---|---|---|---|
| 54,973 | Bank Deposit Program | Retirement | Kevin | 54,973 |
| 119 | Bank Deposit Program | Retirement | Kathleen | 119 |
| 1,475 | Morgan Stanley Liquid Asset Fund | Retirement | Kathleen | 1,475 |
| 11,930 | SSgA Government Money Market Fund | Retirement | Kathleen | 78,562 |
| | Total Unlisted Securities | | | $ 135,129 |

*See accountant's report.*



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47450.078

**KEVIN J. AND KATHLEEN P. O'CONNOR**

**Supplementary Schedule of Cash Value – Life Insurance**

November 30, 2007

| Name | Description of Policy | Insured | Cash Surrender Value |
|---|---|---|---|
| Massachusetts Mutual Life Insurance Company | Group Life Insurance - Face Amount $1,000,000; Death Benefit $1,000,000 | Kevin | $ 177 |

*See accountant's report.*



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47450.079

**KEVIN J. AND KATHLEEN P. O'CONNOR**

**Supplementary Schedule of Real Estate**

November 30, 2007

| Name | Mortgagor | Owner | Amount |
|---|---|---|---|
| Residence - West Hartford, CT 06107 | Countrywide Home Loans P.O Box 660694 Dallas, TX 75266-0694 | Kathleen | $550,000 |

*See accountant's compilation report.*



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47450.080

**KEVIN J. AND KATHLEEN P. O'CONNOR**

**Supplementary Schedule of Other Assets**

November 30, 2007

| Account | Description | Owner | Amount |
|---|---|---|---|
| Putnam Investments | 529 College Advantage Plan | Kevin f/b/o Erin O'Connor | $ 24,639 |
| Putnam Investments | 529 College Advantage Plan | Kevin f/b/o Anne O'Connor | 13,381 |
| Putnam Investments | 529 College Advantage Plan | Kevin f/b/o James O'Connor | 8,319 |
| Putnam Investments | 529 College Advantage Plan | Kevin f/b/o Mary O'Connor | 19,445 |
| New York's 529 College Savings Program | Individual 529 Plan | William F. Plunkett, Jr. f/b/o Erin O'Connor | 7,256 |
| New York's 529 College Savings Program | Individual 529 Plan | William F. Plunkett, Jr. f/b/o James O'Connor | 3,777 |
| New York's 529 College Savings Program | Individual 529 Plan | William F. Plunkett, Jr. f/b/o Mary O'Connor | 6,805 |
| New York's 529 College Savings Program | Individual 529 Plan | William F. Plunkett, Jr. f/b/o Anne O'Connor | 5,632 |
| Total Other Assets | | | $ 89,254 |

*See accountant's compilation report.*



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**U.S. Department of Justice**

Justice Management Division

*Departmental Ethics Office*

*Washington, D.C. 20530*

DEC 14 2007

Robert I. Cusick
Director
Office of Government Ethics
Suite 500
1201 New York Avenue, NW
Washington, DC 20005-3919

Dear Mr. Cusick:

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 Kevin J. O'Connor, who has been nominated by the President to serve as the Associate Attorney General. We have conducted a thorough review of the enclosed report.

The financial conflict of interest statute, 18 U.S.C. 208, requires that Mr. O'Connor recuse himself from participating personally and substantially in any particular matter that has a direct and predictable effect on his financial interests or the financial interests of any other person whose interests are imputed to him, unless he first obtains a written waiver, pursuant to Section 208(b)(1), or qualifies for a regulatory exemption, pursuant to Section 208 (b)(2). Mr. O'Connor understands that the interests of the following persons are imputed to him: his spouse; minor children; any general partner; any organization in which he serves as an officer, director, trustee, general partner or employee; and any person or organization with which he is negotiating or has an arrangement concerning prospective employment. Mr. O'Connor's wife is employed as an attorney by McKenna Long & Aldridge. She receives a fixed salary and is eligible for an annual bonus that is based, in part, on the firm's earnings. Mr. O'Connor will not participate personally and substantially in any particular matter that has a direct and predictable effect on the financial interests of McKenna Long & Aldridge, unless he first obtains a written waiver pursuant to 18 U.S.C. 208(b)(1). In determining whether a particular matter has a direct and predictable effect on his financial interests or on those of any other person whose interests are imputed to him, Mr. O'Connor will consult with Department of Justice ethics officials.

We have advised Mr. O'Connor 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 interests 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. Pursuant to Section 502, Mr. O'Connor will not participate in any particular matter involving specific parties in which Saoi, Ltd., or any of his wife's clients at McKenna Long & Aldridge or Saoi, Ltd., is or represents a party, unless he is authorized to do so. In addition, Mr. O'Connor will not participate in any particular matter

involving specific parties in which the University of Notre Dame or the Notre Dame Monogram Club is or represents a party unless he is authorized to do so.

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,

Michael H. Allen
Deputy Assistant Attorney General
for Administration and
Alternate Designated Agency Ethics Official

Enclosure

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5F 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: O'Connor | First Name and Middle Initial: Kevin J |
| **Position for Which Filing** | Title of Position: US Attorney for the District of Connecticut | Department or Agency *(If Applicable)*: Department of Justice |
| **Location of Present Office** (for forwarding address) | Address *(Number, Street, City, State, and ZIP Code)*: 157 Church St, New Haven, CT 06510 | Telephone No. *(Include Area Code)*: (203) 821-3726 |
| 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: US Attorney for the District of Connecticut, November 2002-Present; Associate Deputy Attorney General, January 2007-April 2007; Chief of Staff to the Attorney General, April -November 2007. | |
| Presidential Nominees Subject to Senate Confirmation | Name of Congressional Committee Considering Nomination: U.S. Senate Judiciary Committee | Do You Intend to Create a Qualified Diversified Trust? ☐ Yes ☑ No |

| | | |
|---|---|---|
| Certification: 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. | Signature of Reporting Individual: [signature] | Date *(Month, Day, Year)*: 12/6/07 |
| Other Review (If desired by agency) | Signature of Other Reviewer: [signature] | Date *(Month, Day, Year)*: 12/11/07 |
| 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 on the back below) | Signature of Designated Agency Ethics Official/ Reviewing Official: [signature] | Date *(Month, Day, Year)*: 12/14/07 |
| **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)*

Annotations with initials JLE made by Jennifer Levin Eichhorn, DEO, DOJ, based on information from filer.

*(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 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

Supersedes Prior Editions, Which Cannot Be Used.

278-113

NSN 7540-01-070-8444
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SF 278 (Rev. 03/2000)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | SCHEDULE A | Page Number |
|---|---|---|
| O'Connor, Kevin J. | | 2 / 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 $1,900 (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 | Exempted Investment Fund | Exempted Trust | Qualified Trust | Income 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 | | | | | | | | | |
| | Doe Jones & Smith, Hometown, State | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | Law Partnership Income $130,000 | |
| | Kempstone Equity Fund | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| | IRA: Heartland 500 Index Fund | | | | | | | | | | | | | X | | | | | | | | | | X | | | | | | | | |
| 1 | Webster Bank, West Hartford, CT | | ✓ | | | | | | | | | | | | | | | ✓ | | | ✓ | | | | | | | | | | | |
| 2 | IRA: Compass Bank Brimingham Al CD | ✓ | | | | | | | | | | | | | | | | ✓ | | | | ✓ | | | | | | | | | | |
| 3 | IRA: Federated Capital Appreciation B | | ✓ | | | | | | | | | | | ✓ | | | | | | | | | | ✓ | | | | | | | | |
| 4 | IRA: Lord Abbot Mid Cap Value B | | ✓ | | | | | | | | | | | ✓ | | | | | | | | ✓ | | | | | | | | | | |
| 5 | IRA: Van Kampen Select Growth B | ✓ | | | | | | | | | | | | ✓ | | | | | | | | ✓ | | | | | | | | | | |
| 6 | IRA: Morgan Stanley Developing GRW Securities B | | ✓ | | | | | | | | | | | ✓ | | | | | | | | ✓ | | | | | | | | | | |

* 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/PureEdge, version 1.0.4 (5/21/01)



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5 C.F.R. Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | SCHEDULE A continued (Use only if needed) | Page Number |
|---|---|---|
| O'Connor, Kevin J. | | 3 / 12 |

| 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 (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 |
| 7 IRA: Morgan Stanley Liquid Asset Fund - Money Market | | | | ✓ | | | | | | | | | ✓ | | | | | | | | ✓ | | | | | | | | | | | |
| 8 IRA:S: Fidelity Adv Mid Cap A | | ✓ | | | | | | | | | | | ✓ | | | | | | | ✓ | | | | | | | | | | | | |
| 9 IRA: S: TCW Select Equities Fund N | ✓ | | | | | | | | | | | | ✓ | | | | | | | | | | ✓ | | | | | | | | | |
| 10 IRA: S: Davis New York Venture A | | | ✓ | | | | | | | | | | ✓ | | | | | | | | ✓ | | | | | | | | | | | |
| 11 IRA: S: T. Rowe Price Small Cap Stock Fund | ✓ | | | | | | | | | | | | ✓ | | | | | | | | | ✓ | | | | | | | | | | |
| 12 IRA: S: Templeton Foriegn Fund A | ✓ | | | | | | | | | | | | ✓ | | | | | | | | ✓ | | | | | | | | | | | |
| 13 IRA: S: Pimco Total Return A | ✓ | | | | | | | | | | | | ✓ | | | | | | | | ✓ | | | | | | | | | | | |
| 14 IRA: S: BlackRock Low Duration BD Svc | ✓ | | | | | | | | | | | | ✓ | | | | | | | | ✓ | | | | | | | | | | | |
| 15 IRA: S: Morgan Stanley Liquid Asset Fund - Money Market | | ✓ | | | | | | | | | | | ✓ | | | | | | | ✓ | | | | | | | | | | | | |

* 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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5 C.F.R. Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | SCHEDULE A continued (Use only if needed) | Page Number |
|---|---|---|
| O'Connor, Kevin J. | | 4 / 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. | | | | | | | | | | | | | | | |

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5 C.F.R. Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | SCHEDULE A continued (Use only if needed) | Page Number |
|---|---|---|
| O'Connor, Kevin J. | | 5 / 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 | | | | | | | | | | | | | | | | |

SF 278 (Rev. 03/2000)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

Reporting Individual's Name: O'Connor, Kevin J.

# SCHEDULE A continued
(Use only if needed)

Page Number: 6 / 12

**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

| | BLOCK A: Assets and Income | BLOCK B: Valuation of Assets at close of reporting period. | | | | | | | | | | | | BLOCK C: Income: type and amount. If "None (or less than $201)" is checked, no other entry is needed in Block C for that item. | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | 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 | Exempted Trust | Qualified Trust | Type: Dividends | Type: Rent and Royalties | Type: Interest | Type: Capital Gains | Amount: None (or less than $201) | Amount: $201 - $1,000 | Amount: $1,001 - $2,500 | Amount: $2,501 - $5,000 | Amount: $5,001 - $15,000 | Amount: $15,001 - $50,000 | Amount: $50,001 - $100,000 | Amount: $100,001 - $1,000,000 | Amount: Over $1,000,000 * | Amount: $1,000,001 - $5,000,000 | Amount: Over $5,000,000 | Other Income (Specify Type & Actual Amount) | Date (Mo., Day, Yr.) Only if Honoraria |
| 34 | *Putnam International Equity Fund | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 35 | *Putnam Income Fund | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 36 | *Putnam High Yield Trust II | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 37 | X DC: Interest Accumulation Portfolio New York 529 College Savings Program (IAP) | | ✓ | | | | | | | | | | | ✓ | | | | | | ✓ | | | | | | | | | | | | |
| 38 | X DC: Interest Accumulation Portfolio New York 529 College Savings Program (IAP) | | ✓ | | | | | | | | | | | ✓ | | | | | | ✓ | | | | | | | | | | | | |
| 39 | X DC: Interest Accumulation Portfolio New York 529 College Savings Program (IAP) | | ✓ | | | | | | | | | | | ✓ | | | | | | ✓ | | | | | | | | | | | | |
| 40 | DC: Putnam College ADV Moderate 2003 CL-B 529-Plan (See portfolio below) | | | ✓ | | | | | | | | | | ✓ | | | | | | ✓ | | | | | | | | | | | | |
| 41 | *(Individual values not ascertainable) | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 42 | *Putnam Investors Fund | | | | | | | | | | | | | ✓ | | | | | | | | | | | | | | | | | | |

* 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. X Note: The New York 529 Savings accounts identified on entries 37-39, and page 7, entry 49, are invested in the Vanguard Short-term reserves account which, in turn, invests in Vanguard Prime Money Market Fund.

FilerEdge, version 1.0.4 (5/21/01)

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5 C.F.R. Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | SCHEDULE A continued (Use only if needed) | Page Number |
|---|---|---|
| O'Connor, Kevin J. | | 7 / 12 |

**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

| | 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 | Exempt Investment Fund | Exempt Trust | Qualified Trust | Income Type: Dividends | Rent and Royalties | Interest | Capital Gains | Income 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 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 43 | *Putnam Growth & Income Fund | | | | | | | | | | | | | ✓ | | | | | | | | | | | | | | | | | | | | |
| 44 | *Putnam Voyager Fund | | | | | | | | | | | | | ✓ | | | | | | | | | | | | | | | | | | | | |
| 45 | *Putnam Capital Opportunities Fund | | | | | | | | | | | | | ✓ | | | | | | | | | | | | | | | | | | | | |
| 46 | *Putnam International Equity Fund | | | | | | | | | | | | | ✓ | | | | | | | | | | | | | | | | | | | | |
| 47 | *Putnam Income Trust | | | | | | | | | | | | | ✓ | | | | | | | | | | | | | | | | | | | | |
| 48 | *Putnam High Yield Trust | | | | | | | | | | | | | ✓ | | | | | | | | | | | | | | | | | | | | |
| X | 49 DC: Interest Accumulation Portfolio New York 529 College Savings Program (IAP) | | ✓ | | | | | | | | | | | ✓ | | | | | | | ✓ | | | | | | | | | | | | |
| GIB | 50 Liquid Assets Fund - Money Market Morgan Stanley | | ✓ | | | | | | | | | | | ✓ | | | | | | | | ✓ | | | | | | | | | | | |
| | 51 DC: Putnam College Adv Moderate 2005 CL-B 529 Plan (See portfolio below) | | ✓ | | | | | | | | | | | ✓ | | | | | | | ✓ | | | | | | | | | | | | |

* 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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5 C.F.R. Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | SCHEDULE A continued (Use only if needed) | Page Number |
|---|---|---|
| O'Connor, Kevin J. | | 8 / 12 |

| 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 (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 |
| 52 *(Individual values not ascertainable) | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| 53 *Putnam Investors Fund | | | | | | | | | | | | | ✓ | | | | | | | | | | | | | | | | | | |
| 54 *Putnam Growth & Income Fund | | | | | | | | | | | | | ✓ | | | | | | | | | | | | | | | | | | |
| 55 *Putnam Voyager Fund | | | | | | | | | | | | | ✓ | | | | | | | | | | | | | | | | | | |
| 56 *Putnam Capital Opportunities Fund | | | | | | | | | | | | | ✓ | | | | | | | | | | | | | | | | | | |
| 57 *Putnam International Equity Fund | | | | | | | | | | | | | ✓ | | | | | | | | | | | | | | | | | | |
| 58 *Putnam Income Trust | | | | | | | | | | | | | ✓ | | | | | | | | | | | | | | | | | | |
| 59 *Putnam High Yield Trust | | | | | | | | | | | | | ✓ | | | | | | | | | | | | | | | | | | |
| 60 IRA:S: Phoenix Multi-Sector S/T BD A | | ✓ | | | | | | | | | | | ✓ | | | | | | | ✓ | | | | | | | | | | | |

* 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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5 C.F.R. Part 2634
U.S. Office of Government Ethics

Reporting Individual's Name: O'Connor, Kevin J.

# SCHEDULE A continued
(Use only if needed)

Page Number: 9 / 12

| 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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5 C.F.R. Part 2634
U.S. Office of Government Ethics

**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 |
|---|---|---|
| O'Connor, Kevin J. | | 10 / 12 |

## 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) Purchase | Sale | Exchange | Date (Mo., Day, Yr.) | Amount of Transaction (x) $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 | | | | 2/1/99 | | | | | | | | | | | | |
| 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 |
|---|---|---|---|
| Example | 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 |
| Example | Frank Jones, San Francisco, CA | Leather briefcase (personal friend) | $300 |
| 1 | | | |
| 2 | | | |
| 3 | | | |
| 4 | | | |
| 5 | | | |

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SF 278 (Rev. 03/2000)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | SCHEDULE C | Page Number |
|---|---|---|
| O'Connor, Kevin J. | | 11 / 12 |

## 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. | | | ☑ | | | | | | ☑ | | |
| | John Jones, 123 JSt., Washington, DC | Promissory note | 1999 | 10% | on demand | ☑ | | | | | | | | | | |
| 1 | | | | | | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| 2 | | | | | | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| 3 | | | | | | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| 4 | | | | | | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| 5 | | | | | | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |

* This category applies only if the underlying 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 recieve 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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SF 278 (Rev. 03/2000)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | SCHEDULE D | Page Number |
|---|---|---|
| O'Connor, Kevin J. | | 12 / 12 |

## 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 | University of Notre Dame Monogram Club, Notre Dame, IN | Non-profit - Athletes alumni Club | Advisor | 06/07 | Present |
| 2 | Hartford Hospital, Hartford, CT | Hospital | Corporator | 11/01 | 12/7/07 GUE |
| 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 ☑

| | 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.

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Senator WHITEHOUSE. Mr. Katsas?

**STATEMENT OF GREGORY G. KATSAS, OF MASSACHUSETTS, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE**

Mr. KATSAS. Thank you, Senator. I would just like to acknowledge a few people, and thank a few others.

First, if I may, I'd like to introduce my girlfriend, Simone Mele, who's here. She came down from New York to be with us, and we're glad that she's here. I'd like to say hello to my mother, who is watching these proceedings on television. She's elderly and couldn't be here in person, but she is watching from Jamaica Plain, Massachusetts. Also, to my sister in Newbury-Port, Massachusetts. She is busy raising two small children with her husband.

I'd like to thank a few of the very many people who have helped me and supported me in various stages of my legal career: Justice Clarence Thomas gave me the incomparable privilege of clerking for him twice, first at the DC Circuit and then at the Supreme Court; Timothy Dyke and Glen Baker were my bosses for many years at Jones, Day, and great teachers and mentors; Robert McKeown, Peter Keisler, and William Mercer each gave me the high honor of serving at the Justice Department for the last six and a half years, both in the Civil Division and the Office of the Associate Attorney General.

I'd like to thank Robert Kaugh and every member of the appellate staff of the Civil Division. I've worked with them side to side for more than 5-years. They are a team of fabulous, dedicated public servants and lawyers. Robert managed that staff flawlessly and I ended up getting much of the credit for his great work. Last, but not least, I'd like to thank the President for nominating me, and I'd like to thank this committee for giving me this hearing.

Finally, I'd like to recognize two people who are no longer with us. The first, is Judge Edward Becker, who gave me my first job out of law school as a clerk in Philadelphia on the Third Circuit. Judge Becker was a giant in the law, but nonetheless a humble man and, as Senator Specter knows, one also who was loved by everyone who had the chance to know him. He taught me so many good lessons, including that good decision-making requires hard work and a painstaking attention to detail. He died much too young, but his memory continues to inspire me and dozens of other former clerks every day of our professional lives.

Finally, my father. He came to this country and lived the American dream for more than 40 years as a distinguished forensic pathologist in Greater Boston. In his obituary, the Boston Globe described his unparaleled reputation for honesty, integrity, for the testimony that he gave in court as a part of his job. I've tried to do my best to live up to those standards of honesty and integrity in my own career so far, and I will do my best to continue to live up to those standards as an Assistant Attorney General, if I should be fortunate enough to be so confirmed.

Thank you very much.

[The biographical information follows.]

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00068 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR NON-JUDICIAL NOMINEES**

**PUBLIC**

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

   Gregory George Katsas.

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

   Assistant Attorney General, Civil Division.

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

   Office of the Associate Attorney General
   United States Department of Justice
   950 Pennsylvania Ave., N.W.
   Washington, DC 20530

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

   1964. Boston, Massachusetts.

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

   I am single and have no children.

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

   Harvard Law School, Sept. 1986 to June 1989, J.D. received June 1989.

   Princeton University, Sept. 1982 to June 1986, A.B. received June 1986.



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

Office of the Associate Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Principal Deputy Associate Attorney General, August 2006 to present
Acting Associate Attorney General, August 2007 to present

Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Deputy Assistant Attorney General, June 2001 to August 2006

Jones Day (formerly Jones, Day, Reavis & Pogue)
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Partner, January 1999 to June 2001
Associate, October 1992 to December 1998

Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543
Law Clerk to Hon. Clarence Thomas, October 1991 to July 1992

U.S. Court of Appeals for the D.C. Circuit
3rd & Constitution Ave., N.W.
Washington, D.C. 20001
Law Clerk to Hon. Clarence Thomas, September 1990 to October 1991

U.S. Court of Appeals for the Third Circuit
601 Market Street
Philadelphia, PA 19106
Law Clerk to Hon. Edward Becker, June 1989 to September 1990



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00070 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Ropes & Gray
One International Place
Boston, MA 02110
Summer Associate, June 1988 to August 1988

Patterson, Belknap, Webb & Tyler
1133 Avenue of the Americas
New York, NY 10036
Summer Associate, June 1987 to August 1987

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

None.

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

Attorney General's Distinguished Service Award, Sept. 12, 2006

Rated "outstanding" (highest possible rating) every year at Department of Justice

Graduated *cum laude* from Harvard Law School, 1989

Executive Editor, Harvard Law Review, 1988 to 1989

Editor, Harvard Law Review, 1987 to 1988

Graduated *cum laude* from Princeton University, 1986

Graduated *summa cum laude* from Groton School, 1982

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.**

Member, D.C. Circuit Judicial Conference, 2004 and 2006



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00071 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**11. Bar and Court Admission:**

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

District of Columbia (admitted Oct. 2, 1995)

Pennsylvania (admitted Nov. 29, 1993) (inactive status)

I took inactive status in the Pennsylvania bar in 1997, because by then I had developed a law practice based primarily in Washington, D.C.

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

Supreme Court of the United States (Jan. 21, 1997)

U.S. Court of Appeals for the D.C. Circuit (May 17, 1996)

U.S. Court of Appeals for the First Circuit (Aug. 1, 1996)

U.S. Court of Appeals for the Second Circuit (Mar. 12, 2002)

U.S. Court of Appeals for the Third Circuit (Feb. 1, 1996)

U.S. Court of Appeals for the Fourth Circuit (April 10, 1998)

U.S. Court of Appeals for the Fifth Circuit (Feb. 7, 2000)

U.S. Court of Appeals for the Sixth Circuit (Sept. 16, 1999)

U.S. Court of Appeals for the Seventh Circuit (May 5, 1995)

U.S. Court of Appeals for the Eighth Circuit (Dec. 1, 1997)

U.S. Court of Appeals for the Ninth Circuit (Sept. 25, 1998)

U.S. Court of Appeals for the Tenth Circuit (March 4, 2004)

U.S. Court of Appeals for the Eleventh Circuit (Dec. 12, 1997) (lapsed)

U.S. Court of Appeals for the Federal Circuit (Aug. 26, 1997)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00072 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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U.S. District Court for the District of Columbia (April 1, 1996)

With no regular practice in the Eleventh Circuit, I have had no occasion to pay the periodic fee to renew my membership.

12. Memberships:

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

St. Sophia Greek Orthodox Cathedral

Parishioner since 1991

Republican Party

Member since law school

Federalist Society

Member since law school

Vice Chair, litigation practice group, 1996 to 2001

**b. Please indicate whether any of these organizations listed in response to 12(a) above currently discriminate or formerly discriminated on the basis of race, sex, or religion -- either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.**

To the best of my knowledge, none of the organizations listed above has ever discriminated on the basis of race, sex, or religion, except insofar as the Orthodox Church ordains as clergy only male Orthodox Christians.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00073 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

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

During the fall of 1983, I wrote an article for *Prospect* magazine on a lawsuit challenging the male-only admissions policies of certain Princeton eating clubs. I have been unable to locate copies of this article.

Case Comment, *Wheat v. United States*, 102 Harvard Law Review 180 (1988) (unsigned student case comment) (attached at tab 1).

Recommended Reading: Chief Justice Rehnquist's *Grand Inquests*, *Federalist Paper* (Oct. 1992) (tab 2).

Supreme Court Highlights, *Federalist Paper* (Jan. 1993) (tab 3).

Retroactive Civil Rights: Back to the Future, *Legal Times* (Aug. 1, 1994) (with Glen Nager) (tab 4).

How to Oppose Certiorari in Supreme Court Business Cases, *Jones Day Commentaries* (Dec. 1995) (unsigned law firm publication) (tab 5).

Congressional Control over State Sovereign Immunity: The Recent Supreme Court Decisions, *Federalism & Separation of Powers News* (Spring 1999) (tab 6).

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

None.

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

I have testified before Congress on four occasions. Copies of that testimony are attached at tabs 7 through 10.



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

On approximately four occasions in the early- to mid-1990s, I appeared as a guest lecturer in an undergraduate course at American University, 4400 Massachusetts Ave., N.W., Washington, D.C. 20016. The course addressed American government and the Constitution. The subject of my lecture was a defense of interpretivism as a method of constitutional construction. Copies of my lecture notes are attached at tab 11.

On October 17, 1997, I participated in a panel on federalism in the wake of the Supreme Court decisions in *City of Boerne v. Flores* and *Printz v. United States*. The panel took place in Washington, D.C. and was sponsored by the Federalist Society, 1015 18th Street, N.W., Suite 425, Washington, D.C. 20036. A transcript of the panel discussion is attached at tab 12.

On July 19, 2002, I gave a speech on the Supreme Court's 2001 Term in Tallahassee, Florida to the Tallahassee chapter of the Federalist Society. Copies of my speaking notes are attached at tab 13.

On July 13, 2003, I gave remarks in Oklahoma City, Oklahoma to the state solicitors' conference of the National Association of Attorneys General (NAAG), 750 First Street, N.E., Washington, D.C. 20002. The subject of my remarks was how the Department of Justice (DOJ) conducts its appellate litigation and how DOJ and NAAG might coordinate amicus filings in cases of mutual interest. I no longer have my speaking notes, which were minimal.

On November 14, 2003, I participated in an immigration law panel sponsored by the Federalist Society in Washington, D.C. A transcript of the panel discussion is attached at tab 14.

On various dates in late 2004, I gave speeches on the Supreme Court's 2003 Term. My schedule for these speeches was as follows: on August 12, I spoke in Cleveland, Ohio to the Cleveland chapter of the Federalist Society; on October 13, I spoke in Tallahassee, Florida to the Tallahassee chapter of the Federalist Society; on October 14, I spoke in Fort Lauderdale, Florida to the Nova Southeastern University Law Center, 3305 College Ave., Ft. Lauderdale-Davie,



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FL 33314; on October 14, I spoke in Coral Gables, Florida to the University of Miami School of Law, 1311 Miller Drive, Coral Gables, FL 33146; on October 14, I spoke in Miami, Florida to the St. Thomas University School of Law, 16401 N.W. 37th Avenue, Miami Gardens, FL 33054; on October 15, I spoke in Stuart, Florida, to the Martin County Bar Association, c/o Alan Forst, 3353 SW Thistlewood Lane, Palm City, FL 34990; and on October 28, I spoke in Cincinnati, Ohio to the Cincinnati chapter of the Federalist Society. Copies of my speaking notes are attached at tab 15.

On March 22, 2005, I gave a speech in Singapore to the Milops Conference of the United States Pacific Command, USPACOM/J01PA, Box 64031, Camp H.M. Smith, HI 96861. The topic of my speech was terrorism litigation. Attached at tab 16 is copy of my speech outline, together with handwritten annotations that I used in giving the speech.

On various dates beginning in late 2005, I gave speeches on the Supreme Court's 2004 Term. My schedule for these speeches was as follows: on November 15, I spoke in Tallahassee, Florida to the Tallahassee chapter of the Federalist Society; on November 16, I spoke in Orlando, Florida to the Orlando chapter of the Federalist Society; on November 16, I spoke in Tampa, Florida to the Stetson University College of Law, 1700 North Tampa Street, Tampa, FL 33602; on November 17, I spoke in Coral Cables, Florida to the University of Miami School of Law; on November 17, I spoke in Miami, Florida to the St. Thomas University School of Law; on November 17, I spoke in Miami, Florida to the Florida International University College of Law, University Park Campus, Rafael Diaz-Balart Hall, Suite 1055, Miami, FL 33199; on November 18, I spoke in Stuart, Florida to the Martin County Bar Association; and on February 9, 2006, I spoke in Carlisle, Pennsylvania to the Dickinson School of Law, 150 South College Street, Carlisle, PA 17013. Copies of my speaking notes are attached at tab 17.

On May 11, 2006, I spoke on a panel in Portland, Oregon to the Oregon Bar Historical Society, c/o John Stephens, Esler, Stephens & Buckley, 700 Pioneer Tower, 888 SW Fifth Ave., Portland, OR 97204. The subject was litigation over the interaction between federal drug laws and the Oregon statute authorizing physician-assisted suicide. Copies of my speaking notes are attached at tab 18.

On June 3, 2006, I spoke on a panel at reunions at Princeton University, Princeton, NJ 08544. The subject was the Roberts Court. Copies of my speaking notes are attached at tab 19.

On June 27, 2006, I spoke on a panel in Houston, Texas to the Houston chapter of the Federalist Society. The subject was the Supreme Court's 2005 Term. Copies of my speaking notes are attached at tab 20.



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On September 18, 2006, I spoke on a panel in Indianapolis, Indiana to the Indianapolis Chapter of the Federalist Society. The subject was the Supreme Court's 2005 Term, but my remarks were limited to the *Hamdan* decision. Copies of my speaking notes are attached at tab 21.

On October 20, 2006, I participated in a debate at the George Washington University School of Law, 200 H St., N.W., Washington, D.C. 20052, on the *Hamdan* decision. I used the same speaking notes that I had previously used on September 18 in Indianapolis.

In March 2007, I gave three speeches on the Guantanamo detainee litigation. My schedule for these speeches was as follows: on March 19, I spoke in Orlando, Florida to the Orlando chapter of the Federalist Society; on March 20, I spoke in Gainesville, Florida to the University of Florida Levin College of Law, P.O. Box 117621, Gainesville, FL 32611; and on March 21, I spoke in Tallahassee, Florida to the Tallahassee chapter of the Federalist Society. Copies of my speaking notes are attached at tab 22.

On March 22, 2007, I participated in a panel debate about the Guantanamo detainee litigation during the District of New Jersey Judicial Conference in West Orange, New Jersey. A transcript of that debate is attached at tab 23.

On April 13 and 14, 2007, I participated in a seminar on civil rights and the war on terrorism at the University of Montana School of Law, Missoula, MT 59812. I used the same speaking notes that I had previously used for my speeches in March 2007.

On April 26, 2007, I gave a speech on the Guantanamo detainee litigation to the ABA Administrative Law and Regulatory Practice Institute, c/o Dan Troy, Sidley Austin, 1501 K Street, N.W., Washington, D.C. 20005. The speech took place in Washington, D.C. Copies of my speaking notes are attached at tab 24.

On July 9, 2007, I participated in a debate on the *Boumediene* and *El Masri* decisions. The debate took place in New York City and was sponsored by the New York chapter of the Federalist Society. I no longer have my speaking notes, which were minimal.

On July 19, 2007, I gave a speech on the Guantanamo detainee litigation in Milwaukee, Wisconsin to the Milwaukee chapter of the Federalist Society. I no longer have my speaking notes, which were minimal.

On August 7, 2007, I delivered prepared remarks at a farewell ceremony for Acting Associate Attorney General Bill Mercer. The ceremony took place in Washington, D.C. Copies of my remarks are attached at tab 25.



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On September 20, 2007, I delivered prepared remarks at a police stakeholders' meeting sponsored by the National Institute of Justice. The meeting took place in Washington, D.C. Copies of my remarks are attached at tab 26.

On September 20, 2007, I delivered prepared remarks at the annual awards ceremony of the Environment and Natural Resources Division of the Justice Department. The ceremony took place in Washington, D.C. Copies of my remarks are attached at tab 27.

On September 26, 2007, I participated in a panel discussion previewing the Supreme Court's 2007 Term. The discussion took place in Washington, D.C. and was sponsored by the Federalist Society. My remarks focused on the *Boumediene* decision. I no longer have my speaking notes, which were minimal. An audiotape of the discussion is available at www.fed-soc.org/publications/pubID.410/pub_detail.asp.

On September 27, 2007, I delivered prepared remarks at a national human trafficking conference sponsored by the Office of Justice Programs of the Justice Department. The conference took place in Chicago, Illinois. Copies of my remarks are attached at tab 28.

On October 15, 2007, I delivered prepared remarks at the annual meeting of the National Association of Medical Examiners in Savannah, Georgia. Copies of my remarks are attached at tab 29.

In October 2007, I gave three speeches on the Supreme Court's 2006 Term. My schedule for these speeches was as follows: on October 18, I spoke in Tallahassee, Florida to the Florida State University College of Law, 425 W. Jefferson St., Tallahassee, FL 32306, and to the Tallahassee chapter of the Federalist Society; on October 18, 2007, I spoke in Orlando, Florida to the Barry University School of Law, 6441 East Colonial Drive, Orlando, FL 32807; and on October 19, I spoke in Stuart, Florida to the Martin County Bar Association. Copies of my speaking notes are attached at tab 30.

On October 24, 2007, I introduced Acting Attorney General Peter Keisler at the annual awards ceremony of the Tax Division of the Justice Department. The ceremony took place in Washington, D.C. Copies of my remarks are attached at tab 31.

On October 30, 2007, I delivered prepared remarks at the kickoff meeting for the Combined Federal Campaign in Washington, D.C. Copies of my remarks are attached at tab 32.

On November 9, 2007, I participated in a conference on law, terrorism, and national security. The conference was held in Bristol, Rhode Island at the



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Roger Williams University School of Law, Ten Metacom Ave., Bristol, RI 02809. I no longer have my speaking notes, which were minimal.

On December 5, 2007, I delivered remarks at the annual awards ceremony of the Civil Division of the Justice Department. The ceremony took place in Washington, D.C. I no longer have my speaking notes, which were minimal.

On December 6, 2007, I delivered prepared remarks at a ceremony commemorating the 50th anniversary of the Civil Rights Division of the Justice Department. The ceremony took place in Washington, D.C. Copies of my remarks are attached at tab 33.

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

On July 1, 1996, I appeared on a cable television program to discuss Justice Thomas's first five years on the Supreme Court. I do not remember the name of the program, and I do not have a tape or transcript of the show.

On April 28, 1997, I appeared on the television show *Crossfire* to debate the Supreme Court's decision in *Bryan County v. Brown.* I do not have a tape or transcript of the show.

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

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

Deputy Assistant Attorney General, Civil Division

Served from June 2001 to August 2006

Appointed by Attorney General John Ashcroft

Principal Deputy Associate Attorney General

Served from August 2006 to present

Appointed by Attorney General Alberto Gonzales



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00079 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Acting Associate Attorney General

Served from August 2007 to present

Service by operation of the Vacancies Reform Act

I have never run for elective office or been nominated unsuccessfully for an appointed office.

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

During the 2000 presidential election, I provided legal advice to the Bush-Cheney campaign in the Florida recount litigation. Although I did not have a formal title, I drafted and reviewed briefs, and I assisted in the development of legal strategies for possible proceedings before the Florida legislature or Congress. Most of my advice was rendered between November 24, 2000 and November 30, 2000, when I was onsite in Tallahassee.

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

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

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

Upon graduation from law school, I began my legal career with three judicial clerkships: for the late Judge Edward Becker of the U.S. Court of Appeals for the Third Circuit, from June 1989 to September 1990; for then-Judge Clarence Thomas of the U.S. Court of Appeals for the D.C. Circuit, from September 1990 to October 1991; and for Justice Clarence Thomas of the Supreme Court of the United States, from October 1991 to July 1992.

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

I have never practiced alone.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00080 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

Office of the Associate Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Principal Deputy Associate Attorney General, since August 2006
Acting Associate Attorney General, since August 2007

Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Deputy Assistant Attorney General, June 2001 to August 2006

Jones Day (formerly Jones, Day, Reavis & Pogue)
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Partner, January 1999 to June 2001
Associate, October 1992 to December 1998

Ropes & Gray
One International Place
Boston, MA 02110
Summer Associate, June 1988 to August 1988

Patterson, Belknap, Webb & Tyler
1133 Avenue of the Americas
New York, NY 10036
Summer Associate, June 1987 to August 1987

**b. Describe:**

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

Between October 1992 and June 2001, I worked in the Issues and Appeals section of the litigation department of Jones Day, a large private law firm. "Appeals" work consisted of litigating in the Supreme Court, the federal courts of appeals, and state appellate courts. "Issues" work consisted of law-driven aspects of trial court practice: briefing dispositive and other significant motions; arguing such motions; and providing advice regarding the preservation of arguments, and the development of a record,



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00081 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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so as to maximize the likelihood of success on appeal. During this time, the general character of my practice did not change, but I was given greater responsibility over time to supervise more matters, write briefs of greater significance, and do more oral arguments.

Between June 2001 and August 2006, I was the Deputy Assistant Attorney General responsible for overseeing the Appellate Staff of the Civil Division. In that capacity, I supervised, briefed, or argued many of the most significant appeals handled by the Civil Division. In addition, I was responsible for making recommendations to the Solicitor General about whether the government, in all cases handled by the Civil Division, should pursue appeals from adverse trial-court decisions, should intervene or make amicus filings in courts of appeals, or should seek en banc or certiorari review of adverse appellate decisions. I was also responsible for advising superiors and client agencies regarding the progress of our cases.

Since August 2006, I have served as the Principal Deputy Associate Attorney General. In that capacity, I am responsible for helping supervise the thirteen DOJ components that report to the Associate Attorney General. In addition, I have continued to argue a limited number of significant appeals and to supervise a limited number of significant cases, albeit on a much more general level than had been possible when I was in the Civil Division.

Since August 2007, I have served as the Acting Associate Attorney General. In that capacity, I supervise (on an interim basis) the thirteen DOJ components that report to the Associate Attorney General.

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

My practice has always been fairly generalist. In private practice, I did significant amounts of work in antitrust, constitutional law, employee benefits law, employment discrimination, insurance law, international law and arbitrations, and products liability. Some of my significant clients included Alliedsignal Inc.; the American Civil Liberties Union; the American Council of Life Insurance; Bellaire Corporation; BP Exploration (Alaska); First American Bankshares, Inc.; General Electric Company; the Health Insurance Association of America; Loewen Group, Inc.; LTV Corporation; Marshfield Clinic; National Public Radio, Inc.; the Nebraska Heart Institute; People for the American Way; the Public Broadcasting Service; R.J. Reynolds Tobacco Company; Westinghouse Electric Corporation (later CBS, Inc); and Westland Corp.

In the Civil Division, my clients included the United States Congress; all agencies within the Executive Branch; and federal officials,



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ranging from individual prison guards to the Attorney General of the United States, sued in their individual or official capacities. My areas of responsibility extended to all appellate litigation conducted by the Civil Division. Since the terrorist attacks of September 11, 2001, I have paid particularly close attention to litigation related to terrorism and war.

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

In private practice and during my time in the Civil Division, my practice consisted almost entirely of handling or supervising litigation. Since joining the Office of the Associate Attorney General (OASG), I have spent probably about one-half of my time handling or supervising litigation conducted by the litigating divisions that report to OASG, one-fourth of my time supervising the other DOJ components that report to OASG, and one-fourth of my time on general management activities unconnected to specific cases or components.

I have appeared frequently in court, beginning as a senior associate in 1996. Since then, I have argued approximately 39 appeals, including cases in every United States court of appeals, and approximately eight dispositive or other significant motions in United States district courts or state trial courts. I have also argued significant matters in bankruptcy court and in an international arbitration.

**i. Indicate the percentage of your practice in:**
1. **federal courts;**
2. **state courts of record;**
3. **other courts.**

In private practice, my litigation practice was divided approximately as follows: 70 percent of time in federal courts; 20 percent of time in state courts; and 10 percent other (including administrative adjudication, arbitration, and supporting litigation conducted in foreign courts). During my time at DOJ, my litigation practice has consisted exclusively of matters in federal courts.

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

In private practice, civil proceedings occupied at least 95 percent of my time, and criminal proceedings occupied at most five percent of my time. While at DOJ, my litigation docket has been exclusively civil.



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

As primarily an appellate lawyer, I have not served as sole or chief counsel in any case tried to verdict or judgment. I have served as chief defense counsel in one federal criminal sentencing of two defendants. I have also briefed numerous dispositive and other important trial-court motions; argued approximately eight such motions (including seven as lead counsel); and served as an associate counsel and legal strategist on numerous teams handling large trials. Although most of my trial-court practice has involved large matters that either settle before trial or are resolved through dispositive motions, I have had extensive involvement, as an associate counsel, in four large civil matters that were tried to judgment in courts of record, two large matters that proceeded to decision in contested arbitrations, and one large matter that was adjudicated before a state administrative agency.

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

Of the four cases mentioned above, one was tried to a jury, and three were tried before judges.

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

I have had an active Supreme Court practice throughout my legal career.

In private practice, I filed two merits briefs, three amicus briefs on the merits, 13 petitions for certiorari and supporting replies (two of which were granted), five briefs in opposition, and two amicus briefs supporting petitions for certiorari. Copies of these filings are attached at tabs 34 to 58. I was the sole or principal author in each of them except the petition for certiorari and the supporting reply brief in *Lorillard Tobacco Co. v. Reilly*, which was co-written by two other lawyers and me. In particular, I was a principal author of the successful petition for certiorari and the supporting reply brief in *Markman v. Westview Instruments* even though, for reasons of client and co-counsel relations, the names of the Jones Day attorneys who worked on that case do not appear on the briefs.

While at DOJ, I have played an active role in supporting the Supreme Court practice of the Office of the Solicitor General. In the government, I have argued eight court-of-appeals cases that were later reviewed by the Supreme Court. In each of those cases (and many others), I have been actively involved in



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helping develop the government's Supreme Court litigation strategy, reviewing its Supreme Court briefs, and assisting its advocate in preparing for oral argument.

**16. Litigation: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**

**a. the date of representation;**

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

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

1. *El Masri v. Tenet*, 479 F.3d 296 (4th Cir.), *cert. denied*, 128 S. Ct. 373 (2007). Plaintiff Khaled El Masri, a German citizen, alleged that he had been kidnapped by Macedonian officials, handed over to the CIA, flown to a secret prison in Afghanistan, and interrogated and abused there for several months. El Masri brought *Bivens* and other claims against George Tenet, the former Director of Central Intelligence, and various other corporations and individuals. In the district court, the United States intervened in order to assert the state secrets privilege and to contend that the case could not be litigated without an unacceptable risk of disclosing state secrets. The district court agreed and dismissed the case. The Fourth Circuit affirmed, and the Supreme Court denied certiorari. I successfully argued the case for the United States as appellee in the Fourth Circuit, and I was actively involved in reviewing the government's filings in both the Fourth Circuit and the Supreme Court. Representation culminated in Fourth Circuit oral argument on March 2, 2007, before Judges King, Shedd, and Duncan. Co-counsel included Peter Keisler, 4964 Allan Road, Bethesda, MD 20816, 301-320-4490; Douglas Letter, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7513, Washington, D.C. 20530, 202-514-3602; and Thomas Byron, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7260, Washington, D.C. 20530, 202-616-5367. Principal opposing counsel was Benjamin Wizner, ACLU Foundation, 125 Broad Street, New York, NY 10004, 212-549-2500.

2. *DKT International v. USAID*, 477 F.3d 758 (D.C. Cir. 2007). This case involved a First Amendment challenge to conditions imposed by Congress on the receipt of foreign aid funds to combat HIV and AIDS. The governing statute requires recipients of such funds to certify that they have a policy explicitly opposed to prostitution and sex trafficking. Plaintiffs, who wished to accept funding but not adopt such a policy, challenged the condition. The district court



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struck down the condition, but the D.C. Circuit reversed. I successfully argued the case for the government in the D.C. Circuit, and I was actively involved in reviewing and editing the government's briefs. In addition, I have been actively involved in supervising similar litigation that is pending in the Southern District of New York and is being handled by that U.S. Attorney's Office. Representation culminated in D.C. Circuit oral argument on January 11, 2007, before Judges Henderson, Randolph, and Kavanaugh. Co-counsel included Peter Keisler, 4964 Allan Road, Bethesda, MD 20816, 301-320-4490; and Sharon Swingle, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7250, Washington, D.C. 20530, 202-353-2689. Principal opposing counsel was Julie Carpenter, Jenner & Block LLP, 601 Thirteenth Street, N.W., Suite 1200 South, Washington, DC 20005, 202-639-6000.

3. *Boumediene v. Bush* and *Al Odah v. United States*, 476 F.3d 981 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (2007). These cases involve the extent of constitutional rights, if any, of aliens captured outside the United States and detained as enemy combatants at Guantanamo Bay, Cuba. Exercising habeas corpus jurisdiction, the district court in *Boumediene* held that the Guantanamo detainees have no constitutional rights, and the district court in *Al Odah* held that the detainees have constitutional rights and that the military procedures used to classify individual detainees as enemy combatants are unconstitutional. The ensuing appeals were consolidated and argued in the D.C. Circuit, primarily on Fifth Amendment grounds. After the first oral argument, Congress enacted the Detainee Treatment Act (DTA), which replaced habeas jurisdiction with an alternative scheme of judicial review in the D.C. Circuit. The D.C. Circuit then ordered further briefing and argument on the constitutionality of the DTA under the Suspension Clause. After the second oral argument, the Court ordered further supplemental briefing to address the intervening Supreme Court decision in *Hamdan v. Rumsfeld*, and then to address the Military Commissions Act (MCA), which Congress enacted in response to *Hamdan*. The D.C. Circuit ultimately upheld the constitutionality of the DTA and the MCA, primarily on the ground that the Suspension Clause and the Fifth Amendment are inapplicable to the Guantanamo detainees. That ruling is presently under review in the Supreme Court. I have been actively involved in the Guantanamo litigation since its inception. I reviewed the government's district court filings in these cases, was a principal author of its D.C. Circuit briefs, successfully argued both cases in the D.C. Circuit, and actively assisted the Office of the Solicitor General (OSG) with these cases in the Supreme Court. Representation culminated in D.C. Circuit oral arguments on September 8, 2005, and March 22, 2006, before Judges Sentelle, Randolph, and Rogers. Co-counsel included Paul Clement, Office of the Solicitor General, 950 Pennsylvania Ave., N.W., Room 5143, Washington, DC 20530, 202-514-2201; Peter Keisler, 4964 Allan Road, Bethesda, MD 20816, 301-320-4490; Douglas Letter, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7513, Washington, D.C. 20530, 202-514-3602; Robert Loeb, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7268, Washington, D.C. 20530, 202-514-4332; and Eric Miller, U.S. Department of Justice, 950



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Pennsylvania Ave., N.W., Room 5634, Washington, D.C. 20530, 202-514-4063. Principal opposing counsel were Stephen Oleskey, Wilmer Cutler Pickering Hale and Dorr LLP, 60 State Street, Boston, MA 02109, 617-526-6000; and Thomas Wilner, Shearman & Sterling LLP, 801 Pennsylvania Avenue, NW, Washington, DC 20004, 202-508-8000.

4. *Planned Parenthood v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), *rev'd*, 127 S. Ct. 1610 (2007), and *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 127 S. Ct. 1610 (2007). These cases involved constitutional challenges to the Partial Birth Abortion Ban Act, in which Congress prohibited the partial-birth method of abortion. Plaintiffs argued that the statutory definition of partial-birth abortion was impermissibly vague and overbroad, and that the Act unconstitutionally failed to include a health exception. Various medical issues were litigated before the district courts, which enjoined enforcement of the Act. The courts of appeals affirmed, but the Supreme Court reversed and upheld the Act. I was involved in formulating the government's legal strategy and overseeing the trials in district court. I also argued the government's appeals in the Eighth and Ninth Circuits, was a principal author of its briefs in those courts, and actively supervised a similar appeal handled in the Second Circuit by the local U.S. Attorney's Office. Finally, I actively assisted OSG with these cases in the Supreme Court. Representations culminated in 9th Circuit oral argument on October 20, 2005, before Judges Reinhardt, Thomas, and William Fletcher, and 8th Circuit oral argument on April 14, 2005, before Judges Loken, Fagg, and Bye. Co-counsel included Peter Keisler, 4964 Allan Road, Bethesda, MD 20816, 301-320-4490; Shannen Coffin, 5568 Glenwood Drive, Alexandria, VA 22310, 703-461-3022; Marleigh Dover, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7210, Washington, D.C. 20530, 202-514-3511; Teal Miller, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7234, Washington, D.C. 20530, 202-514-5048; and Catherine Hancock, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7236, Washington, D.C. 20530, 202-514-3469. Principal opposing counsel were Eve Gartner, Planned Parenthood Federation of America, 434 West 33rd Street, New York, NY 10001, 212-541-7800; and Priscilla Smith, Center for Reproductive Rights, 120 Wall St., New York, NY 10005, 917-637-3600.

5. *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004), *rev'd*, 547 U.S. 47 (2006). This case involved First Amendment challenges to the Solomon Amendment, through which Congress required universities that accept federal funding to afford military recruiters the same access to students on campus that they afford to other recruiters. Plaintiffs argued that the Amendment impermissibly infringed their right to advocate for military service by homosexuals. A divided panel of the Third Circuit struck down the Solomon Amendment, but the Supreme Court unanimously reversed. I argued the case for the government in the Third Circuit, was actively involved in reviewing and editing its Third Circuit brief, and actively assisted OSG with this case in the Supreme Court. Representation culminated in Third Circuit oral argument on



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June 30, 2004, before Judges Ambro, Stapleton, and Aldisert. Co-counsel included Peter Keisler, 4964 Allan Road, Bethesda, MD 20816, 301-320-4490; Douglas Letter, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7513, Washington, D.C. 20530, 202-514-3602; Scott McIntosh, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7259, Washington, D.C. 20530, 202-514-4052; and Howard Bashman, 2300 Computer Avenue, Suite G-22, Willow Grove, PA 19090, 215-830-1458. Principal opposing counsel were Joshua Rosenkranz, Heller Ehrman LLP, Times Square Tower, 7 Times Square, New York, NY 10036, 212-832-8300; Paul Smith, Jenner & Block LLP, 601 Thirteenth Street, N.W., Suite 1200 South, Washington, DC 20005, 202-639-6000; and Walter Dellinger, O'Melveny & Myers LLP, 1625 Eye Street, NW, Washington, DC 20006, 202-383-5300.

6. *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004), *aff'd*, 546 U.S. 243 (2006). This case involved the interaction between the federal Controlled Substances Act (CSA), which prohibits the use of controlled substances except for a legitimate medical purpose, and the Oregon Death With Dignity Act, which specifically authorizes the practice of physician-assisted suicide. The Attorney General construed the CSA to prohibit the use of federally controlled substances for assisted suicide, despite the contrary authorization under state law. The State of Oregon, two physicians, and a group of terminally-ill patients sued the Attorney General for a declaration that his interpretation of the CSA was erroneous and for an injunction prohibiting enforcement of the CSA against physicians who assist suicides in conformity with state law. The district court, the court of appeals, and the Supreme Court all agreed with Oregon and enjoined the disputed CSA enforcement. I was actively involved in this case at all levels. In the district court, I argued both the preliminary injunction motions and the summary judgment motions for the federal government, and I was a principal author of its briefs. In the Ninth Circuit, I argued the appeal for the federal government and was a principal author of its briefs. Finally, I actively assisted OSG with this case in the Supreme Court. Representation culminated in Ninth Circuit oral argument on May 7, 2003, before Judges Tallman, Wallace, and Lay (of the Eighth Circuit, sitting by designation). Co-counsel included Robert McCallum, PSC 277, Box 1, APO, AP 96549, 61-2-6214-5841; Jonathan Levy, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7231, Washington, D.C. 20530, 202-353-0169; and Craig Green, Klein Hall, Room 803, Temple University School of Law, 1719 North Broad St., Philadelphia, PA 19122, 215-204-0611. Principal opposing counsel were Robert Rocklin, Appellate Division, Oregon Department of Justice, 1162 Court St., NE, Salem, OR 97301, 503-378-4402; Stephen Bushong, Trial Division, Oregon Department of Justice, 1162 Court St., NE, Salem, OR 97301, 503-378-6313; Eli Stutsman, 621 SW Morrison, 13th Floor, Portland, OR 97205, 503-274-4048; and Nicholas van Aelstyn, Heller Ehrman LLP, 333 Bush Street, San Francisco, CA 94104, 415-772-6000.



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7. *In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003), *vacated*, 542 U.S. 367 (2004), *on remand*, 406 F.3d 723 (D.C. Cir. 2005) (en banc). This case involved the alleged applicability of the Federal Advisory Committee Act (FACA) to the National Energy Policy Development Group (NEPDG), a Cabinet-level task force chaired by the Vice President. Plaintiffs argued that FACA applied to the NEPDG because the task force assertedly included private citizens as de facto members, despite a presidential order limiting membership to specified government officials. The district court declined to dismiss the suit and then permitted discovery against senior Executive Branch officials, including the Vice President. On interlocutory review, the D.C. Circuit held that it lacked both appellate and mandamus jurisdiction. The Supreme Court reversed, held that the exercise of mandamus jurisdiction was appropriate, and remanded for the D.C. Circuit to re-consider its de facto membership doctrine. On remand, the en banc D.C. Circuit abandoned that doctrine and ordered the case dismissed. I argued for the government in the first proceeding before the D.C. Circuit, and I was actively involved in formulating the government's legal strategy, and in reviewing and editing its briefs, at every level of court. Representation culminated in D.C. Circuit oral argument on April 17, 2003, before Judges Edwards, Randolph, and Tatel. Co-counsel included Robert McCallum, PSC 277, Box 1, APO, AP 96549, 61-2-6214-5841; Paul Clement, Office of the Solicitor General, 950 Pennsylvania Ave., N.W., Room 5143, Washington, DC 20530, 202-514-2201; Shannen Coffin, 5568 Glenwood Drive, Alexandria, VA 22310, 703-461-3022; Mark Stern, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7531, Washington, D.C. 20530, 202-514-5089; and Michael Raab, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7237, Washington, D.C. 20530, 202-514-4053. Principal opposing counsel were Larry Klayman, 601 Brickell Key Drive, Suite 404, Miami, FL 33131, 305-579-3455; and Sanjay Narayan, Wilkie Farr & Gallagher LLP, 1875 K Street, N.W., Washington, DC 20006, 202-303-1000.

8. *Center for National Security Studies v. DOJ*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004). This case involved the question whether information about individuals held in connection with a sensitive terrorism investigation is exempt from disclosure under the Freedom of Information Act (FOIA). Plaintiffs sought the names, dates of arrest and release, locations of arrest and detention, and reasons for detention of all individuals held in connection with the investigation that followed the terrorist attacks of September 11, 2001. The government withheld the information pursuant to the law-enforcement exception contained in FOIA Exemption 7(A). The district court held the exemption inapplicable to the names of the detainees and their lawyers, but applicable to the further information sought by plaintiffs. On cross-appeals, the D.C. Circuit held the exemption applicable to all of the information at issue. I successfully argued this case for the government in the D.C. Circuit, and I was a principal author of its briefs in that court. Representation culminated in D.C. Circuit oral argument on November 18, 2002, before Judges Sentelle, Henderson, and Tatel. Co-counsel included Robert McCallum, PSC 277, Box 1, APO, AP 96549, 61-2-6214-5841; Mark Stern, U.S. Department of Justice, 950



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Pennsylvania Ave., N.W., Room 7531, Washington, D.C. 20530, 202-514-5089; and Eric Miller, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 5634, Washington, D.C. 20530, 202-514-4063. Principal opposing counsel was Kate Martin, 1120 19th Street, N.W., 8th Floor, Washington, DC 20036, 202-721-5650.

9. *Dalrymple v. Reno*, 334 F.3d 991 (11th Cir. 2003), *cert. denied*, 541 U.S. 935 (2004), and *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003). These cases arose from the raid in which federal authorities removed Elian Gonzalez from the home of his Miami relatives in order to return him to his father in Cuba. The *Gonzalez* plaintiffs were the Miami relatives of Elian Gonzalez, and the *Dalrymple* plaintiffs were their friends and supporters. Plaintiffs brought *Bivens* actions against former Attorney General Janet Reno, former Deputy Attorney General Eric Holder, and former INS Commissioner Doris Meissner for constitutional violations allegedly committed during the raid. Representing the defendants in their individual capacities, DOJ moved to dismiss both complaints on qualified immunity grounds. The district courts denied the motions, we took interlocutory appeals, and the Eleventh Circuit reversed and ordered dismissal or both cases. I successfully argued the *Gonzalez* appeal in the Eleventh Circuit for Attorney General Reno, Deputy Attorney General Holder, and INS Commissioner Meissner (the West reporter erroneously lists Thomas Byron as arguing counsel), and I was a principal author of these officials' briefs in that court. In addition, I was actively involved in briefing and argument preparation for the *Dalrymple* appeal. Representation culminated in Eleventh Circuit oral arguments on April 23, 2002, before Judges Tjoflat, Cox, and Bright (of the Eighth Circuit, sitting by designation). Co-counsel included Robert McCallum, PSC 277, Box 1, APO, AP 96549, 61-2-6214-5841; Barbara Herwig, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7263, Washington, D.C. 20530, 202-514-5425; Scott McIntosh, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7259, Washington, D.C. 20530, 202-514-4052; Michael Raab, 950 Pennsylvania Ave., N.W., Room 7237, Washington, D.C. 20530, 202-514-4053; and Stephen Preston, Wilmer Cutler Pickering Hale and Dorr LLP, 1875 Pennsylvania Ave., N.W., Washington, D.C. 20006, 202-663-6000. Principal opposing counsel were Larry Klayman, 601 Brickell Key Drive, Suite 404, Miami, FL 33131, 305-579-3455; and Robert Guralnick, 550 Brickell Ave., Miami, FL 33131, 305-373-0066.

10. *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003), and *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002). These cases raised First Amendment challenges to the closure of administrative immigration hearings for aliens connected to the investigation conducted after the terrorist attacks of September 11, 2001. For a time, such hearings were closed to the press and public pursuant to an order issued by Chief Immigration Judge Michael Creppy. Members of the press challenged the order, and district courts in New Jersey and Michigan struck it down. On appeal, the Third Circuit reversed and upheld the closure order in a case potentially affecting removal hearings nationwide. By contrast, the Sixth



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00090 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Circuit affirmed and invalidated the order as applied to the removal hearing of one Rahib Haddad. I argued the government's appeals in both the Third Circuit (successfully) and the Sixth Circuit (unsuccessfully), and I was a principal author of its briefs in those courts. Representation culminated in Third Circuit oral argument on September 17, 2002, before Chief Judge Becker and Judges Scirica and Greenberg, and Sixth Circuit oral argument on August 26, 2002, before Judges Keith, Daughtrey, and Carr (of the Northern District of Ohio, sitting by designation). Co-counsel included Robert McCallum, PSC 277, Box 1, APO, AP 96549, 61-2-6214-5841; Robert Loeb, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Room 7268, Washington, D.C. 20530, 202-514-4332; and Sharon Swingle, 950 Pennsylvania Ave., N.W., Room 7250, Washington, D.C. 20530, 202-353-2689. Principal opposing counsel were Lee Gelernt, ACLU Foundation, 125 Broad St., New York, NY 10004, 212-549-2500; and Lawrence Lustberg, Gibbons P.C., One Gateway Center, Newark, NJ 07102, 973-596-4500.

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 fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)**

In addition to the cases described above in question 16, here are some other significant litigated matters that I personally handled for the government:

*Newdow v. United States Congress*, 9th Cir. No. 05-17344. Plaintiff Michael Newdow and others contend that the Pledge of Allegiance violates the Establishment Clause insofar as it contains the words "under God." Plaintiffs sought an injunction against voluntary recitation of the Pledge in various California public school districts, and the United States intervened to defend the constitutionality of the Pledge. The district court held that voluntary recitation of the Pledge in public schools is unconstitutional, and enjoined such recitation in the Rio Linda Unified School District. The United States and the school district appealed. I argued the appeal for the United States in the Ninth Circuit on December 4, 2007, and I was a principal author of its Ninth Circuit briefs.

*Cook v. Gates*, 1st Cir. No. 06-2313. This case involves a constitutional challenge to the federal statute restricting military service by homosexuals. Plaintiffs argued that the statute, which several courts of appeals had previously upheld, could not survive the Supreme Court's recent decision in *Lawrence v. Texas*. The district court upheld the statute, and the plaintiffs appealed. I argued for the government in the First Circuit on March 7, 2007, and I was actively involved in reviewing and editing the government's First Circuit brief.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00091 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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*Scholl v. United States*, 463 F.3d 1328 (Fed. Cir. 2006), *cert. denied*, 128 S. Ct. 50 (2007). Plaintiff David Scholl sought damages against the United States for the allegedly wrongful failure of the U.S. Court of Appeals for the Third Circuit to reappoint him as a bankruptcy judge. DOJ represented the United States, Judge Anthony Scirica (who was Chief Judge of the Third Circuit when the lawsuit was filed), and Judge Edward Becker (who had been Chief Judge of the Third Circuit when Scholl was denied reappointment). The Court of Federal Claims denied our motion to dismiss and then allowed Scholl to commence discovery of deliberations by the Third Circuit regarding his application for reappointment. We sought mandamus in the Federal Circuit, where I successfully briefed and argued on behalf of the United States and the Third Circuit judges. The Federal Circuit halted the discovery and ordered dismissal of the case.

*American Jewish Congress v. CNCS*, 399 F.3d 351 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006). This case raised Establishment Clause challenges to a program awarding scholarships to individuals who perform at least 1700 hours of public service. Plaintiffs argued that the program was unconstitutional to the extent that it allowed scholarship recipients to earn credit by teaching secular subjects at parochial schools. The district court invalidated the program, but the D.C. Circuit reversed. I successfully argued the government's appeal in the D.C. Circuit, and I was a principal author of its briefs.

*UDV v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004) (en banc), *aff'd*, 546 U.S. 418 (2006). Plaintiffs in this case alleged an entitlement under the Religious Freedom Restoration Act (RFRA) to drink hallucinogenic tea for sacramental purposes. The government argued that RFRA did not preclude application of federal drug statutes that were, in its view, necessary to achieve the compelling interests in protecting health, preventing diversion of dangerous and addictive drugs, and complying with international drug-control treaties. The district court, the Tenth Circuit, and the Supreme Court all disagreed, and prohibited the government from enforcing federal drug laws against the plaintiffs. I argued the government's appeal before the en banc Tenth Circuit, I was actively involved in reviewing and editing its Tenth Circuit briefs, and I assisted OSG with this case in the Supreme Court.

*Hodges v. Thompson*, 311 F.3d 316 (4th Cir. 2002), *cert. denied*, 540 U.S. 811 (2003). This case involved Spending Clause and Tenth Amendment challenges to funding conditions imposed under the Temporary Assistance to Needy Families (TANF) program. Congress has required states accepting TANF funds to meet certain computer automation requirements in order to facilitate the inter-state enforcement of child support obligations. South Carolina, which accepted TANF funds but failed to meet the requirements, argued that the ensuing reduction of its funding was unconstitutional. The district court upheld the funding conditions, and the Fourth Circuit affirmed. I successfully argued the case for the federal government in the Fourth Circuit.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00092 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Here are some significant litigated matters that I worked on in private practice:

*United States v. Estate of Romani*, 523 U.S. 517 (1998). This case presented the question which of two conflicting statutes determines bankruptcy priorities when the United States is one of the competing creditors. Although every federal court of appeals to have addressed the question gave the government an absolute priority under one of the statutes at issue, the Supreme Court unanimously agreed with our position that the other statute (under which our client would be entitled to priority) governed in the circumstances presented. In this pro bono representation, I wrote the successful brief for the respondent private creditor. Opposing counsel was the Office of the Solicitor General.

*Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995). This case presented the question whether Supreme Court decisions that change prior law may be applied only prospectively. Respondent Carol Hyde was severely injured in an automobile accident caused by an employee of petitioner Reynoldsville Casket Company. In determining when to file her lawsuit, Hyde relied on a tolling statute that had prevented the applicable statute of limitations from running. Then, in another case, the Supreme Court invalidated the tolling statute and thereby rendered Hyde's lawsuit untimely. In this pro bono representation, I wrote the brief for Hyde, which argued that Supreme Court decisions should be denied retroactive effect where the denial is necessary to prevent unfair surprise.

*A.D. Bedell Wholesale Co. v. Philip Morris, Inc.* 263 F.3d 239 (3d Cir. 2001), *cert. denied*, 534 U.S. 1081 (2002). Plaintiffs in this case raised antitrust challenges to the historic $368 billion settlement of smoking-and-health litigation between 46 states and every leading tobacco company. With strong support from the states, the defendant tobacco companies argued that the settlement was immune from antitrust scrutiny under the *Noerr-Pennington* and state action doctrines. Together with one co-counsel, I successfully argued in the Third Circuit on behalf of the defendants.

*General Electric Co. v. Delaney*, 251 F.3d 976 (Fed. Cir. 2001). This case raised the question whether government contractors may use historic exchange rates, as opposed to current exchange rates, to price depreciation in dollar-based contracts for the provision of goods and services abroad. The question has great economic significance where, as in this case, the project is capital-intensive and the foreign economy is hyperinflationary. I wrote the Federal Circuit briefs for appellant General Electric, which successfully argued that the applicable government-contract regulations permit the use of historic exchange rates to account for depreciation. Opposing counsel was the Commercial Litigation Branch of the Civil Division.

*EEOC v. Staten Island Savings Bank*, 207 F.3d 144 (2d Cir. 2000). The Second Circuit held that the Americans With Disabilities Act does not prohibit insurers from providing different coverage for different risks and, in particular,



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00093 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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does not prohibit insurers from offering coverage for physical disabilities but not mental disabilities. In this case, I was lead counsel for the American Council of Life Insurance (ACLI) and the Health Insurance Association of America (HIAA), for whom I wrote a successful amicus brief in the Second Circuit. On behalf of ACLI and HIAA, I wrote successful amicus briefs on the same issue, or substantially similar issues, in various other courts of appeals as well.

*Unity Real Estate Co. v. Hudson*, 178 F.3d 649 (3d Cir.), *cert. denied*, 528 U.S. 963 (1999). This case involved retroactivity-based takings and due process challenges to the Coal Industry Retiree Health Benefit Act, which makes coal mining companies liable for lifetime retiree health benefits based on expired collective bargaining agreements signed by the companies years or decades before the statute was enacted. I argued in the Third Circuit for several former mining companies appearing as amici. I also wrote the Third Circuit amicus brief, and was actively involved in assisting counsel for the plaintiff companies. Opposing counsel included the Appellate Staff of the Civil Division.

*Charles v. Burton*, 169 F.3d 1322 (11th Cir.), *cert. denied*, 528 U.S. 879 (1999). This case involved the extent of protections available to migrant farmworkers under the Agricultural Workers Protection Act. That Act requires employers to obtain insurance on vehicles that transport workers to the fields. The Eleventh Circuit held that this duty extends not only to farm labor contractors (FLCs) that recruit the workers, but also to farm operators that contract with FLCs for labor. The Eleventh Circuit further held that, when an employer fails to obtain the required insurance, injured workers may recover actual damages from the employer. In this pro bono representation, I successfully argued the appeal for the plaintiffs, a group of migrant farmworkers who had been severely injured when a pickup truck overturned while carrying them to work. My co-counsel was the Migrant Farmworker Justice Project.

*United States v. Olbres*, 99 F.3d 28 (1st Cir. 1996). In this case, I served as lead counsel for two defendants convicted of criminal tax evasion. The First Circuit held that a district court, in determining the applicable sentencing guideline range, must find that the defendant willfully evaded taxes on the entire amount of income for which the defendant is held responsible. The court further upheld a downward departure from the guidelines in order to prevent economic hardship to innocent third parties. I successfully briefed and argued the appeal for the defendants, and I then served as lead trial counsel for the defendants at their re-sentencing. Opposing counsel was the Tax Division of DOJ.

*Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996). This case involved antitrust litigation between Blue Cross, a large medical insurer, and Marshfield Clinic, a medical clinic with offices at various locations in Northern Wisconsin. Blue Cross argued that Marshfield overcharged its insureds and that Marshfield physicians unlawfully refused to participate in HMO networks offered by Blue



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00094 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Cross. A jury found for Blue Cross and entered a $20 million verdict. On appeal, the Seventh Circuit reversed, held that Marshfield lacked power in any properly defined antitrust market, and ordered dismissal of most of Blue Cross's case. I was the principal author of Marshfield's successful briefs in the Seventh Circuit.

*Action for Children's Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996). In this case, various broadcasters, organizations representing broadcasters, and public-interest groups raised First Amendment challenges to the procedures used by the FCC to adjudicate fines for allegedly indecent broadcasting. The plaintiffs argued that these procedures failed to ensure adequate judicial review and, in practice, operated as an unconstitutional system of prior restraint. The district court and the court of appeals rejected these contentions, and the Supreme Court denied certiorari. I was the principal author of the plaintiffs' various briefs or petitions in the district court, the D.C. Circuit, and the Supreme Court. In addition, I developed the extensive stipulated record based on which the parties filed their dispositive motions. Opposing counsel was the U.S. Attorney's Office for the District of Columbia.

Here are some significant matters that I worked on in private practice and that were not litigated in courts of record:

*Loewen Group v. United States*, ICSID No. ARB(AF)/98/3. This case was the first arbitration filed against the United States under Chapter 11 of the North American Free Trade Agreement (NAFTA), which gives investors of one signatory country a right to arbitrate against other signatory countries for alleged violations of international law. The dispute arose out of the treatment of Loewen, a Canadian company, in private litigation filed against Loewen by a Mississippi plaintiff in Mississippi state court. In a commercial dispute involving assets valued at under $5 million, a jury awarded the plaintiff $500 million, including $74 million in emotional-distress damages and $400 million in punitive damages. When the Mississippi appellate courts refused to reduce a bond requirement to prevent execution pending appeal, Loewen settled the case under duress for $275 million. The NAFTA arbitration raised claims against the United States (which under international law is responsible for violations committed by individual states) under theories of due process, equal protection, and takings. I was one of three attorneys who conceptualized this case, drafted Loewen's pleadings (which in total ran into hundreds of pages), and conducted the arbitration for Loewen on the merits. The claim was arbitrated before a three-member panel that included the Honorable Abner Mikva, former Chief Judge of the D.C. Circuit, and Sir Anthony Mason, the retired Chief Justice of Australia. Opposing counsel was the Federal Programs Branch of the Civil Division. After several days of hearings, the panel dismissed the claims based on Loewen's asserted lack of standing.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00095 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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*In re: A Hearing To Review the Plan of Development and Operation and Other Agreements as They Affect Natural Gas Liquid (NGL) Throughput, Miscible Injectant (MI) Utilization and Ultimate Recovery From Prudhoe Bay* (1996). This matter involved administrative proceedings before the Alaska Oil and Gas Conservation Commission (AOGCC), which has regulatory authority over Prudhoe Bay, the largest oil field in North and South America. By 1996, 11 oil companies had invested $16 billion into the field and had run it successfully for two decades. Nonetheless, the AOGCC *sua sponte* noticed an administrative hearing to consider involuntary "re-unitization" of the field (i.e., the forcible restructuring of all of its ownership interests). The three principal investors in Prudhoe Bay – BP Exploration (Alaska), Arco, and Exxon – all agreed to oppose the proposal. In the ensuing hearings before the AOGCC, my firm represented BP Exploration (Alaska). I was actively involved in preparing our case and in assisting senior partners at the hearing itself. In addition, I was the principal author of our post-hearing brief, which argued that the proposed re-unitization was both unauthorized by Alaska statutes and unwise. The AOGCC ultimately accepted our arguments and abandoned its attempt to re-unitize Prudhoe Bay.

I have not performed lobbying activities for any clients.

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

I have not taught any courses. I have occasionally appeared as a guest lecturer at an undergraduate course at American University, as described above in my answer to question 13(d).

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

I have two sources of future retirement income attributable to my time in private practice at Jones Day. First, during that time, I made investments, and Jones Day made investments on my behalf, into the Jones Day Retirement Plan, a Keogh retirement plan offered by Jones Day to its employees. My investments are in the Balanced Fund offered through that Plan. They are presently worth about $77,200. Neither I nor Jones Day can make further contributions on my behalf to the Plan, and the value of my investment does not depend on the financial performance of Jones Day. Second, as a result of my nearly 2.5 years of service as a Jones Day partner, I am entitled, under the terms of the Jones Day partnership agreement and the Jones Day Pension Plan, to be paid a pension benefit



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00096 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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of about $227 per month for life, beginning on September 30, 1929. The amount of this defined benefit also does not depend on the financial performance of Jones Day.

During my time in the federal government, I have made investments, and the government has made investments on my behalf, into the Thrift Savings Plan, a defined contribution retirement savings plan for federal employees. My investments in this plan are presently worth about $69,900.

20. Outside Commitments During Service: **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.

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

Attached are copies of my financial disclosure report.

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

See attachment.

23. Potential Conflicts of Interest:

a. **Identify any affiliations, pending litigation, financial arrangements, or other factors that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.**

Having served in DOJ without significant conflict-of-interest issues during the last six years, I do not believe that I would face significant conflicts, if confirmed, upon my return to the Civil Division. My financial holdings are listed on the attached net worth statement. They have remained largely unchanged during the last six years, and they have only rarely required me to recuse myself from matters that I otherwise would have worked on. In the unlikely event that one of my holdings compelled a recusal that was prejudicial to the government, I would consider divesting myself of the holding. Based on prior work in private practice, I am recused from *United States v. Philip Morris*, a major case that the Civil Division is litigating against several large tobacco companies.



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

If confirmed, I would create a recusal list based on my financial holdings and my past work in private practice. Consistent with ordinary Civil Division practice, I would expect attorneys to consult this list before adding my name to filings as the Assistant Attorney General. As individual matters were brought to my attention, I would make recusal decisions based on the criteria established by statute and in DOJ regulations. In doing so, I would tend to err on the side of recusal, and I would rely heavily on the advice of the designated ethics officials within the Civil Division and the Justice Management Division, as I have done for the past six years.

**24. Pro Bono Work: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each. If you are not an attorney, please use this opportunity to report significant charitable and volunteer work you may have done.**

Among my most significant pro bono representations are the following:

*United States v. Estate of Romani*, 523 U.S. 517 (1998). This case presented the question which of two conflicting statutes determines bankruptcy priorities when the United States is one of the creditors. The Supreme Court held that the statute favoring our client, the respondent private creditor, governed in the circumstances presented. I afforded successful pro bono representation to the respondent, a small business that could not afford to litigate this case in the Supreme Court. In researching and drafting its brief, and preparing another lawyer for the oral argument, I devoted 278 hours to the case.

*Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997). This case presented the question whether counties may be liable under 42 U.S.C. 1983 for the allegedly negligent hiring of employees who commit constitutional violations. I afforded successful pro bono representation to the National Association of Counties, which filed an amicus brief arguing against the imposition of such liability. I was actively involved in drafting and editing the brief, and I devoted 37 hours to the case.

*Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995). This case presented the question whether Supreme Court decisions that change prior law may be applied only prospectively in order to prevent unfair surprise. Respondent Carol Hyde, who was severely injured in an automobile accident caused by an employee of the petitioner, lost her claims under the retroactive application of a Supreme Court decision invalidating the applicable tolling statute. I afforded pro



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bono representation to Ms. Hyde. In researching and drafting her brief, and preparing another lawyer for the oral argument, I devoted 155 hours to the case.

*Charles v. Burton*, 169 F.3d 1322 (11th Cir.), *cert. denied*, 528 U.S. 879 (1999). In this case, the Eleventh Circuit held that migrant farmworkers could sue both farm labor contractors and farm operators for damages caused by those employers' failure to obtain adequate insurance, as required by the Agricultural Workers Protection Act. I afforded successful pro bono representation to the appellants, a group of farmworkers who had been severely injured when a pickup truck overturned while carrying them to work. In preparing for and presenting oral argument, I devoted 54 hours to the case.

*Sablan v. United States*, 114 F.3d 913 (9th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1025 (1998). This case involved the question how to assess the reasonableness of criminal sentences outside the applicable sentencing guideline range. At a sentencing for petitioner David Sablan, the government and defense counsel agreed to recommend a ten-year sentence, but the district court *sua sponte* departed upwards to impose a twenty-year sentence. Sitting en banc, the Ninth Circuit affirmed the sentence and overruled prior circuit precedent establishing a general methodology for assessing the reasonableness of sentences outside the guideline range (under which, all parties agreed, a sentence exceeding ten years would have been unreasonable). Upon learning of this decision, I contacted Mr. Sablan's local counsel in Guam and offered to represent Mr. Sablan in the Supreme Court pro bono. On his behalf, I researched and wrote a petition for certiorari and a supporting reply brief in the Supreme Court. I devoted 118 hours to the case.

*Action for Children's Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996). This case presented First Amendment challenges to the procedures used by the FCC to adjudicate fines for allegedly indecent broadcasting. For a fixed and substantially reduced fee, my firm represented a consortium of broadcasters, organizations representing broadcasters, and public-interest groups such as the ACLU and People For the American Way. I developed the stipulated record in this case, and was the principal author of the plaintiffs' various filings in the district court, the court of appeals, and the Supreme Court. I devoted a total of 595 hours to this case. To the best of my recollection, I would estimate that about two-thirds of that time was uncompensated.

*Powlos v. INS*, No. 98-2670 (4th Cir. Oct. 4, 1999). Petitioner Adanech Powlos sought review of a decision denying her asylum and ordering her deported to Ethiopia. While her petition for review was pending in the Fourth Circuit, the Board of Immigration Appeals (BIA) agreed to re-open proceedings based on new evidence that the seeming inconsistencies in Ms. Powlos's testimony were due to language barriers and post-traumatic stress syndrome. The Fourth Circuit then dismissed the petition for review. On remand, an immigration judge granted



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asylum based on evidence that the Ethiopian government repeatedly beat Ms. Powlos, and executed her father, on account of her family's political opposition to that government. I afforded successful pro bono representation to Ms. Powlos in the Fourth Circuit, before the BIA, and in immigration court. I supervised the lawyers primarily responsible for this matter, and I devoted 17 hours to it.



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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.

**PLEASE SEE ATTACHMENT.**

| ASSETS | | LIABILITIES | |
|---|---|---|---|
| Cash on hand and in banks | | Notes payable to banks-secured | |
| U.S. Government securities-add schedule | | Notes payable to banks-unsecured | |
| Listed securities-add schedule | | Notes payable to relatives | |
| Unlisted securities--add schedule | | Notes payable to others | |
| Accounts and notes receivable: | | Accounts and bills due | |
| Due from relatives and friends | | Unpaid income tax | |
| Due from others | | Other unpaid income and interest | |
| Doubtful | | Real estate mortgages payable-add schedule | |
| Real estate owned-add schedule | | Chattel mortgages and other liens payable | |
| Real estate mortgages receivable | | Other debts-itemize: | |
| Autos and other personal property | | | |
| Cash value-life insurance | | | |
| Other assets itemize: | | | |
| | | | |
| | | | |
| | | Total liabilities | |
| | | Net Worth | |
| Total Assets | | Total liabilities and net worth | |
| 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 | | | |



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**Gregory G. Katsas**
**Statement of Net Worth**
**December 2007**
(asset valuations rounded to nearest $100)

| | |
|---|---|
| **ASSETS** | |
| Cash on hand | $500 |
| Common Stock | |
| Alcatel-Lucent | $3,200 |
| ASA Ltd. | $8,000 |
| AT&T | $1,200 |
| Cisco Systems | $5,800 |
| Coca Cola | $15,300 |
| General Electric | $73,100 |
| Intel | $6,400 |
| Johnson & Johnson | $100,900 |
| Merck | $31,500 |
| Newmont Mining | $800 |
| Proctor & Gamble | $88,300 |
| Funds | |
| Fidelity Cash Reserves (money market) | $1,330,500 |
| Fidelity Magellan | $98,600 |
| Fidelity Overseas | $45,800 |
| Fidelity Select Industrial Materials | $64,100 |



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| | |
|---|---|
| AIM Diversified Dividend Fund | $14,200 |
| Janus Fund | $3,900 |
| Vanguard GNMA Fund | $16,000 |
| Vanguard International Growth Fund | $12,700 |
| Retirement interests | |
| Federal Thrift Savings Plan | $69,900 |
| Jones Day Retirement Plan | $77,200 |
| Jones Day Pension Plan** | |
| Personal property | $1000 |
| **TOTAL ASSETS** | **$2,068,900** |
| **LIABILITIES** | **$0** |
| **NET WORTH** | **$2,068,900** |

** Through this plan, I will be entitled to receive approximately $227 per month for life, beginning on September 30, 2029. Given the amount of time between now and then, the present value of this benefit is difficult to estimate.

**U.S. Department of Justice**

Justice Management Division

*Departmental Ethics Office*

*Washington, D.C. 20530*

DEC 14 2007

Mr. Robert Cusick
Director
Office of Government Ethics
1201 New York Avenue, NW
Suite 500
Washington, DC 20005-3919

Dear Mr. Cusick:

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 Gregory F. Katsas, who has been nominated by the President to serve as the Assistant Attorney General, Civil Division, 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. Katsas recuse himself from participating personally and substantially in any particular matter that has a direct and predictable effect on his financial interests or the financial interests of any other person whose interests are imputed to him, unless he first obtains a written waiver, pursuant to Section 208(b)(1), or qualifies for a regulatory exemption, pursuant to Section 208 (b)(2). In determining whether a particular matter has a direct and predictable effect on his financial interests or on those of any other person whose interests are imputed to him, Mr. Katsas will consult with Department of Justice ethics officials. Mr. Katsas has a financial interest in several publicly traded securities. 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 financial interest of the issuers of these securities, unless he is granted a waiver to participate or qualifies for a regulatory exemption. Mr. Katsas has been advised and understands that as a Senate-confirmed Presidential appointee, he is not permitted to have any outside earned income during his service in the position.

We have advised Mr. Katsas 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,

Michael H. Allen
Deputy Assistant Attorney General
for Administration and
Alternate 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*) |
|---|---|---|---|---|---|---|
| | | ☐ | | ☒ | ☐ | |

| | | |
|---|---|---|
| Reporting Individual's Name | Last Name: Katsas | First Name and Middle Initial: Gregory G. |
| Position for Which Filing | Title of Position: Assistant Attorney General (Civil) | Department or Agency (*If Applicable*): Department of Justice |
| Location of Present Office (or forwarding address) | Address (*Number, Street, City, State, and ZIP Code*): 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530 | Telephone No. (*Include Area Code*): (202) 514-9500 |
| 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 Associate Attorney General (08/06 to present); Acting Associate Attorney General (08/07 to present) | |
| **Presidential Nominees Subject to Senate Confirmation** | Name of Congressional Committee Considering Nomination: Senate Judiciary Committee | 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. | Gregory G Katsas | Dec. 10, 2007 |
| **Other Review (If desired by agency)** | Signature of Other Reviewer: Jan M. Rodgers | Date (*Month, Day, Year*): Dec. 13, 2007 |
| **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: Michael H. Allen | Date (*Month, Day, Year*): Dec 14, 2007 |
| 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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SF278 (Rev. 03/2000)
5 C.F.R Part 2634
U.S. Office of Government Ethics

Reporting Individual's Name: Katsas, Gregory G.

# SCHEDULE A



**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 acount 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 | Exempted 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 | | | | | | | | | |
| | Doe Jones & Smith, Hometown, State | | | X | | | | | | | | | | | | | | | | | | | | | | | | | | | Law Partnership Income $130,000 | |
| | Kempstone Equity Fund | | | | | X | | | | | | | | | X * | | | | | | | | | X | | | | | | | | | |
| | IRA: Heartland 500 Index Fund | | | | | | | X | | | | | | | X | | | | | | | | | | X | | | | | | | | |
| 1 | AT&T Common | | X | | | | | | | | | | | | | | | | | | X | | | | | | | | | | | |
| 2 | Cisco Systems Common | | X | | | | | | | | | | | | | | | | | | X | | | | | | | | | | | |
| 3 | Coca Cola Common | | | X | | | | | | | | | | | | | X | | | | | X | | | | | | | | | | | |
| 4 | General Electric Common | | | | X | | | | | | | | | | | | X | | | | | | | X | | | | | | | | | |
| 5 | Intel Common | | X | | | | | | | | | | | | | | | | | | X | | | | | | | | | | | |
| 6 | Johnson & Johnson Common | | | | | 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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SF278 (Rev. 03/2000)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | | Page Number |
|---|---|---|
| Kalsas, Gregory G. | **SCHEDULE A continued** (Use only if needed) | 3 of 7 |

| • 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. | | | | | | | | | | | | | | | | |

SF278 (Rev. 03/2006)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

Reporting Individual's Name: Kaisas, Gregory G.

Page Number: 4 of 7

## SCHEDULE A continued
(Use only if needed)

| 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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SF 278 (Rev. 03/2000)
5 C.F.R Part 2634
U.S. Office of Government Ethics

**Do not Complete Schedule B if you are a new entrant, nominee, Vice Presidential or Presidential Candidate**

| Reporting Individual's Name | SCHEDULE B | Page Number |
|---|---|---|
| Katsas, Gregory G. | | 5 of 7 |

## Part I: Transactions

None ☐

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.

| | 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 | | | |

Prior Editions Cannot Be Used.



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SF 278 (Rev. 03/2000)
5 C.F.R Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | SCHEDULE C | Page Number |
|---|---|---|
| Katsas, Gregory G. | | 6 of 7 |

## 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: continuing participation in an employee benefit plan (e.g. 401k, deferred compensation; (2) continuation 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 | Jones Day Retirement Plan - Balanced Fund (no further contribution by filer or firm) | Jones Day, Cleveland, Ohio | 07/99 |
| 2 | Jones Day Pension Plan - Defined Benefit Plan (no further contribution by filer or firm) | Jones Day, Cleveland, Ohio | 01/99 |
| 3 | | | |
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SF 278 (Rev. 03/2000)
5 C.F.R Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | SCHEDULE D | Page Number |
|---|---|---|
| Katsas, Gregory G. | | 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 | | | | | |
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| 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 | | |
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Senator WHITEHOUSE. Thank you, Mr. Katsas.

Mr. O'Connor, you, in addition to being the nominee for Associate Attorney General, also continue in your position as U.S. Attorney for the District of Connecticut.

Mr. O'CONNOR. That's correct. I currently serve as U.S. Attorney for Connecticut.

Senator WHITEHOUSE. Do you intend to relinquish that position?

Mr. O'CONNOR. I believe I would have to, if I was confirmed. I don't think it's a choice by law. I would certainly intend to step down, if confirmed.

Senator WHITEHOUSE. Good.

I think across America, people who have served in the Department of Justice are looking at this institution with real consternation, but also real hope. I think as we all know, this is a really vital, proud, and important institution in the architecture of American government and the enforcement of American liberties and laws. I hope it is now emerging from what probably number among its darkest days.

I think it is very important to every member of this committee, as well as to so many thousands of colleagues who work for the Department of Justice and to those who have gone before you who look back with real pride and affection on their time at the Department of Justice, to see things put right.

I would like to hear from you why, now, you want to be Associate Attorney General and how, to borrow the phrase from the Hartford Current, you will promise to help restore consonance to the Department of Justice and stability to the Department of Justice.

Mr. O'CONNOR. Senator, I think the short answer to that is, because I subscribe to the same views of the Department that you just articulated, I believe that all of us in the Department, particularly those of us who serve at the pleasure of the President and who are here for a finite period of time, we have an obligation to keep the reservoir of credibility as high as we found it. These have, rightfully, been difficult times for the Department. I agree with that wholeheartedly.

I had the pleasure of serving with some of the best U.S. Attorneys in the country, colleagues and friends, and I think we all share the commitment to making sure that we do all that we can to make sure that we leave this Department as good as we found it.

I think the opportunity to serve as Associate Attorney General is an opportunity for me to do all I can in a different capacity, albeit one that would require me to be away from my family for a period of time. But when the Attorney General asks you to serve at challenging times, I think for those of us who are committed to public service, it's a very difficult question to say no to.

I was asked to serve, am honored to have served. I am fortunate to have a family that has supported me in these endeavors, though it hasn't been easy. I can commit to you that, if I am confirmed, I will work every day, not just with those of us who served in this administration, but the men and women who will be there long beyond us, to do all we can to give people the confidence that this Department of Justice has to have to be effective.

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Senator WHITEHOUSE. There will be those awkward circumstances with the political desires and purposes with the administration that you serve that may come into conflict with the laws and liberties that it is the Department's obligation to defend. In those circumstances, how will you evaluate that conflict?

Mr. O'CONNOR. Well, I would follow the law. The law is supreme. No job—no job—is more important than its credibility and integrity. If I ever came to such a situation—and I truly hope and trust that I won't, but if I do—I will not hesitate to walk away, to resign, if I ever felt that I was being asked to do anything other than what's right for the Department, what's right for this country.

Senator WHITEHOUSE. You served as Chief of Staff to Attorney General Gonzales at the time when he gave testimony before this committee, that many of the members felt was less than candid, less than truthful. Were you involved in the preparation of his testimony before this committee as Chief of Staff?

Mr. O'CONNOR. I was involved. I'm not sure what particular testimony you're referring to, but I was involved, generally preparing him and enlisting others, one at the Office of Legislative Affairs, in the various oversight hearings that occurred during the time period I served as Chief of Staff.

Senator WHITEHOUSE. The two statements that come to mind, one was on July 24 when Mr. Gonzales stated, in reference to his visit to Attorney General Ashcroft's hospital room, "The disagreement that occurred and the reason for the visit to the hospital was about other intelligence activities. It was not about the Terrorist Surveillance Program that the President announced to the American people."

Since then, numerous officials, including members of the so-called Gang of Eight, the top intelligence committees on the House and Senate side, and FBI Director Robert Mueller, have confirmed that the disputes did, in fact, concern the Terrorist Surveillance Program.

What was your reaction when he gave that testimony? Were you familiar with the underlying situation or were you out of the classification bubble necessary to understand the testimony?

Mr. O'CONNOR. The latter. I, frankly, have no understanding. I'm not read into the Terrorist Surveillance Program, never have been. With respect to that portion of his testimony, he did testify a few times at the Intel Committee. I was not involved in the preparation for that because I had not been read into that program. So, I could not tell you whether or not anyone's testimony in that regard is accurate or not.

Senator WHITEHOUSE. OK.

The other piece of testimony was on April 19. Mr. Gonzales testified, "I haven't talked to witnesses because of the fact that I haven't wanted to interfere with the investigation", the investigation being the investigation into the dismissal of U.S. Attorneys. Subsequently, White House liaison Monica Goodling testified that the Attorney General had indeed had a discussion with her, one that she found uncomfortable, in which he set out his version of events regarding the process of hiring U.S. Attorneys, and asked her for her reaction.

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Were you involved with that testimony? What is your reaction to what the Attorney General said when he testified as he did?

Mr. O'CONNOR. Well, I don't think I had any reaction at the time. I don't even know if I was serving as Chief of Staff at that point. I believe I became Chief of Staff, like, April 26th. But I was, Senator, I know, part of the folks involved in preparing for that hearing, I believe. At the time he answered that question I had no reason to question him. When Ms. Goodling subsequently testified, there was obviously a difference of opinion there.

I think Judge Gonzales could probably speak better than I can as to explaining that inconsistency. I don't believe that Judge Gonzales, when he subsequently denied having that conversation with this group, I'm not privy, as I said, to exactly what the explanation was. It may have been the fact that he had just not recalled it, or he didn't recall the conversation occurring then.

Senator WHITEHOUSE. Do you know when you first became aware of a conversation that took place between Attorney General Gonzales and Ms. Goodling?

Mr. O'CONNOR. Yes, I do.

Senator WHITEHOUSE. When was that?

Mr. O'CONNOR. It was the day she testified.

Senator WHITEHOUSE. OK. Well, that clarifies what your action would have been to his testimony.

The last point I'd like to ask you about is a more specific version of my earlier question focusing in on the Civil Rights Division, which is a division that has suffered particularly in the past months and years with embarrassing evidence of politically motivated hirings, a decrease in the division's enforcement of Section 2 of the Voting Rights Act, the DOJ amicus brief defending Indiana's Voter Identification law, which, based on all the evidence I have seen, is an effort to make it more difficult to vote, not less difficult.

If confirmed, what would you do to ensure that the Civil Rights Division is apolitical and vigorously protects the right to vote? In particular, what do you think about these State voter ID laws, which strike me as both erecting an obstacle to the right to vote, and doing so in a way that particularly makes it difficult for the elderly, for authorities, and for people who are at the lowest economic levels?

Mr. O'CONNOR. Well, let me try to answer that in two phases. I think with respect to what I would do, should I be confirmed and oversee Civil Rights, would be to communicate very clearly that we do not make any decisions on any cases for anything other than what the law and the facts dictate, and political considerations play absolutely no role in whether we bring or don't bring cases. Only the evidence should matter, number one.

Secondly, I think as a management philosophy of the Civil Rights Division, I'd like to see them get on the front pages for the cases they do, not for anything else. I think, unfortunately, in the past year or two they've made news, but not for the right reasons. I think my goal would be to see the Civil Rights being talked about in the press because of its work, not because of its management, or any of the other issues that have nothing to do with the mission of doing the right thing for the American people and aggressively enforcing civil rights.

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With respect to the second question of voter ID, I must say, I have limited experience with the issue. I don't recall, as U.S. Attorney of Connecticut, there being any issues with any voter ID statutes passed by the State legislature that we have had to enforce. Obviously, HAVA does apply in Connecticut.

There have been a few issues with the Secretary of State's ability to certify compliance, but they haven't really involved our office. I can say that obviously the right to vote is probably one of the most fundamental rights that we have, and guarding it zealously is part of what the Department does in the Civil Rights Division. We have an obligation to make sure that people who should vote can vote, and aren't intimidated. That's probably one of the most important issues that we have.

There is, I believe, a concern in some parts of the country, although I'm not privy to the facts there, where there are people voting who perhaps should not be voting. I think it's safe to say that in those respects there's an interest as well in making sure that people who shouldn't vote don't dilute the votes of those who should.

The question I think in each particular case depends on the facts and circumstances as to whether the remedy, be it a Federal statute, HAVA, or a State statute, is written in a manner that accomplishes that and doesn't have an adverse impact. I know, with respect to the case of Indiana, I know that's pending before the Supreme Court and has been argued. I'm hesitant, not only because I'm not that familiar with it, but also because of the pending nature of that litigation, to make any additional comments specific to that.

Senator WHITEHOUSE. Would you agree with me with the proposition that if there are a handful of people who may vote for whom it is not appropriate that they be voting, it is not legal that they be voting, and the measure that the Department pursues in order to protect against the risk of their voting discourages hundreds of people who are legally entitled to vote, enfranchised properly in this country, to vote for its elected officials. The Department has taken a big step backward.

Mr. O'CONNOR. Well, I would say under those circumstances I would like to think the Department would look long and hard. Ultimately it would be the State legislature that passed the bill that had that impact. The Department would have to ascertain, under those circumstances, what, if any, role to play. Clearly, I think under those circumstances the Department would have to be very reticent to try to defend the statute if that was the impact that the statute was having.

Again, it's hard for me to speculate on the circumstances, but if the goal of the statute is not being accomplished and there's a negative impact on people that the statute did not intend to cover, that's a real problem, I think, from a constitutional perspective. But I think, should an issue like that land in the lap of the Civil Rights Division, we would obviously have to give great weight to that.

Senator WHITEHOUSE. It may be more than just the statute that's involved. It may be enforcement policies at the Civil Rights Division.

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Mr. O'CONNOR. I agree. That's possible, yes.
Senator WHITEHOUSE. OK.
Mr. Katsas, welcome.
Mr. KATSAS. Thank you.
Senator WHITEHOUSE. If you don't mind, I would ask you to embellish a little further on the remarks that you made in your opening statement—you alluded to your pride in your father's accomplishments—and bring them to bear, if you would, on the present situation of the Department of Justice, particularly in terms of its credibility and reputation for integrity and how you see your role in the management position at the Department that you are seeking, and restoring that credibility and that reputation.
Mr. KATSAS. As a forensic pathologist, my father's job was to ascertain the cause of death and, on many occasions, to testify in court about that. He was typically a witness called by the government in the course of a murder or other prosecution, but he never viewed himself as a government witness in the sense of someone whose job it was to secure a conviction.
He viewed his job as telling the facts as he determined them, regardless of where the chips may fall in any particular case. I think that kind of fairness earned him the terrific reputation over time among both prosecutors and defense lawyers who were involved in criminal prosecutions in the Commonwealth of Massachusetts, and served him well professionally and served him well as a human being.
As I said, I share that sense that my job as a lawyer, involved in a different aspect of court proceedings, is to call things as best I can and make the best legal judgments I can, whether as a litigator called upon to defend the government's position or as an advisor called upon to counsel as to what the law might require in a particular case.
One can't work in a litigating division for five years, as I have, without getting the sense that an appreciation of that kind of ethic that runs throughout the staff, throughout the appellate staff that I supervised and the other parts of the Civil Division, there is a wonderful honor that I have felt many times in being able to go into court and say, "May it please the Court, I represent the United States of America."
Deputy Attorney General Comey used to say that that statement always gives one immediate credibility and makes a court inclined to believe whatever follows that statement. But that's only true if all of us continue to do our part to preserve the traditions of fairmindedness and integrity about which you have spoken so eloquently. I did my best for more than 5 years in the Civil Division to uphold that sort of tradition and, if confirmed, I would do my best to continue in the same vein.
Senator WHITEHOUSE. You've mentioned this already, but how do you see the role of career attorneys with the Department of Justice?
Mr. KATSAS. When I was the Appellate Deputy for the Civil Division, there was one of me, a political appointee, and 60 career attorneys working for me and with me. That office couldn't possibly function unless there were a sense of trust and rapport and cooperation between me as the nominal leader and the staff who ac-

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00117 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

tually did the overwhelming bulk of the work, and made the overwhelming majority of the recommendations, and made sure that the work got done.

I think I earned their respect and developed a good relationship with them. It is indispensable. In the Civil Division in its entirety, there are probably something like half a dozen political appointees and 800 career lawyers. No political appointee at the top of that pyramid could possibly function without the confidence of all of the career lawyers working toward the common mission of justice.

Senator WHITEHOUSE. I've recently had the chance to review a number of classified opinions from the Office of Legal Counsel. I've arranged that they are now—sections of them, at least, that I have selected are now declassified so that we can talk about them publicly, and I've spoken about them.

They concern me very much, particularly since an OLC opinion has a precedential effect and one could build on another, and one could, in a chain of self-created precedent, walk the Department pretty far outside of the bounds of traditional legal theory, particularly when opinions are classified and there's very little public opportunity for scrutiny and reaction to it.

I'd like to ask for each of you to react to two points that I extracted from those opinions, and then I'll turn to my learned, distinguished colleague from the State of Maryland, Senator Cardin, who has joined us.

Here are the two propositions that I'd like to ask your comment on. The first proposition is this. An executive order cannot limit a President. There is no constitutional requirement for a President to issue a new executive order whenever he wishes to depart from the terms of a previous executive order. Rather than violate an executive order, the President has instead modified or waived it.

My concern on that one, rather briefly, is that it allows the published executive orders of the executive branch of the government to become a foil and a screen for the real activities of the government if there is never a disclosure of the President's, to use the phrase, modification or waiver of the executive order. I understand perfectly well that the President is free to modify one. He can act outside of one and modify it nunc pro tunc. There is enormous and widespread executive authority.

But the idea that you must never—you're free never to come into compliance or change an executive order and simply run a classified program in violation of your own disclosed executive orders, which in many situations have the force of law, strikes me as being a trespass beyond the bounds of legal propriety.

The second one is very simple. The Department of Justice is bound by the President's legal determinations. It strikes me that that is a particularly difficult proposition where the Department of Justice is called upon to do its duty, that the President, for reasons that may have nothing to do with the enforcement of the laws of the United States of America, may choose to have a different view, maybe as a result of his personal interests or his political self-interests, and unfortunately has to have seen such circumstances. President Nixon was rather famous for saying if the President says so, then it can't be illegal.

So if you could react to those two propositions for me, I'd appreciate it.

Mr. O'Connor.

Mr. O'CONNOR. Thank you, Senator. I would say that, with respect to the first one, I think that perhaps the most appropriate way to respond is that transparency is crucial, that it seems to me always to be the best situation to act in a transparent manner and that, regardless of whether the President can or cannot deviate from an executive order, it seems to me the most prudent course is, when doing so, to make sure that he's consulting with leaderships of the intel committees or the appropriate committees that have jurisdiction or oversight responsibilities.

So I think, with respect to—it's less important to me whether he can or cannot do that. It's really more important whether he should or should not do it. If he does, it seems to me the best course of action would be to make sure he was consulting with the appropriate folks in Congress so that they were aware of it, so it did not look, I think as you said, as a cloak-and-shield type situation. I think that with respect to the second statement about the Department, I am frankly confused by it. It doesn't make sense to me. Obviously I don't have the same context, but the—

Senator WHITEHOUSE. I'm so glad you have the same reaction I had.

Mr. O'CONNOR. Yes. Maybe there's a context to the classified opinion. Obviously I haven't seen that. But the statement, in and of itself, I'm trying to figure out how that could make sense. Perhaps there is a way that I'm just not sophisticated enough and knowledgeable enough to figure out, but it seems to be that the Department has an obligation to call them as we see them.

Senator WHITEHOUSE. Mr. Katsas?

Mr. KATSAS. It's hard to have too definitive a view, not seeing all the context, but let me give you some thoughts based on what you've shared with us.

With respect to—

Senator WHITEHOUSE. And just for the record, I'd be delighted to tell you more about those opinions. Those are the only segments that they've allowed me to talk about, the only segments that are unclassified.

Mr. KATSAS. Understood. With respect to the first statement on how a President can or can't change executive orders, it seems to me literally true in a sense because the Constitution doesn't specify procedures for making or sending executive orders in a way that, say, it specifies the procedures for making and rescinding statutes. To that extent, it's true.

But as your comments suggest, it does seem to create concern about notice and forthrightness. To the extent that an executive order is a published public document intended to convey things to the Congress and to the public about what the executive is doing, there would obviously be concerns if, then, the executive does something completely differently in secret without being clear about what it's doing.

I can obviously understand your concern with respect to Congress' oversight interests, and a more general concern that people like to know what their government is up to. There may be occa-

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sions when there are national security or other needs for secrecy in particular cases, but I just can't evaluate whether such arguments would be compelling in the context of—whatever context that statement was made.

Senator WHITEHOUSE. And the second?

Mr. KATSAS. The second. I think the important question for me as a Justice Department lawyer is, what are my obligations to my superiors up the chain of command, to and including the President. I understand my obligations, both as a constitutional matter within the Article 2 hierarchy and as an ethical matter as an attorney charged with practicing ethically, I understand my obligations as advising and litigating cases and advising superiors consistent with my own assessment of what the law requires.

It is quite easy to imagine circumstances in which I, as a lawyer, think that there is only one legally defensible view to take litigating a case as a member of the Civil Division and someone above me in the chain of command instructs me to do the opposite. That would put me in a terrible position. I think it would compel me to resign. I am happy to say that, in more than 5 years of litigating cases within the Civil Division, I was never put in that uncomfortable and unfortunate position.

Senator WHITEHOUSE. Senator Cardin?

Senator CARDIN. Mr. Chairman, thank you very much.

First, let me thank both of our nominees for their commitment to public service. We very much appreciate that. We know it's a tremendous sacrifice to your family and we thank the family for being willing to share you with public service. So, we thank both of you for that.

I want to followup somewhat with Senator Whitehouse's comments about following the law and the power between the executive branch and the legislative branch. So, Mr. O'Connor, let me, if I might, start by talking a little bit about the U.S. PATRIOT Act and how far the administration can go, contrary to what Congress may do.

One of the issues that's currently being debated is the exclusivity of the U.S. PATRIOT Act on obtaining information from U.S. citizens. There is a balancing that we're trying to do, giving the government the ability to get information it needs in a timely way versus protecting the civil liberties of the people of our own country. We are considering a statute that would be exclusive. As Senator Whitehouse mentioned in some of his statements from legal counsel opinions, there's a question, at least, raised as to whether Congress can do that or not.

You've been involved in some of this litigation. If Congress indeed requires the administration to follow a certain action on obtaining information under the Foreign Surveillance Act, can the President go beyond that, and if he can, what does he have to do in order to notify Congress?

Mr. O'CONNOR. Senator, yes. I think, to be clear, that's the Protect America Act, I believe, and the FISA modernization debate that's going on right now that expires. I must tell you, my knowledge of the PATRIOT Act doesn't really include FISA. That being said, I have a general knowledge. I'm happy to answer the question. I haven't litigated FISA.

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Senator CARDIN. You're correct. The legislation we're currently considering.

Mr. O'CONNOR. That's right. I would say this. I'm generally aware. I don't—I've never really delved in this FISA world as a U.S. Attorney, but my general understanding is—

Senator CARDIN. You're in for a treat.

[Laughter.]

Mr. O'CONNOR. My general understanding is that there are really conflicting views on whether or not Congress can regulate and make FISA the exclusive means of the President's authority to engage in warrantless surveillance. There's an opinion I've seen from Attorney General Griffin Bell where he indicates that FISA does not go to the limits, that there's some inherent authority, recognizing, of course, that you get into the Justice Jackson analogy of Youngstown, where, when you're in that realm, the President's power is probably at its lowest ebb. But I also recognize that there are distinguished legal scholars, including the dean of Yale Law School in my district, who feel otherwise, that the President does not have inherent authority above and beyond what Congress gives them under FISA. I must say, I haven't read these varying points of views. I recognize they exist. They obviously come from people with far more formidable legal minds than mine. I think the solution is, rather than necessarily—one could probably delve into the issue and give a definitive issue—answer on this, but I think it would be in everybody's best interests to avoid the constitutional question in the first place and try to work in the spirit that Attorney General Levy did with Congress, collaboratively, to avoid a constitutional question on who has what authority.

It seems to me the best course of action is always to work collaboratively with Congress on this issue and not put ourselves in that third basket that Justice Jackson required, but to put us in the first basket where the President is acting consistent with Congress' authority.

And should I be confirmed—and I don't know if, as Associate Attorney General, this would even be in my domain. But were I to be asked to participate, I would certainly approach it with the philosophy that collaboration is always better here and staying in that first basket that Justice Jackson so articulately described, rather than having a situation where one branch of government is not seeing eye-to-eye with the other.

Senator CARDIN. Well, I agree with you, it's always best if we can work together. Unfortunately, that has not always been the case. Mr. Katsas said quite clearly that if he—on a fundamental issue there was direction given that he disagreed was following the law, he would consider resigning. It seems to me that in the number-three position at Justice, you'll have an opportunity to exercise a good deal of impact here.

What Congress is trying to do, working with the administration, is develop the manner in which information can be obtained under the Foreign Intelligence Surveillance Act. I guess what I would like to know, is the respect for the different branches of government and that the Judicial Committee must exercise independent judgment here—it can't just be the cheerleader for the President—and

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00121 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

would welcome your thoughts as to how you see your role in that regard.

Mr. O'CONNOR. Well, should I be asked by the Attorney General—I realize there's a February 1 deadline, I believe, under the Protect America Act. But should I be asked to participate, I can assure you that my view here would be focused on one thing and one thing only, and that's the law. But I would say that in cases where there's disagreement over how far Congress can go, the solution is not to ignore Congress and proceed anyway.

If you're going to go to that third bucket, you ought to be doing it in close consultation with Congress and you ought to at least let Congress know that you have this difference of opinion. I hope and I trust, and anything I would do, sir, as Associate Attorney General, were I to be confirmed, would be to keep us out of that situation. I don't think it's in the best interests of our country, or the Department, or this branch, or the executive branch to have those kind of constitutional showdowns. So I'm optimistic, by February 1st, that those people involved in these negotiations will come to some sort of resolution that everybody can live with.

Senator CARDIN. Thank you.

Mr. Katsas, let me, if I might, turn to Guantanamo Bay for a moment.

Mr. KATSAS. Sure.

Senator CARDIN. I understand you've been involved in some of the litigations concerning Guantanamo Bay. Where are we going on Guantanamo Bay? Can we maintain the legal position for an indefinite period of time of detaining individuals under unlawful combatant status without rights under the normal criminal justice system, or even the military justice system?

Mr. KATSAS. I think there are two aspects to your question: what does the Constitution require vis-a-vis the Guantanamo detainees, and what is sound policy vis-a-vis the detainees?

On the first, the first question is pending before the Supreme Court in the *Iloda* and *Boomadine* cases, and we should have a lot more clarity, I would assume, in June when the court, in all likelihood, will render a decision on that question.

Under current law, under current DC Circuit precedent, there is no constitutional impediment to the existing regime at Guantanamo of military tribunals followed by Court of Appeals review, but that's all before the Supreme Court to be decided.

On the broader question of what is sound policy, that is not so much a call for a civil litigator to make. But I can tell you, the President has expressed his desire to close Guantanamo as soon as that can be done responsibly, consistent with that desire. Most of the detainees who have ever been brought to Guantanamo have been released from Guantanamo. About 750 have been brought in, and something on the order of 200 or fewer remain. So, I think the Defense Department is doing its best to wind down as much as it can.

The judgments about whether the detainees can safely be brought to this country, whether they can safely be released or whether they can safely be transferred to other countries under appropriate security conditions and appropriate assurances of humane treatment, frankly, are a bit above my pay grade.

Senator CARDIN. Let me ask your advice on one other area. There are many things that have concerned me about Guantanamo Bay. I've been there. I've had a chance to meet with our soldiers that have been in Guantanamo Bay. One thing I've never understood is why the United States didn't seek the guidance of the international community on the handling of unlawful combatants. The 9/11 Commission talked a little bit about this.

I would just like to get—you're seeking confirmation to a top policy position within Justice—as to your views as to the advisability of the United States seeking international standards for a problem that's going to be with us, I'm afraid, for the indefinite future. We're not going to be able to end the war on terror in the next year or two, so it's likely that we're going to have another round of individuals who are going to be picked up, suspected to be a terrorist, have information that's important for us to obtain for the security of America.

Wouldn't it be—I don't want to lead the witness, but tell me your view as to whether we should be doing this alone, knowing full well that other countries might very well be in a similar position that we're in and do things that we would normally object to. Would it be advisable for us to seek some international standards rather than just try to create our own standards for what we think is right?

Mr. KATSAS. Other things equal, of course it would be advisable to consult with, particularly, our allies and other nations. It seems to me that is part of what the Defense Department has done in the past in the following sense. The detainees at Guantanamo have been given tribunals, have had the opportunity to have a military tribunal determine whether or not the detainee is, in fact, an enemy combatant or an innocent person swept up in the—

Senator CARDIN. I believe that occurred after the courts interviewed.

Mr. KATSAS. After the *Rasoul* decision in 2004. With respect to your point about consulting international standards, my understanding is that the thinking at the time was to do precisely that and to use as a model for the detention system in 2004 going forward the kind of standards that have grown out of Article 5 of the Geneva Convention which addresses the question of figuring out who is, in fact, a combatant and who is not a combatant and who is entitled to P.O.W. status.

Obviously, as we move forward and it looks like detainees might otherwise be staying for the indefinite future, it may well be appropriate to consider further process and further protections and, as part of that dialogue, I would think that the input of our international partners would be a significant consideration going forward.

Senator CARDIN. Just to clarify the record, I think it would be advisable to do more than consultation. I think it would be important for us, with our allies, to develop international standards for this new type of international problem we're confronting, the unlawful combatant issue, so that there's general recognized international standards for how these detainees should be treated. We did this originally under the authority of the President without

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00123 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

really the Congress or the court's concurrence, and then finally the court has developed certain rights.

Absent the court decisions, it's likely that these individuals never would have had a formal process for determining their status. But I would just hope that we would open this up more. We did a lot of things that were very defensible, but we didn't engage the international community. There's a lot of rumors, and some of which were totally false, because of the manner in which we handled it. Ultimately we just didn't know what to do with them.

After a long detention, they had very little value for intelligence, but from a safety point of view we didn't know whether we should try them, or return them, or do what. We're sort of stuck now. Everyone agrees—at least most people agree—that Guantanamo, as it was originally constituted, is no longer desirable for us to maintain. Now we don't know what to do with the people that are there.

So I just would urge us to try to gain international support for these types of activities before just saying, because we're America, we can go ahead and do it because we know what we're doing right.

Mr. Chairman, you've been very patient with time. I want to ask Mr. O'Connor just one more question, or at least comment.

I know that the Chairman's already questioned you on one of the areas that's under your jurisdiction, which is the Civil Rights Division. I don't want this hearing to go without mentioning the Civil Rights Division because I am deeply troubled by the record of the Civil Rights Division over the last couple of years.

To me, the Civil Rights Division has had a proud history in America in advancing the civil liberties/civil rights of all Americans, particularly those who have been denied fully participation in our society. I just would caution you as to what could be done within the Civil Rights Division to really advance the rights of all Americans.

I know the Chairman talked a little bit about election issues, which I've been working with Senator Obama on legislation that I hope will move forward to give you additional tools. But I just believe that this is an area that should have no partisan difference, one in which we all should be looking at ways that that division can perform its historic role in advancing the rights of Americans, and would urge you to give this your highest priority.

Mr. O'CONNOR. Senator, I will. I would simply say that Congressman Larson was kind enough to refer to a few cases, but we just most recently took guilty pleas from two New Haven police department officers who framed an African American defendant for civil rights. So, I will pledge to this committee that, should I be fortunate enough to be confirmed, I will continue the same level of aggressive enforcement of civil rights in Connecticut on a national level and I'm very, very cognizant of your concerns in this area.

Senator CARDIN. Thank you.

Thank you, Mr. Chairman.

Senator WHITEHOUSE. Well, I thank you both for your service to our country. You both bring significant talents to government service, which you and your families know would be better recompensed, financially at least, and in terms probably of worries taken home at night in other areas of activity, but you have chosen

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00124 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

to dedicate your talents to government service and we are very grateful for that.

I want to particularly thank and express my appreciation to Mrs. O'Connor, who has done a wonderful job of keeping the O'Connor children in a state where their grandparents can be very proud of their behavior through a long afternoon. I know, as the Chairman of these things, that there is a part-way ceremonial aspect to them, but there is also a significant substantive aspect. I appreciate those who are here for family reasons, having had the patience as we went through some of the substantive issues that concern, I think, our entire country.

If there's anything that anybody else would like further to add to the record, the record of these proceedings will remain open for one further week. But other than that, and with my renewed thanks and appreciation to the two witnesses, the hearing is now concluded.

[Whereupon, at 3:10 p.m. the Committee was recessed.]

[Questions and answers and submissions follows.]

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# QUESTIONS AND ANSWERS

**RESPONSES TO WRITTEN QUESTIONS OF SENATOR PATRICK LEAHY, CHAIRMAN, SENATE JUDICIARY COMMITTEE, FOR KEVIN JAMES O'CONNOR, NOMINEE FOR ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES**

1. You argued that a permanent ban on speech was permissible under the First Amendment in a case involving Connecticut librarians who received national security letters and were subject to a gag order. Your view was rejected by two Federal Judges. Judge Janet Hall, on the U.S. District Court for the District of Connecticut, wrote that the effect of your argument led to "a real and present loss of [] First Amendment right to speech that cannot be remedied." On appeal, the case was dismissed on a legal technicality. However, Circuit Judge Richard Cardamone, a Ronald Reagan appointee on the Second Circuit, wrote in a concurrence that "[w]hile everyone recognizes national security concerns are implicated when the Government investigates terrorism within our borders, such concerns should be leavened with common sense so as not forever to trump the rights of the citizenry under the Constitution." Do you now agree with, and accept as binding law, the reasoning of both Judge Hall and Judge Cardamone?

**I accept and respect Judge Hall's ruling on the constitutionality of the non-disclosure provision then in effect as well as the views of Judge Cardamone. I also accept as valid and binding the current statutory non-disclosure provision that was passed by Congress in 2006, after Judge Hall's decision. With respect to my arguments in the district court, it should be noted that the statutory non-disclosure provision challenged in the above-referenced case was enacted by Congress in 1986. As United States Attorney, it was therefore my ethical and professional obligation to provide a defense to the government defendants as well as to defend the constitutionality of an act of Congress that had been in existence for almost twenty years.**

2. The excessive secrecy behind this Administration's use of national security letters has undermined our ability to conduct oversight on government abuses and bad policy. According to press reports, absent the "gag orders" inherent in National Security Letters, some recipients would have spoken out on perceived government abuses and shed light on FBI's systematic abuses of NSLs by participating. Indeed, a March 2007 report from the Inspector General confirmed that even though the Patriot Act required the FBI to fully inform Congress about all requests issued under the statute, the FBI significantly underreported the number of National Security Letter requests in 2003, 2004, and 2005. In the wake of these revelations, do you believe that the secrecy surrounding the government's use of the national security letters power was unwarranted and interfered with oversight.



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**I am only generally familiar with the 2007 Inspector General Report and do not know why the FBI may have under reported the number of National Security Letter requests in prior years. I do recognize that the current statutory scheme under which National Security Letters are issued by the FBI recognizes the need for confidentiality in such investigations. At the same time, in large part due to amendments passed by Congress in 2006, the law now recognizes that the constitutional rights of recipients may be implicated and provides a process by which recipients can seek to protect those rights.**

3. In a September 2003 editorial, in the *Hartford Courant*, you wrote that "even the [Patriot] act's strongest critics must concede that there has not been the flood of abuses predicted." Yet, according to news reports and briefings provided by the FBI, the FBI has been conducting an internal audit of its use of National Security Letters that has confirmed the findings of the March 2007 Inspector General report that there was "widespread and serious misuse of the FBI's national security letter authorities." Given the findings from the FBI and the inspector general, is it still your view that there has not been abuse of the National Security Letter authority?

**I wrote the above editorial in 2003, almost four years before the Inspector General found "widespread and serious misuse" by the FBI related to their authority to issue National Security Letters. At the time I wrote the editorial, I was unaware of those issues. Based on the Inspector General's findings, if I were writing the editorial today, I would not make the same categorical statement about the absence of abuses.**

4. You served as Chief of Staff to former-Attorney General Gonzales at the time this Committee investigated the controversial mass firings U.S. Attorneys for partisan political reasons. At your hearing, you testified that you were involved in former-Attorney General Gonzales's testimony before this Committee as his Chief of Staff.

   a. What was your role in shaping the Department's response to Congressional inquiries about the firing of U.S. Attorneys, including in the Attorney General's testimony?

**In April 2007, Chuck Rosenberg, the acting Chief of Staff to the Attorney General, asked me to assist in the Attorney General's preparation for his upcoming Senate Judiciary Committee oversight hearing. At that time, I was serving as an Associate Deputy Attorney General responsible for violent crime initiatives, a position I assumed in January 2007. Prior to Mr. Rosenberg's request, I was not involved in shaping the Department's response to Congressional inquiries about the firing of United States Attorneys.**



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00127 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**Pursuant to Mr. Rosenberg's request, I did assist in preparing the Attorney General for the April 2007 Senate Judiciary Committee oversight hearing. After I agreed to serve as Chief of Staff in late April 2007, I assisted in preparations for the Attorney General's May 2007 House Judiciary Committee oversight hearing and his July 2007 Senate Judiciary Committee oversight hearing. I also reviewed the Attorney General's written introductory statements that were submitted to the committees. I did not participate in preparing other witnesses who testified before or were interviewed by Congress in connection with the firing of the United States Attorneys.**

**Congress's numerous written requests for information concerning the firing of the United States Attorneys were handled, as a general matter, by the Office of Legislative Affairs and the Office of Legal Counsel.**

b. Please describe your understanding of the Attorney General's role in deciding which U.S. Attorneys would be fired?

**Prior to the request from Chuck Rosenberg to assist in the Attorney General's preparation for his April 2007 Senate Judiciary Committee oversight hearing, I had no understanding of what role the Attorney General played in the decision to ask for the resignations of the United States Attorneys. My present understanding of the Attorney General's role is based on his description of the process and the various public testimony and reports on the matter. My recollection is that what the Attorney General told me and others in prep sessions about his role is consistent with his congressional testimony. It should be noted, however, that because of the joint investigation into this matter being conducted by the Office of Inspector General and the Office of Professional Responsibility, I have not undertaken any independent review or analysis of this matter.**

5. I am concerned about reports that the enforcement record of the Environment and Natural Resources Division has shown signs of a decline in certain types of cases. A May 23, 2007, report by the Environmental Integrity Project (EIP) found that the Justice Department's environmental civil suits have declined by 70 percent. Another report, conducted by the Transactional Records Access Clearinghouse at Syracuse University, found that between 2001 and 2004 criminal prosecutions of environmental violations declined by 28 percent.

a. If confirmed as Associate Attorney General, you will oversee the Environment and Natural Resources Division. Given that Division's recent record of enforcement, will you commit to restoring the integrity of that Division and reversing its trend of declining enforcement actions?

b. During your tenure as U.S. Attorney for the District of Connecticut, your office garnered a reputation for being "active" and "tough" in prosecuting



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00128 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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environmental crimes. If confirmed as Associate Attorney General, what would be your vision and plan of action to repair the integrity and enforcement record of the Environment and Natural Resources Division?

**I am unfamiliar with the EIP report or whether civil suits have declined as the report claims. Nevertheless, as United States Attorney for Connecticut, I have been fortunate to lead an office that has been very aggressive in the enforcement of our environmental laws. I personally handled the investigation, prosecution and conviction of the Operations Manager of the Fisher's Island Ferry District for violations of the Clean Water Act arising from the ferry's dumping of its waste directly into Long Island Sound. The office has successfully prosecuted many other environmental crimes cases, including two prosecutions that resulted in guilty pleas and the assessment of two of the largest criminal penalties in New England history. Most recently, working with attorneys from the Environment and Natural Resources Division, we obtained a conviction after a jury trial against Ionia Management for violations of the Act to Prevent Pollution from Ships and obstruction of justice. At sentencing, the court imposed a large fine on the company and barred its ships from entering U.S. ports until they are fitted with new equipment to monitor overboard discharges.**

**Should I be confirmed, I will lead by example and continue, alongside the many outstanding attorneys in the Environment and Natural Resources Division, to aggressively investigate and enforce violations of our environmental laws.**

6. At your confirmation hearing, you were asked questions about your commitment for ensuring that the Civil Rights Division is apolitical and protects the right to vote. That Division also needs a restoration in morale and of its historical priorities. In the last seven years, the Justice Department appears to have moved away from its historic positions in civil rights cases ranging from employment discrimination to racial integration in schools. During the hearing, you testified that you would ensure that the Civil Rights Division gets talked about in press "because of its work, not because of its management," but what is your vision for the role of the Justice Department with regard to civil rights enforcement? How do you plan to address the well-documented problems with low morale in the Division?

**The Department of Justice and the Civil Rights Division have a long and proud history and commitment to enforcing our nation's civil rights laws. I strongly support the mission of the Civil Rights Division and, if confirmed, will work to ensure that it has the tools and resources necessary to fulfill its important mission.**



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00129 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**In Connecticut, we have embraced that mission. In the past five years alone, we have prosecuted and convicted the sitting mayor of one of the state's largest cities, two police officers and a private citizen for violating the civil rights of African Americans. Should I be confirmed, I will bring that same level of commitment to the national level and ensure that the Department lives up to its proud history of aggressively enforcing our civil rights laws.**

**To the extent that there are morale or management issues in the Civil Rights Division, should I be confirmed I will work closely with the head of the Division to immediately address and resolve such problems so that they will not and cannot in any way impact or affect the very important work of the attorneys in that division.**

7. Last year, thousands of Americans marched to protest unjust racially charged incidents in Jena, Louisiana. In October 2007, the local Federal prosecutor testified that the noose-hanging incident at the local high school was a hate crime. Yet, even after the peaceful protests in Jena occurred last year, Americans witnessed almost a dozen more reports of nooses in Illinois, Maryland, New York, North Carolina, South Carolina, and Pennsylvania. If confirmed, you would oversee the Civil Rights Division. What do you believe is the proper role of the Justice Department with respect to preventing and responding to hate crimes in order to ensure that heinous noose incidents, like the ones we witnessed in Jena and across the country, do not reoccur in the future?

**The Department of Justice must play an active role in responding to any hate crimes. The Civil Rights Division, through its newly launched racial threats initiative, has prioritized such matters and views every noose incident as a potential hate crime to be investigated thoroughly.**

**In Connecticut, we have, unfortunately, experienced instances of nooses being displayed and we are actively investigating each such instance. I participated in a press conference with the FBI and the Connecticut chapter of the NAACP at which all of us stated that the display of nooses would be investigated as potential hate crimes and that those responsible would be prosecuted. Since the press conference, there has been only one reported instance of a noose and the person responsible has been charged. Should I be confirmed, I would bring this same level of engagement and awareness to the Department and continue to proactively and aggressively respond to such crimes.**

8. Despite the Department's intense focus on criminally charging individuals for "voter fraud," scant evidence of actual voter fraud had been found. Yet, you testified at your confirmation hearing that the Department has an "interest" in ensuring that "people who shouldn't vote don't dilute the votes of those who should."



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00130 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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a. If confirmed, would you investigate and report to Congress on why the Department prioritized the prosecution of voter fraud when there is scant evidence that this crime is being committed?

b. Would you commit to investigating and reporting to Congress what impact the Department's focus and devotion of resources on prosecuting voter fraud has had on the Department's other efforts to enforce the Nation's civil rights laws, including voting rights laws?

**Should I be confirmed, I will aggressively enforce all laws designed to protect the right to vote and the integrity of the voting process. It should be noted, however, that most voter fraud prosecutions are handled by the Criminal Division and the United States Attorney's offices, components of the Department of Justice over which, as Associate Attorney General, I would not have responsibility.**



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**Senator Edward M. Kennedy**
**Responses to Questions for the Record**
**Senate Judiciary Committee Hearing on the Nomination of Kevin O'Connor to be Associate Attorney General**

**1. Dual Roles as U.S. Attorney and Associate Deputy Attorney General and, Later, Chief of Staff to Attorney General Gonzales**

Last January, you became an Associate Deputy Attorney General here in Washington, but continued to serve as United States Attorney for Connecticut. When you became Attorney General Gonzales' Chief of Staff in April, you signed on for even more intensive "double duty."

As U.S. Attorney for Connecticut, you've been the principal federal litigator for the United States in that state, and you've had full responsibility for the U.S. Attorney's office in the areas of personnel, financial management, and procurement. Yet for many months, you apparently spent only one day a week in Connecticut performing these responsibilities.

A U.S. Attorney position requires enormous time and energy. It seems impossible to do the job adequately from Washington—much less while running the office of the Attorney General during congressional investigations into the politically motivated firings of other U.S. Attorneys.

**Questions:**

**A. How did you manage to run the Attorney General's office and the Connecticut U.S. Attorney's office at the same time?**

I was able to manage the United States Attorney's Office while I served as Associate Deputy Attorney General and, later, Chief of Staff, because I have an outstanding leadership team in the United States Attorney's Office who can and did handle matters very effectively when I was in Washington. I stayed in daily contact with the United States Attorney's office when in Washington through regular email exchanges and conference calls. In addition, I traveled back to Connecticut almost every week and spent numerous weekends and weekdays in my Connecticut office during the time I held additional positions in Washington.

**B. Did you ever worry that you were compromising the quality of your work in either position?**

Yes. Before I agreed to serve as Associate Deputy Attorney General and, later, Chief of Staff, I considered whether accepting additional responsibilities in Washington would negatively impact my work as United States Attorney. After discussions with the leadership team in Connecticut and with other past and present United States Attorneys who have served in dual capacities, I agreed to serve because I had been asked and because I believed there would be benefits from my service to the United States Attorney



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00132 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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community and to my office in Connecticut. I did, however, on both occasions, limit the term for which I would serve in Washington to six months because I wanted to have the option to return full-time to Connecticut if I came to the conclusion that my service in dual roles was negatively impacting my duties and responsibilities as United States Attorney.

**C. Do you thlnk being a U.S. Attorney can be done satisfactorily as a part-time job?**

I believe that there are real benefits to having United States Attorneys serve in positions in Washington, including the need to bring a local perspective to decisions being made in Washington that will impact operations in the field. That being said, it is my view that such assignments should be done only if (1) there is a need for a United States Attorney's involvement; (2) the United States Attorney's office is operating in a manner that the assignment will not impact negatively the work of the office; and (3) the assignment is for a finite period of time. Under such circumstances, I believe both the Department and the United States Attorney's office can and have benefitted from such service.

**D. Did you ever suggest to anyone that it might be inadvisable or inappropriate for you to hold both positions simultaneously for such a long time?**

As I discussed in response to Question 1C, I was concerned about holding two positions. Nevertheless, when I was asked to serve, during very difficult times for the Department, I felt it was the appropriate thing to do. On both occasions, I accepted the offer to serve on the condition that I would serve for six months, after which time I would reevaluate whether it was in the best interests of the Department and the United States Attorney's office for me to serve longer. As Associate Deputy Attorney General, my service lasted less than four months. My service as Chief of Staff lasted just over six months, after which I returned to Connecticut full time.

**2. <u>U.S. Attorney Firings and Activities While Chief of Staff to Attorney General Gonzales</u>**

Last April, you became Chief of Staff to Attorney General Gonzales during our investigation of the firing of U.S. Attorneys. I assume that every document and every decision in the Attorney General's office would have gone through you as Chief of Staff, and that you would have been involved in preparing the Attorney General for congressional testimony.

His testimony before our Committee about the U.S. Attorney firings left many of us convinced that we had been severely misled. Mr. Gonzales was unable to recall numerous important points and contradicted himself on several subjects, including who was responsible for identifying the attorneys to be fired, why they were fired, and what his role was in these events. Yet he expressed confidence that nothing improper had occurred in the U.S. Attorney firings, even though he could not remember key events or the reasons why particular U.S. Attorneys were fired. He couldn't even tell us how names got on the list of U.S. Attorneys to be fired.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00133 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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In an interview on talk-radio, you said you became an informal advisor to Attorney General Gonzales, and that this led to your becoming Chief of Staff. You acknowledged that you had been advising him for some time even before the announcement that you would become official Chief of Staff last April.

**Questions:**

**A. What role did you have in preparing Attorney General Gonzales for his testimony before this Committee on April 19, 2007 on the U.S. Attorney firings?**

In April 2007, Chuck Rosenberg, the acting Chief of Staff to the Attorney General, asked me to assist in the Attorney General's preparation for his upcoming Senate Judiciary Committee oversight hearing. At that time, I was serving as an Associate Deputy Attorney General responsible for violent crime initiatives, a position I assumed in January 2007. Prior to Mr. Rosenberg's request, I was not involved in the Department's response to Congressional inquiries about the firing of United States Attorneys. Pursuant to Mr. Rosenberg's request, I, along with many others in the Department, assisted in preparing the Attorney General for his April 2007 Senate Judiciary Committee oversight hearing. I also reviewed the Attorney General's written introductory statement that was submitted to the committee.

**B. Was anyone from the White House involved in the Attorney General's preparation? If so, please describe the nature of that involvement.**

Not that I am aware of.

**C. While you worked for Deputy Attorney General McNulty, did you participate in his preparation to testify before Congress on the firings?**

No.

**D. Before or after Mr. Gonzales's testimony, did you investigate the events surrounding the U.S. Attorney firings? If so, what did you find?**

No. Because of the joint investigation into this matter being conducted by the Office of Inspector General and the Office of Professional Responsibility, I did not undertake any independent review or analysis of this matter.

**E. Do you know how names were put on the list of U.S. Attorneys to be fired?**

How names were put on the list of U.S. Attorneys to be fired is a matter about which I have no personal knowledge. It is also the subject of an ongoing investigation by the Office of Inspector General and the Office of Professional Responsibility.

**F. Do you know who put which names on the list of U.S. Attorneys to be fired?**

Who put names on the list of U.S. Attorneys to be fired is a matter about which I have no personal knowledge. It is also the subject of an ongoing investigation by the Office of Inspector



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00134 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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General and the Office of Professional Responsibility.

**G. Do you know how the false story was developed that the firings were based on the inadequate performance of the targeted U.S. Attorneys?**

Whether or not the performance of the individual United States Attorneys who were fired was a factor in their dismissals is a matter about which I have no personal knowledge. It is also the subject of an ongoing investigation by the Office of Inspector General and the Office of Professional Responsibility.

**H. Have you been interviewed by the Inspector General or the Office of Professional Responsibility in the course of their ongoing joint investigation into the U.S. Attorney firings and the improper partisan hiring in the Department under Attorney General Gonzales?**

**a. If no: Were you contacted to be interviewed? If not, have you reached out to investigators?**

I was never interviewed, but I, along with numerous other Department employees, received a general questionnaire from the Office of Inspector General which I completed in 2007. I was subsequently asked, in my role as Chief of Staff, to assist the Office of Inspector General in encouraging those Department employees who had not responded to the questionnaire to do so.

**b. If yes: When did the interview take place and how long did it last? Did anything occur in the interview that this Committee should know about before acting on your nomination?**

**3. <u>Bybee "Torture Memo" and the President's Power to Torture</u>**

As you know, the nation is engaged in an intense debate about torture. In 2002, the Justice Department's Office of Legal Counsel issued the notorious Bybee "torture memorandum," a legal opinion that redefined torture in such a narrow way that almost nothing would be covered. As the memo stated: "Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Anything that fell short of this standard would not be torture. CIA interrogators called the memo their "golden shield," because it allowed them to use virtually any interrogation method.

The memo also invented a commander-in-chief exception, which no legal authority had ever recognized, stating that the President and the officials he directs are not bound by laws passed by Congress against torture. The memo stated as well that government officials can avoid prosecution for torture by invoking the defenses of "necessity" or "self-defense"—even



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00135 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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though the Convention Against Torture, ratified by Congress in 1994, states very clearly that "no exceptional circumstances whatsoever" may be used as a justification for torture.

In 2004, we learned that American soldiers had engaged in sadistic acts in the Abu Ghraib prison in Iraq. Shocking photos of such acts created worldwide outrage and condemnation. America lost its moral high ground in the fight against terrorism, possibly for years to come.

Last October, Attorney General Mukasey added to the controversy by refusing to answer this Committee's questions on torture. He refused to say whether waterboarding is illegal, or to state his views on other interrogation techniques. He did not reject the legal reasoning behind the infamous Bybee memo.

Also in October, we learned from the media that only months after withdrawing the Bybee memorandum, the Office of Legal Counsel issued two new secret legal opinions in 2005 approving the use of severe interrogation techniques.

Just weeks ago, we also learned the CIA had destroyed videotapes of its employees in the act of torturing detainees. Those tapes were never shown to Congress or any court. They were never shown to the bipartisan 9-11 Commission. Instead, they were destroyed.

If you are confirmed as Associate Attorney General, you'll obviously be part of the debate on torture. You'll have a chance to help bring America back to the rule of law and the ideals we hold dear—and say "no" to interrogation techniques that are cruel, inhuman, and degrading.

**Questions:**

**A. Dean Harold Koh of Yale Law School has said that the Bybee memo was "perhaps the most clearly erroneous legal opinion I have ever read." He called it "a stain upon our law and our national reputation." Do you agree?**

I agree that the Bybee Memo was flawed and that the Department properly withdrew it.

**B. Do you agree or disagree with the Bybee memo's claim that "necessity" can justify the use of torture?**

I disagree. My understanding is that neither the President nor the Department of Justice can authorize torture on the grounds of "necessity."

**C. Do you agree or disagree with the Bybee memo's claim that "self-defense" can justify the use of torture?**

I disagree. My understanding is that neither the President nor the Department of Justice can justify the use of torture on the grounds of "self-defense."

**D. Do you agree or disagree with the Bybee memo's claim that for purposes of the Torture**



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00136 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**Act, physical suffering can never be "severe" unless it is of "extended duration or persistence"?**

From what I understand, the Bybee Memo did not suggest that physical suffering could not be "severe" unless it is of "extended duration or persistence." Rather, it concluded that "severe physical suffering" was not a separate concept from "severe pain" under the anti-torture statute. I disagree with that conclusion and, more generally, disagree with the unduly narrow definition of "severe physical pain or suffering" adopted by the Bybee Memo.

**E. Do you agree or disagree with the theory—which this Administration has never repudiated—that laws banning torture do not always bind the Executive Branch, because of the President's inherent powers as commander-in-chief?**

I do not believe the President has inherent authority to disregard laws banning torture.

**F. During your service in the Department of Justice, have you had any involvement of any kind in any matter relating to interrogation practices or techniques? If so, please describe your involvement.**

Yes. In July 2007, I became aware that the President issued an Executive Order concerning the legality of the CIA's current interrogation program and that the Department of Justice, through the Office of Legal Counsel, had provided legal advice related to the Executive Order. I took no substantive part in that process, however.

**4. Waterboarding**

As you know, waterboarding has become the worldwide symbol for America's debate over torture. It became the centerpiece of Attorney General Mukasey's confirmation hearings. It was the technique apparently shown on the videotapes that the CIA destroyed. Waterboarding, however, is not by any means the only interrogation technique used by the Bush Administration that Congress and legal experts believe to be torture. It's just the most infamous.

In fact, waterboarding is hardly new. It's an ancient, barbaric technique. In the fifteenth and sixteenth centuries, it was used in the Spanish Inquisition. In the nineteenth century, it was used against slaves in this country. In World War II, it was used against our own soldiers by Japan. In the 1970s, it was used by the Khmer Rouge and the military dictatorships in Chile and Argentina. It's being used today against pro-democracy activists in Burma. That's the company the Bush Administration is keeping when it refuses to give up waterboarding.

Top military lawyers and legal experts across the political spectrum have condemned it as a violation of U.S. law and a crime against humanity. After World War II, the United States helped organize the International Military Tribunal for the Far East, and it prosecuted Japanese soldiers for waterboarding Allied prisoners of war. At one trial, an Army Lieutenant testified that the experience "felt more or less like I was drowning, just gasping between life and death."



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00137 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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We sentenced Japanese officers to years of hard labor for using waterboarding.

Like many of my colleagues and many Americans, I was troubled by Attorney General Mukasey's evasive answers about waterboarding. He repeatedly refused to acknowledge that waterboarding is torture. Yet as the record makes clear, courts and military tribunals have consistently agreed that waterboarding is an unlawful act of torture.

During his confirmation hearings, Attorney General Mukasey pledged to conduct an inquiry into the legality of torture techniques, including waterboarding. I understand that you have not been given access to some classified information regarding interrogation techniques, but I would like to hear your personal views in response to the following questions.

**Questions:**

**A. As Chief of Staff to the Attorney General or in any other capacity, were you involved in investigating this legal question? If so, please describe your involvement in detail.**

No.

**B. Is waterboarding torture, as defined by domestic and international law?**

I share the Attorney General's personal view that waterboarding is repugnant. I also believe it important to consider when analyzing interrogation methods how the use of any such method might affect the safety of our own servicemen and servicewomen as well as the impact that such methods may have on our relationships with our allies and other nations. However, because waterboarding is not and may not be a part of the CIA's current interrogation program, the Attorney General has decided to refrain from addressing this question in the absence of concrete facts and circumstances that call for an answer. In view of the Attorney General's decision and, as a subordinate to the Attorney General, I must respectfully decline to answer this question.

**C. Is waterboarding illegal under United States law?**

Please see my answer to Question 4B.

**D. Would it be lawful for another country to use waterboarding against an American?**

Please see my answer to Question 4B. It should also be noted that an American soldier would be entitled to the full protections afforded by the Geneva Convention for lawful prisoners of war, which exceed the threshold guarantees of Common Article 3.

**E. According to *The New Yorker* magazine, in a recent interview the Director of National intelligence, Admiral Mike McConnell, stated: "If I had water draining into my nose, oh God, I just can't imagine how painful! Whether it's torture by anybody else's definition, for me [waterboarding] would be torture."**

**a. When even our own DNI acknowledges that waterboarding would be torture**



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00138 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**"for [him]," doesn't that call into question the soundness of any legal definition of torture that excludes waterboarding?**

Please see my answer to Question 4B.

**b. Would waterboarding be torture for you?**

I have never experienced it, but by all accounts waterboarding would be a very frightening and traumatic experience for anyone subjected to it.

**F. Do you agree with Admiral McConnell that practices that are "excruciatingly painful to the point of forcing someone to say something because of the pain" should be considered torture under our laws, regardless of their duration or persistence?**

Please see my answer to Question 4B.

**G. Where do you draw the line if you cannot say that waterboarding, a classic method of torture through the ages, is never permissible? If you feel you cannot say whether waterboarding is torture and illegal, what about the rack and the screw? Can we bring them back? What is the legal definition of torture as you understand it?**

Please see my answer to Question 4B. Torture has been legally defined by Congress as actions taken under color of law that are specifically intended to inflict severe physical pain or suffering or to cause prolonged mental harm through certain threats or acts. See 18 U.S.C. §§ 2340(1), (2). Torture is also prohibited by the prohibition by the Detainee Treatment Act and the Military Commissions Act, and Common Article 3 of the Geneva Convention.

**5. FISA and Executive Power**

The scandal over the Administration's warrantless eavesdropping is still coming to light. But we already know that its surveillance activities were so shocking that up to 30 Justice Department employees threatened to resign because of them. The President's own head of the Office of Legal Counsel, Jack Goldsmith, testified that he "could not find a legal basis for some aspects of the program." He called it "the biggest legal mess [he] had ever encountered."

Here is how Mr. Goldsmith described the Administration's general approach to FISA: "After 9/11 . . . top officials in the administration dealt with FISA the way they dealt with other laws they didn't like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis of the operations." He said that David Addington, the powerful Counsel to the Vice President, once exclaimed, "We're one bomb away from getting rid of that obnoxious [FISA] court."



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00139 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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As you know, Congress is currently debating possible reforms of FISA. The White House has asked that we make the temporary changes made by the Protect America Act permanent, and that we amend FISA in other ways as well. At the same time, the Administration refuses to acknowledge it is bound by FISA. So we have a bizarre situation: the Administration is asking Congress to pass a new law, but it is simultaneously insisting that no such law is necessary and that it will not be bound by it.

The language of FISA is clear. It provides the "exclusive" means by which the Executive can conduct foreign intelligence surveillance. As we know from Justice Jackson's famous opinion in the Steel Seizure Cases half a century ago, the President's authority is at its weakest when he acts contrary to a congressional statute. Yet President Bush apparently intends to defy clear statutory language.

**Questions:**

**A. I was concerned that in Attorney General Mukasey's confirmations hearings, he seemed to suggest that the President is free in certain cases to ignore the crystal clear instruction from Congress that FISA is the "exclusive" means by which the Executive Branch can conduct foreign intelligence surveillance. Do you agree that the Executive Branch is bound to conduct all foreign intelligence surveillance according to FISA?**

I recognize that this question is currently the subject of much discussion and debate. There are many distinguished and respected legal scholars who agree that the Executive Branch is bound to conduct all "electronic surveillance" a term defined by FISA, pursuant to the procedures set forth in FISA or the domestic wiretap act. These scholars argue that the President has no authority, inherent or otherwise, to operate outside these limitations. *See January 9, 2006 Letter to Congressional Leaders from, among others, Professors Walter Dellinger, Ronald Dworkin, Richard Epstein, Harold Hongku Koh, Philip Heymann, Beth Nolan, Geoffrey R. Stone, Kathleen M. Sullivan and Laurence Tribe.* At the same time, there is significant precedent in the federal courts supporting the argument that the President has "inherent authority to conduct warrantless searches to obtain foreign intelligence information" and that "FISA could not encroach on the President's constitutional power." *In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. Rev. 2002); *see also United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980); *United States v. Butenko*, 494 F. 593, 602-06 (3d Cir. 1974)(en banc). It is my hope that the Legislative and Executive branches will arrive at an acceptable legislative solution, in the midst of the current debate over the Protect America Act or otherwise, that will both ensure the safety of the American people and preserve important civil liberties, so that this unsettled and difficult constitutional question be need not be resolved.

**B. When if ever, in your view, would the President be authorized to disregard or violate FISA?**



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00140 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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As I note in my answer to Question 5A, a difficult constitutional question would arise if FISA's limitations were to be viewed by the President as conflicting with his inherent authority under the Constitution.

**6. Political Personnel Practices**

Federal law and civil service rules prohibit discrimination against career Justice Department personnel based on political affiliation. Yet in recent months, we've seen many troubling reports of partisanship in personnel decisions at the Department.

--Monica Goodling, a former aide to the Attorney General, admitted that she probably crossed a line in considering candidates for civil service positions.

--Bradley Schlozman, a former high ranking official in the Civil Rights Division, testified before this Committee that he had bragged about hiring Republicans, and the Washington Post has published other reports of his politically motivated personnel decisions.

--In July 2006, the Boston Globe reported that the number of attorneys with civil rights experience being hired in three key sections of the Civil Rights Division had declined sharply, while the number of such attorneys hired who had ties to the Republican National Lawyers Association and conservative groups such as the Federalist Society had increased.

--The head of the Division's Voting Section has been the subject of repeated reports of politically motivated decision-making on both personnel and law enforcement matters, and was recently removed from his position.

The appearance of unlawful political considerations in the hiring process has done enormous damage to the Department's reputation and the morale of its attorneys.

**Questions:**

**A. What steps did you take as Chief of Staff to correct these problems?**

When I agreed to serve as Chief of Staff in late April 2007, I viewed it as my primary responsibility to respond to and correct any personnel or other problems of which I became aware. With the assistance of a career prosecutor that I detailed into the Attorney General's office and others in the Department, I oversaw numerous efforts to address such problems. For example, since April 2007 the Department has instituted a number of policy and procedural changes, including: (1) rescission of the hiring authority and delegation order empowering the Chief of Staff to approve all personnel decisions in the Department's leadership offices; (2) revisions to the hiring process for immigration judges that emphasize the role of career employees in the process; (3) revisions to the hiring process for Honors Program and Summer Law Interns Program that also formalize the role of career employees in the process; and (4)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00141 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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revision of the procedure governing the hiring of Assistant United States Attorneys by interim or acting United States Attorneys so as to preclude involvement in the process by political appointees in senior leadership offices. Additionally, in June 2007, then Assistant Attorney General Wan Kim issued a memorandum to employees of the Civil Rights Division emphasizing that career personnel decisions must be made only on the merits and political considerations should not under any circumstances influence such decisions. In December 2007, Acting Assistant Attorney General Grace Chung Becker reissued this memorandum to reinforce this important point.

Additionally, in my role as Chief of Staff, when I became aware of allegations concerning improper personnel practices, I referred the allegations to the Office of Inspector General and the Office of Professional Responsibility for inclusion in their joint investigation.

**a. Did you insist that hiring decisions be based on merit, not politics?**

Yes.

**B. As you know, these allegations are also part of an internal Justice Department investigation. Will you commit to reviewing the findings of the Inspector General and the Office of Professional Responsibility and taking whatever steps are needed to correct any of the problems that are identified?**

Yes.

**7. <u>Poor Record on Race and National Origin Discrimination</u>**

As Associate Attorney General, you will oversee the Civil Rights Division. I'm very concerned about the Department's priorities on civil rights. Throughout this Administration, the Department seems to have downgraded its long-standing commitment to vigorous enforcement of the nation's civil rights laws. In particular, the number of cases alleging discrimination against African Americans and Latinos has declined.

In seven years under the Bush Administration, the Civil Rights Division has filed only two voting rights cases alleging race discrimination against African Americans, and very few national origin cases on behalf of Latinos under the Voting Rights Act. By comparison, the Clinton Administration filed at least 18 cases under the Voting Rights Act alleging race discrimination against African Americans alone.

On job discrimination, the Department's own data show that the Division has filed and resolved far fewer cases than in the Clinton Administration, despite an increase in the number of Division attorneys handling such cases. In fact, the Division has filed nearly as many cases alleging national origin or race discrimination against whites as against African Americans and Latinos combined.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00142 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**Questions:**

**A. Clearly, no one should suffer discrimination, regardless of their race or national origin. However, the Department's civil rights enforcement should also reflect the cases of greatest need. Do you have any reason to believe that vigorous enforcement of the nation's laws against discrimination based on race or national origin is needed any less today than it was in the late 1990s?**

No.

**B. As a former Chief of Staff, what do you know about why the Department shifted resources away from pursuing race and national origin cases?**

As Chief of Staff, this issue was not one that I encountered, nor am I aware of whether or not the Department shifted resources away from such cases.

**C. If you are confirmed, will you commit to work with the Attorney General, the Deputy Attorney General and Assistant Attorney General for Civil Rights, to determine whether the Department's civil rights priorities appropriately respond to existing civil rights problems?**

Yes.

**D. If you conclude that the decline in enforcement in the areas of race and national origin discrimination is due to a lack of resources, will you promptly inform Congress of that fact? It would surprise me if that were the case, but if so, we'd want to know immediately.**

If I identify such a decline and conclude that it is attributable to a lack of resources, I will work with others in the Department of Justice as well as with Congress to address and correct it.

**8. Hate Crimes**

Hate crimes violate everything our country stands for. They send the poisonous message that some members of our society deserve to be victimized because of who they are. The FBI reported that nearly 10,000 Americans were victims of hate crimes last year – up 8% since 2005. We know that these statistics show only a small part of the problem, because hate crimes routinely go unreported.

Current law covers only hate crimes based on race, color, religion, or national origin. We've been trying to pass stronger legislation on this issue for the past ten years. We came close this year to extending protection to victims of hate crimes based on gender, sexual orientation, disability or gender identity. The bill also would have updated current law by removing the outdated requirement that a victim be engaging in one of a limited number of federal activities, such as traveling in interstate commerce, before the federal government can intervene.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00143 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Despite the fact that such a large number of hate crimes occur every year, there has been a steady decline in hate crime prosecutions and convictions by the Department of Justice. In 1999, the department charged 45 individuals with hate crimes and convicted 38. In 2006, the Department charged 20 individuals with hate crimes and convicted 19. This trend is disturbing, particularly in light of the increase in hate crimes. It's obvious that hate crimes are a national problem, and should be a higher priority of the Department. As Associate Attorney General you would oversee the Civil Rights Division's prosecution of hate crimes.

**Questions:**

**A. What is your opinion of these trends in hate crimes and race-related incidents?**

I believe that the Department of Justice must play an active role in investigating and prosecuting hate crimes. In Connecticut, where I serve as United States Attorney, I personally participated in the prosecution of a hate crime case involving an African American victim targeted at his workplace. The defendant was convicted and received a term of imprisonment. Should I be confirmed, I would bring the same level of commitment to aggressively investigating and prosecuting hate crimes in my capacity as Associate Attorney General overseeing the Civil Rights Division.

**B. What role does the Department have in assisting states in dealing with hate crimes?**

The Department has an obligation because of its responsibilities to enforce and protect civil rights to work very closely with our state and local law enforcement counterparts who also in many cases have jurisdiction over hate crimes. With every reported hate crime, it is crucial that the Department work closely with state and local law enforcement to investigate such matters and select the most appropriate forum, state or federal court, to prosecute anyone charged with committing such crimes.

**C. One complaint that we have heard recently is that current law makes it difficult to prosecute individuals who use nooses to threaten people because of their race. Will you support efforts to expand current law to protect more victims of such crimes?**

I am unaware of the basis for complaints that current law makes it difficult to prosecute individuals who use nooses to threaten people because of their race. I believe the display of a noose constitutes a potential hate crime that can be investigated and prosecuted under current federal civil rights laws. Indeed, as United States Attorney I participated in a joint press conference with the FBI and the Connecticut Chapter of the NAACP to emphasize that any display of a noose would be treated as a potential hate crime and investigated and prosecuted vigorously.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00144 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**9. Voting Rights Enforcement**

The Department of Justice's Voting Access and Integrity initiative, adopted in the early years of the Bush Administration, was a major change from previous policy, and put high emphasis on combating fraudulent voting or registration by persons who are ineligible for the franchise. As a result, the Department shifted many of its priorities and resources away from efforts to increase access to voting, and toward the prevention of voter fraud.

Everyone agrees that only eligible citizens should vote, but the evidence shows that the Department's recent emphasis on fraudulent efforts to impersonate voters is unjustified. Voter fraud at the polls simply hasn't been a problem. In the past five years, despite the Administration's strong focus on voter fraud, there have been only 86 convictions nationwide – mostly involving poor, immigrant, or minority voters who had no intention of violating the law, but didn't know that they were not legally allowed to register to vote.

By contrast, strong evidence exists of discriminatory efforts to limit access to the ballot based on race, national origin, and language minority status, as the extensive record collected during last year's reauthorization of the Voting Rights Act makes clear. Obviously, there is a far greater need for the Department to protect against attempts to limit ballot access than to prevent the exceedingly rare occurrence of fraudulent voting by those impersonating other voters.

**A. Do you agree that the lack of evidence of fraudulent voting by persons impersonating other voters means that a large commitment of resources by the Department to such cases is unwarranted?**

I am unaware of the current resource allocation by the Department to voter fraud cases. Moreover, most election crimes are prosecuted by the Criminal Division and the United States Attorney's offices, components which do not report to the Associate Attorney General. Should I be confirmed, I will aggressively enforce all laws designed to protect the right to vote and the integrity of the voting process.

**B. The role of the Civil Rights Division has been to increase ballot access. Prosecution of election-related crimes largely has been left to the Criminal Division, although the Civil Rights Division has authority to prosecute those who restrict voters' access to the ballot on the basis of race. This distinction in roles is important. If the Civil Rights Division is perceived as prosecuting those who vote erroneously, citizens will be less likely to report access problems to the Division, and it will be unable to maintain the community relationships that are essential to its mission of preventing discrimination. Do you agree that the Civil Rights Division's traditional emphasis on ballot access should be maintained?**

Yes.

**C. The shift in priorities to combating voter fraud has affected the Civil Rights Division's work. The Division has failed to file cases to enforce provisions of the National Voter Registration Act that increase voters' access to the ballot. Instead, it has attempted to use the Act to force states to purge voters from registration lists.**



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00145 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**a. The Department brought one such case in Missouri, but it was thrown out because there was no evidence that any inaccuracy in Missouri's registration lists would affect the outcome of an election. This focus on non-existent voter fraud has been an enormous waste of resources. Now that we know there's no evidence to support the Department's focus on voter fraud, will you restore the Division's proper focus on ballot access rather than continuing to spend resources on voter fraud?**

As stated above, should I be confirmed, I will aggressively enforce all laws designed to protect the right to vote and the integrity of the voting process.

**D. The Bush Civil Rights Division has developed and filed only two cases to protect African Americans against racial discrimination in voting (one under Section 2 of the Voting Rights Act, the other under Section 5 of the Act). In answers to written questions received January 24, 2008, the Department pointed to two other cases as cases filed in this Administration to protect African Americans from race discrimination in voting – *U.S. v. Crockett County,* and *U.S. v. Miami-Dade County* – but neither of those is apposite. The Crockett County matter was investigated and approved for filing during the Clinton Administration; negotiations delayed resolution of the case until a few months into the Bush Administration. The Miami Dade County case alleged discrimination based on language minority status, but did not include a claim of race discrimination. Do you believe that this record – two cases of race discrimination in voting against African Americans in seven years – adequately reflects the voting rights problems in the country?**

I do not know. If confirmed, I will aggressively enforce all laws designed to protect the right to vote and the integrity of the voting process.

**E. The low number of suits in this area is extremely troubling. Enforcing the Act on behalf of African Americans and other minorities should be a central part of the Division's work on voting rights. If confirmed, will you examine the work of the Voting Section to ensure it's enforcing all of the Voting Rights Act, including the prohibition in Section 2 of the Act against racial discrimination? Will you also look into the reasons why the Division has filed so few cases to protect African Americans from racial discrimination in voting, and provide an explanation to the Committee?**

If confirmed, I will work with the Civil Rights Division to aggressively enforce all laws designed to protect the right to vote and the integrity of the voting process.

**10. <u>Personnel Practices in the Civil Rights Division</u>**

There has been a flood of disturbing reports of improper personnel practices in the Civil Rights Division, particularly in the Voting Section. In addition to the involuntary transfer of Robert Berman, I'm concerned about reports of low morale in the Department's Section 5 Unit.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00146 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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At least thirteen of the analysts who review Section 5 requests have left since 2003 – that's more than are now in the Section. Recently, Teresa Lynn, an African American civil rights analyst who served for 33 years in the Section 5 unit, said in a National Public Radio interview that she had retired because of "fear of retaliation" and "disparate treatment of civil rights analysts based on race."

Ms. Lynn also spoke of low morale among the Section 5 analysts and identified the now ex-Chief of the Voting Section, John Tanner, and the former Deputy Chief for the Section 5 unit as responsible. When she retired, Ms. Lynn sent an email to her colleagues saying that she left "with fond memories of the Voting Section I once knew" and was "gladly escaping the plantation it has become." Those are very serious charges from a person who spent decades in the Department under both Republican and Democratic administrations. It is encouraging that Mr. Tanner and his Section 5 Deputy have been removed from their positions, but clearly the Voting Section needs significant attention.

**Question:**

**A. Will you agree to look into the allegations of racial discrimination and low morale in the voting Section and press for appropriate remedies?**

I have no knowledge of these allegations or whether morale is a problem. Should I be confirmed, I will work with the leadership of the Civil Rights Division to determine whether such problems exist and, if so, address and correct them promptly.

**11. <u>"Pattern or Practice" Discrimination Cases</u>**

The number of cases brought by the Department alleging a pattern or practice of discrimination against women, African Americans, or Latinos, is also troubling. Pattern or practice cases have a huge potential to improve the workplace, because they root out broad, systemic discrimination that generally affects many workers, not just a few. The Department's role in bringing such cases is particularly important, because the cases usually require far more time and resources than civil rights organizations or even many private attorneys have available. If the Department fails to bring these cases, serious workplace problems are likely not to be addressed. Since 2001, the Division has filed 13 complaints alleging a pattern or practice of discrimination, roughly half the number filed by the Clinton Administration each year.

**Question:**

A. **If confirmed, will you look into the Department's record in pattern or practice cases, and ensure that the Department is doing all it can in this area?**



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00147 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Yes.

**12. Jena Six**

The racially charged prosecution of six African American high school students in Jena, Louisiana has raised concerns throughout the nation. Six African American youths were expelled and then charged with attempted second-degree murder in 2006 after they were alleged to have fought with a white student. In the months before the fight, there were heightened racial tensions at the school, which began when white students hung nooses from a tree in the schoolyard. The white students who hung the nooses, however, received only a slap on the wrist.

**Question:**

**A. The circumstances in Jena suggest a large discrepancy in the level of discipline that African American students and white students received from the school.**

**Unfortunately, the problem of disparate discipline in schools is not unique to Jena. If confirmed, will you work with the Civil Rights Division, the Community Relations Service and the Department of Education to determine whether the Department of Justice is doing all it can to address this problem?**

Yes.

**A. The Jena controversy has also raised concerns that local prosecutors may be engaged in selective prosecutions based on race. Has the Division commenced an investigation into this issue? If not, will you examine whether such an investigation is appropriate if you are confirmed?**

While I cannot comment on whether or not there is an ongoing investigation, if confirmed I will ensure that the Civil Rights Division takes appropriate action if it finds a violation of any federal civil rights laws in Jena.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00148 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**Questions Submitted by U.S. Senator Russell D. Feingold to Associate Attorney General, Kevin O'Connor**

1. Please explain the role that you personally played in the litigation in Connecticut involving the challenge to the issuance of a national security letter to Library Connection and the accompanying nondisclosure order. To what extent were you involved in the case and in decision-making related to the case?

**As United States Attorney for the District of Connecticut, my office and attorneys from the Civil Division of the Department of Justice in Washington, D.C. represented the defendants in litigation brought in federal court in Connecticut challenging the constitutionality of the non-disclosure order accompanying the National Security Letter issued to the plaintiffs. With respect to my personal involvement, I first learned that the National Security Letter and accompanying non-disclosure order had been issued when I received a copy of the plaintiffs' lawsuit. My role in the litigation from that point forward consisted of general supervision of the Assistant United States Attorneys in my office who were assigned to the matter. I did not draft any pleadings or briefs in the matter. I argued the government's opposition to the plaintiffs' motion for temporary injunction before Judge Hall, but did not argue the subsequent appeal of Judge Hall's ruling before the Second Circuit Court of Appeals. While I did not have daily involvement with the matter, I participated in periodic discussions with lawyers from my office, the Civil Division and the FBI concerning litigation strategy.**

**As United States Attorney, I also serve as the Department of Justice's spokesman in Connecticut. In that capacity, at various times during the pendency of the litigation and afterward I was asked questions about the matter which I answered in a manner consistent with Department of Justice policy and applicable court rules. I also participated with the plaintiffs and their attorney in at least one panel discussion about the litigation after it was resolved.**

2. At a subcommittee hearing that I chaired last year, George Christian, one of the plaintiffs in that lawsuit, testified about the personal and professional difficulties he and others encountered as a result of the national security letter that he had received and the accompanying nondisclosure order. Please review his testimony, which is available at http://judiciary.senate.gov/testimony.cfm?id=2679&wit_id=6284. In light of this testimony, would you have done anything differently with respect to this

case?

**During the course of the litigation and afterward, I came to know, respect and admire Mr. Christian. His actions were and are clearly motivated by a legitimate desire to protect the privacy interests of his clients and public library patrons – a sentiment that I have expressed publicly on numerous occasions.**

**I also keenly understood and sympathized with the situation that Mr. Christian and the other plaintiffs found themselves in when they received the non-disclosure order. I also recognize and regret that this situation became even more difficult for the plaintiffs when, in the course of the parties' efforts to file redacted pleadings, references to the Library Connection were not completely redacted and this, combined with an electronic docketing error, led to its public disclosure as a plaintiff.**

**As United States Attorney, however, I was ethically and professionally obligated to provide a defense to the government defendants as well as to defend the constitutionality of a statute and non-disclosure provision that had been in existence for almost twenty years. Indeed, the non-disclosure provision being challenged by the plaintiffs was enacted in 1986, long before the Patriot Act was passed in 2001 and the plaintiffs' suit was filed in 2005. In every step of the litigation, I endeavored to balance my obligations to my clients with the legitimate interests and concerns of the plaintiffs.**

**For example, the issue of whether to abandon enforcement of the non-disclosure order once the plaintiffs' identities were publicly reported was seriously considered. However, the statute being challenged by the plaintiffs did not provide any latitude to the government to allow a recipient to disclose their identity under <u>any</u> circumstance at any time. Had the government acquiesced in such disclosure, it too would arguably be in violation of the strict non-disclosure order that did not provide any means by which exceptions could be granted.**

**However, once Congress amended the statutory scheme to give the FBI discretion to waive the non-disclosure provision accompanying National Security Letters, the FBI agreed to apply it retroactively (even though its retroactive application was an open question) to the National Security Letter issued to the plaintiffs, allowing them to publicly disclose their identities and the receipt of the National Security Letter at issue.**

3. In June 2006, you were quoted in a *New York Times* story regarding the government's decision to release the Library Connection librarians from the NSL gag order provision for the stated reason that the government had completed its investigation. According to the *Times*, you said at the time: "They're celebrating the fact they don't have to comply, and I don't think that's something that should be celebrated. What are you celebrating? You're celebrating the fact that you prevented the government from investigating a potential terrorist threat."

a. Were you suggesting that the plaintiffs in that suit should not have filed their constitutional challenge, which was successful in the district court, and instead should have complied with a statute they believed violated the Constitution?

**No.**

b. In retrospect, do you think this statement was appropriate?

**As I have said on numerous occasions, I respect the motives of the plaintiffs and their right to challenge the constitutionality of the non-disclosure order. I have also repeatedly credited them for the integral role their case played in the statutory amendments made by Congress in 2006 to National Security Letter non-disclosure orders. The statements referenced above reflect my response when asked by a reporter about a press release issued by the plaintiffs' attorneys after the litigation was resolved in which the matter was characterized as a successful refusal by the plaintiffs to comply with the National Security Letter. My statements were intended to clarify that, although the plaintiffs were never required in this matter to comply with the National Security Letter, there was never any dispute or question in the litigation as to whether the FBI acted properly and lawfully in issuing the National Security Letter or that the recipients were obligated under the law to produce information in response to it. The only issue before the court was whether the statutory non-disclosure order accompanying the National Security Letter – which prohibited them from telling anyone they received the National Security Letter – was constitutional. My comments were an effort on my part to convey that the outcome of the litigation was not, as some may have believed, a prohibition on the issuance of National Security Letters to libraries or others or the establishment of a right of recipients to not comply with such letters, but rather the ability for future recipients to challenge the**



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**non-disclosure provisions of such orders and for the government to exercise its new found discretion to not impose the non-disclosure provision in the first place.**

**U.S. SENATE, COMMITTEE ON THE JUDICIARY**

**Executive Nominations Hearing**

**TUESDAY, JANUARY 22, 2007**

**Responses to Questions for the Record from SENATOR CHARLES E. GRASSLEY**

**for**

**Kevin J. O'Connor, of Connecticut, to be Associate Attorney General, U.S. Department of Justice**

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1. What is your opinion of the federal False Claims Act?

**I strongly support the federal False Claims Act. It is an extremely important and vital piece of legislation that allows the Department of Justice, on behalf of the American taxpayers, to uncover fraud and aggressively pursue those responsible.**

2. As Assistant Attorney General for the Civil Division, will you vigorously enforce the False Claims Act?

**Should I be confirmed as Associate Attorney General, I will vigorously enforce the False Claims Act.**

3. Do you have any question as to the constitutionality of the FCA and the *qui tam* provisions?

**I have no reason or basis to question the constitutionality of the False Claims Act or its *qui tam* provisions.**

4. Will you oppose efforts by industry groups, including the health care industry, to weaken the False Claims Act and the *qui tam* provisions of the FCA?

**Yes.**

5. Will you pledge to ensure that the Civil Division has sufficient funding for the Commercial Litigation branch to vigorously enforce the FCA?

**Yes.**

6. Will you ensure that the budget of the Commercial Litigation branch is not reduced in a manner limiting enforcement of the FCA?

**Yes.**

7. I understand that the Department successfully resolves around 100 FCA cases a year. What, in your opinion, would be required in order for the Department to double the number of cases successfully resolved in a year?

**Recently, the Department allocated additional attorney positions to U.S. Attorney's offices and the Civil Division to investigate and prosecute healthcare fraud. The District of Connecticut was fortunate to receive one of those positions and I expect that the additional position, when filled, will result in an increase in the number of False Claims Act cases pursued and resolved. I would expect a similar impact on the other offices that received these positions.**

8. Do you believe U.S. Attorneys prosecute and resolve enough FCA cases?

**I have no reason to believe that U.S. Attorneys do not prosecute and resolve enough False Claims Act cases. In Connecticut, where I have served as United States Attorney since 2002, we have aggressively pursued and resolved False Claims Act cases.**

9. Are there any U.S. Attorneys that have not filed or resolved a FCA case in the last three fiscal years? If so, please provide a list of offices.

**From what I understand, the Department does not have specific information concerning the number of FCA cases filed by U.S. Attorney's Offices over the past three fiscal years. However, the Department does generally track the number of civil fraud cases brought by the U.S. Attorney's Offices and those figures show that all but one U.S. Attorney's Office has filed at least one civil fraud case during this period of time.**

10. What steps can be taken by the Department, and other government offices, to shorten the length of time FCA cases are placed under seal?

**In many False Claims Act cases, for the Department to thoroughly investigate claims asserted by relators, and make an informed election decision, it takes longer than the sixty days provided under the False Claims Act. As a result, motions are filed to extend the sealing period so that the government can complete its initial investigation. In many of these cases, the government must, amongst other investigative steps, subpoena a large volume of documents and then review those documents. The timing of the government's election decision may also be affected by the existence of related criminal proceedings or qui tam actions, which may raise various procedural or jurisdictional issues. And, often the government attempts to resolve qui tam cases before intervention, because**

**defendants frequently have an incentive to settle while the case is under seal. While it is important that the government be given sufficient time to conduct a thorough investigation and resolve procedural issues, it must also endeavor to complete that investigation so that the case may be unsealed as promptly as possible. Should I be confirmed as Associate Attorney General, I will approach all of these cases with that standard in mind and, where possible, work to shorten the length of time False Claims Act cases are placed under seal.**

11. What steps can be taken by the Department, and other government offices, to shorten the length of time it takes to successfully resolve FCA cases?

**The Department's recent allocation of additional attorney positions to U.S. Attorney's offices and to the Civil Division to investigate and prosecute healthcare fraud should improve the efficiency by which such cases are pursued and resolved. Should I be confirmed as Associate Attorney General, I will work to ensure that the Department is investigating, litigating and resolving False Claims Act matters in the most efficient and effective manner possible.**



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WRITTEN QUESTIONS OF SENATOR PATRICK LEAHY,
CHAIRMAN, SENATE JUDICIARY COMMITTEE,
FOR GREGORY G. KATSAS,
NOMINEE FOR ASSISTANT ATTORNEY GENERAL OF THE CIVIL DIVISION

1. **This administration appears to have engaged in a policy of extraordinary rendition – sending detainees to be interrogated in other countries where they could be, and in some cases apparently have been, tortured. Indeed, I have asked former Attorney General Alberto Gonzales on several occasions about the case of Maher Arar, a Canadian citizen who when returning home from a vacation in 2002, was detained by federal agents at JFK Airport in New York City on suspicion of ties to terrorism. He was sent, not to Canada, but to Syria, where he was held for 10 months. A Canadian commission found no evidence that he had any terrorist connection or posed any threat, but concluded that he was tortured and held in abhorrent conditions in Syria. The Canadian government has apologized to Mr. Arar for its part in this debacle. The head of the Royal Canadian Mounted Police resigned, and the country has agreed to compensate Mr. Arar almost $10 million. Our government has never apologized or admitted any wrongdoing in Mr. Arar's case.**

   **You represented the government in a case in which a former detainee, Khalid El Massari, challenged the CIA's extraordinary rendition program. In the course of you representation, did you become aware of the possibility that detainees could be transferred to another country where there was a realistic possibility that he or she may be tortured, regardless of any assurances you receive from that country? Do you believe that there are adequate precautions to prevent this from happening?**

   During the course of my representation of the United States in *El Masri v. Tenet*, I did not learn anything suggesting that detainees held by the United States could be transferred to another country where there is a realistic possibility of torture. Section 2242 of the Foreign Affairs Reform and Restructuring Act, which implements Article 3 of the United Nations Convention Against Torture, prohibits the United States from transferring any detainee within our borders to a country in which there are substantial grounds for believing that the detainee would be in danger of being subjected to torture. Moreover, as a matter of policy, the United States applies the same rule to detainees held outside our borders. I have no reason to believe that the government fails to honor these legal and prudential obligations.

2. **At a June 2007 hearing on Habeas Corpus, Detentions at Guantanamo Bay, Cuba, before a Subcommittee of the House Judiciary Committee, you testified that "extending habeas to aliens abroad is both unnecessary and unwise." You also defended the habeas stripping provisions of the Military**



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**Commissions Act by stating that "we think it's defensible on the law and we think it's defensible on the basis of national security." Given your reluctance to extend habeas rights to detainees, what assurances can you give us that you will preserve the Department's traditions of fair-mindedness and integrity in all cases, including detainee treatment cases or challenges to the administration's detainee policy?**

The role of the Civil Division is to defend the constitutionality of federal statutes, and the lawfulness of federal executive action, whenever there are reasonable legal arguments in support of the statute or executive action at issue. In more than six years as the Appellate Deputy for the Civil Division, I applied that principle to defend challenged statutes and executive actions regardless of my own personal views about their wisdom, and I would continue to do so if confirmed as Assistant Attorney General. In successfully defending the constitutionality of the Military Commissions Act in the D.C. Circuit in the *Boumediene* litigation, I acted consistent with the principle that congressional statutes should be defended if reasonable arguments can be asserted in their favor. To the extent that my June 2007 testimony also made policy arguments as well as legal ones, it reflected my role as an Administration witness testifying before Congress about proposed changes to existing law. Such policy arguments, however, should play no role in the Civil Division's defense of existing statutes.

3. **On the subject of treatment of detainees, this Administration has consistently discouraged, refused, and prevented congressional input and participation. In fact, in 2002 the Department of Justice opined, "Any effort by Congress to regulate the interrogations of battlefield combatants would violate the Constitution's sole vesting of the commander-in-chief authority in the president." Do you agree with this statement or will you work with Congress to ensure that we have a legal regime in place to deal with detainees that is credible to the rest of the world?**

I disagree with the statement quoted above, because it does not adequately take into account Congress's express constitutional powers to regulate the conduct of United States armed forces and to define and punish offenses against the law of nations. If confirmed as the head of a litigating division, I would not expect to be directly involved in any interactions between the Administration and the Congress. However, I would support efforts to ensure that we have an appropriate legal regime in place to govern the treatment of detainees, and I agree that credibility abroad is one important consideration that such a regime should take into account.

4. **At your confirmation hearing, you were asked whether an executive order can or cannot limit a President. In response, you testified that "because the Constitution doesn't specify procedures for making or sending executive orders" it would be "literally true" that a President could act outside of an executive order and modify it without issuing a new executive order. What**



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**do you believe are the limits, if any, on a President's authority to act outside of the scope of previously issued executive order?**

As I testified at my confirmation hearing, because the Constitution does not specify procedures for making or amending executive orders, I can discern no general constitutional prohibition on the President's informally modifying a written executive order. However, to the extent that any modification purported to change the legal rights and duties of private parties, I assume that due process would require effective communication of the modification to those parties. Finally, as a prudential matter, I believe that the President should make executive orders (including modifications or amendments to those orders) publicly available absent some strong reason for preserving their confidentiality.

5. **The memo dated August 1, 2002, signed by then-Assistant Attorney General Jay Bybee and known as the "Bybee memo" concluded that for an act to violate the torture statute, it "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." The Bybee memo was rescinded, but never repudiated. Will you repudiate that memo as contrary to law and American values? Do you believe that the President has the authority under any circumstances to exercise a "commander-in-chief override" and immunize acts of torture, as the Bybee memo argued?**

The Department of Justice has already repudiated the August 2002 memorandum discussed above. The Department withdrew that memorandum in June 2004, and, in December 2004, it issued a "replacement memorandum" that by its terms "supersedes the August 2002 Memorandum in its entirety." See *Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A*, at 2 (Dec. 30, 2004). Moreover, the authors of the December 2004 memorandum expressly "do not agree with" the statement that an act of unlawful torture must cause pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." See *id.* at 8 n.17. The December 2004 memorandum remains effective as the controlling DOJ position, and I agree with that position.

I have difficulty imagining any circumstance in which the President could immunize acts of torture. To begin with, the Fifth, Eighth, and Fourteenth Amendments prohibit torture at least within the United States, and these Amendments of course bind the Executive Branch. Moreover, through the exercise of its express constitutional power to define and punish violations against the law of nations, Congress by statute has prohibited torture outside the United States. See 18 U.S.C. §§ 2340-2340A. Thus, to the extent that a President purported to authorize such torture, his power would be "at its lowest ebb." See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring). To my knowledge, no President has ever claimed the need to torture as an exercise of his powers and duties as Commander-in-Chief, and President



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Bush, in the context of the ongoing armed conflict against the Taliban and al Qaeda, repeatedly has stated that the United States will never engage in torture, and repeatedly has ordered the humane treatment of enemy detainees. See, *e.g.*, Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002); Military Order of November 13, 2001, § III, 66 Fed. Reg. 57831, 57834 (Nov. 16, 2001).

6. **At your hearing, you testified that you would resign if a conflict arose between you and a superior over litigating a case where you believed there was "only one defensible view." Absent such an extraordinary conflict, what assurances can you give us that, if confirmed, you will withstand any pressure from the White House or elsewhere to conform their legal judgments to political preferences?**

Political preferences must have no role in determining what the law is or what legal positions are defensible in litigation. For over six years, I served as the Appellate Deputy for the Civil Division. In that capacity, I supervised hundreds if not thousands of appeals, and I was personally involved in litigating many of the most important appeals handled by the Division. During that time, I was never once asked to conform my litigation judgments to the political preferences of the White House, or to those of my superiors within the Justice Department. For that reason, I would be surprised and disappointed if I were asked in the future to conform my litigation judgments to political preferences, and I would resist any such requests by all appropriate means, including by resigning if necessary.

7. **Professor Goldsmith testified before this Committee about the extraordinary secrecy with which this Administration treats legal opinions, particularly those related to terrorism. He said, for example, the controversial "Bybee memo" on torture and related memos were not circulated for comments to the State Department, which had expertise on the issue of torture and the consequences of adopting particular positions. The opinions on warrantless surveillance, before Professor Goldsmith arrived, were held so closely that not even the Deputy Attorney General was permitted to see them.**

**Secrecy is obviously important when sensitive national security issues are involved, but here the purpose of the secrecy is to insulate the legal decision-making from review by those who might challenge or disagree. This is unhealthy and has led to led to extraordinarily costly legal and policy errors on the part of this Administration. You have argued on behalf of the Government in court in favor of an excessive reliance on secrecy in seeking to dismiss numerous important cases, including challenges to the treatment of detainees, on "state secrets" ground. If confirmed, will you commit to review the Civil Division's assertions of a "state secrets" defense and to ensure that it is not used excessively as a way of denying people the ability to assert basic rights in courts?**



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Yes. The state secrets privilege should be asserted as sparingly as possible. As you know, courts require each assertion of the privilege to be made personally by the head of the federal agency seeking to protect the information at issue. In my experience, the Assistant Attorney General for the Civil Division has also personally reviewed each possible assertion of the privilege, if the Civil Division would handle the underlying litigation in court, and I pledge to continue that practice if confirmed.



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**Senator Edward M. Kennedy**
**Questions for the Record**
**Senate Judiciary Committee Hearing on the Nomination of Gregory G. Katsas for Assistant Attorney General, Civil Division**

**1. Litigation Record**

You've litigated an extraordinary number of cases in the Administration's war on terrorism, and you've taken some controversial positions on behalf of the government. As a lawyer in the Justice Department, I understand that you were performing the role of an advocate, and that the policy decisions you supported were made elsewhere. But one of the tasks of the confirmation process is to find out your own, personal views on the Department's legal policies. If confirmed as head of the Civil Division, you will have significantly more influence on policymaking than you did as an advocate, and it's important to know where you stand on the key legal issues of our time.

You've apparently been involved in every one of the recent landmark cases on the right to habeas corpus of enemy combatants. In *Rasul v. Bush* and again in *Hamdan v. Rumsfeld*, you defended the government's position that detainees who are foreign nationals have no constitutional or statutory rights to habeas corpus. In both of these cases, however, the Supreme Court overruled the Administration, holding that it lacked the authority to deny detainees access to the judicial system. In these and other cases, the Court has had to remind the Bush Administration of what should have been obvious: "A state of war is not a blank check for the President."

The issue of habeas corpus is before the Court again in *Boumediene v. Bush*, which will be decided by the Supreme Court later this year. During oral argument in the D.C. Circuit on the rights of aliens held by the U.S. government outside the United States, a judge asked you point blank, "Are you saying they don't have any rights?" Reports indicate that you agreed. In addition, you testified before Congress last July that "extending habeas corpus to aliens abroad is both unnecessary and profoundly unwise."

In that same testimony, you defended the Combatant Status Review Tribunals used at Guantanamo, asserting that they provide greater procedural protections to detainees than have ever before been provided. Just a week earlier, however, Lt. Col. Stephen Abraham had filed an affidavit in which he explained with insider's knowledge the many ways in which these tribunals are fundamentally flawed and unjust.

Lt. Col. Abraham later testified that when he served on a tribunal panel to review evidence on the recommended status of a detainee, he found the information presented to be legally unsound. He stated: "What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence."



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**Questions:**

**A. In all of the cases you have helped prepare or litigate for the Administration relating to the war on terrorism, can you provide any examples of legal arguments put forth by the government with which you personally disagreed? If so, which ones?**

The question of how many rights are available to wartime detainees remains very much alive in pending cases. As an advocate, I have a continuing duty of loyalty to the government, and I would not want any possible disagreement between my client and me to be used against my client in litigation. Therefore, I do not feel comfortable stating my possible disagreement with legal arguments that I have made on behalf of the government in this litigation. However, I can assure the Committee that, before taking any position on behalf of any client in litigation, I have always satisfied myself that there are reasonable, legally-defensible arguments in favor of that position.

**B. Do you agree that the Supreme Court's repeated rebukes of the Administration's positions on detainee rights indicate that the Administration has taken a fundamentally flawed legal approach to the treatment of detainees?**

I respectfully disagree. In the *Hamdi* and *Hamdan* cases, the Supreme Court agreed with the Administration that the ongoing struggle against the Taliban and al Qaeda is properly subject to the law of armed conflict. In *Hamdi*, the Supreme Court further agreed with the Administration that due process analysis must take into account the exigencies of armed conflict. Following the *Rasul* decision, Congress, in enacting the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, adopted the Administration's position that the habeas corpus statute should not extend to aliens captured outside the United States and detained as enemy combatants at Guantanamo Bay, Cuba. Following the *Hamdan* decision, Congress, in enacting the MCA, adopted the Administration's position that the rules applicable to military commissions need not rigidly follow the rules applicable to courts martial. Finally, in *Boumediene*, the D.C. Circuit agreed with the Administration that the Suspension Clause and the Fifth Amendment are inapplicable to the Guantanamo detainees. To be sure, neither Congress nor the courts have agreed with all of the legal positions taken by the Administration in these cases, and I recognize that reasonable people can differ over these difficult and controversial questions. On balance, however, I believe that the Administration's positions have fared generally well in the courts and before Congress.

**C. Do you believe that a suspected terrorist, citizen or non-citizen, who is being held under the effective control of the United States beyond our borders has any legal rights under our laws? If so, which rights?**

Yes. Under the Supreme Court's decision in *Reid v. Covert*, a citizen held outside our borders would likely have a significant measure of constitutional rights. The Guantanamo detainees (all of whom are non-citizens) are entitled to a status determination before a Combatant Status Review Tribunal, under procedures specified in part by the Detainee Treatment Act and in part by binding regulations issued by the



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Department of Defense. Moreover, each detainee may challenge an adverse CSRT decision in the Court of Appeals for the District of Columbia Circuit. To the extent that any non-citizen is eligible for prosecution by military commission, he or she would be entitled to the various statutory protections set forth in the Military Commissions Act. Those protections include a presumption of innocence and a requirement of proof beyond a reasonable doubt; the right to counsel; rights of confrontation, compulsory process, and access to exculpatory evidence possessed by the government; the right against self-incrimination; restrictions on the admission of hearsay and classified evidence; exclusion of evidence obtained by unlawful interrogation methods; a prohibition against double jeopardy; and a right of judicial review in the D.C. Circuit. With respect to treatment and interrogation methods, the federal torture statute imposes a criminal prohibition on the torture of citizens and non-citizens alike, the war crimes statute criminalizes grave breaches of the Geneva Conventions (including of Common Article 3), and the DTA imposes a prohibition on subjecting citizens and non-citizens alike to cruel, inhuman, or degrading treatment.

**D. In light of the criticism by Lt. Col. Abraham and many others, do you still maintain that the Combatant Status Review Tribunals and other protections for detainees being held at Guantanamo are legally and morally adequate?**

In the *Boumediene* litigation and elsewhere, the government continues to maintain that the regime of status determinations before Combatant Status Review Tribunals, followed by judicial review in the D.C. Circuit, is a legally adequate substitute for district-court habeas corpus. In defense of that position, the government has explained that CSRTs afford greater procedural protections for wartime status determinations than those available under Article 5 of the Third Geneva Convention, which the Supreme Court in *Hamdi* said would be constitutionally sufficient to justify the detention of enemy combatants who are citizens.

I respectfully disagree with the specific criticism raised by Lt. Col. Abraham. As noted above, he has stated that, in his view, some of the evidence relied upon by some of the CSRTs "lacked even the most fundamental earmarks of objectively credible evidence." However, the judicial review mechanism enacted by Congress enables a detainee to raise in the D.C. Circuit the specific question whether a CSRT determination is "supported by a preponderance of the evidence." See Detainee Treatment Act § 1005(e)(2)(C)(i). Thus, to the extent that the criticism raised by Lt. Col. Abraham has force in the context of any particular case, the detainee may fairly pursue that issue in the D.C. Circuit.

The question whether CSRTs are adequate as a policy or moral matter lies well beyond the responsibilities of the Civil Division. If confirmed as Assistant Attorney General, my role would be to assert reasonable legal defenses in support of CSRT decisions challenged in court. As an Administration witness testifying before Congress, I have expressed the view that the present scheme does, as a policy matter, represent a reasonable accommodation between the need to ensure fairness to individual detainees and the exigencies of the ongoing armed conflict. However, I recognize that the question



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whether additional protections are warranted is a difficult one about which reasonable people may disagree, and one that Congress and the Administration no doubt will continue to discuss.

**E. What assurances can you provide us that, in confirming you for this position, the Senate would not be confirming someone who subscribes to the extreme executive-power theories of David Addington and John Yoo?**

I do not believe that my views or my record can fairly be characterized as extreme. As explained above, I believe that the litigation positions that I have taken on behalf of the government in the detainee cases lie well within the bounds of reasonableness, and have generally fared well in the courts and before Congress. Similarly, to the extent that I have expressed policy positions in congressional testimony and elsewhere, I have done so in defense of recent congressional statutes. More generally, despite arguing many of the most challenging appeals handled by the Civil Division over the last seven years, I have won 28 appeals over the course of my career, and lost only nine. Over the years, I have successfully defended the constitutionality of the Freedom of Access to Clinics Entrances Act, successfully argued that former Attorney General Janet Reno should not be held personally liable for any constitutional violations committed during the Elian Gonzalez raid, successfully represented injured migrant farmworkers seeking compensation from employers, and sought to expand procedural protections available to broadcasters accused by the FCC of indecent programming. Thus, I believe that my record reflects the effective representation of a wide range of client interests, as well as a balanced and thoughtful approach to the law.

**a. Can you point to a single legal position or positions that either Addington or Yoo has taken with which you personally disagree? If so, please list all such examples.**

My only professional interaction with Mr. Addington involved my successful defense of the Vice President in one case, and I have had no professional interaction with Mr. Yoo. I am familiar with statements by Professor Jack Goldsmith that Mr. Addington consistently has favored unilateral executive action over working jointly with the Congress where possible. To the extent those statements accurately portray Mr. Addington's views, I would respectfully disagree with those views. Moreover, I am familiar with public speculation that Mr. Yoo was involved in preparing the August 1, 2002 memorandum titled *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*. I believe that this memorandum was legally flawed and correctly withdrawn.

**2. Secrecy**

By all objective measures, this Administration has withheld more documents and more information from the American people than any in recent history, often on the flimsiest of legal and policy grounds. As the *New York Times* noted in an editorial last December, "government secrecy has become [a] higher and darker art under the Bush administration."



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You've had a prominent role in litigation to protect the Administration's claims of secrecy. In the most recent example, in *El-Masri v. Tenet*, you argued that the state secrets privilege prevented the court from considering the plaintiff's well-documented claim that he was kidnapped by the CIA as part of its "extraordinary rendition" program and sent to Afghanistan to be tortured—all on the basis of mistaken identity. You said: "Just because some facts are in the public domain doesn't eliminate the need to keep others secret. . . . Even disclosures to judges carry risks."

You made similar arguments in other notable cases. In *Detroit Free Press v. Ashcroft* and *North Jersey Media Group, Inc. v. Ashcroft*, you defended the Attorney General's decision to close post-9/11 "special interest" deportation hearings to the public and the press. In *Center for National Security Studies v. Department of Justice*, you defended the Department's categorical refusal to disclose any information on hundreds of people detained in the wake of the 9/11 attacks.

In both these cases, you relied partly on the "mosaic theory," which holds that the government should not release even the most harmless-seeming information, since that information might be combined with other information to form a dangerous mosaic. At the 2003 Federalist Society Convention, you emphasized the significance of this theory.

As you may know, many commentators have criticized the government's reliance on the mosaic theory in these and other cases as being excessive and overbroad.

One commentator said that the mosaic theory provides "a latently subversive basis for withholding information." He said the theory has "supported both more secrecy in the [Bush Administration's] management of information and more secrecy about that secrecy by foreclosing scrutiny ex post." Since these highly speculative claims are impossible to disprove, he said, they make "the mosaic theory ripe for agency opportunism and abuse."

Another commentator observed that "[n]ow, the government invokes mosaic theory to rationalize closing deportation hearings, indefinitely detaining non-citizens, restricting dissemination of non-classified information, and secretly searching certain kinds of records, including library and Internet records. In other words, the government uses mosaic theory to justify the very bases of certain programs or actions. . . . Unfortunately, the government's current use of mosaic theory effectively reads constitutional liberties out of the balance. Government officials apparently have determined that there is no acceptable risk of danger from disclosure of information and that infringement of constitutional liberties is an unavoidable side-effect of attaining that level of risk (although they rarely say this out loud)."

Still another commentator observed that "[i]n case after case, the [Bush] Administration has asserted that it can't release even previously unclassified data because they might be part of a mosaic—innocent in and of themselves but able to be fitted together toward some unspecified evil end. . . . The invocation of a 'mosaic' metaphor to suppress what might be connected to some amorphous other could be used to justify keeping anything at all secret."



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**Questions:**

**A. Did you personally agree with every assertion of the mosaic theory you made on behalf of the government? If not, with which assertions did you disagree?**

For the reasons set forth above, I am not comfortable identifying my possible disagreement with arguments that I have asserted in court on behalf of clients. However, I am confident that the positions asserted by the government in each of the cases mentioned above are reasonable. In fact, the courts of appeals agreed with the government's litigation positions in three of the four cases: *El Masri*, *Center for National Security Studies*, and *North Jersey Media Group*. Although the government's litigation position did not prevail in *Detroit Free Press*, that case presented a close question, and at least three courts of appeals have specifically disagreed with the Sixth Circuit's reasoning and result in that case. See *Center for National Security Studies v. DOJ*, 331 F.3d 918, 932 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004); *North Jersey Media Group v. Ashcroft*, 308 F.3d 198, 201 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003); *Copley Press, Inc. v. Superior Court*, 141 P.3d 288, 309-10 (Cal. 2006).

**B. What is your response to critics who say that the Bush Administration—and you in particular—have abused the mosaic theory to shield government actions from legitimate scrutiny?**

In litigation in which I have been directly involved, the government has invoked the mosaic theory in an attempt to protect the confidentiality of government records or proceedings on three occasions: in *CNSS*, *North Jersey Media Group*, and *Detroit Free Press*. In each of those cases, national-security concerns were raised not by me or other litigators in the Civil Division, but by senior law-enforcement professionals in the FBI and experienced prosecutors in what was then the Terrorism and Violent Crime Section of the Criminal Division. Those experts filed detailed affidavits laying out their concerns, which centered on protecting the confidentiality of the law-enforcement investigation into the terrorist attacks of September 11, 2001. In litigating these cases on behalf of the government, my role was to argue that the affidavits established the applicability of Exemption 7 of the Freedom of Information Act (in *CNSS*) and the inapplicability of First Amendment rights of access (in *North Jersey Media* and *Detroit Free Press*). As noted above, the courts accepted our arguments in *CNSS* and *North Jersey Media*, and the adverse decision in *Detroit Free Press* has been the subject of reasonable criticism by other appellate courts. I am unfamiliar with any assertions of the mosaic theory by the government other than in the three cases discussed above.

**C. The mosaic theory is clearly susceptible to opportunism and abuse. It "proves too much" by potentially covering even the most harmless information. What steps has the Justice Department taken to avoid its improper use? What steps should be taken?**

The mosaic theory represents a longstanding recognition that, in some instances, "superficially innocuous information" may in fact be quite sensitive. See, *e.g.*, *CIA v.*



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*Sims*, 471 U.S. 159, 178-79 (1985); *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1987). That principle may be relevant in assessing a wide variety of legal questions, including the applicability of constitutional rights of access to government information, the applicability of the state secrets privilege, or the applicability of FOIA exemptions. In all such cases, government security experts must assess the risk of disclosure and must explain any concerns in sworn affidavits; government litigators must assess whether there are reasonable arguments for confidentiality under the governing legal standards; and courts must assess whether any government claim of confidentiality ultimately has merit. In my experience, this division of responsibility usually leads to reasonable confidentiality assertions by the government, and reasonable adjudications by the courts.

**D. In an Administration criticized as being the most secretive and opaque that America has ever had, you've had a central role in defending this secrecy in court. The legal positions you have advocated have set back this country's many years of progress in making the federal government more open to the people. Can you provide any examples of how you've shown reluctance or at least moderation and a proper respect for democratic accountability in your handling of matters related to government secrecy?**

As explained above, I have defended the confidentiality of government records or information only to the extent that government security experts have urged operational needs for confidentiality in sworn affidavits, and only to the extent that, in my professional judgment, there has been a defensible case for preserving confidentiality under governing legal standards established by Congress and the courts. With respect, I do not believe that the litigation positions successfully asserted by the government in *El Masri*, *CNSS*, and *North Jersey Media* have inappropriately set back the important value of government openness.

**3. Torture**

As you know, the nation was disgraced in the eyes of the world by the Bybee "torture memorandum" of August 2002, a legal opinion by the Office of Legal Counsel that redefined torture in such a narrow way that it justified interrogation techniques that are widely recognized as torture.

As the memo stated: "Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Anything that fell short of this standard would not be torture, the memo said. CIA interrogators called the memo their "golden shield," because it allowed them to use virtually any interrogation method they wanted.

The memo also created a commander-in-chief exception, which no legal authority had ever recognized, stating that the President and the people he directs are not bound by laws passed by Congress that prohibit torture.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00167 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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The memo further stated that government officials can avoid prosecution for their acts of torture by invoking the defenses of "necessity" or "self-defense"—even though the Convention Against Torture, an international treaty ratified by Congress in 1994, states very clearly that "no exceptional circumstances whatsoever" may be invoked as a justification for torture.

At the end of 2004, when the Office of Legal Counsel withdrew the Bybee memorandum, it replaced it with a less extreme opinion that did not address the most controversial parts of the earlier opinion. The Department made this new opinion public.

But last October, we learned from the *New York Times* that the Office of Legal Counsel had issued two other secret "torture memos" in 2005—only a few months after publicly releasing the memo that replaced the Bybee memo.

The first secret memo reportedly authorized interrogators to use harsh techniques in combination, in order to create a more extreme overall effect. They could deprive detainees of sleep and food, bombard them with loud music, and subject them to freezing temperatures, all at the same time. These are techniques that our Judge Advocates General have said are illegal under U.S. law and the Geneva Conventions.

The second memo reportedly declared that none of the CIA's interrogation methods violated the ban on cruel, inhuman, and degrading treatment that Congress was preparing to pass. At the time, the CIA was using abhorrent techniques copied from the Soviet Union and other brutal regimes.

Before he was sidelined by the White House, Deputy Attorney General James Comey told his colleagues at the Justice Department that they would all be "ashamed" when the world eventually learned of these opinions. The world has now learned of them, and once again there's a scandal involving opinions of the Office of Legal Counsel, issued in secret, authorizing interrogation techniques widely believed to violate laws against torture.

**Questions:**

**A. In your years at the Justice Department, you've had a lead role in several major cases dealing with the treatment of detainees. I would like you to specify in as much detail as possible: what role did you play in *developing* any of the Administration's policies toward terrorist suspects, as opposed to simply *defending* these policies?**

During my time in the Civil Division, from June 2001 to August 2006, I played no role in developing any of the Administration's policies toward terrorist suspects. Since then, during my time in the Office of the Associate Attorney General, the only role I have played in developing such policies involved advising Administration lawyers who were working with Congress to secure enactment of the Military Commissions Act.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00168 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**a. Did you ever consult or advise in any way, formally or informally, on any legal document other than a court pleading, decision, or directive that related to interrogation practices?**

As noted above, I informally advised Administration lawyers who were seeking enactment of the Military Commissions Act. Section 6 of the MCA affects interrogation practices by defining criminal offenses that constitute grave breaches of Common Article 3 of the Geneva Conventions, and by authorizing the President to define less serious breaches of Common Article 3 through executive action. To the best of my recollection, my advice did not address any of those subjects.

**b. Have you had any contacts with lawyers at the Office of Legal Counsel regarding any analysis they have produced relating to interrogation? Please explain in detail all such contacts.**

I have never had any contact with any Office of Legal Counsel lawyer regarding the preparation of OLC advice, whether written or oral, relating to interrogation. In preparing for my confirmation hearing, I was advised informally by OLC attorneys regarding the treatment standards set forth in the federal torture statute, the war crimes statute, the Detainee Treatment Act, Common Article 3 of the Geneva Conventions, and Executive Order 13440. That preparation did not involve discussion of any nonpublic OLC memoranda relating to interrogation.

**B. Dean Harold Koh of Yale Law School has said that the Bybee memo was "perhaps the most clearly erroneous legal opinion I have ever read." He called it "a stain upon our law and our national reputation." Do you agree?**

I agree that the August 2002 memorandum was legally flawed and that it was correctly withdrawn.

**C. Do you agree or disagree with the Bybee memo's claim that "necessity" can justify the use of torture?**

I have not had occasion to study this question carefully, but I am inclined to disagree. The availability of a common-law necessity defense to a federal criminal prohibition turns on congressional intent. See, *e.g.*, *United States v. Bailey*, 444 U.S. 394, 409-13 (1980); Model Penal Code § 3.02. On its face, the federal torture statute does not address whether a necessity defense is available. See 18 U.S.C. §§ 2340-2340A. However, to the extent that the statute was designed to fully implement the Convention Against Torture, the defense would appear to be foreclosed because Article 2 of the CAT provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00169 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**D. Do you agree or disagree with the Bybee memo's claim that "self-defense" can justify the use of torture?**

I have not had occasion to study this question carefully, but I am inclined to disagree for the reasons set forth above.

**E. Do you agree or disagree with the Bybee memo's claim that for purposes of the Torture Act, physical suffering can never be "severe" unless it is of "extended duration or persistence"?**

I do not understand the August 2002 memorandum to have asserted that claim. The August 2002 memorandum asserted that "severe physical pain" and "severe physical suffering" are "not distinct concepts" under the federal torture statute, and that both require pain or suffering that "must rise to the level of death, organ failure, or the permanent impairment of a significant body function." See *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* at n.3 & accompanying text (Aug. 1, 2002). The successor OLC memorandum expressly repudiated both of these conclusions. See *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* at 2, 10 (Dec. 30, 2004). I believe that the successor memorandum was correct to do so.

**F. Do you agree or disagree with the theory—which this Administration has never repudiated—that laws banning torture do not always bind the Executive Branch, because of the President's inherent powers as commander-in-chief?**

I have difficulty imagining any circumstance in which the President could use his commander-in-chief powers to override laws banning torture. To begin with, the Fifth, Eighth, and Fourteenth Amendments prohibit torture at least within the United States, and these Amendments of course bind the Executive Branch. Moreover, through the exercise of its express constitutional power to define and punish violations against the law of nations, Congress by statute has prohibited torture outside the United States. See 18 U.S.C. §§ 2340-2340A. Thus, to the extent that a President purported to authorize such torture, his power would be "at its lowest ebb." See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring). To my knowledge, no President has ever claimed the need to torture as an exercise of his powers and duties as Commander-in-Chief, and President Bush, in the context of the ongoing armed conflict against the Taliban and al Qaeda, repeatedly has stated that the United States will never engage in torture, and repeatedly has ordered the humane treatment of enemy detainees. See, *e.g.*, Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002); Military Order of November 13, 2001, § III, 66 Fed. Reg. 57831, 57834 (Nov. 16, 2001).

**G. Do you believe that the President has any reservoir of authority under the Constitution that allows him to disregard laws that Congress passes on torture?**

Please see my answer to question 3(F) above.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00170 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**4. Waterboarding**

As you know, waterboarding has become the worldwide symbol for America's debate over torture. It was the centerpiece of Attorney General Mukasey's confirmation hearings. It was also the technique apparently shown on the videotapes that the CIA destroyed. Waterboarding, however, is not by any means the only interrogation technique approved by the Bush Administration that Congress and legal experts believe to be torture. It's just the most notorious.

In fact, waterboarding is hardly new. It's an ancient, barbaric technique. In the fifteenth and sixteenth centuries, it was used in the Spanish Inquisition. In the nineteenth century, it was used against slaves in this country. In World War II, it was used against our own soldiers by Japan. In the 1970s, it was used by the Khmer Rouge and the military dictatorships in Chile and Argentina. It's being used today against pro-democracy activists in Burma. This is the company the Bush Administration is keeping when it refuses to give up waterboarding.

Top military lawyers and legal experts across the political spectrum have condemned it as a violation of U.S. law and a crime against humanity. After World War II, the United States helped organize the International Military Tribunal for the Far East, and it prosecuted Japanese soldiers for waterboarding Allied prisoners of war. At one trial, an Army Lieutenant testified that the experience "felt more or less like I was drowning, just gasping between life and death." We sentenced Japanese officers to years of hard labor for using waterboarding.

Like many of my colleagues and many American citizens, I was very troubled by Attorney General Mukasey's evasive answers about waterboarding. He repeatedly refused to acknowledge that waterboarding is torture. Yet as the record makes clear, courts and military tribunals have consistently agreed that waterboarding is an unlawful act of torture.

The question is not whether torture is unlawful—everyone knows that it is. Nor is the question whether torture is repugnant—everyone agrees on that too. The question is what constitutes torture. I am not asking you for an official pronouncement on the legality of waterboarding or any other interrogation technique. I am asking for your personal views on this legal question.

**Questions:**

**A. Is waterboarding torture, as defined by domestic and international law?**

During his recent oversight testimony, Attorney General Mukasey specifically declined to address the question of whether or when waterboarding – which is not presently authorized under any circumstances – may be a lawful interrogation technique in the context of the ongoing armed conflict against the Taliban and al Qaeda. The Attorney General explained his view that it is inadvisable to address difficult legal questions in the absence of concrete facts and circumstances, particularly where any answer could reveal to our adversaries the contours of generally-worded laws that define



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00171 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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the limits of a highly classified interrogation program. Given the Attorney General's decision, I must respectfully decline, as a subordinate Department of Justice official, to answer this question.

**B. Is waterboarding illegal under United States law?**

Please see my response to question 4(A).

**C. Would it be lawful for another country to use waterboarding against an American?**

It would probably be unlawful. To the extent that such waterboarding might occur outside the context of an armed conflict, I assume that it would constitute an unlawful battery. To the extent that such waterboarding might occur inside the context of an armed conflict, United States forces – which have a recognized command structure, fight in uniform, carry arms openly, and conduct operations in accordance with the laws and customs of war (most importantly, by not targeting civilians) – would be entitled to the full prisoner-of-war protections under the Third Geneva Convention. For prisoners-of-war, Article 17 of that Convention prohibits all forms of coercive interrogation, including "any unpleasant or disadvantageous treatment of any kind."

**D. According to *The New Yorker* magazine, in a recent interview the Director of National Intelligence, Admiral Mike McConnell, stated: "If I had water draining into my nose, oh God, I just can't imagine how painful! Whether it's torture by anybody else's definition, for me [waterboarding] would be torture."**

**a. When even our own DNI acknowledges that waterboarding would be torture "for [him]," doesn't that call into question the soundness of any definition of torture that excludes waterboarding?**

In testimony before the Senate Select Committee on Intelligence, Director McConnell has stated that *The New Yorker* misquoted him. In any event, even as quoted in *The New Yorker*, Director McConnell expressly declined to address the question of when waterboarding might satisfy the legal definition of torture. See "The Spymaster," *The New Yorker*, Jan. 21, 2008, at 53. Moreover, as the Attorney General has explained, that question is a difficult one about which reasonable minds can and do differ.

**b. Would waterboarding be torture for you?**

I imagine that I would likely find the technique extremely frightening and unpleasant.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00172 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**E. Where do you draw the line if you cannot say that waterboarding, a classic method of torture throughout the ages, is never permissible? If you feel you cannot say whether waterboarding is torture and illegal, what about the rack and the screw? Can we bring them back?**

Lines may be drawn by consulting the text, legislative history, and caselaw interpreting the federal torture statute, the war crimes statute, and the Detainee Treatment Act. For example, in the context of an armed conflict, the war crimes statute prohibits not only torture and cruel or inhuman treatment, but also specific acts such as murder, mutilation or maiming, intentionally causing serious bodily injury, rape, and sexual assault or abuse. See 18 U.S.C. § 2241(d). Moreover, although the torture statute does not specifically define the operative term "severe physical or mental pain or suffering," see *id.* § 2340(1), legislative history suggests that the statute reaches "extreme, deliberate and unusually cruel practices" such as "sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain." S. Exec. Rep. No. 101-30, at 13-14 (Senate Foreign Relations Committee analysis of the Convention Against Torture, which the federal torture statute implements). Furthermore, the Detainee Treatment Act defines cruel, inhuman, or degrading treatment as the kind of conduct "prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States," DTA § 1003(d), thus incorporating an extensive body of federal constitutional precedents. These sources provide reasonable benchmarks for analysis, even though many fact patterns obviously would present close and debatable questions. Under these standards, I believe that the rack and the screw would be clearly unlawful.

**F. Did you have any knowledge of any kind about the CIA interrogation tapes that were destroyed in 2005? If so, please specify in as much detail as possible the nature of your knowledge of the tapes and the actions you took in regard to that knowledge.**

No.

**G. If you had been asked by the CIA, what would your advice have been on whether the tapes should have been destroyed?**

If asked, I would have advised the CIA not to destroy the tapes.

**5. <u>Army Field Manual Legislation</u>**

In the Detainee Treatment Act passed in 2005, Congress attempted to restore confidence in America's treatment of detainees and affirm our commitment to the basic rights in the Geneva Conventions. But by not specifically applying the Army Field Manual's interrogation standards to all government agencies, we left open a loophole that an administration determined to use abusive techniques might exploit. The Bush Administration drove a Mack truck through that loophole.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00173 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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The CIA's so-called "enhanced interrogation program," carried out at secret sites, became an international scandal and a new stain on America in the eyes of the world. The Administration issued an Executive Order last year to minimize the outcry, but the Order failed to provide guidelines for civilian interrogators or to renounce abuses such as waterboarding, mock executions, use of attack dogs, beatings, and electric shocks. The recent disclosure of secret opinions by the Office of Legal Counsel is evidence that the Administration still intended to use such techniques. Attorney General Mukasey's refusal to say whether waterboarding is illegal and the destruction of the CIA videotapes give us even greater reason for concern.

All of these disgraceful episodes leave no doubt that the only solution is for Congress to apply the Army Field Manual standards across the board. The Intelligence Authorization Bill now pending in the Senate would do that.

The Army Field Manual clearly states that "[u]se of torture is not only illegal but also it is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the [interrogator] wants to hear." The Manual still leaves great flexibility for interrogators, but it makes clear that torture is illegal and always forbidden.

Applying the Field Manual's standards throughout the government will help repair the damage to our international reputation. It will also improve the quality of our intelligence gathering, and help protect our own personnel from torture anywhere in the world. It will make America safer and stronger.

**Questions:**

**A. Shouldn't we require all interrogations to comply with the standards of the Army Field Manual, no matter who conducts them?**

The Army Field Manual is designed primarily to govern the interrogation of lawful combatants entitled under the Third Geneva Convention to be free from all forms of coercive interrogation. Accordingly, the Army Field Manual prohibits a wide range of interrogation techniques that constitute neither torture nor cruel, inhuman, or degrading treatment. The question of which of these techniques, if any, should be available to the CIA lies well beyond the expertise of the Civil Division or the Office of the Associate Attorney General.

**B. If not, which specific techniques disallowed by the Field Manual do you believe the CIA should be allowed to use—even though the Department of Defense has rejected them as illegal, immoral, ineffective, and damaging to America's global standing and the safety of our own servicemen and women overseas?**

Please see my answer to question 5(A) above.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00174 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**C. The standard we apply to detainees also sets the standard for other nations' treatment of Americans they take into custody. If we decide it is lawful for us to use sleep deprivation, waterboarding, and stress positions, then we increase the likelihood that other countries will use the same practices on us. Do you agree that we shouldn't subject anyone to interrogation practices that we'd consider unlawful if used against an American?**

I agree that reciprocity concerns are an important consideration in this area. On that point, I would note that, consistent with the Geneva Conventions, the United States does not engage in any coercive interrogation techniques when fighting against adversaries who respect the laws of war.

**6. FISA and Executive Power**

The scandal over the Administration's warrantless eavesdropping is still coming to light. But we already know that its surveillance activities were so shocking that up to 30 Justice Department employees threatened to resign because of them. The President's own head of the Office of Legal Counsel, Jack Goldsmith, testified that he "could not find a legal basis for some aspects of the program." He called it "the biggest legal mess [he] had ever encountered."

Here is how Mr. Goldsmith described the Administration's general approach to FISA: "After 9/11 . . . top officials in the administration dealt with FISA the way they dealt with other laws they didn't like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis of the operations." He said that David Addington, the powerful Counsel to the Vice President, once exclaimed, "We're one bomb away from getting rid of that obnoxious [FISA] court."

As you know, Congress is currently debating the possible reform of FISA. The White House has asked that we make the temporary changes made by the Protect America Act permanent, and that we amend FISA in other ways as well. At the same time, the Administration refuses to acknowledge it is bound by FISA. So we have a bizarre situation: the Administration is demanding that Congress pass a new law, but it is simultaneously insisting that no such law is necessary and that it will not be bound by it.

The language of FISA is clear: it provides the "exclusive" means by which the Executive may conduct foreign intelligence surveillance. As we know from Justice Jackson's famous opinion in the Steel Seizure Cases half a century ago, the President's authority is at its weakest when he acts contrary to a congressional statute. Yet President Bush apparently intends to defy clear statutory language.



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**Questions:**

**A. In Attorney General Mukasey's confirmations hearings, he seemed to suggest that the President is free in certain cases to ignore the crystal-clear instruction from Congress that FISA is the "exclusive" means by which the Executive Branch can conduct foreign intelligence surveillance. Do you agree that the Executive Branch is bound by FISA in conducting all foreign intelligence surveillance?**

I agree that the President is bound by FISA except insofar as particular applications of FISA might be unconstitutional. I also believe that, were the President to assert that a particular application of FISA would unconstitutionally interfere with his powers under Article II of the Constitution, his power would be "at its lowest ebb." See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

**B. When if ever, in your view, would the President be authorized to disregard or violate FISA?**

In my view, the President would never be authorized to violate FISA in cases where the statute is constitutional as applied. The President would be authorized to disregard FISA in cases where the statute is inapplicable, in cases where it has been amended or superseded by subsequent legislation, and in cases (if any) where it is unconstitutional as applied.

**C. Do you agree that any new legislation should reaffirm that FISA is the "exclusive" means by which the executive can conduct foreign intelligence surveillance?**

I am unfamiliar with specific policy issues related to FISA. In general, I believe that Congress and the President should work together as much as possible to establish appropriate parameters for the conduct of foreign intelligence surveillance.

**D. In an Administration that has shown little respect for FISA, it will obviously take courage to insist that the law must be followed. No matter what pressures you face, will you insist that government surveillance must comply with FISA?**

The Civil Division does not enforce compliance with FISA. Instead, it defends challenged executive action when there are reasonable, good-faith arguments to be asserted. If faced with executive action that violates FISA, I would defend that action in court only to the extent I concluded that there were reasonable, good-faith arguments that FISA was unconstitutional in the particular circumstances presented. Otherwise, I would decline to defend any executive action in violation of FISA.



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**7. Office of Immigration Litigation**

As head of the Civil Division, you supervise the Office of Immigration Litigation, whose role is to defend the decisions of the Board of Immigration Appeals and the Department of Homeland Security in federal court. However, some have criticized the Office for expanding its role and becoming involved in immigration policy within the Department of Justice.

**Questions:**

**A. How would you define the role of the Office of Immigration Litigation? Does it have a role in setting policy on immigration issues at the Department of Justice? If so, is that an appropriate role?**

The Office of Immigration Litigation is a litigation branch of the Civil Division. I agree that its primary role is to defend the decisions of the Board of Immigration Appeals and the Department of Homeland Security in federal court. To the extent that OIL has any involvement in policy development, that role should be to advise on the litigation consequences of particular policy decisions made by others outside the Civil Division.

**In the last two years, I understand that the number of cases being appealed from the Board of Immigration Appeals to the federal courts has decreased, a reversal of what had been the trend in the prior several years.**

**B. Is that the case? If so, what do you attribute the decline to?**

Yes. According to the database maintained by the Civil Division, there were 11,073 petitions for review of BIA decisions filed in 2005, and only 9140 such petitions filed in 2007. I do not know the reason for this decline.

**On the other hand, I understand that the number of appeals from Department of Homeland Security decisions has increased.**

**C. What do you attribute this trend to?**

While I do not have exact figures on this point, my understanding is that the number of challenges to DHS decisions has increased. I do not know the precise reasons for this increase. However, one significant source of new litigation has been mandamus actions seeking to compel decisions on naturalization requests.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00177 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**U.S. SENATE, COMMITTEE ON THE JUDICIARY**

**Executive Nominations Hearing**

**TUESDAY, JANUARY 22, 2007**

**Questions for the Record from**
**SENATOR CHARLES E. GRASSLEY**

**for**

**Gregory G. Katsas, of Massachusetts, to be**
**Assistant Attorney General, Civil Division, U.S. Department of Justice**

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During my years in the Senate, I've been committed to combating fraud, waste, and abuse in the government and government programs. I believe that the False Claims Act has proved to be the most effective tool in the effort to prevent fraud and abuse against the government and has enabled the government to recover over $20 billion since 1986. The *qui tam* provisions of the False Claims Act encourage citizens, who have knowledge and evidence of false claims of fraud, to report the illegal activity. These patriotic whistleblowers are the federal government's greatest allies in the fight against fraud.

As the Senate sponsor of the 1986 Amendments to the False Claims Act, I'm one of the Act's biggest supporters and defenders. Mr. Katsas, it is my hope that as the Assistant Attorney General for the Civil Division, you'll also vigorously support the False Claims Act and its *qui tam* provisions.

1. **As Assistant Attorney General for the Civil Division, will you vigorously enforce the False Claims Act?**

   Yes.

2. **Do you have any question as to the constitutionality of the FCA and the *qui tam* provisions?**

   The substantive provisions of the FCA are unquestionably constitutional, and the courts unanimously have rejected constitutional challenges to the *qui tam* provisions of the FCA. Given those strong precedents, I would have no difficulty vigorously defending the *qui tam* provisions against any further constitutional challenges.

3. **Can you inform the Judiciary Committee of your experience with the False Claims Act?**

   Between June 2001 and August 2006, I served as the Deputy Assistant Attorney General responsible for the Appellate Staff of the Civil Division. In that capacity, I supervised dozens of appeals taken or defended by the Civil Division in FCA cases, and I personally submitted dozens of appeal, *en banc*, or *certiorari* recommendations to the Solicitor General in FCA cases. Since August 2006, I have provided more general



47450.148

supervision of the Civil Division, including all of its FCA litigation, from within the Office of the Associate Attorney General. Finally, prior to June 2001, I was a supporting attorney in approximately three FCA appeals handled by my law firm at that time.

4. **Will you oppose efforts by industry groups, including the health care industry, to weaken the False Claims Act and the *qui tam* provisions of the FCA?**

Yes.

5. **Do you anticipate any decrease in the budget for the Commercial Litigation branch which is responsible for false claims prosecutions? In previous years, the Department has specifically requested litigation support funds, including funding for accounting experts, for the false claims cases pending. Are you committed to securing the funding necessary to successfully litigate FCA cases?**

I do not anticipate any decrease in the budget for the Commercial Litigation Branch of the Civil Division. If confirmed as Assistant Attorney General, I would use my best efforts to secure funding necessary to litigate FCA cases successfully.

6. **Will you ensure that Civil Division attorneys aggressively enforce the False Claims Act, and will you work with the U.S. Attorneys to ensure their vigorous support and enforcement of the False Claims Act and the *qui tam* provisions of the FCA?**

Yes. On the specific question of coordination between the Civil Division and U.S. Attorney Offices, I believe that the Civil Division can and should use its unparalleled FCA expertise to support litigation handled in the field by USAOs.

7. **Will you agree to promote a close working relationship between *qui tam* relators' counsel and the Justice Department for the purpose of establishing the public/private relationship envisioned when the FCA was signed into law by President Reagan?**

Yes. If confirmed, I would continue present Civil Division policy of working as closely as possible with *qui tam* relators and their counsel.

# SUBMISSIONS FOR THE RECORD

## STATEMENT OF CONGRESSMAN JOHN B. LARSON (CT-01)

### SENATE JUDICIARY COMMITTEE HEARING ON EXECUTIVE NOMINATIONS
### JANUARY 22, 2008

### INTRODUCTION OF KEVIN J. O'CONNOR
### UNITED STATES ATTORNEY FOR THE DISTRICT OF CONNECTICUT
### NOMINATED FOR ASSOCIATE ATTORNEY GENERAL OF THE UNITED STATES

I am proud to be here to introduce Kevin O'Connor. He has brought honor and distinction to every endeavor he's been associated with. This is a proud moment for him, his wife Kathleen, their children, and the entire O'Connor family. It's a proud moment for the State of Connecticut.

Our local paper – the Hartford Courant – wrote of Mr. O'Connor's nomination, "In Kevin J. O'Connor the White House has someone whose record and integrity promise to help restore confidence and stability to the agency."

I couldn't agree more.

In his five years as the United States Attorney for Connecticut, his office successfully prosecuted numerous public officials – both Republicans and Democrats – for corruption and bribery charges.

Mr. O'Connor has been adamant in enforcing our civil rights laws. He's protected our children from predators by successfully implementing a Project Safe Childhood program that combats online sex crimes against children.

He won a conviction in a federal civil rights trial against the former Mayor of Waterbury, Connecticut, for sexually abusing two minor children.

And, he's sent a clear message that racial discrimination has no place in the State of Connecticut with the prosecution of racially motivated crimes.

Mr. O'Connor personally prosecuted a man who pled guilty to violating federal civil rights laws by accosting a colleague and making racially derogatory comments.

As United States Attorney, he's successfully tried a criminal case, argued two cases before the U.S. Court of Appeals for the Second Circuit and appeared in court on behalf of the United States on numerous other matters.

But, he also took his job and responsibility outside of the courtroom and onto the streets by implementing a Project Safe Neighborhoods program.

He worked to reduce gun crime because there is no better way to lower our crime rates than to prevent criminal behavior before it begins.



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I know firsthand from working with him and seeing the level of commitment, understanding, and coordinated involvement he brings to a problem.

He also took on companies in our state whom he believed were violating the Clean Water Act. They were found guilty of dumping sewage into our waterways and falsifying records. In addition to obtaining two of the largest criminal penalties in New England history for their convictions, he secured commitments from the companies to clean up their acts and improve environmental compliance efforts.

Mr. O'Connor recently served with distinction as Chief of Staff to the Attorney General. He assumed this position during a difficult time for the Department and the U.S. Attorney community. He helped maintain consistency during the transition between the Acting Attorney General and Attorney General Michael Mukasey. He stepped up to the job by instituting processes that fixed department problems and ensured integrity.

His previous experience includes a stint as a partner in a large Connecticut law firm. He also enforced our Nation's securities laws while working for the United States Securities and Exchange Commission. And, he teaches law at the University of Connecticut and George Washington University. He has been an active and involved member of our community, serving on boards with distinction.

As Associate Attorney General, I am confident that he will continue to enforce the Nation's laws and continue to show a strong and impartial commitment to the rule of law.

I am honored to introduce Kevin O'Connor to you for your consideration of his nomination to the position of Associate Attorney General, for which he is eminently qualified, and like everything else he has done....distinguished himself on behalf of the nation he is sworn to serve.

**STATEMENT OF SENATOR PATRICK LEAHY**
**CHAIRMAN, SENATE JUDICIARY COMMITTEE**
**ON EXECUTIVE NOMINATIONS CONFIRMATION HEARING**
**JANUARY 22, 2008**

We begin the second session of the 110th Congress, by continuing the critical work of restoring professionalism and independence to the Department of Justice. With today's hearing, our first in the new year, we continue to work to fill the high-level vacancies at the Justice Department after a crisis of leadership under the former Attorney General left those ranks decimated.

I thank Senator Whitehouse for agreeing to chair this hearing today on two important nominations to the Department in which he served as U.S. Attorney for Rhode Island. If Kevin O'Connor is confirmed to be Associate Attorney General, the number three position at the Justice Department, he would oversee 13 Justice Department components. We will also hear from Gregory G. Katsas, the nominee to be Assistant Attorney General of the Civil Division at the Justice Department, the Division that represents the interests of the Federal Government and its agencies in important civil matters.

This hearing comes at a critical time for our Nation. Last session, this Administration continued to promote immunity over accountability, secrecy over responsiveness to congressional oversight, and unilateral power over the checks and balances that have defined this Nation and protected Americans' rights and freedom for more than two centuries. Our efforts on this Committee made a difference and began the process or restoring the Department of Justice and rebuilding the American people's faith in it.

Last year, many high-ranking Department officials – including the former Attorney General, Deputy Attorney General, Associate Attorney General, and many others, along with several high ranking White House political operatives – resigned during the Committee's investigation into the firing of well-performing U.S. Attorneys for partisan, political purposes and our exposure of the influence of White House political operatives on federal law enforcement.

Shrouded in scandal, the Department experienced a crisis of leadership reminiscent of the worst days of Watergate, one that has taken a heavy toll on the tradition of independence that has long guided the Justice Department and provided it with a safe harbor from political interference. It shook the confidence of the American people and Congress. We need to restore the Department to a law enforcement institution that will uphold the rule of law free from fear or favor.

In the course of the Committee's investigation into the unprecedented mass firings of U.S. Attorneys, we also uncovered an effort by officials at the White House and Justice Department to exploit an obscure provision enacted during the Patriot Act reauthorization to do an end-run around the Senate's constitutional duty to confirm U.S. Attorneys. The result was the firing of well-performing U.S. Attorneys for not bending to the will of political operatives at the White House. Indeed, Mr. O'Connor served as Chief of Staff



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to Attorney General Gonzales at a time when we were investigating the firings and the Department and Administration provided us with shifting stories for why they occurred. We will be interested to hear about Mr. O'Connor's involvement and what insights he has gained from that time.

I had hoped that when the Senate voted overwhelmingly to close the loophole created by the Patriot Act when we passed S.214, the "Preserving United States Attorneys Independence Act of 2007," by a vote of 97-0, it would send a clear message to the Administration to make nominations that could receive Senate support and begin to restore an important check on partisan influence in law enforcement.

Yet, even as we closed one loophole, the Administration has been exploiting others to continue to avoid coming to the Senate. Under the guise of an erroneous opinion of the Justice Department's Office of Legal Counsel, the Administration has been employing the Vacancies Act authority to use acting U.S. Attorneys and the power to appoint interim U.S. Attorneys sequentially. They have used this misguided approach to put somebody in place for 330 days without the advice and consent of the Senate.

We also learned startling new revelations about the extent to which some will go to avoid accountability, undermine oversight, and stonewall the truth. Just last month, we learned that the CIA destroyed videotapes of detainee interrogations. And two weeks later, in a regrettably familiar pattern, we learned that the involvement of senior Administration officials seems to have been much more significant than it appeared from their initial denials. These revelations are leading to additional investigations by the Justice Department, Congress, and the courts.

In light of this Administration's troubling record on thwarting checks and balances, the need for oversight continues. Next week our Committee will hold our first oversight hearing of the new session and our first with new Attorney General Michael B. Mukasey. We still have outstanding oversight requests and letters. I look forward to exploring these issues, and many more, with the Attorney General.

Mr. Katsas has been nominated to head the Civil Division, which has had a crucial role in protecting national security and defending the government in civil cases related to the war on terror – including defending challenges to the Patriot Act and defending the Administration's detainment and interrogation policies.

Several press reports detail the CIA's use of its own Gulfstream V and Boeing 737 jets to secretly transfer detainees to countries around the world, where it is likely that they will be tortured. The Justice Department defended this CIA policy before the Fourth Circuit in *El Masri v. Tenet*, a case where a Canadian citizen with no terrorist ties was abducted by our government, taken to a secret overseas prison, and detained for over a year.

The Administration made an historic mistake by suspending the writ of habeas corpus – not just for those confined at Guantanamo Bay but for millions of legal residents in the United States. The Justice Department defends the Military Commissions Act, which



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eliminated that hallowed right which guarantees an opportunity to go to court and challenge an abuse of power by Government.

For our government to condone torture is unacceptable to our ideals and a threat to our national security. Guantanamo Bay has caused us immeasurable damage to our reputation as a defender of democracy and a beacon of human rights around the world. We will want to know how Mr. Katsas's appointment will restore the independence of the Department of Justice and strengthen the rule of law.

With today's hearing on two executive nominees, we continue the tremendous progress we made at the end of last year in considering and confirming executive nominees. By the time we adjourned the first session of this Congress, the Committee had favorably reported 20 executive nominations and the Senate had already confirmed 22 executive nominations, including the confirmations of nine U.S. Attorneys, four U.S. Marshals, and nine other important positions.

Our Committee held hearings last session on nine executive nominations, including a two-day hearing on the nomination of Michael B. Mukasey to be Attorney General of the United States. Indeed, in the last week of the first session we held two confirmation hearings in order to expedite this President's executive nominations, including a hearing on five nominations for high-ranking Executive Branch positions and a hearing on Mark Filip to be Deputy Attorney General of the United States.

I worked to make further progress in connection with the nominations of Joseph P. Russoniello to be U.S. Attorney for the Northern District of California, Cynthia Dyer to be Director of the Violence Against Women Office, Nathan J. Hochman to be Assistant Attorney General of the Tax Division, and Scott M. Burns to be Deputy Director of National Drug Control Policy, Executive Office of the President.

Of course, we could have been in a position to make even more progress had the White House worked with us to send us timely nomination to fill the remaining vacancies with nominees who will restore the independence of federal law enforcement. For months I have been talking publicly about the need to name U.S. Attorneys around the country, since more than a quarter of those positions are not-Senate confirmed appointments.

We will continue to make progress when we can, and I continue to urge the White House to work with the Senate to fill these vacancies.

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**Statement of Senator Lieberman**
**Nomination of Kevin O'Conner of Connecticut to be**
**Associate Attorney General of the United States**
**January 22, 2008**

Chairman Patrick Leahy, Ranking Member Specter, the President made a terrific choice when he nominated Kevin O'Conner to be the next Associate Attorney General of the United States.

Since 2002, Kevin has served as the United States Attorney for the District of Connecticut. Under his leadership, the United States Attorney's office in Connecticut successfully prosecuted a number of high level political corruption cases, restoring public confidence in government, and sought to dismantle violent gangs and drug enterprises while keeping communities safe from child predators. Kevin also pursued prosecutions under the Clean Water Act, obtaining two of the largest criminal penalties in New England history.

Kevin's commitment to the mission of the Department of Justice extended beyond the State. He distinguished himself as a trusted prosecutor and respected colleague among the other United States Attorneys and served as the Chairman of the Violent Crimes Subcommittee of the Attorney General's Advisory Committee and as the Chief of Staff for the Attorney General. In the latter post, Kevin earned a stellar reputation as a leader who provided sober, objective guidance to the Attorney General and represented the collective interests of all of the ninety-three United States Attorneys around the country.

With his experience and temperament, Kevin will be a great asset to Attorney General Michael Mukasey. As one of my hometown newspapers – the Hartford Courant – opined:

> In Kevin J. O'Connor ... the White House has someone whose record and integrity promise to help restore confidence and stability to the agency. ... The controversies of the past year have left the Justice Department demoralized, compromised and with vacancies in several key leadership positions. The agency's new leadership must be dedicated to the fair and impartial administration of justice. We're proud of Mr. O'Connor's nomination. We are confident his appointment to associate U.S. attorney general overseeing the enforcement of civil rights, antitrust and environmental laws would help get the agency back on an even keel and restore a measure of public trust.

I agree with the Hartford Courant and I urge my colleagues on the Judiciary Committee to support his nomination. I look forward to being able to do the same when the nomination is on the Senate floor.

# NEWS FROM U.S. SENATOR SHELDON WHITEHOUSE

**FOR IMMEDIATE RELEASE**
**January 22, 2008**

**Contact: Alex Swartsel**
**(202) 228-6293 press office**
**press@whitehouse.senate.gov**

## Whitehouse Chairs Confirmation Hearings in Judiciary Committee

### *Kevin O'Connor and Gregory Katsas Considered for Department of Justice Appointments*

*Washington, D.C. – U.S. Senator Sheldon Whitehouse (D-R.I.) today chaired a Senate Judiciary Committee to consider two nominations to fill openings in the Department of Justice. Kevin O'Conner, currently the United States Attorney for the District of Connecticut and former Chief of Staff to Attorney General Alberto Gonzales, has been nominated to be the Associate Attorney General; and Gregory Katsas, the Acting Associate Attorney General and the Principle Deputy Associate Attorney general, has been nominated to be the Assistant Attorney General of the Civil Division. Whitehouse's opening statement, as prepared, is below.*

Today, the Committee will hear from two witnesses: Kevin O'Connor, nominated to be the Associate Attorney General, and Gregory Katsas, nominated to be the Assistant Attorney General of the Civil Division.

Mr. O'Connor is currently the United States Attorney for the District of Connecticut, and has previously served as Chief of Staff to Attorney General Alberto Gonzales and as Associate Deputy Attorney General. Prior to joining the Department of Justice, he had an impressive career in both the private and public sectors. The position to which Mr. O'Connor has been nominated is a vital one: the Associate Attorney General is the number three official at DOJ, responsible for supervising a number of important offices, including the Antitrust, Civil, Civil Rights, and Environment and Natural Resources Divisions.

Mr. Katsas is currently both the Acting Associate Attorney General and the Principal Deputy Associate Attorney General. From 2001 – 2006, he served as the Deputy Attorney General of the Civil Division, where he supervised much of the Division's appellate work – so he is well familiar with the workings of the very important Division he has been nominated to lead.

Before proceeding with the witnesses' opening statements, I would like to make two observations.

First, this hearing marks another important step in the effort to restore the Department's credibility after the disastrous tenure of Alberto Gonzales – which ended with vacancies throughout the Department's upper ranks.

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Indeed, the nominees before the Committee today are the ninth and tenth, respectively, to have confirmation hearings before this Committee since Mr. Gonzales stepped down, a list which includes nominees to be Attorney General, Deputy Attorney General, Associate Attorney General, and three Assistant Attorneys General. I commend Chairman Leahy for his determination to help fill these vacancies so that Attorney General Mukasey can have his leadership team intact and so that the Department's credibility can be restored. Whether that happens will depend, in large part, on whether the nominees are committed to operating in a manner different from the approach of the Gonzales Justice Department – in which they both served.

Second, this hearing is a reminder of the vital role of Congressional oversight of the Department of Justice. It was thanks to this Committee's hard work last year that the American people learned of U.S. Attorneys fired for political reasons, a hiring process corrupted by politics, and a policy that allowed hundreds of people at the White House to have case specific conversations with dozens of DOJ lawyers. Attorney General Mukasey has taken some steps to right the ship – but there is much more to be done, and Congress will play an instrumental role in ensuring that progress is made.

Which brings us back to today's hearing.

I look forward to the testimony of both Mr. O'Connor and Mr. Katsas. We need independent voices in the leadership of the Department of Justice; people who make decisions based on the law, not on politics; people who will stand up to political pressure from the White House; and people who understand and value the time-honored traditions that make the Department great. These are the measures by which I will judge your nominations.

I look forward to your testimony, and I now turn to Ranking Member Specter for his opening remarks.

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# NOMINATIONS OF JAMES RANDAL HALL, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF GEORGIA; RICHARD H. HONAKER, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF WYOMING; GUSTAVUS ADOLPHUS PURYEAR, IV, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF TENNESSEE; BRIAN STACY MILLER, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF ARKANSAS

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TUESDAY, FEBRUARY 12, 2008

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

The Committee met, pursuant to notice, at 2:34 p.m., in room 301, Russell Senate Office Building, Hon. Dianne Feinstein, presiding.

Present: Senators Cardin and Specter.

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

Senator FEINSTEIN. I will call this meeting of the Judiciary Committee to order. I spoke with Senator Specter this morning. He indicated that he was going to be here, but I know he does hear his distinguished colleagues on other occasions. So in the interest of time, I am going to begin.

We have four nominees before us today. They are: Richard Honaker for the District of Wyoming; Gus Puryear, for the Middle District of Tennessee; Brian Stacy Miller for the Eastern District of Arkansas; and James Randal Hall, for the Southern District of Georgia.

We also have a distinguished panel of U.S. Senators who are here who care enough to come to the committee to be able to introduce the nominees from their State. If anyone has an absolute time problem, please let me know. Otherwise, I will begin with Senator Alexander and just go straight down the table.

If there is no problem, Senator Alexander, please proceed.



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**PRESENTATION OF GUSTAVUS ADOLPHUS PURYEAR, IV, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF TENNESSEE, BY HON. LAMAR ALEXANDER, A U.S. SENATOR FROM THE STATE OF TENNESSEE**

Senator ALEXANDER. Thank you, Madam Chairman. Thank you for your time and for allowing me to come by, with Senator Corker, on behalf of Gus Puryear. He was nominated by President Bush in June. He would succeed Judge Robert Ecchles, who is taking senior status, who has been a very excellent, very excellent judge in Nashville.

Gus has a strong record of achievement in both the public and the private sectors. He's tried cases in both Federal and State courts. He has worked for committees in the U.S. Senate, and he has worked most recently in the private sector with one of Tennessee's largest companies. He's an honors graduate of—and the University of North Carolina. He clerked on the Fifth Circuit Court of Appeals, where I once clerked many years earlier. He's been a litigator with one of Nashville's major firms.

I think it's important to note that in private life he has been a commissioner of the National Prison Rape Elimination Commission, one of eight commissioners on a bipartisan panel created by the Prison Rape Elimination Act of 2003. He's active with the Red Cross, the Boy Scouts, and in the First Presbyterian Church in Nashville. His family is here today. I'm sure he'll introduce them. It's my pleasure to be here to support the President's nomination, to say that I hope the Senate will swiftly confirm him.

Thank you very much for your time.

Senator FEINSTEIN. Thank you very much, Senator Alexander.

Senator Chambliss.

Senator CHAMBLISS. Madam Chairman, thank you very much. I'm happy to yield to our colleague from Tennessee to keep this in order if Senator Corker wants to go, and we'll have both Tennesseans going first.

Senator FEINSTEIN. That's fine. Thank you.

Senator Corker.

**PRESENTATION OF GUSTAVUS ADOLPHUS PURYEAR, IV, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF TENNESSEE, BY HON. BOB CORKER, A U.S. SENATOR FROM THE STATE OF TENNESSEE**

Senator CORKER. Thank you, Madam Chairman. Thank you for rescheduling things so this hearing could take place. I know you're very busy. We thank you, and are honored to be here. Senator Cardin, thank you for the same.

I am very excited to join Senator Alexander in being here and talking about Gus Puryear. He's a Tennessean who has practiced law for the majority of his career in Middle Tennessee, and has had a distinguished career as a lawyer. He's excelled in the private sector, as Lamar has mentioned and served his country twice, once as a law clerk to the Fifth Circuit Court of Appeals, and then as a lawyer here in the U.S. Senate.

In his service here in the Senate, he served as counsel to the Committee on Government Affairs during the campaign finance investigation, and then went on to serve 2 years as Legislative Direc-

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tor for Senator Bill Frist. Currently, Gus, as Lamar has mentioned, is general counsel for a national corporation, Correction Corporation of America.

He's been exposed to many facets of law, however, Gus is also a devoted family man. He's been blessed with a beautiful wife, Jennifer, who is with him today, and two daughters, Ruth and Mary, who join him today. He's been active in many civic endeavors, which I greatly applaud, in the Nashville area, and has been a tremendous asset to his community. I hope that this committee will see fit to bring him to the floor as quickly as possible.

Again, thank you for this time.

Senator FEINSTEIN. Thank you very, very much.

Senator Chambliss.

**PRESENTATION OF JAMES RANDAL HALL, NOMINEE TO BE U.S. DISTRICT JUDGE OF GEORGIA, BY HON. SAXBY CHAMBLISS, A U.S. SENATOR FROM THE STATE OF GEORGIA**

Senator CHAMBLIS. Thank you very much, Madam Chairman. We lost Senator Cardin. Now, this is a lot more exciting than Ben thought it was going to be.

[Laughter.]

Madam Chairman, I am pleased to be here today to have the opportunity to introduce James Randal Hall to the Committee. I would say that my colleague, Senator Isakson, has a conflict, but he is going to be here a little bit later to also speak on behalf of Randy Hall.

Randy Hall is well-qualified to fill the position to which he's been nominated on the District Court bench in the Southern District of Georgia, and I'm pleased to endorse his nomination. I, and the people of Georgia, thank Chairman Leahy and Senator Specter for scheduling Randy's hearing today, and I hope the Judiciary Committee will act promptly to favorably report his nomination, and the Senate will follow with a swift confirmation.

Randy Hall has been a partner with Warlick, Tripp, Simmons & Hall since 2004. Prior to that, he served in the Georgia State Senate as a Senator from the 22nd District. For over 10 years, Randy's practice has focused on commercial real estate, banking, corporate matters, and commercial litigation. He has a reputation for integrity and character. Those who have worked with him say he is totally committed to the rule of law and that he is fair and honest in all of his dealings and undertakings. Obviously those traits are very much needed on the bench today.

Mr. Hall is a native of Augusta, Georgia. He graduated from Augusta College in 1979 and became a fellow Bulldog when he graduated from the University of Georgia School of Law in 1982. He's an active member of his community, serving on the Augusta-Richmond County Community Partnership for Children and Families, and attends Trinity-on-the-Hill United Methodist Church.

He is here today with his wife Suzi and other members of his family, including his daughters, Betsy and Mary Catherine, that he will introduce. I commend my friend, Randy Hall, to this Committee, urge swift action to advance his nomination, and look forward to the prompt confirmation of James Randal Hall to the Southern District of Georgia.

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I thank you, Madam Chairman.

Senator FEINSTEIN. Thank you very much, Senator.

Senator Enzi.

**PRESENTATION OF RICHARD H. HONAKER, NOMINEE TO BE U.S. DISTRICT JUDGE OF THE DISTRICT OF WYOMING, BY HON. MICHAEL B. ENZI, A U.S. SENATOR FROM WYOMING**

Senator ENZI. Thank you, Madam Chairman. I want to begin by thanking you for holding this hearing today. I know the difficulties with the scheduled vote this morning, and then the difficulties in having rooms in the afternoon. I really appreciate that you're the Chairman of the Rules Committee and we're able to pull that off.

Senator FEINSTEIN. Sometimes it does come in handy. Thank you.

[Laughter.]

Senator ENZI. I think the last time that I was in this room testifying, it was 11 years ago when I was trying to bring my laptop on the floor of the U.S. Senate.

Senator FEINSTEIN. I remember that, yes.

Senator ENZI. Yes. I trust that today's hearing will have a much better outcome for me. Although Senator Leahy is unable to attend, I want to formally thank Chairman Leahy for his willingness to hold this hearing. I spoke with the Chairman a number of times about Mr. Honaker's nomination, and I appreciate that the Chairman has kept his word and placed him on the Committee's schedule.

This will be a little bit different introduction because Mr. Honaker has been a long-time friend of mine. He was actually nominated by Craig Thomas—Craig Thomas was the senior Senator—and went through an extensive selection process that involved a lot of the legal community in Wyoming, and selected Richard and put his name forward. He has since, of course, been supported by a wide group of people from Wyoming. You will find many positive letters of reference in his file. I do have a number of letters that I'd like to introduce and have as part of the record.

Senator FEINSTEIN. They will be included in the record.

Senator ENZI. Thank you.

[The letters appear as a submission for the record.]

Senator ENZI. One is from our most popular former Governor and former Ambassador to Ireland, Mike Sullivan, who is a Democrat. Another is from the former Senator, Allen Simpson, who all of us know is a very strong Republican. You'll find that kind of a mix throughout the file.

Mr. Honaker will be an excellent jurist for our home State of Wyoming. He has the experience and the temperament to serve our State and judiciary well. You'll be making the correct decision if you vote to move his nomination forward.

He was born in Wyoming in 1951. He obtained an undergraduate degree at Harvard University. He returned to Wyoming to study law, and graduated from the University of Wyoming College of Law in 1976. Since he graduated, he practiced law or worked in State government in one form or another in Wyoming. If he's confirmed to be a District Judge, his familiarity with Wyoming and the rest will undoubtedly benefit him as he hears cases.

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Now, as a Republican, I never thought I would be supporting a trial lawyer to be a Federal judge, but Mr. Honaker's qualifications are beyond reproach. He has served as the president of the Wyoming State Bar Association, and he's served as the president of the Wyoming Trial Lawyer's Association. The American Bar Association has unanimously given Mr. Honaker its highest rating of "Well Qualified."

I'm well aware of some special interest groups who oppose Mr. Honaker's nomination. I don't think there has ever been a judge who's not faced some sort of opposition before being confirmed. The groups that oppose Mr. Honaker do not know him as well as I do. They don't know him as well as those in the legal community who have sent in countless letters in support of the nomination. He is a fair and just man. I know that from experience that comes from many times before.

He does know the difference between legislating—and that's from his experience as a Wyoming representative and a Democrat—and judging from all his years of court work. Since the criteria is fairness, I want to assure you that Richard is among the fairest people I know. I mentioned that he's a good lawyer. He's also a good friend. We did serve together in the State legislature.

We worked across the aisle with each other to provide leadership on a lot of bills, and I highly recommend that we vote this nomination out of Committee so that the Senate can confirm him so that he can be a District Judge for the District of Wyoming. One of the letters in here is also from the retiring judge, who has done an outstanding job and highly recommends him.

I thank you, Madam Chairman, for the opportunity. The other Senator from Wyoming is also here, and I think would appreciate it if he could say a few words.

Senator FEINSTEIN. Thank you very much. Senator Corker, that is very nice of you. If the other panel can come up, please. We'll hear from the other Senator from Wyoming, Senator Barrasso, first.

**PRESENTATION OF RICHARD H. HONAKER, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE STATE OF WYOMING, BY HON. JOHN BARRASSO, A U.S. SENATOR FROM THE STATE OF WYOMING**

Senator BARRASSO. Thank you very much, Madam Chairman and Senator Specter. Thank you very much for allowing me the opportunity to be here with you today.

I'm pleased to join Senator Enzi to speak in support of Richard Honaker to be the U.S. District Judge for the District of Wyoming. Richard's family is here as well, his wife Shannon, their three children. And Senator Specter, the nominee's daughter is a senior at Penn Law School right now.

Mr. Honaker is an outstanding attorney. He is widely regarded by his peers, as evidenced by the fact that he is the first attorney in the history of the State of Wyoming to serve as both president of the Wyoming State Bar Association and the Wyoming Trial Lawyers Association.

Now, Madam Chairman, as you know, I'm an orthopedic surgeon. I never thought I'd be here today supporting a trial lawyer for the

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federal bench. But he is just outstanding. I feel very proud to support Richard Honaker as our nominee. He has earned the respect of the legal community. The Standing Committee of the Federal Judiciary of the American Bar Association has unanimously voted that Mr. Honaker is "Well Qualified" for a position on the Federal bench in the District of Wyoming. His 30-plus years of legal work is exemplary. There is no question that he is ready to fill the seat for which he has been nominated. I know Mr. Honaker. I respect him as an individual. I admire his legal abilities, his passion, and his love for the law. That respect is shared by many of Wyoming's finest legal minds.

Words I have heard from members of the Wyoming Bar to describe Mr. Honaker are: bright, fair, civil, ethical, passionate about his clients, and devoted to the law. He expects the same of others that he requires of himself, is which to be well-prepared, to observe the rules of courtroom procedure and decorum, and to treat every person in the courtroom, whether lawyer, litigant, witness, or juror, with the greatest measure of courtesy and respect. Madam Chairman, Richard Honaker is eminently qualified to serve on the Federal bench in the District of Wyoming. He has my support, and I would ask the members of this Committee to support his nomination as well.

Thank you, Madam Chairman.

Senator FEINSTEIN. Thank you very much, Senator.

We will now turn to the remaining nominee, Mr. Miller. We have Senator Lincoln and Senator Pryor. Also, I see Senator Isakson is here. So why do we not begin with you, Senator Lincoln, if you would?

**PRESENTATION OF BRAIN STACY MILLER, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF ARKANSAS, BY HON. BLANCHE L. LINCOLN, A U.S. SENATOR FROM THE STATE OF ARKANSAS**

Senator LINCOLN. Well, thank you, Madam Chairwoman and Senator Specter, and to all the members of the Judiciary. I am enormously appreciative of the opportunity to appear before you this afternoon to introduce Brian Miller, who has been nominated to be the U.S. District Judge for the Eastern District of Arkansas. East Arkansas is my home, and it's Mr. Miller's home as well.

As the senior Senator from Arkansas, I am pleased to support Mr. Miller for this important post. After reviewing his record and speaking with many of his friends and colleagues in Arkansas, I can assure the Committee that Brian Miller is not only a superb lawyer and public servant, but he's also a trusted friend who is held in high regard by so many in our great State.

Mr. Miller is a native of my hometown, Helena, Arkansas, which also happens to be the oldest city in the State of Arkansas. After high school, Brian continued his education, graduating from the University of Central Arkansas in 1992. Not satisfied with only a baccalaureate degree, he continued his education by earning a law degree from Vanderbilt University.

Brian also had the distinction, which I have to say adds to my pride in being here before this Committee, in serving as one of the first interns for my office in the U.S. House of Representatives in

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00194 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

the summer of 1993. Brian began his professional career up the Mississippi River in Memphis, Tennessee at the firm of Martin, Tate, Morrow & Martsen.

In 1998, Brian ran a successful campaign to be the city attorney for our hometown of Helena. While he served as city attorney, his father served as mayor. I must add that as Brian and I both grew up in the same hometown, our parents worked very diligently in that community to make it a strong community and that makes me even more proud to be here on Brian's behalf.

He continued to work part-time with his firm in Memphis until January of 2007, when he was selected by Governor Mike Huckabee to be a State Appellate Judge. Throughout his career, Brian has been no stranger to the courtroom. In addition to the positions mentioned above, he also was appointed Deputy Prosecuting Attorney for Phillips County. In fact, between January of 1999 and January of 2006, Brian spent 3 days a week, every week, in the courtroom either in his capacity as a prosecutor or on behalf of his clients.

He has a reputation for being a tough, but fair, litigator who is a respected prosecutor and tireless advocate. He's received overwhelming support from the legal community around my State for his nomination.

When evaluating lifetime appointments to the Federal bench, I carefully consider a nominee's skills, experience, intellect, and ability to understand and apply established precedent. Fundamentally, I'm interested in knowing that a nominee can fulfill his responsibility under the constitution to apply the law fairly, without political favor or bias. I am fully satisfied, Madam Chairwoman, that Brian has met that standard.

In closing, I want to thank Chairman Leahy and Senator Specter and the Chairwoman here today for working with Mr. Miller, my staff, and myself in working to prepare for this hearing today. I appreciate your consideration of this nominee and encourage members of this Committee to certainly support his confirmation.

Thank you, Madam Chairwoman.

Senator FEINSTEIN. Thank you, Senator Lincoln.

Senator Pryor.

**PRESENTATION OF BRAIN STACY MILLER, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF ARKANSAS, BY HON. MARK PRYOR, A U.S. SENATOR FROM THE STATE OF ARKANSAS**

Senator PRYOR. Thank you, Madam Chair. I want to thank the Committee for having us today, and having this hearing.

I want to begin with a statement and end it in the same way, and that is: I heartily recommend and support Brian Miller for confirmation for this position in the Eastern District of Arkansas. He has earned a reputation in legal circles and around the State of Arkansas as a qualified and fair judge, and he understands that he has big shoes to fill for the late Judge George Howard, Jr. I'm confident that he is up to the task of filling those shoes.

Now, this Committee has seen more than its share of polarizing nominees, but Brian Miller is the exception. He has a track record of bringing integrity and impartiality to the Arkansas Court of Ap-

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00195 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

peals. Before that, he was a municipal judge, before that, a deputy prosecuting attorney, and also before that, in private practice for 9 years.

He's a graduate of Vanderbilt University Law School and the University of Central Arkansas, as well as the Phillips Community College. He also served in the Navy and the Navy Reserve from 1985 to 1992. As a member of the Arkansas Bar, I hear a lot of comments from lawyers in Arkansas about issues that are important to them. I understand that members of this Committee feel my pain on that. We have a lot of lawyers that contact me about different legal matters, especially when it comes to Federal judgeships.

But when Judge Miller's name began to circulate for this nomination, I received only praise from his colleagues. In fact, it was one of the few occasions—maybe the only one—since I've been in the Senate where not a single person criticized this nomination. He had truly an outpouring of support from the Arkansas legal community and folks outside the legal community in my State. I think one of the primary reasons, is he brings such a breadth and diversity of experience and fairmindedness and intelligence to this position in the court today.

So I would say that Brian Miller is in it for all the right reasons. He exemplifies what is right with the system and he is a nominee that people in Arkansas feel extremely comfortable with. I will end where I began, and that is: I heartily endorse Judge Brian Miller for the Eastern District of Arkansas.

Senator FEINSTEIN. Thank you very much, Senator Pryor.

Senator Isakson, welcome.

## PRESENTATION OF JAMES RANDAL HALL, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF GEORGIA, BY HON. JOHNNY ISAKSON, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator ISAKSON. Thank you very much, Madam Chairman. I'd like to thank Ranking Member Specter and Chairman Leahy for facilitating this hearing today and allowing these nominees to come before the Committee.

I join the Senior Senator from Georgia, Saxby Chambliss, in praising Randy Hall, who's been nominated to replace Judge Avant Edenfield in the State of Georgia. I won't recite the long litany of accomplishments that Senator Chambliss has already presented to you because those are in the record, but I would like to emphasize a couple of things about Randy's record that is so exemplary for why he would be great on the bench.

He has an extensive practice in real estate, business, corporate law, and corporate litigation which is an absolutely critical type of a practice to have in our judiciary, and that type of expertise.

Second, as Senator Pryor was talking about, phone calls from home, we all get phone calls from home on appointments. But I have to tell you, in my experience in the U.S. Senate—this is my fourth year—I have never had a total volume of totally unanimous calls about any prospective judicial appointment until Randy's name was recommended by the President of the United States. Au-

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00196 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

gusta, Georgia is the home of the Masters, but it is also the home of the most opinionated people I've ever seen.

[Laughter.]

In their opinion, Randy Hall is the right man for this judicial appointment.

He is joined today by his lovely wife, Suzi. He's a graduate of my alma mater, the University of Georgia, with his juris doctor in 1982. He was elected to the Georgia State Senate and served there. Before that, he served in his spare time as the chairman of the Augusta-Richmond County Planning and Development Authority.

So, Randy brings extensive business experience, extensive government experience, and a great deal of support from his home community, and I commend him to the Committee with my highest recommendation. Thank you.

Senator FEINSTEIN. Thank you very much, Senator Isakson. I believe that completes the testimony of the Senators, actually two, for each of the nominees. So if you wish to be excused, you certainly can. I thank the Senators very much.

I notice that there are some empty seats in the first couple of rows; if people who are standing would like to take them, please feel welcome to do so.

We are joined by our Ranking Member, Senator Specter. Senator, do you have a statement you'd like to make?

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

Senator SPECTER. Thank you very much, Madam Chairwoman. Just a word or two. I appreciate the listing of these nominees. It is my hope that we will be able to process them promptly for up-and-down votes. We have had some considerable discussion about expediting the confirmation of judges or the rejection of judges so that we have quite a backlog, and it is my hope that we will be able to proceed for up-and-down votes.

Just one comment. It's nice to be in the Rules Committee hearing room.

Senator FEINSTEIN. Well, you're very welcome. It's a beautiful room, isn't it?

Senator SPECTER. It's an exquisite room. It's the first time that I can recollect being on the dais here, and it's a magnificent room. The Russell Building has appointments which are remarkable, built in 1909. We've had other buildings since, but none can quite match the grandeur of this hearing room. I know we're here because you are the Chairperson of the Rules Committee and this is your home.

Senator FEINSTEIN. It was a place to go.

Senator SPECTER. So thank you for inviting all of these people, and me, to your home.

Senator FEINSTEIN. You're very welcome.

We will now proceed. I'll ask the four nominees to please come forward and be seated. The way we will proceed, is I will ask each one, before they're seated, to affirm the oath when I complete its reading.

[Whereupon, the witnesses were duly sworn.]

Senator FEINSTEIN. Thank you. You may be seated.

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00197 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

The process right now, gentlemen, is this. Each of you will be afforded the opportunity to make an opening statement. I think Senator Specter and I would hope that you would introduce your family and that they would stand when they are introduced so that we might acknowledge their presence.

Then following your statements, each member of the Committee that's present, which right now is the two of us, will ask a few questions and that will be it.

So why don't we begin with you, Mr. Hall, and we'll just proceed right down the table.

**STATEMENT OF JAMES RANDAL HALL, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF GEORGIA**

Mr. HALL. Thank you, Madam Chair. Let me particularly thank you for chairing this meeting, Senator Specter, for your presence. I thank the Committee for calling this hearing today. I want to thank President Bush for the nomination and thank my friends, Senators Chambliss and Isakson, for not only their support, but for those very kind words that they've offered into the record.

It's my great privilege today to present my family. They did travel with me from Georgia for this very special moment. My wife, Suzi, my oldest daughter, Mary Catherine, who is a freshman at Friendly University.

Senator FEINSTEIN. Please stand.

Mr. HALL. My youngest daughter, Betsy, a high school freshman. My father, Jim Hall, and my stepmother, Julia Hall. I'm very pleased to have them. Thank you.

Senator FEINSTEIN. Well, we are delighted to have the family, so please feel very welcome. Thank you very much.

[The biographical information follows:]

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00198 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

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

   James Randal Hall

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

   United States District Judge for the Southern District of Georgia

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

   699 Broad Street, Suite 1500
   (P.O. Box 1495)
   Augusta, Georgia 30901 (30903)

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

   1958; Augusta, Georgia

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

   I am married to Mary Suzanne (Crowder) Hall (Suzi)
   Homemaker/Substitute Teacher
   Episcopal Day School
   2248 Walton Way
   Augusta, Georgia 30904

   Two Dependent Children

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

   University of Georgia School of Law, 1980-1982, Juris Doctor, 1982
   Walter F. George School of Law/Mercer University, 1979-1980, no degree
   Augusta College, Augusta, Georgia, 1975-1979, Bachelor of Arts, 1979



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00199 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

Employment

2004 – Present
Warlick, Tritt, Stebbins & Hall, LLP/Partner
699 Broad Street, Suite 1500
Augusta, Georgia

1999-2003
Hunter, Maclean, Exley & Dunn, P.C./ Augusta Office Managing Partner
699 Broad Street, Suite 1202
Augusta, Georgia

1996-1999
J. Randal Hall, P.C./ Hall & Mullins, P.C./Partner
699 Broad Street, Suite 1202
Augusta, Georgia

1985-1996
Bankers First Corporation/ Corporate Vice President & Legal Counsel
985 Broad Street
Augusta, Georgia

1984-1985
Avrett & Hall, P.C./ Partner
440 Greene Street
Augusta, Georgia

1982-1984
Sanders, Mottola, Haugen & Goodson/ Associate Attorney
11 Perry Street
Newnan, Georgia

1979-1981 (Summers Only)
Lighting G alleries, Inc./Employee
1939 Walton Way
Augusta, Georgia



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00200 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Other Affiliations
2004-Present
Patriot Foods, LLC-Member/Owner
867 West Calhoun Street
Wadley, Georgia

2000-Present
Hall-Augusta Properties, LLC-Member/Owner
519 Winchester Drive
Augusta, Georgia 30909

1997-Present
Georgia Carolina Bancshares, Inc./First Bank of Georgia/Director
Wheeler Road
Augusta, Georgia

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

None.

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

Outstanding Family and Children's Advocate 2001-Augusta Richmond County Community Partnership for Children and Families

Outstanding Advocacy Award-2004-Community Mental Health Center of East Central Georgia

Legislative Advocacy Award-2004-Superior Court Clerks Association of Georgia

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

American Bar Association
State Bar of Georgia
-Real Property Law Section
Augusta Bar Association
Coweta County Bar Association (Former Member)
American Corporate Counsel Association (Former Member)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00201 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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11. **Bar and Court Admission**:

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

1982-State Bar of Georgia.
No Lapses in Membership.

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

Georgia Court of Appeals, 1982
Supreme Court of Georgia, 1982
United States District Court for the Northern District of Georgia, 1982
United States District Court for the Southern District of Georgia, 1984
United States District Court for the Middle District of Georgia, 2001
United States Tax Court, 1982

There have been no lapses in membership in the above courts with the exception of my membership in the United States Southern District of Georgia which lapsed due to my resignation in late 2005. Since the Southern District required member lawyers to accept appointed criminal matters (that frequently require immediate attention), I elected to resign due to service in the Georgia State Senate and the conflicts that occur between appointment needs and campaign obligations. On February 16, 2007, I was re-admitted to the roll of attorneys admitted to practice in the Court.

12. **Memberships**:

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

Leadership Augusta, 1985-1986
Trinity on-the-Hill United Methodist Church, 1984-Present
National Rifle Association, 2004-Present
Augusta Country Club, 1999-Present
Pinnacle Club of Augusta, 1996-Present
Rotary Club of Augusta, 2006-Present
Augusta Coalition for Children & Youth/Augusta Partnership for Families, 1985-Present (Past President)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00202 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Rotary Club of Newnan, Georgia, 1983-1984
Columbia County Chamber of Commerce, 2006-Present
Member: Legislative Affairs Subcommittee
Newnan Country Club, 1982-1984
Young Professionals Club of Augusta, 1985
West Lake Country Club, 1987-1999
Henpecked Supper Group, 2003-2006
American Corporate Counsel Association, 1993-1996
Lions Club of Augusta, 1986-2006 (President; District Cabinet Secretary)
Family Y of Augusta, 1998-2002
Augusta Southern Nationals, 1986-2003 (Past Chairman)
Augusta Symphony League, 1997-Present
Episcopal Day School Annual Giving Campaign, 2000-2002
Citizens Task Force on Cable Franchise Issues, 1994-1995

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

None.

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

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

Editorial Article, "*Agency Will Step Up Effort For Children*"; August 29, 2003; The Atlanta Journal-Constitution

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

None.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00203 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

Letter to Douglas D. Batchelor, Jr., as County Attorney for Columbia County, Georgia addressing concerns about a proposed zoning overlay ordinance proposed by the Board of Commissioners of Columbia County, Georgia.

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

2004 Augusta Mayor's Prayer Breakfast/National Day of Prayer Keynote Speech
Commencement Speech-Episcopal Day School Middle School-1993

In addition, beginning in May 2002 and ending in November 2004, I delivered numerous campaign speeches as a candidate and legislative "wrap-up" speeches as a State Senator to civic, political and neighborhood groups located in Augusta, Georgia and several surrounding counties. I do not have a record of the dates of the speeches or copies of the speeches. However, the campaign speeches typically focused on the need for improvements to education, economic development and improved ethics in government. The legislative "wrap-up" speeches focused on the actions of the Georgia General Assembly following the conclusion of each session.

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

Commencing in May 2002 and ending in November 2004, I frequently gave interviews to the media in connection with my candidacies for the Georgia State Senate and my service as a Georgia State Senator. I do not have a record of the dates of such interviews, nor do I have copies of clips or transcripts of the interviews.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00204 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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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 not held a judicial office.

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

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

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

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

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

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

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

I have not served as a judge.

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

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

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

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



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00205 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

I have not served as a judge.

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

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

2006, Governor's Task Force on Redistricting, Appointed by Governor Sonny Perdue

2005-Present, Georgia Medical Center Authority, Appointed by Georgia State Senator Eric Johnson

2003-2004, Georgia State Senate/22nd District Senator, Elected

1997-2002, Augusta-Richmond Planning Commission, Appointed by Commissioner Jerry Brigham; Chairman 2000-2002

I was an unsuccessful candidate for the Georgia State Senate/23rd District in 2004

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

Richmond County Republican Party-Member

Perdue for Governor 2008-Richmond County Chairman

Max Burns For Congress-Volunteer

David Roper for Superior Court Judge-2006- Volunteer

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

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



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00206 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

47450.164

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

I did not serve as a clerk to a judge.

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

I practiced alone for a brief period, July – October 1999.

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

1982-1984
Sanders, Mottola, Haugen & Goodson/ Associate Attorney
11 Perry Street
Newnan, Georgia

1984-1985
Avrett & Hall, P.C./ Partner
440 Greene Street
Augusta, Georgia

1985-1996
Bankers First Corporation/ Corporate Vice President & Legal Counsel
985 Broad Street
Augusta, Georgia

1996-1999
J. Randal Hall, P.C./ Hall & Mullins, P.C./Partner
699 Broad Street, Suite 1202
Augusta, Georgia

1999- 2003
Hunter, Maclean, Exley & Dunn, P.C./ Augusta Office Managing Partner
699 Broad Street, Suite 1202
Augusta, Georgia

2004 - Present
Warlick, Tritt, Stebbins & Hall, LLP/Partner
699 Broad Street, Suite 1500
Augusta, Georgia



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00207 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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b. Describe:

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

I was initially hired by the firm of Sanders, Mottola, Haugen & Goodson in Newnan, Georgia to specialize in tax matters and that work comprised 10-15% of my time. The remainder of my practice in Newnan consisted of real estate, banking, general litigation and appointed criminal work. As the youngest lawyer in the then-largest firm in Newnan, my opportunities for appointed criminal work were numerous. When I returned to Augusta, Georgia in 1984, my practice was primarily general, with an emphasis in banking, real estate and commercial litigation. In July, 1985, I joined my largest client, Bankers First Corporation, as general counsel and served in that position until June, 1996, when I left the company following its acquisition by SouthTrust Corporation. While at Bankers First, I managed the entire legal function of that $1 billion corporation, including securities matters, regulatory matters (state and federal), litigation, loan work-outs, real estate acquisition and development, employment issues and general corporate projects. My litigation experience during this period consisted of management of each case, including supervision of outside counsel and providing assistance to outside counsel at trial. My practice since 1996 has consisted of commercial real estate, banking, corporate matters, entity formations and commercial litigation. My litigation practice since 1996 has primarily consisted of bankruptcy matters (creditor representation), loan workouts, collections and small business disputes. My commercial real estate practice covers small to multi-million dollar projects in most of the states of the southeastern United States.

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

My clients have included individuals, small businesses, corporations, and banks. I have specialized in tax matters, banking, real estate, commercial litigation, and bankruptcy matters

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

i. Indicate the percentage of your practice in:
   1. federal courts: 40%
   2. state courts of record: 60%
   3. other courts.



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ii. Indicate the percentage of your practice in:
1. civil proceedings: 90%
2. criminal proceedings. 10%

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

I would estimate I have tried thirty to forty cases to verdict or judgment. Of this amount, approximately eighty percent would have been in the role of sole or chief counsel.

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

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

I have not practiced before the Supreme Court of the United States.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

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

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

1. SouthTrust Bank / Porter Communications Litigation. 268 Ga. App. 29; original case filed in the Superior Court of Richmond County, Georgia Civil Action File No. 2001-RCCV-535.

I served as chief counsel in this action by SouthTrust Bank as successor to Bankers First Savings and Loan Association against Jimmy Porter, Porter Communications Company, and The Porter Company. In 1983, Porter Communications Company and The Porter Company purchased two buildings in Augusta, Georgia from Bankers



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First Federal Savings and Loan Association, a predecessor in interest to SouthTrust Corporation. As part of the transaction, Porter agreed to restore and lease the buildings back to the Bank. On March 22, 1983, Bankers First and The Porter Company entered into a fifteen (15) year lease for the property. Following the execution of the lease, permanent financing for the project was obtained by Porter and his companies through a $1,000,000.00 bond issued by the Downtown Development Authority of Augusta and purchased by First National Bank of Atlanta. In addition, First National Bank provided Porter with a $200,000.00 note to finance additional costs. As security for Porter's obligations under the bond note, Porter and Porter Communications Company assigned their right to receive rental income under the lease. The transaction also required that Bankers First and The Porter Company execute guaranty agreements guaranteeing the obligation of Porter and Porter Communications Company under the bond note. Bankers Firsts' guaranty was secured by a collateral assignment of mortgage-backed securities that were later replaced by certificates of deposit. The term of the lease ended on October 31, 1998. Bankers First made rent payments under the lease until it's expiration on December 31, 1998. At that time, a balance of approximately of $300,000.00 remained due on the bond note. The term note had been paid in full by Porter in May, 1987. Although Bankers First maintained that it complied with the terms of the lease and made no further rent payments, it was forced to tender the bond payments to First National Bank pursuant to its obligations as guarantor of the bond note. Upon Porter's refusal to reimburse Bankers First for the $300,000.00 bond payments, Bankers First filed suit seeking contribution from Porter and The Porter Company for all amounts paid to First National Bank and from The Porter Company as a co-guarantor. The Defendants answered and admitted all of the facts and allegations of the complaint but asserted a counterclaim for $300,000.00. Judge William M. Fleming of the Superior Court of Richmond County, Georgia granted SouthTrust's Motion for Summary Judgment and denied the similar Motion for Summary Judgment filed by Porter. Porter argued that the language of the lease and a subsequent compromise agreement required that Bankers First's payments equaled the total amount of the debt service. However, Bankers First argued successfully that the term of the lease was 15 years, while the term of the bond note was 20 years and that this fact was well known to the parties at the time of the execution of the lease and subsequent amendment and compromise agreement. The Court of Appeals agreed with the contentions of Bankers First, now SouthTrust and affirmed Judge Fleming's grant of summary judgment on June 18, 2004. The attorney for Porter was J. Patrick Claiborne, whose address is 699 Broad Street, Suite 1206, Augusta, Georgia 30901, and telephone number is (706) 722-8224. James S. Murray, as Associate with the law firm of Warlick, Tritt, Stebbins & Hall, LLP, served as co-counsel in this matter. His telephone number is (706) 722-7543.

2. In Re: Harley (Theo D. Mann, Trustee, vs. General Motors Acceptance Corporation and Thornton Chevrolet, Inc., United States Bankruptcy Court, N.D. Georgia, Newnan Division. Case decided June 27, 1984.



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In this matter, I served as counsel to the Bankruptcy Trustee, Theo D. Mann. Mr. Mann was a partner in the law firm of Sanders, Mottola, Haugen & Goodson. At the time of the case I was an Associate with that firm. The case is reported at 41 BR 276. The action was commenced in December of 1983 by Mann as Trustee for Nilet, Lee and Mary Vilene Harley, Chapter 7 Debtors. The adversary proceeding was commenced in order to recover a preferential transfer. In this case, the U. S. Bankruptcy Court, W. Herman Drake, Judge, granted Mann's motion for summary judgment and denied motions for summary judgment filed by GMAC and Thornton Chevrolet. The brief facts are as follows: In May, 1983, Thornton Chevrolet sold a 1983 Chevrolet Silverado pick-up truck to Nilet Lee Harley. As part of that transaction, Harley executed a retail installment sales contract granting to GMAC a security interest in the pick-up and took possession. On the date of sale, Mr. Harley also executed a State of Georgia MV-1 Title Application which did reflect a security interest in GMAC. However, Thornton was delinquent in submitting the title application to the Georgia Department of Motor Vehicles, which resulted in the Certificate of Title not being issued until approximately 47 days after the date of sale and within the statutory preference period. The principal issues in the case were whether the transaction constituted a preference under Section 547 of the Bankruptcy Code and whether the transfer qualified under the 546 and 547(c) exceptions, In this matter, the Bankruptcy Court concluded that all elements of a preference had been satisfied and that the transaction was a preference. Secondly, the Bankruptcy Court concluded that the contemporaneous exchange exception under Section 547(c)(1) of the Bankruptcy Code was not available in this matter since perfection was not completed within the ten day time limit of Section 547(c)(3)(B) or within the twenty (20) day period allowed under O.C.G.A. §40-3-50(b).

The Bankruptcy Trustee, Theo D. Mann, has a current address of P.O Box 310 and telephone number 770-253-2222.

3. Wachovia Bank of Georgia, N.A. vs. Goldberg Brothers, Inc., Richmond Recycling, Inc., Philip Goldberg and Alberta Goldberg, Superior Court of Richmond County, Georgia, Civil Action File No. 96-RCCV-827.

During the period of 1996-1997, I represented the plaintiff, a national bank, in connection with a check kiting scheme engaged in by defendants, Goldberg Brothers, Inc. and Richmond Recycling, Inc. The amount in controversy was in excess of $200,000.00. The matter was primarily litigated in front of Judge William M. Fleming, Jr., Chief Judge of the Richmond County Superior Court. A judgment in favor of plaintiff was obtained.

4. In Re: Estate of Alberta Goldberg, Chapter 7, Case No. 98-12769-JSD, In Re: Richmond Recycling, Inc., Case No. 97-12960-JSD, In Re: Goldberg Brothers, Inc., Case No. 97-12958-JSD, and In Re: Philip Goldberg, Case No. 98-12150-JSD. U. S. Bankruptcy Court for the Southern District of Georgia, Augusta Division.

During the period of 1997-1999, I represented Wachovia Bank, N.A. in connection with these related bankruptcy matters, which generated a significant amount of



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litigation and adversarial proceedings, including Adversary Proceeding No. 99-01007A-JSD, in which Regions Bank, formerly known as Allied Bank of Georgia, filed a proceeding against Wachovia Bank of Georgia, N.A. and A. Stephenson Wallace was Trustee for the Estate of Alberta Goldberg, seeking to establish priority of certain liens on the personal residence of Alberta and Philip Goldberg. The matters were litigated in front of Judge John S. Dalis of the U.S. Bankruptcy Court for the Southern District of Georgia, Augusta Division. Mr. James T. Wilson, Jr., whose address is P.O. Box 2112 and telephone number is (706) 722-4933, served as counsel to Goldberg Brothers, Inc., Richmond Recycling, Inc., Philip Goldberg and Alberta Goldberg in the collection action filed in Superior Court of Richmond County, Georgia. Mr. Wilson also served as counsel in the bankruptcy matters. In connection with the adversary proceeding between Regions Bank and Wachovia Bank of Georgia, opposing counsel was Mr. Mark L. Wilhelmi, 237 Davis Road, Augusta, Georgia 30907, telephone (706) -868-9646.

5. Columbia County Board of Commissioners vs. Larry H. Pierce and Parcel of land lying at the intersection of Fury's Ferry Road and Baston Road, in Columbia County, Georgia, Superior Court of Columbia County, Georgia in Civil Action File No. CV-94-299.

This case was initiated on June 27, 1994, as a Petition for Condemnation in Rem. On August 4, 1994, Judge Albert M. Pickett entered an Order of Taking, granting possession of the property to Columbia County. The Condenmee subsequently filed a Notice of Appeal in connection with the amount of compensation. On April 19, 1999, I entered a Notice of Appearance in the case and became sole counsel for the Condemnee. The matter was heard by Special Master, Mr. A. Zachary Everitt on September 27, 2001. The Special Master rendered an award in the amount of $95,000.00. On October 4, 2001, Judge Albert M. Pickett of the Richmond County Superior Court entered an Order on the Special Master's award and the matter was concluded. Additional counsel in this case was Mr. William J. Keough, III of Hull, Towill, Norman, Barrett & Salley, who represented Columbia County, Georgia. Mr. Keogh's address is Post Office Box 1564, Augusta, Georgia 30903, and his telephone number is (706) 722-4481.

6. Icarus Investments, Inc., SouthTrust Bank, N.A. and Dennis J. Kelly v. Edward Adams, Pamela Bowman, et al, in the Superior Court of Richmond County, Georgia, Civil Action File No. 98-RCCV-758.

In this case, I served as counsel to the plaintiffs. In August 1998, the Defendants executed a promissory note in favor of Kelly and, in connection therewith, executed and delivered a deed to secure debt in favor of Kelly that covered a tract of land in Richmond County, Georgia. Shortly thereafter, Kelly obtained a loan from Bankers First Savings Bank (predecessor to SouthTrust) and secured his debt with a collateral assignment of the subject security deed. In 1991, Kelly paid the Bankers First debt in full. Upon payment, Bankers First cancelled the security deed in lieu of transferring it back to Kelly. At all times during the period that Bankers First held the security deed, the Defendants made the note payments to Kelly. In 1998, the Defendants defaulted



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under the terms of the note and security deed. When Icarus (as assignee of Kelly) attempted to collect the debt by foreclosure, the erroneous cancellation was discovered. In September of 1999, I filed a petition to reform the security deed based upon the error by Bankers First. The Defendants raised several issues, including standing and payment of the debt in full. Upon commencement of the trial, the Defendants conceded to the Plaintiffs' allegations and Judge J. Carlisle Overstreet issued a Judgment on January 21, 2001 reforming the security deed. Opposing Counsel in this matter was William O. Key, Jr., 3239 Deans Bridge Road, Augusta, Georgia 30919 and his telephone number is 706-793-9999.

7. Bill Easler Builders, Inc. v. Jeffrey W. Banks and Debra W. Banks, in the Superior Court of Columbia County, Georgia, Civil Action File No. CV-2000-510.

I represented the defendants in this dispute over the quality and cost of construction of their personal home in Columbia County, Georgia. The matter was litigated in front of Judge Carlisle Overstreet. Opposing Counsel in this matter was Mark Cleary, 1223 George C. Wilson Drive, Augusta, Georgia 30909 and his telephone number is 706-860-9995.

8. Blanchard & Calhoun Real Estate Co. V. Ronald Galloway, Magistrate Court of Richmond County, Georgia, Civil Action No. 49432.

I represented the plaintiff in this 2000-2001 action arising out of a breach of lease. A judgment in favor of plaintiff was obtained. Opposing counsel in this matter was Andrew Magruder, 2914A Professional Parkway, Augusta, Georgia 30907 and his telephone number is 706-650-8960.

9. In the Matter of Piedmont Hardwood Flooring, LLC, Chapter 11 Case No. 01-55662-JDW, United States Bankruptcy Court, Middle District of Georgia, Macon, Georgia.(Judge James D. Walker, Jr.)

I represented Battle Lumber Company, one of the largest creditors in this complex reorganization case of a hardwood floor manufacturer. After a significant period of litigation, we successfully negotiated a purchase of most of the debtor's industrial assets by my client. Debtor's counsel was Mr. Sean C. Kulka, Alston & Bird, LLP, One Atlantic Center, 1201 West Peachtree Street, Atlanta, Georgia 30309.

10. Madeline R. Arnall v. Commissioner of Internal Revenue, T.C. Memo. 1983-23, 1983 WL 14211 (U.S. Tax Ct.), 45 T.C.M. 1423, T.C.M. (P-H) P 83,232, 1983 PH TC Memo 83,232.

As a young tax associate in the firm of Sanders, Mottola, Haugen & Goodson in Newnan, Georgia, I litigated this matter under the supervision of the firm's senior



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partner, Charles Van S. Mottola. Although under Mr. Mottola's overall supervision, I personally handled all aspects of this litigation. The matter arose out of the taxpayer's dispute with the Internal Revenue Service about an alimony deduction that the taxpayer took in connection with a settlement reached with the former wife of the taxpayer's deceased husband. The Tax Court determined that the deduction was not allowed.

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

In 1995 and 1996, I represented Bankers First Corporation, in my capacity as general counsel, in its acquisition by SouthTrust Corporation. Bankers First Corporation was a bank holding company with assets of over $1 Billion dollars. My representation included the following issues: contracts, corporate, regulatory, employment, employee benefits/ERISA and real estate.

In 1994, I represented Bankers First Corporation, in my capacity as general counsel, in its sale of Athens Federal Savings Bank to Synovus Corporation. My representation included the same issues as set forth in item a. above.

In 2003, I served as the principal counsel for Battle Lumber Company in its acquisition of Piedmont Hardwood Flooring of Macon, Georgia.

In 1999, I represented a group of investors that acquired control of McDuffie Bank and Trust in Thomson, Georgia.

Since 1996, I have represented B&C Southeast, LLC and Blanchard & Calhoun Commercial Corporation, a major regional developer of commercial real estate properties, in the acquisition, financing and development of single- and multi-purpose real estate projects in Georgia, South Carolina, North Carolina, Tennessee, and Mississippi.

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

None.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00214 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

    None.

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

    I intend to maintain ownership interests in Hall-Augusta Properties, LLC and Patriot Foods, LLC. Hall-Augusta Properties, LLC is jointly owned with my father and owns commercial real estate in Columbia County, Georgia. Patriot Foods, LLC is jointly owned with my father and is the operator of a Huddle House franchise restaurant at Fort Gordon, Georgia. I spend a minimal amount of time in connection with my interest in either entity and do not expect that the interests will be a source of any issues if appointed.

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

    See attached Financial Disclosure Report.

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

    See attached Net Worth Statement

26. **Potential Conflicts of Interest**:

    a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

        The only categories of litigation or financial arrangements likely to present potential conflicts-of-interest would involve previous clients along with entities in which I have a significant financial interest through stock ownership or other means.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00215 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

In the event that a matter is assigned to me that appears to present a potential conflict of interest, whether I identify the issue or it is raised by a potential litigant or its counsel, I will immediately refer to all applicable rules to determine the existence of a conflict, including 28 U.S.C. Section 455. In many cases, the answer will be clear and I will act accordingly. In those cases where the answer is not clear, I will discuss the issue with counsel for the parties to gauge their concerns and the likelihood that my service on the case will be an actual or perceived conflict. In every case, I will follow the Code of Conduct for United States Judges and applicable statutes, policies and procedures.

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

Since 1996, I have regularly provided legal services to several inner-city churches in the Augusta, Georgia area on a pro bono or significantly discounted basis. I would estimate that I have averaged 5-10 hours per month on these services. For over twenty years, I have provided hundreds of hours of professional and non-professional assistance to various child advocacy organizations in the Augusta community whose missions are to improve the quality of life for disadvantaged children in the community. Organizations assisted have included the Augusta Coalition for Children and Youth, the Family Connection Project and the Augusta-Richmond County Community Partnership for Children and Families.

28. **Selection Process**:

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

A selection committee of six individuals conducted interviews of potential candidates for this nomination. Each applicant was interviewed by the committee for approximately 30 minutes. My interview addressed my reasons for applying



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00216 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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for the nomination, legal experience and practice nature, ideas for improvements to the Southern District and general discussions regarding the status of legal practice in the Augusta area. I have not been advised of the recommendations of the committee.

I participated in a second interview with representatives of the Office of the White House Counsel and Department of Justice in December, 2006. After completing nomination paperwork, I was informed that I would be nominated. My nomination was sent to the Senate on March 19, 2007.

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

No.



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Rev. 1/2004

# FINANCIAL DISCLOSURE REPORT

## Nomination Report

*Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App. §§101-111)*

| 1. Person Reporting *(Last name, first, middle initial)* | 2. Court or Organization | 3. Date of Report |
|---|---|---|
| Hall, James R. | Southern District of Georgia | March 21, 2007 |
| **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)** _X_ Nomination, Date March 19, 2007 ___ Initial ___ Annual ___ Final | **6. Reporting Period** 1/1/2006 thru 2/28/2007 |
| **7. Chambers or Office Address** 699 Broad Street Suite 1500 Augusta, Georgia 30901 | **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 _____ | |

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

| | POSITION | NAME OF ORGANIZATION/ENTITY |
|---|---|---|
| [ ] | NONE (No reportable positions.) | |
| 1 | Partner | Warlick, Tritt, Stebbin & Hall, LLP |
| 2 | Director | Georgia-Carolina Bancshares, Inc. |
| 3 | Director | First Bank of Georgia |

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

| | DATE | PARTIES AND TERMS |
|---|---|---|
| [X] | NONE (No reportable agreements.) | |
| 1 | | |
| 2 | | |

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

**A. Filer's Non-Investment Income**

| | DATE | SOURCE AND TYPE | GROSS |
|---|---|---|---|
| [ ] | NONE (No reportable non-investment income.) | | |
| 1 | 2006 | Warlick, Tritt, Stebbins & Hall, LLP-Partner Distributions | $ 158,600 |
| | 2007 | Warlick, Tritt, Stebbins & Hall, LLP-Partner Distributions | $ 19,000 |
| 3 | 2006 | Georgia-Carolina Bancshares, Inc./First Bank of Georgia-Director Fees | $ 7,500 |

**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.) | | |
| 1 | 2007 | Church of the Good Shepherd/Episcopal Day School-Salary | |
| 2 | 2006 | Church of the Good Shepherd/Episcopal Day School-Salary | |

**FINANCIAL DISCLOSURE REPORT**

| Name of Person Reporting | Date of Report |
|---|---|
| Hall, James R. | March 21, 2007 |

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

| | SOURCE | DESCRIPTION |
|---|---|---|
| ☐ | **NONE** (No such reportable reimbursements.) | |
| 1 | | EXEMPT |
| 2 | | |
| 3 | | |
| 4 | | |
| 5 | | |
| 6 | | |
| 7 | | |

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

| | SOURCE | DESCRIPTION | VALUE |
|---|---|---|---|
| ☐ | **NONE** (No such reportable gifts.) | | |
| 1 | | EXEMPT | $ |
| 2 | | | $ |
| 3 | | | $ |
| 4 | | | $ |

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

| | CREDITOR | DESCRIPTION | VALUE CODE* |
|---|---|---|---|
| ☐ | **NONE** (No reportable liabilities.) | | |
| 1 | Bank of America MBNA | Credit Card | J |
| 2 | Bank of America MBNA | Credit Card | J |
| 3 | Citigroup/Smith Barney | Security Margin Account | N |
| 4 | Chase | Credit | J |
| 5 | | | |

[redacted]

**FINANCIAL DISCLOSURE REPORT**

| Name of Person Reporting | Date of Report |
|---|---|
| Hall, James R. | March 21, 2007 |

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

[redacted]

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| ☐ | **NONE** (No reportable income, | | | | | | | | | |
| 1 | Wachovia Corp. Common | F | Div | P1 | T | Exempt | | | | |
| 2 | GECR Common | | None | G | T | | | | | |
| 3 | Bunge Ltd Common | A | Div | J | T | | | | | |
| 4 | Allegheny Technologies Common | A | Div | J | T | | | | | |
| 5 | American Tower Common | | None | J | T | | | | | |
| 6 | Anglo American PLC Common | A | Div | J | T | | | | | |
| 7 | Goldman Sachs Common | A | Div | J | T | | | | | |
| 8 | Google Class A Common | | None | J | T | | | | | |
| 9 | Honda Motor ADR | A | Div | J | T | | | | | |
| 10 | JPMorgan Chase Common | A | Div | J | T | | | | | |
| 11 | Legg Mason Common | A | Div | J | T | | | | | |
| 12 | Lehman Brothers Common | A | Div | J | T | | | | | |
| 13 | Merrill Lynch Common | A | Div | J | T | | | | | |
| 14 | Morgan Stanley Common | A | Div | J | T | | | | | |
| 15 | NYMEX Holdings Common | | None | J | T | | | | | |
| 16 | Pepsico Common | A | Div | J | T | | | | | |
| 17 | Prudential Financial Common | A | Div | J | T | | | | | |

[redacted]

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**FINANCIAL DISCLOSURE REPORT**

| Name of Person Reporting | Date of Report |
|---|---|
| Hall, James R. | March 21, 2007 |

**VII. Page 2 INVESTMENTS and TRUSTS -- income, value, transactions** *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

[redacted]

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| ☐ | **NONE** (No reportable income, assets, or transactions) | | | | | | | | | |
| 18 | Taiwan Semiconductor ADR | A | Div | J | T | | | | | |
| 19 | Time Warner Common | A | Divi | J | T | | | | | |
| 20 | Toyota Motor ADR | A | Div | J | T | | | | | |
| 21 | United Technologies Common | A | Div | J | T | | | | | |
| 22 | Hall-Augusta Properties | E | Gain | M | W | | | | | |
| 23 | Patriot Foods | E | Dist | M | W | | | | | |
| 24 | Denise/Jeff Malcolm-note receivable | B | Int | J | U | | | | | |
| 25 | Northwestern Mutual Universal Life Policy | B | Int | K | U | | | | | |
| 26 | First Bank of Georgia-IRA CD's | A | Int | J | T | | | | | |
| 27 | Fidelity Independence Mutual Fund-IRA | A | Div | J | T | | | | | |
| 28 | First Bank of Georgia Accounts | A | Int | K | T | | | | | |
| 29 | River Ridge Investors | F | Dist | None | | | | | | |
| 30 | | | | | | | | | | |
| 31 | | | | | | | | | | |
| 32 | | | | | | | | | | |
| 33 | | | | | | | | | | |
| 34 | | | | | | | | | | |

[redacted]

| FINANCIAL DISCLOSURE REPORT | Name of Person Reporting | Date of Report |
|---|---|---|
| | Hall, James R. | March 21, 2007 |

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

I. Positions (continued)

| | |
|---|---|
| 4. Member | Patriot Foods, LLC |
| 5. Member | Hall-Augusta Properties, LLC |
| 6. Director | Georgia Medical Center Authority |

III.A. Filer's Non-investment Income

| | |
|---|---|
| 4. 2007 Georgia-Carolina Bancshares, Inc./First Bank of Georgia-Directors Fees | $ 1,100.00 |
| 5. 2005 Watlick, Tritt, Stebbins & Hall, LLP-Partner Distributions | $99,846.00 |
| 6. 2005 Georgia-Carolina Bancshares, Inc./First Bank of Georgia-Directors Fees | $11,661.00 |

## 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 3/21/2007

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.)

[redacted]

## 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 | | 30 | 000 | Notes payable to banks-secured | | | |
| U.S. Government securities-add schedule | | | 150 | Notes payable to banks-unsecured | | | |
| Listed securities-add schedule | 1 | 369 | 010 | Notes payable to relatives | | | |
| Unlisted securities--add schedule | | 350 | 000 | Notes payable to others | | | |
| Accounts and notes receivable: | | | | Accounts and bills due | | | |
| Due from relatives and friends | | | | Unpaid income tax | | 11 | 000 |
| Due from others | | | 750 | Other unpaid income and interest | | | |
| Doubtful | | | | Real estate mortgages payable-add schedule | | 105 | 000 |
| Real estate owned-add schedule | | 690 | 000 | Chattel mortgages and other liens payable | | | |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 150 | 000 | Stock Margin Loan | | 292 | 000 |
| Cash value-life insurance | | 18 | 000 | | | | |
| Other assets itemize: | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | Total liabilities | | 408 | 000 |
| | | | | Net Worth | 2 | 199 | 910 |
| Total Assets | 2 | 607 | 910 | Total liabilities and net worth | 2 | 607 | 910 |
| CONTINGENT LIABILITIES | | | | GENERAL INFORMATION | | | |
| As endorser, comaker or guarantor | | 485 | 000 | 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 | | | | | | | |



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## FINANCIAL STATEMENT

NET WORTH SCHEDULES

| | |
|---|---|
| U.S. Government Securities | |
| Series E Bond | $ 150 |
| | |
| Listed Securities | |
| Wachovia Corporation | $ 1,035,950 |
| Georgia-Carolina Bancshares, Inc. | 202,832 |
| Exxon-Mobil | 2,700 |
| Bunge Limited | 6,768 |
| Activision Inc. | 6,103 |
| American Express Co. | 3,582 |
| American Tower Corp | 6,741 |
| Amgen, Inc. | 4,547 |
| Anglo American PLC | 7,298 |
| Bank of America Corp | 4,254 |
| Celgene Corp | 6,576 |
| Danaher Corp | 5,265 |
| Genentech Inc. | 3,270 |
| General Electric Co. | 2,293 |
| Goldman Sachs Group, Inc | 1,948 |
| Google Inc. | 6,302 |
| Honda Motor Co., Ltd. ADR | 7,058 |
| JP Morgan Chase & Co. | 2,453 |
| Lehman Brothers Holdings, Inc. | 4,641 |
| Merrill Lynch & Co., Inc. | 4,372 |
| Morgan Stanley | 6,321 |
| Pepsico, Inc. | 4,400 |
| Prudential Financial, Inc. | 4,726 |
| Schlumberger, Ltd | 1,712 |
| Taiwan Semiconductor Mfg Co, Ltd. ADR | 6,439 |
| Time Warner, Inc. | 6,545 |
| Toyota Motor Corp. ADR | 7,203 |
| United Technologies Corp. | 6,711 |
| Total Listed Securities | $ 1,369,010 |
| | |
| Unlisted Securities | |
| Hall-Augusta Properties, LLC | $ 200,000 |
| Patriot Foods, LLC | 150,000 |
| Total Unlisted Securities | $ 350,000 |

| | |
|---|---|
| Real Estate Owned | |
| Personal residence | $ 300,000 |
| Condominium | 300,000 |
| Undeveloped lot | 90,000 |
| Total Real Estate Owned | 690,000 |
| | |
| Real Estate Mortgages Payable | |
| Personal residence | $ 105,000 |

AFFIDAVIT

I, JAMES RANDAL HALL, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

March 21, 2007
(DATE)

(NAME)

Gail Shafer
(NOTARY)

GAIL SHAFER NOTARY PUBLIC GEORGIA EXPIRES JAN. 16, 2010 RICHMOND COUNTY

**STATEMENT OF RICHARD H. HONAKER, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF WYOMING**

Mr. HONAKER. Thank you, Senator Feinstein, for being here on such a busy legislative day to convene this hearing.

I would like to begin by thanking the late Senator Craig Thomas, who was so kind to sponsor my nomination. I want to thank Senator Enzi and Senator Barrasso for their warm and generous comments and for their leadership in advancing my nomination after Senator Thomas' passing.

I'd also like to thank Senator Allen Simpson, former Senator from Wyoming, who couldn't be here today but who has kindly provided me with great counsel and support during the process. And, of course, I'd like to thank the President for his nomination.

It's my pleasure, Senator, to introduce my family to you. I'd like to start by introducing my daughter, Heather and her husband Derrick, Heather and Derrick Mercer. Heather serves our country in the Foreign Service. Heather worked as a staffer in Senator Enzi's office, and Derrick in Senator Kyl's office.

Senator FEINSTEIN. Oh, my goodness.

Mr. HONAKER. And I'd like to introduce my daughter Harmony Decosimo and her husband David Decosimo. Harmony's a third-year student at Penn, and David is a Ph.D. candidate at Princeton. The two of them, in our big family event of the year, are expecting their first child and our first grandchild in June.

Senator FEINSTEIN. That's wonderful.

Mr. HONAKER. I'd like to introduce my son Dustin, who is a senior at the University of Wyoming, and also works in our oil fields out there.

And the most important person in my life, my wife Shannon, the great person in my life.

Thank you very much. I look forward to your questions.

[The biographical information follows:]

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**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

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

   Richard Henderson Honaker

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

   United States District Judge for the District of Wyoming

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

   Honaker Law Offices, LC
   P.O. Box 366
   Rock Springs, WY 82901

   Honaker Law Offices, LC
   214 Winston Drive
   Rock Springs, WY 82902

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

   1951, Laramie, Wyoming

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

   I am married to Shannon C. Honaker.
   Homemaker.
   Part-time legal assistant, Honaker Law Offices, LC.
   Owner of home-based fashion consulting and clothing business, Classic Chic, LC.

   We have no dependent children.

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

   University of Wyoming College of Law, 1973 – 1976, J.D., 1976.

   Harvard College, 1969 – 1973, B.A. *cum laude*, 1973.



47450.184

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

Employment
October 2000 to present
Honaker Law Offices, LC
P.O. Box 366
Rock Springs, WY 82902
This is a solo law practice in which I am the sole member of the LLC.

July 1991 to October 2000
Honaker, Hampton & Newman, LC
P.O. Box 1000
Rock Springs, WY 82902
This was a three-lawyer partnership in which I was the senior and managing partner.

Approximately August 1985 to July 1991
Honaker & Hampton, LC
P.O. Box 1000
Rock Springs, WY 82902
This was a two-lawyer partnership in which I was the senior and managing partner.

Approximately December 1981 to approximately August 1985
Honaker Law Firm
P.O. Box 1000
Rock Springs, WY 82902
This was a solo practice that I established.

Approximately April 1979 to December 1981
State of Wyoming
State Public Defender
2001 Capitol Avenue
Cheyenne, WY 82002
I was appointed by the Governor of Wyoming and served as State Public Defender I served as Assistant Public Defender March-November, 1979.

June 1976 to April 1979.
State of Wyoming
Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00228 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Approximately June 1973 to approximately June 1976.
Laramie Daily Boomerang
320 East Grand Avenue
Laramie, WY 82070
After graduation from college and during law school, I worked fulltime as a news reporter and night editor for this daily newspaper.

Other affiliations
Classic Chic, LC
453 Quadrant Drive
Rock Springs, WY 82901
This is an entity formed by my spouse and I for the operation of her home-based fashion consulting and clothing business.
October 2005 to present.

Providence Reformed Church
1001 Ninth Street
Rock Springs, WY 82901
This church, that my family and I attend, is a Wyoming non-profit corporation. I have been an officer since approximately 1992 and have been treasurer since January 2005.

The Horse Creek Ranch, a Wyoming LLC
6106 Yellowstone Road
Cheyenne, WY 82009
This is an entity formed by my spouse, mother-in-law, and myself for purposes of subdividing and selling rural residential real estate in Laramie County, Wyoming. The subdivision is now sold out.
July 1998 to present.

Home School Legal Defense Association
P.O. Box 3000
Purcellville, VA 20134
This is a 501(c)(4) nonprofit corporation for which I serve as a member of the board.
October 1992 to present.

Home School Foundation
P.O. Box 3000
Purcellville, VA 20134
This is a 501(c)(3) charitable foundation for which I serve as a member of the board.
Approximately 2000 to present.

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

None.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00229 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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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.

Graduated with honors (cum laude) from Harvard College, in English.

Awarded the John J. Bugas Scholarship, University of Wyoming College of Law.

Recognized by Martindale-Hubbell as an AV lawyer for approximately the past 20 years.

Named to The Best Lawyers in America, 1999 to present.

Only lawyer in the history of Wyoming to have been elected by my peers to serve as president of both the Wyoming State Bar and the Wyoming Trial Lawyers Association.

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.

Wyoming State Bar; member, 1976 to present; commissioner, 1997-2000; vice president, 2000-01; president-elect, 2001-02; president, 2002-03.

American Board of Trial Advocates; member, 1990-present; president of Wyoming chapter, 2005-06; member of National Board of Directors, 2006-present.

Wyoming Trial Lawyers Association; member, 1982-present; board member, 1983-86; president, 1986.

Association of Trial Lawyers of America; member, 1982-present.

Federalist Society; member, 2002-present.

American Law Institute; member, 2002-03.

American Bar Association; member, approximately 2001-05

Sweetwater County Bar Association; member, 1982-present; president, 1995-96.

Western States Bar (the 17 western states); delegate, 2000-03.

Board of Professional Responsibility; member, 2004-present; vice chair, 2006-present.

Wyoming State Bar Foundation; director, 2001-04; fellow since 2001.

Select Committee to Review Disciplinary Functions - appointed by Wyoming Supreme Court to chair committee to rewrite disciplinary code for lawyers, 2001-02.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00230 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Board of Visitors, University of Wyoming College of Law; --member, 2002 to present.

Legislative and Law Reform Committee of Wyoming State Bar; member, 1997-present.

Civil Pattern Jury Instruction Committee of Wyoming State Bar; member, 1992-98.

Permanent Rules Advisory Committee – Civil Division; member, 1988- present.

Uniform District Rules Subcommittee of the Wyoming Supreme Court; member, 1992.

Computer and Technical Committee of Wyoming State Bar; member, 1998.

Rules of Criminal Procedure Advisory Subcommittee of the Wyoming Supreme Court; member, 1978-82.

State Judicial Planning Committee of the Wyoming Supreme Court; member, 1979-83.

State Planning Commission on Criminal Administration; member, 1979-81.

Within the past 10 years, I was appointed by the U.S. District Court to serve on a panel to select a U.S. Magistrate for Southwestern Wyoming, but I can't recall the date.

11. **Bar and Court Admission**:

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

Wyoming, 1976.
No lapses in membership.

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

All Wyoming state courts, 1976.

United States District Court for the District of Wyoming, 1976.

United States Court of Appeals for the Tenth Circuit, 1977.

Supreme Court of the United States, 1989.

No lapses in any memberships.



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12. **Memberships**:

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

University of Wyoming Alumni Association; life member.

Harvard Varsity Club; member since 1971.

Sweetwater County Republican Party; precinct committeeman since 1996.

Wyoming Republican Party; delegate to state conventions, most recently 2006.

University of Wyoming Cowboy Joe Booster Club; member since 1998.

University of Wyoming Foundation and President's Society; member since 1991.

Rotary Club International; member since 2006.

National Rifle Association; life member.

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

No.

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

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

Wyoming Trial Handbook, Lawyers Cooperative Publishing, 1995, chapter author for two chapters: "Eyewitness Identification" and "Mistrial."



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00232 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Series of six president's columns published in *Wyoming Lawyer*, 2002-03.

Guest editorial, "Law Day, 1997."

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

September 2003 President's report to Wyoming State Bar Annual Meeting, published in the Wyoming Law Review.

2002 Chairman's report to Wyoming Board of Bar Commissioners from Select Committee to Review Disciplinary Functions.

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

None.

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

Speech to Leadership Wyoming Class of 2005.

Three speeches given to the 2005 Wyoming state home school convention. "History", "Leadership" and "Liberty and Law"

Remarks upon the 25th anniversary of the Wyoming Public Defender Program

Speech to Sweetwater County Republican Women's Club, September 8, 2004.
Remarks to the Wyoming State Bar's Judicial Luncheon, September 2003.

Toast to Governor and First Lady and Past Presidents of the Wyoming State Bar, September 2003.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00233 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Remarks at robing ceremony for Judge Timothy C. Day, September 2003.

Speech to Kemmerer, Wyoming Rotary Club on "tort reform," March 12, 2003.

Speech to Rock Springs, Wyoming Rotary Club on "tort reform," March 11, 2003.

Introduction of U.S. Senator Mike Enzi, March 2002.

Speech to 2001 convention of Wyoming Emergency Responders.

Legislative campaign speech, summer 1994.

Speech to Wyoming chapter of the Christian Legal Society, September 17, 1992.

During my three terms of service from 1987-93, I made many floor speeches in the Wyoming House of Representatives on many issues. I have retained no copies, and, at the time I served, floor speeches were not recorded or journaled by the Wyoming House. The only record of any speeches would be newspaper reports on them.

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

I was interviewed from time to time by news media when I was a state legislator from, but I do not have copies of any interviews. The only record of any interviews would be newspaper reports on them.

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; I have served as a mediator, but not as a judge.

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

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

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

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



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00234 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

47450.191

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

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

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

I have not served as a judge.

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

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

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

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

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

I have not served as a judge.

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

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

Member, Wyoming House of Representatives, 1987-1993 (elected for three two-year terms.) Served on House Judiciary Committee; House Corporations,



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00235 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

47450.192

Elections, and Political Subdivisions Committee, and House Rules Committee.

Wyoming Governor Ed Herschler appointed me Assistant Attorney General for the State of Wyoming in 1976, and appointed me as Wyoming State Public Defender in 1979.

Unsuccessful candidate for election to Wyoming House of Representatives in 1994.

Elected as Republican precinct committeeman, 1996-present.

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

My spouse and I co-chaired U.S. Senator Mike Enzi's successful 1996 and 2002 campaigns in Sweetwater County, Wyoming.

My spouse and I co-chaired U.S. Senator Craig Thomas' successful 2006 campaign in Sweetwater County, Wyoming.

My spouse and I co-chaired Republican gubernatorial candidate Ray Hunkins' unsuccessful 2006 campaign in Sweetwater County, Wyoming.

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

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

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

I did not serve as a clerk to a judge.

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

I practiced alone from approximately December 1981 to approximately August 1985 in Rock Springs, Wyoming, and again from October 2000 to the present, also in Rock Springs, Wyoming.

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



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00236 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Honaker Law Offices, LC
P.O. Box 366
Rock Springs, WY 82902
This is a solo law practice in which I am the sole member of the LLC. October 2000 to present.

Honaker, Hampton & Newman, LC
P.O. Box 1000
Rock Springs, WY 82902
This was a three-lawyer partnership in which I was the senior and managing partner from July 1991 to October 2000.

Honaker & Hampton, LC
P.O. Box 1804
Rock Springs, WY 82902
This was a two-lawyer partnership in which I was the senior and managing partner from approximately August 1985 to July 1991.

Honaker Law Firm
P.O. Box 1804
Rock Springs, WY 82902
This was a solo practice that I established in approximately December 1981, and converted into a partnership in approximately August 1985.

State of Wyoming
State Public Defender
2001 Capitol Avenue
Cheyenne, WY 82002
I was appointed by the Governor of Wyoming and served as State Public Defender from approximately November 1979 to December 1981. I served as Assistant Public Defender from March – November 1979.

State of Wyoming
Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
I was appointed by the Governor of Wyoming and served as Assistant Attorney General from approximately June 1976 to April 1979.

b. Describe:

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

From 1976 to 1981 I served as a prosecutor and public defender, focusing on criminal cases. I handled a great deal of criminal litigation until 1992,



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00237 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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when my criminal law practice tapered off. My current practice focuses on civil litigation all over Wyoming, with about 40 percent of my litigation cases in the federal courts and about 60 percent in the state courts. With the advent of alternative dispute resolution, I resolve many cases through mediation every year. In addition, I have briefed and argued more than 50 appeals in the Wyoming Supreme Court and the United States Court of Appeals for the Tenth Circuit.

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

I typically represent individuals, and ordinarily they are plaintiffs in civil litigation. I represent large corporate defendants from time to time, including Questar Pipeline Company, Caterpillar Tractor Co., and Anadarko Petroleum, and I have represented large insurers, including St. Paul and Zurich. I also represent a large number of physicians and medical groups, as well as small businesses in Southwestern Wyoming. I represent the Rock Springs Firefighters Union and the Rock Springs Police Protective Association.

The heart of my practice is representing individuals who have been injured or killed because of defective products, negligent truck drivers, or negligence in the oil field or mines. I believe I have handled more wrongful death cases than any other Wyoming lawyer – 87 at last count – and have developed special expertise in the nuances of wrongful death law in Wyoming.

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

i. Indicate the percentage of your practice in:
   1. federal courts: 40%
   2. state courts of record: 60%
   3. other courts.

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

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

I would estimate between 25 and 35 cases in which I was chief or sole counsel, and perhaps about five as a second chair.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00238 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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i. What percentage of these trials were:
   1. jury: 90%
   2. non-jury: 10%

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

I am a member of the Bar of the Supreme Court, but I have not actually briefed or argued a case in the Supreme Court.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

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

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

1. State v. Selig.

I represented the defendant, Ronald Selig, in a capital case in 1979-80 in which he was charged with murdering three hunters in the Big Horn Mountains of Wyoming. I was chief counsel. The defense was self-defense. The case was tried for two weeks in the state district court in Cody, Wyoming, before Judge John T. Dixon (now deceased) and a jury, but ended in a hung jury. The case was retried in the state district court in Jackson, Wyoming, before Judge Robert B. Ranck (now retired, but reachable at (307) 733-2574) and a jury, which acquitted the defendant. I mention this case because it was one of the most notorious murder cases in the history of Wyoming. My co-counsel was John V. Lake, 500 South Gillette Avenue, Suite 112, Gillette, WY 82716. The adverse counsel was the Big Horn County & Prosecuting Attorney, Nancy J. Guthrie, who is now the state district court judge in Jackson, Wyoming, Teton County Courthouse, P.O. Box 1036, Jackson, WY 83001, (307) 733-1461. A bill of exceptions taken to the Wyoming Supreme Court by the State is reported as *State v. Selig*, 635 P.2d 786 (Wyo. 1981).

2. State v. Daniel.

I represented the defendant, Alvah Daniel, in a first degree murder case in 1981-82, in which he was charged with murdering a prominent woman in Rock



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00239 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Springs, Wyoming. I was chief counsel. The defense was accident, the defendant claiming he accidentally stabbed the decedent with a pen knife after she sprayed him with mace. The case was tried for two weeks in the state district court in Green River, Wyoming, before Judge John D. Troughton (now retired, but reachable at (307) 789-6174), and the defendant was convicted of involuntary manslaughter. The remarkable thing about this case was the admission into evidence of a stipulated polygraph test, and a clash of testimony between the two foremost polygraph experts in the world at that time – Dr. David Raskin and Dr. David T. Lykken. This is also a case in which the defendant subsequently went on the "Geraldo Rivera Show" and confessed to having premeditated a murder. My co-counsel was W. Keith Goody, P.O. Box 3690, Alpine, WY 83128, (307) 733-4446. The adverse counsel was the Sweetwater County & Prosecuting Attorney, Jere A. Ryckman, who is now the state district court judge in Green River, Wyoming, P.O. Box 1210, Green River, WY 82935-1210, (307) 872-6344, and his deputy, Robert J. Reese, Attorney at Law, P.O. Box 157, Green River, WY 82935-0157, (307) 875-5175. The appeal of the conviction to the Wyoming Supreme Court is reported as *Daniel v. State*, 644 P.2d 172 (Wyo. 1982).

3. Fanning v. Fanning.

This was a litigated divorce case in which, on appeal to the Wyoming Supreme Court, I was successful in establishing as the black letter law of Wyoming the principle that, for purposes of an award of child custody, a father must be given equal consideration with the mother. In other words, the "maternal preference rule" was abrogated. The case is reported as *Fanning v. Fanning*, 717 P.2d 346 (Wyo. 1986). The trial judge was Kenneth G. Hamm (now deceased), and adverse counsel was Jere A. Ryckman, who is now the state district court judge in Green River, Wyoming, P.O. Box 1210, Green River, WY 82935-1210, (307) 872-6344.

4. Jones v. Chevron.

This case established the frequently cited black letter law of Wyoming concerning the duty of care that an owner of premises owes to the employee of an independent contractor. The principle is significant because of Wyoming's mineral-based economy in which the rule of law frequently must be applied to oil field, pipeline, and mining accidents. The case is reported as *Jones v. Chevron, U.S.A., Inc.*, 718 P.2d 890 (Wyo. 1986). The judge was State District Judge Kenneth G. Hamm (now deceased). Adverse counsel was Richard R. Bostwick, who now is retired and in his late 80's. He still lists an office address as Murane & Bostwick, LLC, 201 North Wolcott Street, Casper, WY 82601, (307) 234-9345. An additional adverse counsel was Mark W. Gifford, P.O. Box 2508, Casper, WY 82602-2508, (307) 265-3265.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00240 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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5. McLaughlin v. Michelin Tire Corp., Caterpillar Tractor Co., and Fletcher Enterprises.

This was the first case in which I obtained a recovery of more than $1 million for a client. The case was settled following an appeal of a summary judgment to the Wyoming Supreme Court in which the principle was established for Wyoming that the failure to warn, in and of itself, can be deemed a product defect. I worked on this case for seven years. The case is reported as *McLaughlin v. Michelin Tire Corp.*, 778 P.2d 59 (Wyo. 1989). The trial judge was State District Judge Kenneth G. Hamm (now deceased). Michelin actually was dismissed from the case without paying any money. Their counsel was Peter K. Michael, P.O. Box 1707, Cheyenne, WY 82003-1707, and Nicholas G. Kalokathis, now a state district court judge in Cheyenne, 309 West 20th Street, Suite 3300, Cheyenne, WY 82001, (307) 633-4290. Counsel for Fletcher Enterprises, which paid most of the settlement, is now deceased. Fletcher was represented late in the case by Richard E. Day of Williams, Porter, Day & Neville, P.O. Box 10700, Casper, WY 82602, (307) 265-0700. Counsel for Caterpillar Tractor Co. was Paul Kapp of Sundahl, Powers, Kapp & Martin, P.O. Box 328, Cheyenne, WY 82003-0328, (307) 632-6421. Interestingly, I was later retained by Caterpillar to defend a case on their behalf.

6. State v. West.

This is a case in which I was appointed in 1986 by State District Judge Kenneth G. Hamm (now deceased) to serve as Special Prosecutor in a high profile fraud case against the sitting mayor of Rock Springs, Wyoming, who was C. Keith West. Mayor West owned a company called Desert Oil Company, and was involved in overcharging customers (large oil companies, including Chevron). An additional special prosecutor was Robert J. Pickett, a Rock Springs attorney who was later disbarred over an unrelated matter. It was our task to review over 80 boxes of documents and to construct an indictment of, as I recall, about 235 counts. The problem with the case was that the amount of money involved in each count was less than $1,000, making the counts misdemeanors, and State District Judge Leonard McEwan (now retired and in his late 80's) ruled that the counts could not be aggregated into a felony. At that point the case was plea bargained. The defendant was ordered to pay fines and restitution, but was not incarcerated. It was during the prosecution of this case that I had a bullet pass through my living room window early one morning. The case can be found as *State of Wyoming v. C. Keith West*, CR-86-75, Third Judicial District, Sweetwater County, Wyoming. Judgment and sentence was entered April 13, 1987.

7. Wolf v. Rail Link.

Part of the significance of this case is that it resulted in the largest voluntary F.E.L.A. settlement in the history of the United States, $8.625 million. Dominic Wolf was a 20-year old Hispanic boy who was sent, inexperienced and untrained, into ultra-hazardous work for a small spur railroad company called Rail Link, Inc., that operated trains transporting soda ash from a processing facility to the Union Pacific main line in Southwestern Wyoming. Dominic lost both legs



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00241 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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when he was run over by a train operated by an incompetent and intoxicated engineer. The case was investigated by the United States Mine Safety and Health Administration, and resulted in federal indictments against Rail Link officials who falsified Wolf's training records. I was involved in working with the U.S. Attorney's office and in preparing witnesses, including my client, to testify before a federal grand jury. Before culminating in settlement, the case was contentiously litigated, and then mediated in St. Louis, then in Chicago, then in Denver, and finally in Cheyenne before U.S. Magistrate Judge William C. Beaman. The federal trial judge was U.S. District Judge Clarence A. Brimmer. My co-counsel was John P. Kujawski, 1331 Park Plaza Drive, Suite 2, O'Fallon, IL 62269-1764, (618) 622-3600. The primary cite to the case is *Wolf v. Rail Link, Inc., et al*, U.S. District Court, District of Wyoming, 98-CV-1044B. A bad faith case against one of the insurers flowed out of the primary case, cited as *Wolf and General Star Indemnity Company v. Rail Link, Inc. and Reliance Insurance Company*, U.S. District Court, District of Wyoming, 99-CV-040B. That case was settled while on appeal to the U.S. Court of Appeals for the Tenth Circuit, Nos. 00-8020 and 00-8021. There were a number of defense counsel in the case, including Scott L. Carey, Bates & Carey, 191 North Wacker, Suite 2400, Chicago, IL 60606, (312) 762-3140, for General Star; Michael J. Sullivan and Jeffrey C. Brinkerhoff of Brown, Drew & Massey, 159 North Wolcott Street, Suite 200, Casper, WY 82601, Mr. Sullivan – (307) 232-0222, Mr. Brinkerhoff – (307) 234-1000, for Rail Link, Inc.; Thomas A. Nicholas III, Hirst & Applegate, P.O. Box 1083, Cheyenne, WY 82003-1083, (307) 632-0541, for Reliance.

Mr. Kujawski and I co-counseled a second case against Rail Link, Inc. in 2004 that resulted in a substantial recovery on behalf of the family of a man who was killed in the same rail yard where Dominic Wolf lost his legs. That case is cited as *Ridgeway v. Rail Link, Inc.*, Third Judicial District, Sweetwater County, Wyoming, No. C-04-140-R. Mr. Brinkerhoff defended Rail Link in this case. A probate aspect of the case was tried before State District Court Judge Nena James in 2005, cited as *In the Matter of the Estate of Jerry L. Ridgeway*, Probate No. 03-11-J.

Rail Link no longer does business in Southwestern Wyoming.

8. Kenyon, et al. v. Diamond Surface, et al.

I represented the families of three men who were killed in a pipeline explosion, and a woman who was badly burned in the explosion, that occurred near Interstate 80 in Wyoming. The case is cited as *Kenyon, Hopkins and Cleveland v. Diamond Surface, Inc., Western Gas Resources, Inc., and the State of Wyoming*, Third Judicial District, Sweetwater County, Wyoming, Nos. C-96-228, C-96-229, and C-96-230. The judge was State District Judge Jere A. Ryckman. My co-counsel was Kerry N. Jardine of Burg, Simpson, Eldredge, Hersh & Jardine, 40 Inverness Drive East, Englewood, CO 80112, (303) 792-5595. Adverse counsel included Paul K. Knight, for Diamond Surface, a Jackson, Wyoming attorney now suspended from the practice of law, and Joe M. Teig, for



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00242 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Western Gas, of Holland & Hart, LLP, 25 South Willow Street Suite 200, P.O. Box 68, Jackson, WY 83001-0068, (307) 739-9741. As president of the Wyoming State Bar, I later appointed Mr. Teig, confirmed by the Wyoming Supreme Court, to serve as chair of the Board of Professional Responsibility. Representing the State of Wyoming was Gregory C. Dyekman of Dray, Thomson & Dyekman, P.C., 204 East 22nd Street, Cheyenne, WY 82001-3799, (307) 634-8891. Mr. Dyekman later chaired the state bar convention for me. The State of Wyoming was dismissed from the case, and the appeal of that dismissal is reported as *Diamond Surface, Inc. v. Cleveland*, 963 P.2d 996 (Wyo. 1998). The case against Diamond Surface and Western Gas was intensely litigated, and was finally settled in mediation. I believe the case has resulted in safer procedures for monitoring highway construction projects near pipelines and utilities in Wyoming.

9. Wright v. Pacificorp.

This was a federal court case in which I represented Larry Wright, an Auburn-educated engineer and high level management employee of Pacificorp, which operated the Bridger Coal Company in Southwestern Wyoming. Wright's employment had been terminated, and the lawsuit sounded in breach of contract, age discrimination, and bad faith. Discovery was voluminous, and many depositions were taken in Portland, Oregon, Salt Lake City, Utah, and in Wyoming, The case was settled in an all-night federal court mediation shortly before trial. The mediator was U.S. Magistrate Judge William C. Beaman. The trial judge was U.S. District Judge Clarence A. Brimmer. Adverse counsel were Stanley K. Hathaway, the former Governor of Wyoming who is now deceased, and his partner, Brent R. Kunz of Hathaway & Kunz, PC, 2515 Warren Avenue, Suite 500, P.O. Box 1208, Cheyenne, WY 82003-1208, (307) 634-7723, and also Pacific Minerals corporate counsel from Portland. Shortly after this case was settled, Pacific Minerals replaced the manager who fired Larry Wright, and Bridger Coal Company has been a model of good employer-employee relations ever since. The case is cited as *Wright v. Pacificorp, et al.*, U.S. District Court, District of Wyoming, 96-CV-020B.

10. Moncecchi v. Nissan North America.

This was a federal court case in which I represented Johannah Moncecchi, a 19-year old University of Wyoming student who was catastrophically injured when the passenger door of a 1999 Nissan Pathfinder came unlatched during a rollover collision, and she was partially ejected from the vehicle. This was a complex liability case in which substantial work was done in the area of accident reconstruction, biomechanical engineering, computer animation, restraint system analysis, and door system analysis. Following extensive depositions of fact and expert witnesses, the case was settled at a mediation in Denver during the summer of 2006. The trial judge was U.S. District Judge Alan B. Johnson. My co-counsel was Terry W. Mackey, Moriarity, Badaruddin & Booke, LLC, 314 East 21st Street, Cheyenne, WY 82001, (307) 635-7517. Adverse counsel were Paul Kapp of Sundahl, Powers, Kapp & Martin, P.O. Box 328, Cheyenne, WY 82003-0328,



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(307) 632-6421, and Kim Schmidt and Mary Novacheck of Bowman & Brooke, LLP, 150 South Fifth Street, Suite 2600, Minneapolis, MN 55402, (612) 672-3200. The case is cited as *Moncecchi v. Nissan North America, Inc.*, U.S. District Court, District of Wyoming, No. 05-CV-304J.

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

Serving on the House Judiciary Committee of the Wyoming House, for me, was a very special act of public service as a lawyer. We were charged with writing the laws that citizens would live by and that lawyers would practice by, and that gives you a very great sense of responsibility. The condition of bills arriving at committee was often appalling. The non-lawyer members of the committee – and in Wyoming there are very few lawyers in a legislature largely made up of ranchers and farmers – relied heavily upon the lawyers to craft language that would effectuate the committee's intent. While floor speeches receive a lot of public attention, the real lawyer's work occurs in amending bills in committee and thereby seeking consensus. I had a reputation in the House Judiciary Committee for being extremely precise in the crafting of language, but in the crafting of language upon which fellow legislators could agree. My precision in writing serves me well in the crafting of clear and concise jury instructions, and I served for six years on the committee that drafts Wyoming's Civil Pattern Jury Instructions for the Supreme Court.

Leading a state bar association, which I did in 2002-03, was one of the most significant activities I pursued as a lawyer. My focus was on ethics, civility, and professionalism, and lifting the public image of the legal profession. My columns reflect the themes that I spread around the state, and my report for that year summarizes a series of major accomplishments. One year is a very short period of time. To accomplish major things requires a great deal of pre-planning, followed by energetic and efficient leadership. Within the same year we completed, under my leadership, a complete revision of Wyoming's disciplinary code for lawyers. Serving presently as vice-chair of the Board of Professional Responsibility, I can testify that the new disciplinary code is fair to both complainants and to lawyers, and is working exceptionally well. I believe our code provides a good model for other states.

Despite having served in a state legislature, I have not engaged in any lobbying activities except for appearing before the House Judiciary Committee on one occasion in 2003 on behalf of the Wyoming State Bar.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00244 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

I currently teach Business Law I at Western Wyoming Community College. I have taught this course in 2005-06 and 2006-07. I do it as a pro bono activity, donating my salary to the Western Wyoming Community College Foundation.

I taught the law of arrest and the law of search and seizure to law enforcement officers at the Wyoming Law Enforcement Academy, from 1976 to 1978. Any syllabus or notes for those courses no longer exist.

I have taught trial practice at the Western Trial Advocacy Institute, at the University of Wyoming College of Law, during the summer session in 1993. There is no syllabus or notes for that summer teaching experience.

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

At present, I have no arrangements to be compensated in the future for any financial or business interest. Should I be confirmed and appointed as a United States District Judge, I will make arrangements to transfer my cases to other counsel for completion. While I anticipate I would be reimbursed for expenses I have advanced and would be compensated for the reasonable value of the legal services I have done on those cases, I will seek ethical advice concerning that. I will do whatever is ethical and proper.

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

No.

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

See attached Financial Disclosure Report



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00245 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

See attached Net Worth Statement

26. **Potential Conflicts of Interest**:

a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

I am committed to carefully reviewing each party and matter with regard to the issue of conflict of interest or appearance of conflict of interest. At this time, there is only one situation that comes to mind. My brother-in-law, Michael D. Newman, is a practicing attorney in Rock Springs, Wyoming who occasionally appears in our federal courts. Mr. Newman also is a former partner.

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

I am committed to resolving any potential conflict of interest by specifically identifying my concern, by considering any concern of others that may be brought to my attention, and by applying appropriate rules and principles of judicial ethics to the situation. In all cases, I will adhere to the Code of Conduct for United States Judges, and all relevant statutes, policies and procedures.

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

I have not logged pro bono work, but I do quite a bit of it. Most typical instances are doing wills and powers of attorney for senior citizens, providing informal advice to individuals on how they can best resolve their own insurance claims, providing informal advice on landlord-tenant problems, assisting people in filling out pro se divorce or child custody forms, helping people prepare small claims documents, and on some occasions drawing up simple pro se complaints for them.

28. **Selection Process**:

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



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00246 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Please do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

United States District Judge Clarence A. Brimmer announced September 27, 2006 that he was taking senior status. Shortly after Judge Brimmer's announcement, Senator Thomas appointed a selection committee of lawyers to screen qualified candidates. I was interviewed by the selection committee in Cheyenne, Wyoming on December 7, 2006. The following day I was notified that I was one of the three persons chosen by the selection committee to be recommended to Senator Thomas. I was subsequently notified that Senator Thomas had sent my name, along with two others, to the White House for its consideration.

I was interviewed at the White House on January 22, 2007, and was subsequently notified that the White House wished to move forward with a possible nomination, and that counsel from the Department of Justice would be in contact with me. I have been in contact with counsel from the Department of Justice regarding the nomination paperwork. My nomination was submitted to the Senate on March 19, 2007.

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

Absolutely not.



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# FINANCIAL DISCLOSURE REPORT
## NOMINATION FILING

*Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)*

| 1. Person Reporting (last name, first, middle initial) | 2. Court or Organization | 3. Date of Report |
|---|---|---|
| Honaker, Richard H | U.S. District Court, Wyoming | 03/20/2007 |
| **4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)** | **5a. Report Type (check appropriate type)** | **6. Reporting Period** |
| U.S. District Judge Nominee | [X] Nomination, Date 03/19/2007<br>[ ] Initial [ ] Annual [ ] Final<br>5b. [ ] Amended Report | 01/01/2006 to 03/20/2007 |
| **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.** | |
| P.O. Box 366<br>Rock Springs, WY 82901 | 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.)*

[ ] NONE *(No reportable positions.)*

| POSITION | NAME OF ORGANIZATION/ENTITY |
|---|---|
| 1. Member, LLC | Honaker Law Offices, LC |
| 2. Trustee | Trust 1 |
| 3. National Board Member | American Board of Trial Advocates |
| 4. Board Member | Home School Legal Defense Association |
| 5. Board Member | Home School Foundation |
| 6. Member, LLC | Classic Chic, LC |
| 7. Member, LLC | The Horse Creek Ranch, a Wyoming LLC |
| 8. | |

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

[X] NONE *(No reportable agreements.)*

| DATE | PARTIES AND TERMS |
|---|---|
| 1. | |
| 2. | |
| 3. | |

| FINANCIAL DISCLOSURE REPORT<br>Page 2 of 10 | Name of Person Reporting | Date of Report |
|---|---|---|
| | Honaker, Richard H | 03/20/2007 |

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

**A. Filer's Non-Investment Income**

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

| | DATE | SOURCE AND TYPE | INCOME (yours, not spouse's) |
|---|---|---|---|
| 1. | 2005 | Honaker Law Offices, LC, Legal Fees | $ 747,967 |
| 2. | 2006 | Honaker Law Offices, LC, Legal Fees | $ 352,543 |
| 3. | 2006 | Home School Legal Defense Association, Directors' Fees | $ 3,000 |
| 4. | 2006 | Western Wyoming Community College -- Teaching | $ 1,611 |
| 5. | 2007 | Honaker Law Offices, LC, Legal Fees | $ 162,619 |
| 6. | 2007 | Home School Legal Defense Association, Directors' Fees | $ 1,000 |

**B. Spouse's Non-Investment Income** - *If you were married during any portion of the reporting year, complete this section.*
*(Dollar amount not required except for honoraria.)*

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

| | DATE | SOURCE AND TYPE |
|---|---|---|
| 1. | | |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |

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

☐ NONE *(No reportable reimbursements.)*

| | SOURCE | DESCRIPTION |
|---|---|---|
| 1. | EXEMPT | |
| 2 | | |
| 3. | | |
| 4. | | |
| 5. | | |

| FINANCIAL DISCLOSURE REPORT<br>Page 3 of 10 | Name of Person Reporting | Date of Report |
|---|---|---|
| | Honaker, Richard H | 03/20/2007 |

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

☐ NONE *(No reportable gifts.)*

| SOURCE | DESCRIPTION | VALUE |
|---|---|---|
| 1. EXEMPT | | |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |

**VI. LIABILITIES.** *(Includes those of spouse and dependent children. See pp. 32-34 of instructions.)*

☐ NONE *(No reportable liabilities.)*

| CREDITOR | DESCRIPTION | VALUE CODE |
|---|---|---|
| 1. Chase United Mileage Plus Visa | Credit Card | J |
| 2. Countrywide Home Loans | Mortgage on rental property, Laramie, Wyoming house | L |
| 3. | | |
| 4. | | |
| 5. | | |

**FINANCIAL DISCLOSURE REPORT**
Page 4 of 10

| Name of Person Reporting | Date of Report |
|---|---|
| Honaker, Richard H | 03/20/2007 |

## VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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) |
|---|---|---|---|---|---|---|---|---|---|
| 1. Trust #1 | E | Rent | P1 | W | EXEMPT | | | | |
| 2. --Rental Property, Office Building, Rock Springs, Wyoming | | None | | | | | | | |
| 3. --Rental Property -- Laramie, Wyoming House | | None | | | | | | | |
| 4. --Rock Springs Residence | | None | | | | | | | |
| 5. --California residential property | | None | | | | | | | |
| 6. --Undeveloped rural residential lots | | None | | | | | | | |
| 7. --Rocky Mountain Bank Checking Acct, Rock Springs, Wyoming | | None | | | | | | | |
| 8. Assurant Health HSA | A | Interest | K | T | | | | | |
| 9. Rock Springs National Bank Acct, Rock Springs, Wyoming | | None | J | T | | | | | |
| 10. State Farm Life Policy | A | Interest | J | T | | | | | |
| 11. Fidelity Brokerage Account X | | | | | | | | | |
| 12. --AAV | A | Dividend | | | | | | | |
| 13. --ACAS | A | Dividend | J | T | | | | | |
| 14. --BAC | A | Dividend | | | | | | | |
| 15. --BJS | A | Dividend | J | T | | | | | |
| 16. --BP | | None | J | T | | | | | |
| 17. --CHI | A | Dividend | | | | | | | |

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

**FINANCIAL DISCLOSURE REPORT**
Page 5 of 10

| Name of Person Reporting | Date of Report |
|---|---|
| Honaker, Richard H | 03/20/2007 |

**VII. INVESTMENTS and TRUSTS** – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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) |
|---|---|---|---|---|---|---|---|---|---|
| 18. --CVX | B | Dividend | K | T | | | | | |
| 19. --EWJ | A | Dividend | | | | | | | |
| 20. --EWY | A | Dividend | K | T | | | | | |
| 21. --FGP | A | Dividend | | | | | | | |
| 22. --GPS | A | Dividend | | | | | | | |
| 23. --IVV | A | Dividend | | | | | | | |
| 24. --KMP | A | Dividend | | | | | | | |
| 25. --MDY | A | Dividend | | | | | | | |
| 26. --PVX | A | Dividend | | | | | | | |
| 27. --PWJ | B | Dividend | | | | | | | |
| 28. --QQQQ | A | Dividend | K | T | | | | | |
| 29. --RF | A | Dividend | | | | | | | |
| 30. --SLB | A | Dividend | | | | | | | |
| 31. --UNH | | None | J | T | | | | | |
| 32. --VZ | A | Dividend | | | | | | | |
| 33. --WFC | A | Dividend | | | | | | | |
| 34. --Money Market Funds | 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 =$250,001 - $500,000 | O =$500,001 - $1,000,000 | P1 =$1,000,001 - $5,000,000 | P2 =$5,000,001 - $25,000,000 | |
| 3. Value Method Codes (See Column C2) | P3 =$25,000,001 - $50,000,000 | R =Cost (Real Estate Only) | P4 =More than $50,000,000 | T =Cash Market | |
| | Q =Appraisal | V =Other | S =Assessment | | |
| | U =Book Value | | W =Estimated | | |

**FINANCIAL DISCLOSURE REPORT**
Page 6 of 10

| Name of Person Reporting | Date of Report |
|---|---|
| Honaker, Richard H | 03/20/2007 |

## VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | If not exempt from disclosure | | | |
| | (1) Amount Code 1 (A-H) | (2) Type (e.g. div., rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | (2) Date Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
| 35. Fidelity Brokerage Account Z | | | | | | | | | |
| 36. --BRLC | | None | J | T | | | | | |
| 37. --CAT | A | Dividend | K | T | | | | | |
| 38. --DVN | A | Dividend | J | T | | | | | |
| 39. --NUE | | None | K | T | | | | | |
| 40. --QQQQ | A | Dividend | K | T | | | | | |
| 41. --RAI | | None | K | T | | | | | |
| 42. --RTN | | None | K | T | | | | | |
| 43. --Money Market Funds | A | Interest | J | T | | | | | |
| 44. Fidelity SEP-IRA | D | Dividend | O | T | | | | | |
| 45. --ACAS | | | | | | | | | |
| 46. --AET | | | | | | | | | |
| 47. --AMX | | | | | | | | | |
| 48. --BRLC | | | | | | | | | |
| 49. --BTU | | | | | | | | | |
| 50. --BYD | | | | | | | | | |
| 51. --C | | | | | | | | | |

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

| FINANCIAL DISCLOSURE REPORT<br>Page 7 of 10 | Name of Person Reporting<br>Honaker, Richard H | Date of Report<br>03/20/2007 |
|---|---|---|

**VII. INVESTMENTS and TRUSTS** – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets)<br>Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | (1) Amount Code 1 (A-H) | (2) Type (e.g. div., rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | 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) |
| 52. --CELG | | | | | | | | | |
| 53. --CE | | | | | | | | | |
| 54. --CX | | | | | | | | | |
| 55. --DVN | | | | | | | | | |
| 56. --ENPIX | | | | | | | | | |
| 57. --EP | | | | | | | | | |
| 58. --MDPIX | | | | | | | | | |
| 59. --MDU | | | | | | | | | |
| 60. --MO | | | | | | | | | |
| 61. --MPEL | | | | | | | | | |
| 62. --MPIXX | | | | | | | | | |
| 63. --NBR | | | | | | | | | |
| 64. --QQQQ | | | | | | | | | |
| 65. --RIG | | | | | | | | | |
| 66. --PSY | | | | | | | | | |
| 67. --UST | | | | | | | | | |
| 68. --UTX | | | | | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1 Income Gain Codes:<br>(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<br>(See Columns C1 and D3) | J =$15,000 or less | K =$15,001 - $50,000 | L =$50,001 - $100,000 | M =$100,001 - $250,000 | |
| | N =$250,001 - $500,000 | O =$500,001 - $1,000,000 | P1 =$1,000,001 - $5,000,000 | P2 =$5,000,001 - $25,000,000 | |
| 3 Value Method Codes<br>(See Column C2) | P3 =$25,000,001 - $50,000,000 | R =Cost (Real Estate Only) | P4 =More than $50,000,000 | T =Cash Market | |
| | Q =Appraisal | V =Other | S =Assessment | | |
| | U =Book Value | | W =Estimated | | |

| FINANCIAL DISCLOSURE REPORT<br>Page 8 of 10 | Name of Person Reporting<br>Honaker, Richard H | Date of Report<br>03/20/2007 |
|---|---|---|

**VII. INVESTMENTS and TRUSTS** – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets)<br>Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | If not exempt from disclosure | | | |
| | (1) Amount Code 1 (A-H) | (2) Type (e.g. div., rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | (2) Date Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
| 69. --FDRXX | | | | | | | | | |
| 70. AXA Advisors | | | | | | | | | |
| 71. --Cash | A | Interest | J | T | | | | | |
| 72. --AWSCX | A | Dividend | J | T | | | | | |
| 73. --BALCX | A | Dividend | J | T | | | | | |
| 74. --FADCX | A | Dividend | J | T | | | | | |
| 75. --FSRCX | A | Dividend | J | T | | | | | |
| 76. --SHSPX | | None | J | T | | | | | |
| 77. --TEDSX | A | Dividend | J | T | | | | | |
| 78 --TEGTX | A | Dividend | J | T | | | | | |
| 79. ALPS Class A Common Shares | | None | K | T | | | | | |

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

| FINANCIAL DISCLOSURE REPORT<br>Page 9 of 10 | Name of Person Reporting<br>Honaker, Richard H | Date of Report<br>03/20/2007 |
|---|---|---|

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

| FINANCIAL DISCLOSURE REPORT<br>Page 10 of 10 | Name of Person Reporting<br>Honaker, Richard H | Date of Report<br>03/20/2007 |
|---|---|---|

**IX. CERTIFICATION.**

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

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

Signature Richard H. Honaker Date March 20, 2007

**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 | | 75 | 000 | Notes payable to banks-secured | | | |
| U.S. Government securities-add schedule | | | | Notes payable to banks-unsecured | | | |
| Listed securities-add schedule | | 891 | 734 | Notes payable to relatives | | | |
| Unlisted securities--add schedule | | 19 | 084 | Notes payable to others | | | |
| Accounts and notes receivable: | | | | Accounts and bills due | | | |
| Due from relatives and friends | | 20 | 000 | Unpaid income tax | | | |
| Due from others | | | | Other unpaid income and interest | | | |
| Doubtful | | | | Real estate mortgages payable-add schedule | | 218 | 000 |
| Real estate owned-add schedule | 1 | 980 | 000 | Chattel mortgages and other liens payable | | 20 | 000 |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 150 | 000 | | | | |
| Cash value-life insurance | | | | | | | |
| Other assets itemize: | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | Total liabilities | | 278 | 000 |
| | | | | Net Worth | 2 | 857 | 818 |
| Total Assets | 3 | 135 | 818 | Total liabilities and net worth | 3 | 135 | 818 |
| 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 | | 40 | 000 | | | | |
| Other special debt | | | | | | | |

**FINANCIAL STATEMENT**

NET WORTH SCHEDULES

| | |
|---|---|
| Listed Securities | |
| Investment Account 1 | |
| ACAS | $ 11,118 |
| BJS | 2,736 |
| CVX | 27,752 |
| EWY | 37,770 |
| QQQQ | 21,635 |
| SPRXX | 565 |
| FTEXX | 88,585 |
| UNH | 10,860 |
| XLE | 22,916 |
| Investment Account 2 | |
| Cash | $ 12,959 |
| BRLC | 3,060 |
| CAT | 16,043 |
| DVN | 13,036 |
| NUE | 19,116 |
| QQQQ | 38,943 |
| RAI | 18,108 |
| RTN | 15,990 |
| SPRXX | 5,217 |
| Investment Account 3 | |
| FDRXX | 30,320 |
| CE | 9,066 |
| ACAS | 17,788 |
| AET | 10,968 |
| AMX | 36,648 |
| BRLC | 12,240 |
| BTU | 7,682 |
| BYD | 8,922 |
| C | 15,018 |
| CELG | 21,316 |
| PSY | 16,384 |
| CX | 16,340 |
| DVN | 32,590 |

| | |
|---|---|
| ENPIX | 50,659 |
| EP | 14,040 |
| MDPIX | 47,362 |
| MDU | 10,889 |
| MO | 25,566 |
| MPEL | 6,108 |
| MPIXX | 10,965 |
| NBR | 9,063 |
| QQQQ | 21,635 |
| RIG | 23,490 |
| UST | 12,814 |
| UTX | 26,028 |
| Investment Account 4 | |
| Cash | 451 |
| AWSCX | 5,580 |
| BALCX | 6,069 |
| SHSPX | 3,184 |
| FSRCX | 2,633 |
| FADCX | 5,304 |
| TEDSX | 2,359 |
| TEGTX | 5,844 |
| Total Listed Securities | $ 891,734 |
| Unlisted Securities | |
| ALPS Corporation | $ 19,084 |
| Real Estate Owned | |
| Personal residence | $ 750,000 |
| Residential Property 1 | 375,000 |
| Residential Property 2 | 230,000 |
| Office Building | 400,000 |
| Undeveloped lots | 225,000 |
| Total Real Estate Owned | $ 1,980,000 |
| Real Estate Mortgages Payable | |
| Personal residence | $ 150,000 |
| Residential Property 2 | 68,000 |
| Total Real Estate Mortgages Payable | $ 218,000 |

AFFIDAVIT

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

March 20, 2007
(DATE)

Richard H. Honaker
(NAME)

KAYE L. FABRITZ • NOTARY PUBLIC
COUNTY OF SWEETWATER STATE OF WYOMING
MY COMMISSION EXPIRES APRIL 26, 2008

Kaye L. Fabritz
(NOTARY)

STATE OF WYOMING )
: ss
COUNTY OF SWEETWATER )

SUBSCRIBED and sworn to before me by Richard H. Honaker this 20th day of March, 2007.

Senator FEINSTEIN. Thank you. Thank you. Welcome to the family.

Mr. Puryear.

**STATEMENT OF GUSTAVUS ADOLPHUS PURYEAR, IV, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE MIDDLE DISTRICT OF TENNESSEE**

Mr. PURYEAR. Thank you, Senator. Thank you for holding this hearing. I appreciate the Committee's and staff's hard work in preparing for this hearing.

Senator FEINSTEIN. Is your mic on?

Mr. PURYEAR. It is now.

Senator FEINSTEIN. OK. Good.

Mr. PURYEAR. Thank you, Senator. I appreciate your holding this hearing. I want to thank the Committee and the staff for all the hard work that they do in getting ready for this hearing. I particularly would like to thank Senators Alexander and Corker for coming by and lending their support, and for their friendship through the years.

I'd also like to introduce you to my wife, Jennifer, who is here, and my daughters, Ruth and Mary. I also have my mother, Mary Puryear, who's here. And I'm blessed to have my in-laws, Joe and Marion Herndon, coming to the hearing as well. So I want to thank all of them for their love and support throughout this process, and I look forward to answering any questions you may have.

Senator FEINSTEIN. Welcome to the family, and particularly to the little ones. You're so well behaved.

[Laughter.]

Please, thank you.

[The biographical information follows.]

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

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

   Gustavus Adolphus Puryear IV

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

   United States District Judge for the Middle District of Tennessee

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

   10 Burton Hills Blvd.
   Nashville, TN 37215

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

   1968, Atlanta, Georgia.

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

   Married, Jennifer Herndon Puryear (Jennifer Brigitte Herndon), Attorney/Homemaker, 2 dependent children.

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

   University of North Carolina School of Law, 1990-93, J.D. with honors, May 16, 1993.

   Emory University, 1986-90, B.A. with highest honors, May 14, 1990.

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

Include the name and address of the employer and job title or job description where appropriate.

Employers

January 2001-Present: Executive Vice President, General Counsel & Secretary, Corrections Corporation of America, 10 Burton Hills Blvd., Nashville, TN 37215.

April 1998-August 2000; October 2000-January 2001: Legislative Director, United States Senator Bill Frist, M.D., United States Senate, Washington, D.C. 20510.

April 1997-February 1998: Counsel, Special Investigation, United States Senate Committee on Governmental Affairs, United States Senate, Washington, D.C. 20510.

September 1994-April 1997: Associate Attorney, Farris, Warfield & Kanaday (now Stites & Harbison), 424 Church Street, Suite 1800, Nashville, TN 37219. Also employed while studying for the bar (June-August 1993) and as a summer associate (July-August 1992; June-August 1991).

August 1993-August 1994: Law Clerk, The Honorable Rhesa Hawkins Barksdale, Circuit Judge, United States Court of Appeals, Fifth Circuit, 245 E. Capitol St., Room 200, Jackson, MS 39201.

June 1992-July 1992: Summer Associate, King & Spalding, 191 Peachtree St., Atlanta, GA 30303.

September 1992, September 1991- May 1992; May 1991: Research Assistant, University of North Carolina School of Law, Van Hecke-Wettach Hall, 100 Ridge Road, Chapel Hill, NC 27713.

Other Business Affiliations

October 2006-Present: Director, Nashville Bank & Trust Co., 4525 Harding Road, Suite 300, Nashville, TN 37205.

1996-Present: Chief Manager, G.A.P. Realty #1, LLC, 2433 Bear Road, Nashville, TN 37215.

Institutions and Organizations

2002- Present: Director, American Red Cross, Nashville, 2201 Charlotte Avenue, Nashville, TN 37203.

2002- Present: Director (Chairman & President, April 2006-present), Antiques & Garden Show of Nashville, Inc., P.O. Box 50950, Nashville, TN 37205.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00263 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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2003-Present: Executive Board, Boy Scouts of America, Middle Tennessee Council, 3414 Hillsboro Pike, Nashville, TN 37215.

2004-Present: Trustee, Cheekwood Botanical Gardens & Museum of Art, 1200 Forrest Park Drive, Nashville, TN 37205.

2003-05; 2006-Present (Ex Officio): Director, Exchange Club of Nashville, Inc., P.O. Box 60128, Nashville, TN 37206.

2004-Present: Deacon (Treasurer, 2005-present), First Presbyterian Church, Nashville, 4815 Franklin Pike, Nashville, TN 37220.

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

None

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

University of North Carolina School of Law:
Order of the Coif
American Jurisprudence Awards in Civil Procedure, Contracts (I), Contracts (II), Criminal Law, and Introduction to Legal Writing
Sara Graham Kenan Scholar, Chancellors' Scholars Program (full tuition academic scholarship plus stipend)
Chancellors' Scholars Selection Committee (1995-97)

Emory University:
Phi Beta Kappa
Omicron Delta Kappa
Alben W. Barkley Scholar (half tuition merit scholarship)
Dean's Scholar (half tuition merit scholarship)

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

American Bar Association (1994-1997)
Nashville Bar Association (1994-97) (2006)
Tennessee Bar Association (1995-97) (2002-03; 2004-05)
Harry Phillips American Inn of Court (Associate Member 1995-97) (Executive Committee, 1996-97)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00264 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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11. **Bar and Court Admission**:

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

October 20, 1993, Tennessee.

There has been no lapse in membership.

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

Supreme Court, State of Tennessee, October 18, 1994.

United States District Court, Middle District of Tennessee, October 12, 1994.

There have been no lapses in membership.

12. **Memberships**:

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

Belle Meade Country Club, 2001-present.

Exchange Club of Nashville, Member, 2001- present.

First Presbyterian Church, Member, Nashville, 1994-present (Deacon, January 2004-present; Treasurer, January 2005-present).

National Presbyterian Church (Affiliate Member, 1998-2001).

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



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00265 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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To my knowledge, none of these organizations discriminate or have discriminated on the basis of race, sex, or religion, except as follows: While I have no personal knowledge of any prior discriminatory policies by Belle Meade Country Club, I understand that there were no African-American members prior to 1994. To my knowledge, during my membership at the club, it has not discriminated on the basis of race, sex, or religion.

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

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

Note, "The Truth About Polygraph Evidence in Criminal Trials: The Implications of State v. Mitchell," 70 N.C. L. Rev. 2042 (1992).

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

None

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

None

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

I have participated as a presenter at two "Super Conferences" sponsored by Inside Counsel magazine. The 2005 Super Conference was on June 22, 2005 at the Sheraton Hotel in Chicago. The topic concerned a General Counsel's relationship



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00266 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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with other senior executives. There were no prepared materials; my co-presenter and I had each participant anonymously address two areas of concern they have in their interaction with other corporate executives; we then discussed them.

The 2006 Super Conference was held April 18-89, 2006, also at the Sheraton Hotel in Chicago. The panel on which I was a presenter was entitled "Managing the Audit Process," and the focus of my remarks dealt with managing internal investigations within the Audit Committee process. I have a draft of my portion of the power point presentation, which was incorporated by conference staff into one power point for the whole panel. I also have a summary of our panel from Inside Counsel.

I also presented at the opening retreat for the Tennessee Bar Association's Leadership Law program. The presentation was on January 7, 2005, at Montgomery Bell State Park in Burns, TN. I was a panelist for a discussion of balancing personal lives and professional obligations for young lawyers. I have not located my notes for this presentation, and I do not believe any record was made of it.

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

Magazines

Robert Vosper, "The Young Gun," Corporate Legal Times, June 2004, at 66.

Greg Land, "No More Get Out of Jail Free," GC South, October 2005, at 16.

Roundtable, "Cost Control: Relationships Matter," GC South, February 2005, at 24.

Newspapers

Michael Cass, "Cheney's Debate Prep Had a Local Flavor," The Tennessean, October 7, 2004 at A1.

Getahn Ward, "Whistle-Blowers May Be Calling 3rd Parties," The Tennessean, August 12, 2004, at E1.

Holly Edwards, "What Would it Mean for Tennessee; Frist Could Boost State's Profile," The Tennessean, December 22, 2002, at A1.

Kirk Loggins, "CCA Not a Federal Civil Rights Target," The Tennessean, May 9, 2001, at A1.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00267 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Getahn Ward, "Court: Lawsuit Rules Don't Apply to Inmates From Other States," The Tennessean, May 4, 2001, at B7.

Rob Johnson, "Abuses in Prisoner Transport Alleged," The Tennessean, April 1, 2001, at A1.

Radio

I served as an occasional guest on a local radio show, "The Teddy Bart Roundtable," which was broadcast on AM 1160 in Nashville. A video of the show was also broadcast throughout Tennessee on some cable systems' public affairs stations. The archives previously maintained by the show on the internet are no longer available; the show went off the air in July 2005. According to my calendar, I was scheduled to appear on the show on the following dates (however, some appearances may have been canceled): May 21, 2002; June 7, 2002; June 24, 2002; July 23, 2002; August 7, 2002; September 23, 2002; November 27, 2002; January 27, 2003; February 10, 2003; March 18, 2003; March 25, 2003; April 15, 2003; April 28, 2003; May 27, 2003; June 3, 2003; July 31, 2003; October 2, 2003; October 15, 2003; October 28, 2003; November 25, 2003; March 15, 2004; April 1, 2004; May 19, 2004; May 27, 2004; June 3, 2004; August 9, 2004; September 28, 2004; October 11, 2004; November 2, 2004; November 29, 2004; January 5, 2005; February 1, 2005; February 23, 2005; March 18, 2005; May 19, 2005; June 21, 2005; and July 18, 2005.

Television

I appeared on the show "Day Side with Linda Vester," which formerly aired on Fox News, on October 6, 2004, to comment on the previous day's vice presidential debate.

I was interviewed by WSMV, Channel 4 News in Nashville (an NBC affiliate) at some point for a news story about how candidates for political office prepare for debates. I cannot recall when the interview was broadcast.

I was interviewed as part of a news story by WKRN, Channel 2 News (an ABC affiliate) in Nashville about whether those attending the 2004 National Republican Convention in New York City were afraid for their safety in the wake of the terrorist attacks of September 11, 2001. I believe the interview was broadcast during July 2004. I was interviewed as someone who had attended the 2000 convention (though not as a delegate).

I have appeared several times in segments on various news programs, including "Open Line," "Morning Line," and "Inside Politics" on WTVF, News Channel 5 (a CBS affiliate, though most of the programs I appeared on aired on News Channel 5+, cable channel 50 in Nashville) discussing current political issues.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00268 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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My calendar shows that I was to tape programs on: September 10, 2004; February 25, 2005; May 29, 2005; July 27, 2005; October 6, 2005; June 16, 2006; and November 3, 2006.

For the past three or four years, I have appeared on Channel 17 News, the local Fox affiliate, to discuss the President's State of the Union address. The interviews aired immediately following the State of the Union.

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, please provide:

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

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

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

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

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

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

I have not served as a judge.

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



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00269 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

47450.225

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

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

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

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

I have not served as a judge.

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

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

December 2003-Present: Commissioner, National Prison Rape Elimination Commission. Appointed by the then-Senate Majority Leader, Bill Frist, M.D.

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

In 2006, I assisted Bob Corker in preparing for his general election debates as a candidate for the U.S. Senate from Tennessee.

In 2004, I assisted Vice President Cheney in his preparation for a general election debate.

In 2002, I assisted Tennessee gubernatorial candidate Van Hilleary in one debate preparation session prior to a general election debate.

During August-October 2000, I was a consultant under contract to Bush-Cheney, Inc., to advise Vice President Cheney in his preparation for a general election debate.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00270 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

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

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

        I served as a clerk to the Honorable Rhesa Hawkins Barksdale, United States Circuit Judge for the Fifth Circuit (August 1993-August 1994).

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

        I have not practiced alone.

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

        January 2001-Present: Executive Vice President, General Counsel & Secretary, Corrections Corporations of America, 10 Burton Hills Blvd., Nashville, TN 37215.

        April 1998-August 2000; October 2000-January 2001: Legislative Director, United States Senator Bill Frist, M.D., United States Senate, Washington, D.C. 20510.

        April 1997-February 1998: Counsel, Special Investigation, United States Senate Committee on Governmental Affairs, Washington, D.C. 20510.

        August 1994-April 1997: Associate, Farris, Warfield & Kanaday (now Stites & Harbison), 424 Church Street, Suite 1800, Nashville, TN 37219.

    b. Describe:

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

        After completing my judicial clerkship, I began the private practice of law with Farris, Warfield & Kanaday in Nashville (the firm has since merged into Stites & Harbison). I worked in the litigation section of the firm, focusing primarily on commercial matters.

        I left the firm after a few years to serve as a Counsel, Special Investigation for the United States Senate Committee on Governmental Affairs. The Committee was investigating illegal and/or improper fundraising in



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00271 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

47450.227

connection with the 1996 federal elections. In virtually every respect, this constituted a continuation of a litigation practice. I reviewed documents, deposed witnesses, helped Senators prepare for televised hearings, and helped draft the Committee's final report. The special investigation was to expire nine months after it began, and I anticipated returning to Nashville to practice law.

After nine months in Washington, however, I agreed to remain and engage in policy work as a legislative director to a U.S. Senator.

After approximately three years of legislative work, I returned to Nashville and to the practice of law to serve as General Counsel for Corrections Corporation of America ("CCA"). In that role, I have ultimate responsibility for all of the Company's legal affairs, including the following areas of responsibility: corporate governanee, compliance with federal securities laws, litigation management, contract management, certain tax issues, labor and employment law issues, internal investigations related to allegations of material wrongdoing by employees, the creation and maintenance of an effective corporate compliance and ethics program, advising on the law pertaining to civil rights and corrections, and other areas.

I also have responsibility for lawsuits and potential claims against CCA; the number of lawsuits and claims against the Company typically stands between 700 and 1100 at any given time. In my early days as General Counsel, when CCA was in financial distress, my primary focus was on several significant litigation matters that placed CCA's survival in jeopardy. Thus, much of my time was spent on strategy surrounding a variety of cases, including cases of the following types: breach of contract claims, civil rights cases, grand jury investigations, and insurance disputes. I observed and/or monitored some significant trials, and actively participated in a variety of mediations and settlement negotiations. Moreover, I was simultaneously creating a corporate legal department from scratch.

Over time, while I have remained involved in significant litigation matters and associated proceedings, I spent an increasing amount of time on corporate governance and federal securities laws issues, as well as managing a growing legal department. My responsibilities also broadened to include some of the company's operational matters, such as running the company's quality assurance department.

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

When I was in private practice, our clients tended to be businesses or individuals involved in the ownership of businesses. Representative



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00272 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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clients included: American General Insurance Co., SunTrust Banks, Western Sizzlin, Microsoft, and Wachovia Bank.

Since 2001 and my return to Nashville to work at CCA, I have been responsible for all legal issues involving the company.

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

For the period 1994-97, when I was engaged in the private practice of law, I was 100 percent engaged in litigation and appeared in court frequently. Percentages listed below (i and ii) pertain to my time in private practice.

Since 2001, in my capacity as General Counsel for a corporation, I have not appeared as counsel of record in court; however, I have been involved in significant cases in the formulation of strategy and attempts to negotiate settlements of such matters. As discussed above, my role in litigated matters has evolved over time. While approximately 75 percent of my time would have been devoted exclusively to litigated matters in 2001, that has evolved to the point where approximately 20 percent of my time is devoted to such matters today.

i. Indicate the percentage of your practice in:
   1. federal courts: 40%
   2. state courts of record: 60%
   3. other courts.

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 95%
   2. criminal proceedings: 5%

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

I have tried two cases to verdict. One I handled as sole counsel, while I was associate counsel on another.

i. What percentage of these trials were:
   1. jury: 100%
   2. non-jury.

e. Describe your practice, if any, before the Supreme Court of the United States. Please supply four (4) copies of any briefs, amicus or otherwise, and, if



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00273 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have not practiced before the Supreme Court of the United States.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    a. the date of representation;

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

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

1. Johnson v. Miller et al., Docket No. 3-92-0422, United States District Court, Middle District of Tennessee; Hon. Thomas A. Higgins;1994-96.

This case was filed on or about March 8, 1992. On October 21, 1994, Michael L. Dagley of my firm was appointed by the court to represent Christopher Johnson, who was an inmate in the custody of the Tennessee Department of Corrections (TDOC). Mr. Johnson had filed a civil rights complaint against various TDOC officials concerning their alleged reliance on convictions shown on an FBI "rap sheet" for classification purposes, when Mr. Johnson had disputed the accuracy of those convictions and the TDOC officials knew that some other convictions show on the "rap sheet" were false. In addition, Mr. Johnson alleged that certain TDOC officials retaliated against him for his complaints about the "rap sheet" by filing false disciplinary reports against him, confiscating legal materials, and placing him in administrative segregation.

From the time Mr. Dagley was appointed, I assumed primary responsibility for the representation. I was the point of contact with Mr. Johnson, performed such investigations, discovery and research as was required, drafted all pleadings and filings, and tried the case by myself. (Mr. Dagley was present for some, but not all, parts of the trial, and he did not participate in the trial.)

Trial commenced on January 16, 1996. As I recall, the trial lasted two or three days. At the conclusion, the jury rendered a defense verdict for the TDOC officials. After additional briefing and argument, on April 6, 1996, Judge Higgins ruled in favor of the defense on a question of law that was not put to the jury.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00274 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Subsequently, Mr. Johnson wished to appeal the case, and I filed a notice of appeal on May 5, 1996. Mr. Johnson, who had since been released, wished to represent himself on appeal. I sought and was granted leave to cease representing Mr. Johnson.

Counsel for Defendants:
Mark A. Hudson
Assistant Attorney General
Civil Rights & Claims Division
404 James Robertson Parkway, Suite 2000
Nashville, TN 37243
(615) 741-3491

Co-Counsel for Plaintiff Christopher Johnson:
Michael L. Dagley (formerly with Farris, Warfield & Kanaday)
Bass, Berry & Sims
315 Deaderick Street
Nashville, TN 37238
(615)742-6200

2. Vance v. The Western Sizzlin Corp., No. 95-1491-II, Chancery Court, Davidson County, Tennessee; Chancellor Ellen Hobbs Lyle; 1997

For much of a two-year period at the firm, I represented The Western Sizzlin Corporation ("WSC") in connection with a wrongful termination claim brought by its former Chief Executive Officer, David K. Wachtel, as well as certain counterclaims brought by the Company against Mr. Wachtel. (See below.) Plaintiff Vance had worked for Mr. Wachtel at WSC, and he had also been dismissed around the time WSC terminated Mr. Wachtel's employment. The issue in this lawsuit was whether WSC breached its employment contract with Vance.

Although I was not involved in this discovery phase of this matter, Dianna Shew asked me to help try it. The trial took place April 14-16, 1997. Ms. Shew was the lead counsel; I handled five witnesses on direct and cross-examination (approximately one-half of the witnesses in the two-day trial). At the conclusion of the trial, the jury found in favor of Mr. Vance and awarded him damages of approximately $122,000; however, I understand that the trial judge granted a post-judgment motion for remittitur, reducing the damages to $51,900.

Lead Co-Counsel for Defendant WSC:
Dianna B. Shew
Sites & Harbison (f/k/a Farris, Warfield & Kanaday)
424 Church Street, Suite 1800
Nashville, TN 37219
(615)244-5200



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00275 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Counsel for Plaintiff Richard T. Vance:
Douglas E. Jones
Schulman, LeRoy & Bennett, PC
501 Union Street, Suite 701
P. O. Box 190676
Nashville, Tennessee 37219
(615)244-6670

3. New Life Corp. of Amer. v. Thomas Nelson, Inc., No. 93-3557-III, Chancery Court, Davidson County, Tennessee, Chancellor Robert S. Brandt and No. 01-A-01-9606-CH-00275, Tennessee Court of Appeals, Middle Section at Nashville; Hon. Ben H. Cantrell, Hon. William C. Koch, Jr., Hon. Samuel L. Lewis; 1994-97.

I represented New Life Corporation of America in this lawsuit against publisher Thomas Nelson, Inc. The issue in the case concerned whether Thomas Nelson, Inc. breached an escrow agreement as part of its purchase of New Life's predecessor, World Bible Society. Michael L. Dagley was the lead counsel; however, much of the later discovery in the case was done by me. I also argued successfully against Thomas Nelson's motion for summary judgment.

Shortly before the trial date, lead counsel for Thomas Nelson left his former firm (Bass, Berry & Sims) and disclosed that he intended to call a former partner as a witness in connection with certain negotiations surrounding the escrow agreement. After discussion, we disclosed our intent to call a partner from Farris, Warfield & Kanaday to testify as to those negotiations; thus, another firm was retained to handle the imminent trial. I was responsible for getting those lawyers prepared for trial. The trial was without a jury; Chancellor Brandt ruled in favor of Thomas Nelson, Inc.

Thereafter, I drafted the appellate briefs. I argued the appeal of the case. The Tennessee Court of Appeals affirmed the Chancery Court's ruling after I had left the firm for Washington.

Lead Co-Counsel for New Life Corporation of America (pre-trial and appeal):
Michael L. Dagley (formerly with Farris, Warfield & Kanaday)
Bass, Berry & Sims
315 Deaderick Street
Nashville, TN 37238
(615)742-6200

Trial Counsel for New Life:
L. Webb Campbell, II
Sherrard & Roe
424 Church Street
Nashville, TN 37219
(615)742-4200



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00276 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Kenneth R. Jones III (formerly with Sherrard & Roe)
150 Fourth Ave. N
Nashville, TN 37219
(615)726-0050

Lead Counsel for Thomas Nelson, Inc.
Jay S. Bowen (formerly with Bass, Berry & Sims)
Bowen, Riley, Warnock & Jacobson
1906 West End Ave.
Nashville, TN 37203
(615)320-3700

Co-Counsel for Thomas Nelson, Inc. (prior to trial)
Joseph F. Welborn III (formerly with Bass, Berry & Sims)
Walker, Tipps & Malone
150 Fourth Ave. N.
Nashville, TN 37219
(615)313-6017

Co-Counsel for Thomas Nelson, Inc. (trial and appeal)
Timothy L. Warnock
Bowen, Riley, Warnock & Jacobson
1906 West End Ave.
Nashville, TN 37203
(615)320-3700

4. Pacific Eastern Corp. v. Gulf Life Holding Co., et al., No. 93-194-I, Chancery Court for Davidson County, Tennessee; Chancellor Irwin Kilcrease; 1994-96.

This case had been previously handled by two lawyers for Farris, Warfield & Kanaday who had left the firm prior to my arrival. The case concerned a commercial development loan for the construction of a hotel/motel in Nashville around 1970. Some twenty years later, the borrower claimed the loan was usurious. The case had been dismissed based on application of the statute of limitations; however, the Tennessee Court of Appeals reversed the dismissal. Michael L. Dagley and I then began to handle the case.

Our client was American General Life Insurance Co., the successor-in-interest to Gulf Life Holding Co. Plaintiffs alleged that Gulf Life Insurance had participated in the original loan, which was made by an affiliated Real Estate Investment Trust (which had different successors in interest). Through discovery, we were able to learn that there was no evidence that Gulf Life had participated in the loan. In the face of pending motion for summary judgment filed on this issue, new lawyers for the plaintiff developer offered to dismiss our client from the case. American General agreed to be dismissed voluntarily by plaintiff rather than await the court's ruling on this pending motion.



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Lead Counsel for Defendant American General Life Insurance Co.:
Michael L. Dagley (formerly of Farris, Warfield & Kanaday)
Bass, Berry & Sims
315 Deaderick Street
Nashville, TN 37238
(615) 742-6200

Counsel for Co-Defendant Grubb & Ellis, Inc.:
Steven E. Anderson (formerly with Bass, Berry & Sims)
John C. Hayworth (also formerly with Bass, Berry & Sims)
Walker, Tipps & Malone
150 Fourth Ave. N.
Nashville, TN 37219
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Counsel for Co-Defendant Chemical Bank:
Sam McAllester III (formerly with Wyatt, Tarrant & Combs)
Bone, McAllester & Norton
511 Union St., Suite 600
Nashville City Center
Nashville, Tennessee 37219
(615)238-6300

Original Counsel for Plaintiff Pacific Eastern Corp.:
Robert L. Delaney
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Nashville, TN 37201
(615)244-3000

Additional Counsel for Plaintiff Pacific Eastern Corp.:
William R. Willis, Jr.
Willis & Knight
215 Second Avenue, North
Nashville, TN 37201
(615) 259-9600

Jeffrey Rappuhn (formerly of Willis & Knight)
HCA, Inc.
1 Park Place
Nashville, TN 37203
(615) 344-2591

5. Aladdin Industries, Inc. v. Allied Plastics, Inc., No. 3-94-1103, United States District Court, Middle District of Tennessee; Hon. Robert Echols, Hon. John Nixon; 1994-95.



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I represented Aladdin Industries in a licensing dispute with Allied Plastics, Inc. Aladdin held a patent for "Can-Grabber" technology used in cupholders, and had entered into a licensing agreement with Allied Plastics, Inc., a manufacturer of plastic automobile accessories. We filed suit on behalf of Aladdin on December 14, 1994. On March 7, 1995, we sought a Temporary Restraining Order to prohibit Allied's continued use of the patented technology. On March 8, 1995, the Order was granted by U.S. District Judge Echols. By agreed order dated March 10, 1995, the TRO was extended through an expedited discovery schedule in anticipation of a preliminary injunction hearing

When I was deposing Allied's corporate representative on or about March 29, 1995, we learned that: Allied was continuing to produce goods using the patented technology; Allied was unaware of the TRO; and, upon learning of the TRO, Allied's corporate representative took the position that a federal judge could not tell them what to do. On March 30, I filed an emergency "show cause" motion, and, on March 31, 1995, U.S. District Judge Nixon found Allied in contempt of court after a hearing that I handled. Judge Nixon then imposed fines for every day of non-compliance, and referred the matter back to Judge Echols for such other relief as should be afforded.

On the day of a scheduled hearing before Judge Echols on the preliminary injunction and the contempt issue, after Allied replaced its counsel, Allied and Aladdin agreed to enter into a settlement and the case was dismissed. As I recall, Michael L. Dagley and H. Naill Falls, Jr., both then with Farris, Warfield & Kanday, oversaw my work at different times on this case, but I was the primary lawyer handling the matter.

Co-Counsel for Aladdin Industries:

Michael L. Dagley (formerly of Farris, Warfield & Kanaday)
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Nashville, TN 37238
(615)742-6200

H. Naill Falls, Jr. (formerly of Farris, Warfield & Kanaday)
1143 Sewanee Rd.
Nashville, TN 37220
(615)242-1800

Original Counsel for Defendant Allied Plastics, Inc.:

Earl Roberts
530 Church St.
Nashville, TN 37219
(615)259-2404

Subsequent Counsel for Defendant Allied Plastics, Inc.:

Craig V. Gabbert, Jr.
D. Alexander Fardon
Harwell, Howard, Hyne, Gabbert & Manner



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315 Deaderick St.
(615) 256-0500

6. Patrick J. McRedmond V. Edward Stephen McRedmond and Lewis Anthony McRedmond, No. 95-P-1899, Probate Court of Davidson County, Tennessee, Honorable Frank Clement, Jr. and McRedmond v. McRedmond Brothers, Inc., No. 96-3243II(I), Chancery Court of Davidson County, Tennessee, Chancellor Irwin Kilcrease; 1995-97.

These cases involved a dispute between cousins who were the second-generation owners of a family business. I worked on this matter with Overton Thompson III, who was the lead counsel.

Two separate proceedings were involved. The first was a corporate dissolution suit in Chancery Court; the second was a challenge to the probate of a will of one of the Company's founders.

The most significant legal issue to occur before my departure for Washington, D.C. involved our attempt to disqualify Robert J. Walker and Joseph F. Welborn III, both then of Bass, Berry & Sims, who were representing the other McRedmonds. We learned that Bass, Berry & Sims had represented all of the McRedmond parties, including our clients, in an appellate matter arising out of claim of minority shareholder oppression relating to another business. The court had not yet ruled on their appeal.

Mr. Thompson and I conducted discovery on the conflict of interest issue, and then I drafted a motion to disqualify Bass, Berry & Sims from representing their clients. Mr. Thompson argued on our behalf. The courts ultimately decided not to disqualify Bass, Berry & Sims, and the cases proceeded with additional discovery. I left the firm for Washington, and understand that the case later settled.

Lead Counsel for Plaintiffs:
Overton Thompson III (formerly of Farris, Warfield & Kanaday)
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(615)742-6200

Counsel for Defendants:
Robert J. Walker (formerly of Bass, Berry & Sims)
Joseph F. Welborn III (formerly of Bass, Berry & Sims)
Walker, Tipps & Malone
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Nashville, TN 37219
(615)313-6000



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7. Wachtel v. Western Sizzlin, No. 95-781-I, Chancery Court for Davidson County, Tennessee; Chancellor Irwin Kilcrease; 1995-97.

This case concerned a wrongful termination/breach of employment contract claim by the ousted Chief Executive Officer of The Western Sizzlin Company ("WSC"). We represented WSC. Mr. Wachtel asserted that he was entitled to $8.5 million in special damages, contending that, had he remained CEO, he would have taken WSC public and his stock would be worth millions.

I worked with both Michael L. Dagley and Overton Thompson III on this case, which consumed a significant part of my practice for more than one year. I left for Washington D.C. after drafting a motion for summary judgment on Wachtel's claim for special damages, in which WSC contended that the claim was barred as remote and speculative, and that his remedy, if any, should have been through a derivative claim. That motion was granted by the trial court after I left town, but was later reversed by the Tennessee Court of Appeals. See Wachtel v. Western Sizzlin Co., 986 S.W.2d 2 (Tenn. App. 1998).

Counsel for Defendant/Counter-Claimant WSC:
Michael L. Dagley (Lead; formerly of Farris, Warfield & Kanaday)
Overton Thompson III (Co-Counsel; formerly of Farris, Warfield & Kanaday)
Bass, Berry & Sims
315 Deaderick Street
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Counsel for Co-Defendant Titus W. Greene
Hal D. Hardin
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Nashville, TN 37201
(615)369-3377

Counsel for Co-Defendant Victor Foti:
Kenneth R. Jones III (formerly with Sherrard & Roe)
150 Fourth Ave. N
Nashville, TN 37219
(615)726-0050

Counsel for Co-Defendant Joe Cowart:
C. Dewey Branstetter, Jr.
Branstetter, Kilgore, Stranch & Jennings
227 Second Ave. N
Nashville, TN 37201
(615)254-8801



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Counsel for Plaintiff David K. Wachtel:
John L. Ross
Neal & Harwell
150 Fourth Ave. N.
Nashville, TN 37219

8. Head v. Wachovia Bank of Georgia, N.A., No.96358, Probate Court of Davidson County, Tennessee; Judge Frank Clement, Jr.; 1995-97.

Along with Michael L. Dagley, I represented Wachovia and a former officer, A. Gilmore Crumpler, in this matter until my departure for Washington D.C. The lawsuit involved a claim by a beneficiary of a trust that Wachovia's predecessor, First American National Bank, Atlanta ("FANB"), had breached its fiduciary duty. The facts were salacious, and are recounted in some length in the appellate opinion. See Head v. Wachovia Bank of Georgia, N.A., 88 S.W.3d 180, 181-86 (Tenn. App. 2002).. The basic issue was that a FANB trust officer (Addison) had a sexual relationship with a personal assistant to the plaintiff's grandmother, while at the same time Addison oversaw the grandmother's trust. The same personal assistant was also embezzling money from the grandmother's checking account at another financial institution (into which the FANB trust made deposits). When the embezzlement came to light, FANB and its attorneys (Jones Day, which also represented the grandmother and her family) recovered more than $500,000 from the personal assistant; Addison resigned. At the instruction of plaintiff's grandmother, FANB and Jones Day were not to pursue any embezzled amounts that may have preceded the creation of the trust at FANB. Years later, plaintiff alleged that Wachovia's actions as executor of his grandmother's estate had been tainted by an underlying breach of its fiduciary duty for not having pursued alleged claims against the personal assistant and Addison with greater vigor.

I was responsible for document review, handled written discovery, took depositions, defended depositions, and helped prepare witnesses for depositions, including defendant Crumpler. I also performed legal research concerning plaintiffs' claims and in anticipation of a summary judgment motion, and helped coordinate the defense of the case with the attorney for Addison. After I left the firm for Washington, Wachovia moved for summary judgment and it was granted; Head later replaced his lawyer, John Schwalb, with Bill Harbison to handle the appeal. Although Mr. Harbison was not involved in the case when I was, he, too, would have knowledge of the record of proceedings. The Tennessee Court of Appeals later affirmed the summary judgment.

Lead Co-Counsel for Defendants Wachovia and Crumpler:
Michael L. Dagley (formerly of Farris, Warfield & Kanaday)
Bass, Berry & Sims
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Nashville, TN 37238
(615) 742-6200



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Counsel for Co-Defendant Addison:
C. Dewey Branstetter, Jr.
Branstetter, Kilgore, Stranch & Jennings
227 Second Ave. N
Nashville, TN 37201
(615)254-8801

Initial Counsel for Plaintiff Francis Head:
John Schwalb
Williams & Schwalb
The Lotz House
111-1 Columbia Avenue
Franklin, TN 37064
(615) 794-7100

Subsequent Counsel for Plaintiff Francis Head:
Bill Harbison
Sherrard & Roe
424 Church St.
Nashville, TN 37219

9. Sandra K. Baker (Abroms) v. State of Tennessee, ex rel, Gary D. Baker, Appeal No. 01A01-9509-CV-00428, Court of Appeals of Tennessee, Middle Section at Nashville; Hon. Ben H. Cantrell, Hon. Samuel L. Lewis, Hon. William C. Koch, Jr.; 1996-97.

This appeal involved the issue of whether the trial court erred in exercising its discretion to avoid the mechanisms of Title IV-D of the Social Security Act in the collection of child support payments; utilizing a Title IV-D contractor resulted in a 5 percent penalty on our client, the non-custodial parent. I served as associate counsel for Ms. Abroms on the appeal, and I drafted the appellee's brief. In its opinion, the Court of Appeals expressed frustration with the statutory scheme's application in this case, but it reversed the trial court based on the plain wording of the statute.

Lead Counsel for Appellee Abroms:
James G. Martin III
Stites & Harbison (f/k/a Farris, Warfield & Kanaday)
424 Church St.
Nashville, TN 37219
(615)244-5200

Counsel for Appellant, State of Tennessee:
James H. Tucker, Jr. (former Assistant Attorney General)
Manier & Herod
150 Fourth Avenue N.
Nashville, TN 37219
(615)244-0030



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10. Alexander v. SunTrust Bank, No. 92C-2518, Third Circuit Court for Davidson County, Tennessee; Hon. Walter C. Kurtz, Circuit Judge; 1996-97.

SunTrust lost a $3.5 million judgment in a trial handled by a partner in my firm in a case in which it was alleged that SunTrust's failure to fund fully a loan commitment resulted in the demise of an apartment complex's operations. The verdict included compensatory and punitive damages against SunTrust. Another partner, Bradley A. MacLean, and I were brought into the matter to assist in the post-judgment work. I drafted the post-judgment motions and memoranda of law; Mr. MacLean handled the argument of the motions. The case settled before the motion was decided.

Co-Counsel for SunTrust Bank, Nashville, N.A.
Bradley A. MacLean (Lead, post-trial motions)
Robert C. Goodrich (Trial)
Stites & Harbison (f/k/a Farris, Warfield & Kanaday)
424 Church St.
Nashville, TN 37219
(615)244-5200

Counsel for Plaintiffs:
Gary Blackburn (formerly of Blackburn, Slobey, Freeman & Happell)
Blackburn & McCune
101 Lea Avenue
Nashville, TN 37210
(866) 222-7770

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

General Counsel for Corrections Corporation of America
Since January 2001, I have served as the General Counsel for Corrections Corporation of America ("CCA" or the "Company"). CCA is a publicly-traded, New York Stock Exchange-listed company that employs about 17,000 people and cares for more than 70,000 inmates. I have been responsible to the Board of Directors and Chief Executive Officer of CCA for all of the Company's legal affairs, including the following areas of responsibility: corporate governance, compliance with federal securities laws, litigation management, contract management, certain tax issues, labor and employment law issues, internal investigations related to allegations of material wrongdoing by employees, the creation and maintenance of an effective corporate compliance and ethics program, advising on the law pertaining to civil rights and corrections, and other areas.



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Litigation is a significant component of the Company's legal department. When I first started with the Company, several pending litigation matters had been disclosed to the market for their potential ability to have a material adverse impact on the operations of the Company. I was personally involved in resolving each such litigation matter. Over time, the vast majority of lawsuits against the Company (which, on average, account for between 700-1100 lawsuits at any one time) have been handled by outside lawyers under the supervision of the Company's Deputy General Counsel for Litigation Management, whom I supervise. Matters that are material - or present a risk of becoming material - to the Company's operations, whether qualitatively or quantitatively, have been personally supervised by me (including advising the Company about whether such matters should be disclosed in the Company's filings with the Securities & Exchange Commission).

Examples of significant litigation-related matters in which I have become substantially involved at the Company include the following:

- A group of federal civil rights suits filed by two law firms against the Company in three separate jurisdictions: South Carolina, New Jersey, and Tennessee. These matters also spawned insurance litigation between the Company and its former insurance carrier in Tennessee and South Carolina. These cases involved repeated mediations (led by the Special Master of the Federal September 11th Victim Compensation Fund), a trial in South Carolina, a trial in New Jersey, and the ultimate resolution of the various claims through trial and/or settlement with insurance funds.

- Civil rights claims in Texas against the Company's inmate-transportation subsidiary alleging sexual assaults on two female detainees by two inmate transportation officers and associated insurance litigation in two jurisdictions.

- A state grand jury investigation into the jail death of a 19 year-old male and related wrongful death claim filed by the parents.

- Various lawsuits relating to the Employee Stock Ownership Plan of an acquired entity, including state and federal litigation by the trustees of that Plan seeking indemnification from the Company for an approximately $21 million verdict against them.

- Federal and state criminal investigations concerning the death of a female inmate shortly after a use of force incident, as well as civil litigation concerning that death.

- An appeal of an IRS audit involving a determination that more than $100 million was owed in back taxes for a predecessor entity. Moreover, one of the adjustments could have required the Company to distribute an additional $70.5



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million in cash or securities as a result of the Company's election to operate as a Real Estate Investment Trust in 1999.

Government Investigations
I worked for about 9 months as a Counsel on the U.S. Senate Committee on Governmental Affairs' investigation into illegal fundraising in connection with the 1996 federal elections. This investigation was very much like a major trial. I deposed a number of witnesses, including officials with the Democratic National Committee and members of the White House Counsel's Office. To prepare for these depositions, I reviewed boxes of documents and transcripts of other witness testimony. I then assisted Senior Counsel on the investigation in preparing for examining the witness at televised hearings, as well as preparing Senators for their examinations of witnesses at the hearings. Finally, I drafted a significant portion of the Committee's final report.

Legislative Experience
Though I was not engaged in the practice of law as Sen. Bill Frist's legislative director from 1998-2001, the work utilized my legal training. I helped draft legislation and counseled other legislative staff and the Senator on the implications of proposed legislation.

Lobbying Activities
While at the Company, I have performed certain lobbying activities on its behalf, and have registered to do so. Most of my work in this area has consisted of strategic advice to the Company's Business Development group and our outside lobbyists; however, I have attended a few meetings on behalf of the Company. All such meetings involved the promotion of the use of private-sector corrections alternatives for federal customers.

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

None

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

Pursuant to certain non-qualified stock incentive plans, and upon my resignation from CCA, I would be required to exercise any vested options within 90 days of the date of my resignation. Once such options are exercised, there are no other arrangements for deferred income or other future benefits from any prior activity.



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

I have no such plans.

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

See attached financial disclosure report.

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

See attached statement of net worth.

26. **Potential Conflicts of Interest**:

a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

Parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during my initial service in the position to which I have been nominated would include business organizations in which I have a financial interest; cases concerning those who may hold securities on my behalf, including Nashville Bank & Trust Co., SunTrust Bank, and Diversified Trust Co.; cases concerning Corrections Corporation of America, Inc. or Nashville Bank & Trust Co., both of which I have served as either an officer or director; and matters involving any nonprofit institution that I have served in a fiduciary capacity.

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

Over time, I would like to pursue investment methods that may reduce the potential for any conflicts. I would resolve any potential conflict of interest by complying with all relevant statutes and the Code of Conduct for United States Judges, as well as any other applicable requirements. Referring to these sources would provide direction in my consideration of whether a recusal was necessary.



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

During private practice, I devoted substantial time to pro bono work. Indeed, shortly after arriving at my firm, I was asked to assume primary responsibility for an inmate in a civil rights lawsuit against state corrections officials. This inmate was being represented by my firm pursuant to an appointment by United States District Judge Higgins. All of my work on this matter, including a multi-day jury trial, was without expectation of remuneration. As my client was not a prevailing party, the entire representation was pro bono. I would estimate that I spent hundreds of hours on this one case alone.

Second, while engaged in the private practice of law, I agreed to participate in the Nashville Bar Association's pro bono program. Through that program, I represented a woman on an estate planning and property question. Before the matter could be concluded, I left the firm to work for the Senate Committee on Governmental Affairs, and another lawyer at my firm continued to represent the woman and he worked to resolve the issue that caused her to seek legal representation.

28. **Selection Process**:

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

After interviewing with both Senator Lamar Alexander and Senator Bob Corker, I received a call from the White House to interview for the nomination. I was interviewed on Wednesday, February 21, 2007 by staff from the White House Counsel's office and from the Department of Justice. On April 10, 2007 I was informed that the President wished to proceed with the nomination, provided additional processing and vetting was satisfactory to the White House. I received nomination paperwork from the Department of Justice and have had periodic contact with them regarding that paperwork. My nomination was forwarded to the Senate on June 13, 2007.

I am not aware of a judicial selection commission in this jurisdiction.



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

No.



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Rev. 1/2006

# FINANCIAL DISCLOSURE REPORT
## NOMINATION FILING

*Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)*

| 1. Person Reporting (last name, first, middle initial) | 2. Court or Organization | 3. Date of Report |
|---|---|---|
| Puryear, Gustavus A | Middle District of Tennessee | 06/13/2007 |
| **4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)** | **5a. Report Type (check appropriate type)** | **6. Reporting Period** |
| District Judge / Nominee | ☒ Nomination, Date 06/13/2007<br>☐ Initial ☐ Annual ☐ Final<br>5b. ☐ Amended Report | 01/01/2006 to 05/31/2007 |
| **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.** | |
| Corrections Corp. of America<br>10 Burton Hills Blvd.<br>Nashville, TN 37215 | 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.)*

☐ NONE *(No reportable positions.)*

| POSITION | NAME OF ORGANIZATION/ENTITY |
|---|---|
| 1. Executive Vice President, General Counsel & Secretary | Corrections Corporation of America |
| 2. Director | Nashville Bank & Trust Co. |
| 3. Chief Manager | GAP Realty #1, LLC |
| 4. Trustee | Trust #1 |
| 5. Director | American Red Cross, Nashville |
| 6. Director, Chairman | Antiques & Garden Show of Nashville |
| 7. Executive Board Member | Boy Scouts of America, Middle Tennessee Council |
| 8. Director | Cheekwood Botanical Gardens & Museum of Art |
| 9. Director | Exchange Club of Nashville, Inc. |
| 10. Commissioner | National Prison Rape Elimination Commission |

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

☒ NONE *(No reportable agreements.)*

| DATE | PARTIES AND TERMS |
|---|---|
| 1. | |
| 2. | |
| 3. | |

| FINANCIAL DISCLOSURE REPORT<br>Page 2 of 20 | Name of Person Reporting<br>Puryear, Gustavus A | Date of Report<br>06/13/2007 |
|---|---|---|

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

**A. Filer's Non-Investment Income**

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

| | DATE | SOURCE AND TYPE | INCOME (yours, not spouse's) |
|---|---|---|---|
| 1. | 2007 | Nashville Bank & Trust Co.- Director compensation | $ 3,000 |
| 2. | 2007 | Nashville Bank & Trust Co. - Chairman of the Compensation and Human Resources Committee | $ 1,100 |
| 3. | 2007 | Corrections Corporation of America- salary, bonus, & restricted stock | $ 439,039 |
| 4. | 2006 | Corrections Corporation of America- salary, bonus, restricted stock, & exercised options | $ 2,258,435 |
| 5. | 2005 | Corrections Corporation of America- salary, bonus, & exercised options | $ 1,031,882 |
| 6. | | | |
| 7. | | | |

**B. Spouse's Non-Investment Income** - *If you were married during any portion of the reporting year, complete this section.*
*(Dollar amount not required except for honoraria.)*

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

| | DATE | SOURCE AND TYPE |
|---|---|---|
| 1. | | |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |

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

☐ NONE *(No reportable reimbursements.)*

| | SOURCE | DESCRIPTION |
|---|---|---|
| 1. | | Exempt |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |

| FINANCIAL DISCLOSURE REPORT<br>Page 3 of 20 | Name of Person Reporting<br>Puryear, Gustavus A | Date of Report<br>06/13/2007 |
|---|---|---|

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

☐ NONE *(No reportable gifts.)*

| | SOURCE | DESCRIPTION | VALUE |
|---|---|---|---|
| 1. | | Exempt | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

**VI. LIABILITIES.** *(Includes those of spouse and dependent children. See pp. 32-34 of instructions.)*

☒ NONE *(No reportable liabilities.)*

| | CREDITOR | DESCRIPTION | VALUE CODE |
|---|---|---|---|
| 1. | | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

**FINANCIAL DISCLOSURE REPORT**
Page 4 of 20

| Name of Person Reporting | Date of Report |
|---|---|
| Puryear, Gustavus A | 06/13/2007 |

## VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of the spouse and dependent children, See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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) |
|---|---|---|---|---|---|---|---|---|---|
| 1. Nashville Bank & Trust Co. Checking Account | D | Interest | M | T | Exempt | | | | |
| 2. SunTrust Bank, Checking Account | A | Interest | J | T | | | | | |
| 3. IRA #1 | | None | J | T | | | | | |
| 4. IRA #2 | | None | K | T | | | | | |
| 5. GAP Realty #1 LLC (50% interest) | F | Rent | O | S | | | | | |
| 6. Nashville Bank & Trust Co. Brokerage Account: | | | | | | | | | |
| 7. -American International Group Inc. | | None | M | T | | | | | |
| 8. -Corrections Corporation of America | | None | N | T | | | | | |
| 9. -SunTrust Banks Inc. | | None | O | T | | | | | |
| 10. -Cash Equivalent FCR Fund | | None | J | T | | | | | |
| 11. Nashville Bank & Trust Co. Managed Bond Account: | | | | | | | | | |
| 12. -City of Chattanooga TN SER A DTD | A | Interest | L | T | | | | | |
| 13. -Madison Cnty Tenn Sch & Pub Impt | B | Interest | L | T | | | | | |
| 14. -Montgomery Cnty Tenn Ref FSA Go Unltd DTD | B | Interest | L | T | | | | | |
| 15. -Shelby Cnty Tenn Pub Impt & Sch-Ser A DTD | | None | L | T | | | | | |
| 16. -Tenn St Sch Bd Auth Second PC-Ser A DTD | A | Interest | L | T | | | | | |
| 17. -Tipton Cty Tenn First Util Dist Wtwrks & Gas | | None | L | T | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1. Income Gain Codes: (See Columns B1 and D 1) | 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 E 3) | J =$15,000 or less | K =$15,001 - $50,000 | L =$50,001 - $100,000 | M =$100,001 - $250,000 | |
| | N =$250,001 - $500,000 | O =$500,001 - $1,000,000 | P1 =$1,000,001 - $5,000,000 | P2 =$5,000,001 - $25,000,000 | |
| 3. Value Method Codes (See Column C2) | P3 =$25,000,001 - $50,000,000 | R =Cost (Real Estate Only) | P4 =More than $50,000,000 | T =Cash Market | |
| | Q =Appraisal | Y =Other | S =Assessment | | |
| | U =Book Value | | W =Estimated | | |

| FINANCIAL DISCLOSURE REPORT<br>Page 5 of 20 | Name of Person Reporting<br>Puryear, Gustavus A | Date of Report<br>06/13/2007 |
|---|---|---|

**VII. INVESTMENTS and TRUSTS** – *Income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets)<br>Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | If not exempt from disclosure | | | |
| | (1) Amount Code 1 (A-H) | (2) Type (e.g. div., rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | (2) Date Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
| 18. -Wilson Cnty Tenn Cnty Dist Sch | | None | L | T | | | | | |
| 19. Nashville Bank & Trust Managed Equity Account: | | | | | | | | | |
| 20. -ABN Amro Holding NV ADR Stock (common) | | None | J | T | | | — | | |
| 21. -AT&T Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 22. -Alcoa Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 23. -Allergan Inc. Stock (common) | | None | J | T | | | | | |
| 24. -Allstate Corp. Stock (common) | A | Dividend | J | T | | | | | |
| 25. -Altria Group Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 26. -American Express Stock (common) | | None | J | T | | | | | |
| 27. -American International Group Inc. Stock (common) | C | Dividend | M | T | | | | | |
| 28. -Ameriprise Financial Inc.Stock (common) | | None | J | T | | | | | |
| 29. -Andrew Corp. Stock (common) | | None | J | T | | | | | |
| 30. -AON Corp. Stock (common) | | None | J | T | | | | | |
| 31. -Apache Corp. Stock (common) | | None | J | T | | | | | |
| 32. -Apple Computer Inc. Stock (common) | | None | J | T | | | | | |
| 33. -Aqua America Inc. Stock (common) | | None | J | T | | | | | |
| 34. -Arrow Electronics Stock (common) | | None | J | T | | | | | |

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

| FINANCIAL DISCLOSURE REPORT<br>Page 6 of 20 | Name of Person Reporting<br>Puryear, Gustavus A | Date of Report<br>06/13/2007 |
|---|---|---|

**VII. INVESTMENTS and TRUSTS** – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets)<br>Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period<br>(1) Amount Code 1 (A-H) | B.<br>(2) Type (e.g. div., rent, or int.) | C. Gross value at end of reporting period<br>(1) Value Code 2 (J-P) | C.<br>(2) Value Method Code 3 (Q-W) | D. Transactions during reporting period<br>(1) Type (e.g. buy, sell, merger, redemption) | If not exempt from disclosure<br>(2) Date Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
|---|---|---|---|---|---|---|---|---|---|
| 35. -Autoliv Inc. Stock (common) | | None | J | T | | | | | |
| 36. -Autozone Inc. Stock (common) | | None | J | T | | | | | |
| 37. -Avis Budget Group Inc. Stock (common) | | None | J | T | | | | | |
| 38. -Banco Bilbao Vizcaya Argentina SA Stock (common) | A | Dividend | J | T | | | | | |
| 39. -Bank America Corp. Stock (common) | B | Dividend | J | T | | | | | |
| 40. -Barclays PLC Stock (common) | A | Dividend | J | T | | | | | |
| 41. -Berkshire Hathaway Inc. Class B Stock | | None | J | T | | | | | |
| 42. -BHP Ltd. Sponsored ADR Stock (common) | A | Dividend | J | T | | | | | |
| 43. -Blackrock Inc. Stock (common) | | None | J | T | | | | | |
| 44. -H&R Block Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 45. -Boston Scientific Corp. Stock (common) | | None | J | T | | | | | |
| 46. -Burlington Northern Santa Fe Corp. Stock (common) | A | Dividend | J | T | | | | | |
| 47. -CRH PLC Stock (common) | | None | J | T | | | | | |
| 48. -C /S Corp. Stock (common) | | None | J | T | | | | | |
| 49. -C bela's Inc. Class A Common Stock | | None | J | T | | | | | |
| 50. -Cabot Microelectronics Corp. Stock (common) | | None | J | T | | | | | |
| 51. -Cardinal Health Inc. Stock (common) | A | Dividend | J | T | | | | | |

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

| FINANCIAL DISCLOSURE REPORT<br>Page 7 of 20 | Name of Person Reporting<br>Puryear, Gustavus A | Date of Report<br>06/13/2007 |
|---|---|---|

**VII. INVESTMENTS and TRUSTS** – *Income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets)<br>Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | (1) Amount Code 1 (A-H) | (2) Type (e.g. div., rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (3) 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) |
| 52. -Caterpillar Inc. Stock (common) | | None | J | T | | | | | |
| 53. -CEMEX SAB DE CV Sponsored ADR Stock (common) | | None | J | T | | | | | |
| 54. -Chevron Corp. Stock (common) | | None | J | T | | | — | | |
| 55. -Chicago Mercantile Exchange Stock (common) | | None | J | T | | | | | |
| 56. -Citigroup Stock (common) | | None | J | T | | | | | |
| 57. -Columbia Sportswear Co Stock (common) | | None | J | T | | | | | |
| 58. -Comcast Corp. Stock (common) | | None | J | T | | | | | |
| 59. -Commscope Inc.Stock (common) | | None | J | T | | | | | |
| 60. -Conoco Phillips Oil Stock (common) | | None | J | T | | | | | |
| 61. -Continental AG Stock (common) | | None | J | T | | | | | |
| 62. -Costco Wholesale Corp. Stock (common) | | None | J | T | | | | | |
| 63. -Danaher Corp.Stock (common) | A | Dividend | M | T | | | | | |
| 64. -Dean Foods Co. Stock (common) | A | Dividend | J | T | | | | | |
| 65. -Dell Inc. Stock (common) | | None. | J | T | | | | | |
| 66. -Devon Energy Corp. Stock (common) | A | Dividend | J | T | | | | | |
| 67. -Diageo PLC Sponsored ADR Stock (common) | A | Dividend | J | T | | | | | |
| 68. -Dover Corp. Stock (common) | A | Dividend | J | T | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1. Income Gain Codes:<br>(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<br>(See Columns C1 and D3) | J =$15,000 or less | K =$15,001 - $50,000 | L =$50,001 - $100,000 | M =$100,001 - $250,000 | |
| | N =$250,001 - $500,000 | O =$500,001 - $1,000,000 | P1 =$1,000,001 - $5,000,000 | P2 =$5,000,001 - $25,000,000 | |
| 3. Value Method Codes<br>(See Column C2) | P3 =$25,000,001 - $50,000,000 | R =Cost (Real Estate Only) | P4 =More than $50,000,000 | T =Cash Market | |
| | Q =Appraisal | V =Other | S =Assessment | | |
| | U =Book Value | | W =Estimated | | |

**FINANCIAL DISCLOSURE REPORT**
Page 8 of 20

| Name of Person Reporting | Date of Report |
|---|---|
| Puryear, Gustavus A | 06/13/2007 |

## VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-37 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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) |
|---|---|---|---|---|---|---|---|---|---|
| 69. -BOG Res. Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 70. -Electronic Arts Stock (common) | | None | J | T | | | | | |
| 71. -Emerson Electric Co. Stock (common) | | None | J | T | | | | | |
| 72. -Expeditors Intl. Stock (common) | | None | J | T | | | | | |
| 73. -Exxon Mobil Corp. Stock (common) | B | Dividend | L | T | | | | | |
| 74. -FLIR Sys Inc. Stock (common) | | None | J | T | | | | | |
| 75. -FPL Group Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 76. -FTI Consulting Stock (common) | | None | J | T | | | | | |
| 77. -Fannie Mae Stock (common) | | None | J | T | | | | | |
| 78. -FedEx Corporation Stock (common) | A | Dividend | J | T | | | | | |
| 79. -Forrester Resh. Inc. Stock (common) | | None | J | T | | | | | |
| 80. -Fortune Brands Inc. Stock (common) | | None | J | T | | | | | |
| 81. -Franklin Res. [illegible]tock (common) | A | Dividend | K | T | | | | | |
| 82. -Freeport McMoran Copper & Gold & Gold Inc (common) | | None | J | T | | | | | |
| 83. -GFI Group Inc. Stock (common) | | None | J | T | | | | | |
| 84. -GAP Inc. Stock (common) | | None | J | T | | | | | |
| 85. -General Electric Co. Stock (common) | | None | J | T | | | | | |

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

**FINANCIAL DISCLOSURE REPORT**
Page 9 of 20

| Name of Person Reporting | Date of Report |
|---|---|
| Puryear, Gustavus A | 06/13/2007 |

## VII. INVESTMENTS and TRUSTS -- *Income, value, transactions (Includes those of the spouse and dependent children. See pp. 34-37 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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) |
|---|---|---|---|---|---|---|---|---|---|
| 86. -General Mills Inc. Stock (common) | | None | J | T | | | | | |
| 87. -Gilead Sciences Inc. Stock (common) | | None | J | T | | | | | |
| 88. -Google Inc. Class A Stock (common) | | None | J | T | | | | | |
| 89. -Greencore Group Stock (common) | | None | J | T | | | | | |
| 90. -Greenhill & Co, Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 91. -HSBC Holdings PLC ADR Stock (common) | | None | J | T | | | | | |
| 92. -John Hancock Bank & Thrift Opportunity Fund (common) | A | Dividend | J | T | | | | | |
| 93. -Hanesbrands Inc. Stock (common) | | None | J | T | | | | | |
| 94. -Harley Davidson Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 95. -Hartford Financial Services Group Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 96. -Helix Energy Solutions Group Stock (common) | | None | J | T | | | | | |
| 97. -Hewitt Associates Inc. Stock (common) | | None | J | T | | | | | |
| 98. -Home Depot Inc Stock (common) | A | Dividend | J | T | | | | | |
| 99. -Honeywell Intl Inc. Stock (common) | | None | J | T | | | | | |
| 100. -Impala Platinum Sponsored ADR Stock (common) | A | Dividend | J | T | | | | | |
| 101. -Innovative Solutions and Supply Stock (common) | | None | J | T | | | | | |
| 102. -Intel Corp. Stock (common) | A | Dividend | J | T | | | | | |

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

**FINANCIAL DISCLOSURE REPORT**
Page 10 of 20

| Name of Person Reporting | Date of Report |
|---|---|
| Puryear, Gustavus A | 06/13/2007 |

## VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period: (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) |
|---|---|---|---|---|---|---|---|---|---|
| 103. -Intuit Stock (common) | | None | J | T | | | | | |
| 104. -Iron Mountain Inc. Stock (common) | | None | J | T | | | | | |
| 105. -Ishares MSCI Index Fund Stock (common) | | None | K | T | | | | | |
| 106. -JP Morgan Chase & Co. Stock (common) | A | Dividend | J | T | | | | | |
| 107. -Jacobs Engineering Group Inc. Stock (common) | | None | J | T | | | | | |
| 108. -Jeffries Group Inc. Stock (common) | | None | J | T | | | | | |
| 109. -Johnson & Johnson Stock (common) | A | Dividend | K | T | | | | | |
| 110. -Kansas City Southern Industries Inc. Stock (common) | | None | J | T | | | | | |
| 111. -Kraft Foods Inc. Class A Stock (common) | | None | J | T | | | | | |
| 112. -Laboratory Corp. America Hldgs Stock (common) | | None | J | T | | | | | |
| 113. -Las Vegas Sands Corp. Stock (common) | | None | J | T | | | | | |
| 114. -Lloyds TSB Group PLC Stock (common) | | None | J | T | | | | | |
| 115. -Loews Corp. Stock (common) | A | Dividend | J | T | | | | | |
| 116. -Lowes Cos Inc. Stock (common) | | None | J | T | | | | | |
| 117. -MGM Mirage Stock (common) | | None | J | T | | | | | |
| 118. -MPS Group Inc. Stock (common) | | None | J | T | | | | | |
| 119. -Manhattan Assoc., Inc. Stock (common) | | None | J | T | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1. Income Gain Codes: (See Columns B1 and D4) | A =$1,000 or less | B =$1,001 - $2,500 | C =$2,501 - $5,000 | D =$5,001 - $15,000 | E =$15,001 - $50,000 |
| 2. Value Codes (See Columns C1 and D3) | F =$50,001 - $100,000 | G =$100,001 - $1,000,000 | H1 =$1,000,001 - $5,000,000 | H2 =More than $5,000,000 | |
| | J =$15,000 or less | K =$15,001 - $50,000 | L =$50,001 - $100,000 | M =$100,001 - $250,000 | |
| | N =$250,001 - $500,000 | O =$500,001 - $1,000,000 | P1 =$1,000,001 - $5,000,000 | P2 =$5,000,001 - $25,000,000 | |
| 3. Value Method Codes (See Column C2) | F3 =$25,000,001 - $50,000,000 | R =Cost (Real Estate Only) | P4 =More than $50,000,000 | T =Cash Market | |
| | Q =Appraisal | V =Other | S =Assessment | | |
| | U =Book Value | | W =Estimated | | |

**FINANCIAL DISCLOSURE REPORT**
Page 11 of 20

| Name of Person Reporting | Date of Report |
|---|---|
| Puryear, Gustavus A | 06/13/2007 |

## VII. INVESTMENTS and TRUSTS — *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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) |
|---|---|---|---|---|---|---|---|---|---|
| 120. -Marathon Oil Corp. Stock (common) | | None | J | T | | | | | |
| 121. -Marriott Intl Inc. Class A Stock (common) | A | Dividend | J | T | | | | | |
| 122. -Masco Corp. Stock (common) | | None | J | T | | | — | | |
| 123. -McDonald's Corp. Stock (common) | | None | J | T | | | | | |
| 124. -McGraw-Hill Co. Inc. Stock (common) | | None | J | T | | | | | |
| 125. -Merrill Lynch & Co. Inc. Stock (common) | | None | J | T | | | | | |
| 126. -Methanex Corp. Stock (common) | A | Dividend | J | T | | | | | |
| 127. -Metorex Ltd. Stock (common) | | None | J | T | | | | | |
| 128. -Microsoft Corp. Stock (common) | | None | J | T | | | | | |
| 129. -Midcap Spdr Tr Unit Ser 1 Stock (common) | A | Dividend | L | T | | | | | |
| 130. -Molina Healthcare Inc. Stock (common) | | None | J | T | | | | | |
| 131. -Moodys Corp. Stock (common) | | None | J | T | | | | | |
| 132. -Nara Bancorp Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 133. -Nautilus Group Inc. Stock (common) | | None | J | T | | | | | |
| 134. -News Corp. Inc. Class A Stock (common) | A | Dividend | J | T | | | | | |
| 135. -Nordstrom Inc. Stock (common) | | None | J | T | | | | | |
| 136. -Norsk Hydro Stock (common) | | None | J | T | | | | | |

1. Income Gain Codes: (See Columns B1 and D4)
2. Value Codes (See Column C1 and D3)
3. Value Method Codes (See Column C2)

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
I =$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
R =Cost (Real Estate Only)
P4 =More than $50,000,000
T =Cash Market
Q =Appraisal
S =Assessment
U =Book Value
V =Other
W =Estimated

**FINANCIAL DISCLOSURE REPORT**
Page 12 of 20

| Name of Person Reporting | Date of Report |
|---|---|
| Puryear, Gustavus A | 06/13/2007 |

## VII. INVESTMENTS and TRUSTS — *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-37 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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) |
|---|---|---|---|---|---|---|---|---|---|
| 137. -Occidental Petroleum Corp. Stock (common) | A | Distribution | J | T | | | | | |
| 138. -Office Depot Inc. Stock (common) | | None | J | T | | | | | |
| 139. -Posco ADR Stock (common) | | None | J | T | | | | | |
| 140. -Paccar Inc. (common) | | None | J | T | | | | | |
| 141. -Paychex Inc. Stock (common) | | None | J | T | | | | | |
| 142. -Pepsico Inc. Stock (common) | | None | J | T | | | | | |
| 143. -Telekomunik Indonesia Spons ADR Stock (common) | | None | J | T | | | | | |
| 144. -Pfizer Inc. Stock (common) | | None | J | T | | | | | |
| 145. -Philadelphia Cons. Hlds Corp. Stock (common) | | None | J | T | | | | | |
| 146. -Plantronics Inc. Stock (common) | | None | J | T | | | | | |
| 147. -Portugal Telecom Sponsored ADR Stock (common) | | None | J | T | | | | | |
| 148. -Praxair Inc. Stock (common) | | None | J | T | | | | | |
| 149. -Procter & Gamble Co. Stock (common) | A | Dividend | K | T | | | | | |
| 150. -Progressive Corp. Ohio Stock (common) | | None | J | T | | | | | |
| 151. -Public Sve. Enterprise Group Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 152. -Qualcomm Inc. Stock (common) | | None | J | T | | | | | |
| 153. -Quanta Service s Inc. Stock (common) | | None | J | T | | | | | |

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

| FINANCIAL DISCLOSURE REPORT<br>Page 13 of 20 | Name of Person Reporting<br>Puryear, Gustavus A | Date of Report<br>06/13/2007 |
|---|---|---|

**VII. INVESTMENTS and TRUSTS** – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets)<br>Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | If not exempt from disclosure | | | |
| | (1) Amount Code 1 (A-H) | (2) Type (e.g. div., rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | (2) Date Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
| 154. -Quest Diagnostics Inc. Stock (common) | | None | J | T | | | | | |
| 155. -Research in Motion Stock (common) | | None | J | T | | | | | |
| 156. -Rio Tinto PLC Stock (common) | A | Dividend | J | T | | | — | | |
| 157. -SK Telecom Ltd. Sponsored ADR Stock (common) | | None | J | T | | | | | |
| 158. -Sappi Ltd. Stock (common) | | None | J | T | | | | | |
| 159. -Sasol Ltd. Sponsored ADR Stock (common) | A | Dividend | J | T | | | | | |
| 160. -Schlumberger Ltd. Stock (common) | | None | J | T | | | | | |
| 161. -Sealed Air Corp. Stock (common) | A | Dividend | J | T | | | | | |
| 162. -Shaw Group Inc. Stock (common) | | None | J | T | | | | | |
| 163. -Sigma-Aldrich Corp. Stock (common) | A | Dividend | J | T | | | | | |
| 164. -Simpson Mfg. Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 165. -Solvay SA-ADR Stock (common) | | None | J | T | | | | | |
| 166. -Sothebys Stock (common) | A | Dividend | J | T | | | | | |
| 167. -Sprint Nextel Corp. Stock (common) | A | Dividend | J | T | | | | | |
| 168. -Starbucks Corp. Stock (common) | | None | J | T | | | | | |
| 169. -Suncor Energy Inc. Stock (common) | | None | J | T | | | | | |
| 170. -SunTrust Banks Inc. Stock (common) | E | Dividend | M | T | | | | | |

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

| FINANCIAL DISCLOSURE REPORT<br>Page 14 of 20 | Name of Person Reporting<br>Puryear, Gustavus A | Date of Report<br>06/13/2007 |
|---|---|---|

**VII. INVESTMENTS and TRUSTS** – *Income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets)<br>Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period<br>(1) Amount Code 1 (A-H) | B. Income during reporting period<br>(2) Type (e.g. div., rent, or int.) | C. Gross value at end of reporting period<br>(1) Value Code 2 (J-P) | C. Gross value at end of reporting period<br>(2) Value Method Code 3 (Q-W) | D. Transactions during reporting period<br>(1) Type (e.g. buy, sell, merger, redemption) | D. Transactions during reporting period<br>If not exempt from disclosure<br>(2) Date Month - Day | D. Transactions during reporting period<br>If not exempt from disclosure<br>(3) Value Code 2 (J-P) | D. Transactions during reporting period<br>If not exempt from disclosure<br>(4) Gain Code 1 (A-H) | D. Transactions during reporting period<br>If not exempt from disclosure<br>(5) Identity of buyer/seller (if private transaction) |
|---|---|---|---|---|---|---|---|---|---|
| 171. -Syngenta AG ADR Stock (common) | | None | J | T | | | | | |
| 172. -TXU Corp. Stock (common) | A | Dividend | J | T | | | | | |
| 173. -Talbots Inc. Stock (common) | A | Dividend | J | T | | | — | | |
| 174. -Technitrol Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 175. -Telefonica De Espana SA Sponsored ADR Stock (common) | | None | J | T | | | | | |
| 176. -Tetra Technologies Inc. Stock (common) | | None | J | T | | | | | |
| 177. -Thor Industries Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 178. -Transatlantic Holdings, Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 179. -Triad Hospitals Inc. Stock (common) | | None | J | T | | | | | |
| 180. -Triumph Group Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 181. -Tyco Intl. Ltd. Stock (common) | A | Dividend | J | T | | | | | |
| 182. -U.S. Bancorp, DEL Stock (common) | A | Dividend | J | T | | | | | |
| 183. -Unionbancal Corp. Stock (common) | A | Dividend | J | T | | | | | |
| 184. -United Technologies Corp. Stock (common) | | None | J | T | | | | | |
| 185. -UnitedHealth Group Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 186. -UPM-KYMMENE OYJ Sponsored ADR Stock (common) | A | Dividend | J | T | | | | | |
| 187. -Varian Semiconductor Equip. Assoc. Inc. Stock (common) | | None | J | T | | | | | |

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

| FINANCIAL DISCLOSURE REPORT<br>Page 15 of 20 | Name of Person Reporting<br>Puryear, Gustavus A | Date of Report<br>06/13/2007 |
|---|---|---|

**VII. INVESTMENTS and TRUSTS** – *Income, value, transactions (includes those of the spouse and dependent children. See pp. 34-37 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets)<br>Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | If not exempt from disclosure | | | |
| | (1) Amount Code 1 (A-H) | (2) Type (e.g. div., rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | (2) Date Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
| 188. -Varian Med. Sys. Inc. Stock (common) | | None | J | T | | | | | |
| 189. -Vulcan Materials Co. Stock (common) | | None | J | T | | | | | |
| 190. -Wachovia Corp. Stock (common) | A | Dividend | J | T | | | — | | |
| 191. -Wal-Mart Stores Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 192. -Walgreen Co. Stock (common) | | None | J | T | | | | | |
| 193. -Washington Mutual Inc. Stock (common) | | None | J | T | | | | | |
| 194. -Wells Fargo & Co. Stock (common) | | None | J | T | | | | | |
| 195. -Whole Foods Mkt Inc. Stock (common) | A | Dividend | J | T | | | | | |
| 196. -Wyeth Stock (common) | A | Dividend | K | T | | | | | |
| 197. -Wyndham Worldwide Corp. Stock (common) | | None | J | T | | | | | |
| 198. -Yara Intl. ADR Stock (common) | | None | J | T | | | | | |
| 199. -Zale Corp. Stock (common) | | None | J | T | | | | | |
| 200. -Zimmer Holdings Inc. Stock (common) | | None | J | T | | | | | |
| 201. -Ingersoll Rand Stock (common) | | None | J | T | | | | | |
| 202. -Transocean Inc. Stock (common) | | None | J | T | | | | | |
| 203. Trust #2: | D | Dividend | O | T | | | | | |
| 204. -Adobe Sys. Inc Stock (common) | | | | | | | | | |

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

| FINANCIAL DISCLOSURE REPORT<br>Page 16 of 20 | Name of Person Reporting<br>Puryear, Gustavus A | Date of Report<br>06/13/2007 |
|---|---|---|

**VII. INVESTMENTS and TRUSTS** -- *Income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets)<br>Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | (1) Amount Code 1 (A-H) | (2) Type (e.g. div., rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | 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) |
| 205. -Apache Corp. Stock (common) | | | | | | | | | |
| 206. -Baxter Intl Inc. Stock (common) | | | | | | | | | |
| 207. -Chevron Corp. Stock (common) | | | | | | | | | |
| 208. -Cisco Sys Inc. Stock (common) | | | | | | | | | |
| 209. -CVS/Caremark Corp. Stock (common) | | | | | | | | | |
| 210. -Danaher Corp. Stock (common) | | | | | | | | | |
| 211. -ExxonMobil Corp. Stock (common) | | | | | | | | | |
| 212. -First Data Corp. Stock (common) | | | | | | | | | |
| 213. -Intel Corp. Stock (common) | | | | | | | | | |
| 214. -MSCI EAFE Index Fd Stock (common) | | | | | | | | | |
| 215. -Johnson & Johnson Stock (common) | | | | | | | | | |
| 216. -Lowes Co. Inc. Stock (common) | | | | | | | | | |
| 217. -Medtronic Inc. Stock (common) | | | | | | | | | |
| 218. -Microsoft Corp. Stock (common) | | | | | | | | | |
| 219. -Midcap Spdr S&P 400 Index Stock (common) | | | | | | | | | |
| 220. -Pepsico Inc. Stock (common) | | | | | | | | | |
| 221. -Procter & Gamble Stock (common) | | | | | | | | | |

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

**FINANCIAL DISCLOSURE REPORT**
Page 17 of 20

| Name of Person Reporting | Date of Report |
|---|---|
| Puryear, Gustavus A | 06/13/2007 |

## VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-37 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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) |
|---|---|---|---|---|---|---|---|---|---|
| 222. -Qualcomm Corp. Stock (common) | | | | | | | | | |
| 223. -STI Classic Fd-Largecap Relative Value Stock (common) | | | | | | | | | |
| 224. -STI Classic FD-Small Cap Val Equity Stock (common) | | | | | | | | | |
| 225. -STI Classic Fd-Intl Equity Index Stock (common) | | | | | | | | | |
| 226. -STI Classic Fd-Largecap Value Equity Stock (common) | | | | | | | | | |
| 227. -SunTrust Tennessee Reserve Fund #1 | | | | | | | | | |
| 228. -SunTrust Tennessee Reserve Fund #2 | | | | | | | | | |
| 229. -Sysco Corp. Stock (common) | | | | | | | | | |
| 230. -Target Corp. Stock (common) | | | | | | | | | |
| 231. -Templetom Instl Fnds/Foreign Equity Ser Stock (common) | | | | | | | | | |
| 232. -Texas Instruments Inc. Stock (common) | | | | | | | | | |
| 233. -United Technologies Corp. Stock (common) | | | | | | | | | |
| 234. -Walgreen Co. Stock (common) | | | | | | | | | |
| 235. -Wellpoint Inc. Stock (common) | | | | | | | | | |
| 236. -3M Co. Stock (common) | | | | | | | | | |
| 237. State of Alaska 529 Plan (John Hancock) #1 | | None | M | T | | | | | |
| 238. State of Alaska 529 Plan (John Hancock) #2 | | None | M | T | | | | | |

1. Income Gain Codes (See Columns B1 and D4)
2. Value Codes (See Columns C1 and D3)
3. Value Method Codes (See Column C2)

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
I =$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
R =Cost (Real Estate Only)
P4 =More than $50,000,000
T =Cash Market
Q =Appraisal
S =Assessment
U =Book Value
V =Other
W =Estimated

**FINANCIAL DISCLOSURE REPORT**
Page 18 of 20

| Name of Person Reporting | Date of Report |
|---|---|
| Puryear, Gustavus A | 06/13/2007 |

## VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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) |
|---|---|---|---|---|---|---|---|---|---|
| 239. Corrections Corporation of America Stock Options | | None | P2 | T | | | | | |
| 240. Diversified Trust Co. Small/Mid Cap US Equity | B | Dividend | N | T | | | | | |
| 241. Diversified Trust Co. International Equity | B | Dividend | N | T | | | — | | |
| 242. Diversified Trust Co. Federated Tax Free Money Market Fund | A | Interest | K | T | | | | | |
| 243. Nashville Bank & Trust Co. Northern Inst. Mun. Fund | E | Interest | K | T | | | | | |
| 244. NBT Cash Management | A | Interest | L | T | | | | | |
| 245. | | | | | | | | | |
| 246. | | | | | | | | | |
| 247. | | | | | | | | | |
| 248. | | | | | | | | | |
| 249. | | | | | | | | | |

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

| FINANCIAL DISCLOSURE REPORT<br>Page 19 of 20 | Name of Person Reporting<br>Puryear, Gustavus A | Date of Report<br>06/13/2007 |
|---|---|---|

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

Part VII. Investments & Trusts

Trust #1 has been completely distributed; there are no assets to report.

| FINANCIAL DISCLOSURE REPORT<br>Page 20 of 20 | Name of Person Reporting<br>Puryear, Gustavus A. | Date of Report<br>06/13/2007 |
|---|---|---|

**IX. CERTIFICATION.**

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

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

Signature _____ Date 6/15/07

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

## FINANCIAL STATEMENT

### NET WORTH

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

| ASSETS | | | | LIABILITIES | | | |
|---|---|---|---|---|---|---|---|
| Cash on hand and in banks | | 337 | 483 | Notes payable to banks-secured | | | |
| U.S. Government securities-add schedule | | | | Notes payable to banks-unsecured | | | |
| Listed securities-add schedule | 3 | 841 | 805 | Notes payable to relatives | | | |
| Unlisted securities--add schedule | | 918 | 048 | 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 | | | |
| Real estate owned-add schedule | 1 | 500 | 000 | Chattel mortgages and other liens payable | | | |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 397 | 000 | Credit Cards | | 24 | 135 |
| Cash value-life insurance | | | | Utilities, Landscape Service, Insurance etc. | | 2 | 692 |
| Other assets itemize: | | | | Dues (Marina, Club) | | 5 | 249 |
| Alaska 529 plans | | 247 | 585 | Professional Services (Tax Preparation) | | | 825 |
| IRA accounts | | 27 | 710 | | | | |
| 50% interest in G.A.P. Realty #1, LLC | | 901 | 208 | Total liabilities | | 32 | 901 |
| Net, After-Tax, Vested Stock Options, CCA | 5 | 322 | 510 | Net Worth | 13 | 460 | 448 |
| Total Assets | 13 | 493 | 349 | Total liabilities and net worth | 13 | 493 | 349 |
| CONTINGENT LIABILITIES | | | | GENERAL INFORMATION | | | |
| As endorser, comaker or guarantor | | | | Are any assets pledged? (Add schedule) | Yes | | |
| On leases or contracts | | | | Are you defendant in any suits or legal actions? | No | | |
| Legal Claims | | | | Have you ever taken bankruptcy? | No | | |
| Provision for Federal Income Tax | | | | | | | |
| Other special debt | | | | | | | |

**FINANCIAL STATEMENT**

NET WORTH SCHEDULES

| Listed Securities | |
|---|---|
| 3M Co. | 11,588 |
| ABN Amro Holding NV ADR | 3,149 |
| Adobe Sys Inc | 2,909 |
| Alcoa Inc. | 2,129 |
| Allergan Inc. | 3,030 |
| Allstate Corpo. | 935 |
| Altria Group | 5,514 |
| American Express | 9,404 |
| American International Group | 372,271 |
| Ameriprise Financial Inc. | 4,163 |
| Andrews Corp. | 1,856 |
| AON Corp. | 775 |
| Apache Corp | 12,688 |
| Apple Computer Inc. | 4,990 |
| Aqua America Inc. | 1,769 |
| Arrow Electronics | 2,229 |
| ATT Inc. | 3,485 |
| Autoliv Inc. | 2,326 |
| Autozone Inc. | 1,330 |
| Avis Budget Group | 141 |
| Banco Bilbao Vizcaya Argentina SA | 2,394 |
| Bank America Corp. | 2,036 |
| Barclays PLC | 2,031 |
| Baxter Intl Inc | 8,211 |
| Berkshire Hathaway Inc. Class B | 3,628 |
| BHP Ltd. Sponsored ADR | 2,442 |
| Blackrock Inc. | 749 |
| Boston Scientific | 772 |
| Burlington Northern Santa Fe Corp. | 1,313 |
| Cabela's Inc. | 3,084 |
| Cabot Microelectonics Corp. | 1,928 |
| Cardinal Health Inc. | 1,049 |
| Caterpillar Inc. | 2,905 |
| CEMEX | 2,275 |
| Chevron Corp | 15,947 |
| Chicago Mercantile Exchange | 4,134 |



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| | |
|---|---|
| Cisco Sys Inc | 10,562 |
| Citigroup | 5,094 |
| City of Chattanooga TN SER A DTD | 50,657 |
| Columbia Sportswear Co. | 2,191 |
| Comcast Corp. | 3,960 |
| Commscope Inc. | 4,432 |
| Conoco Phillips Oil | 8,322 |
| Continental AG | 2,098 |
| Corrections Corporation of America | 427,534 |
| Costco Wholesale Corp. | 4,018 |
| CRH PLC | 2,681 |
| CVS Corp. | 1,486 |
| CVS/Caremark Corp | 4,892 |
| Danaher Corp. | 107,853 |
| Dean Foods | 729 |
| Dell Inc. | 3,403 |
| Devon Energy Corp. | 2,550 |
| Diageo PLC | 1,688 |
| Dover Corp. | 1,444 |
| Electronic Arts | 1,512 |
| Emerson Electric | 1,880 |
| EOG Res Inc. | 2,203 |
| Expeditors Intl. | 2,508 |
| Exxon Mobil | 79,380 |
| Fannie Mae | 1,178 |
| FedEx Corporation | 3,690 |
| First Data Corp | 8,424 |
| FLIR Sys Inc. | 3,037 |
| Forrester Resh. Inc. | 2,707 |
| Fortune Brands | 2,403 |
| FPL Group | 1,287 |
| Franklin Res. Inc. | 19,697 |
| FTI Consulting | 3,125 |
| GAP Inc. | 628 |
| General Electric | 4,608 |
| General Mills | 1,198 |
| GFI Group Inc. | 3,116 |
| Gilead Sciences Inc. | 1,634 |
| Google | 2,828 |
| Greencore Group | 2,386 |
| Greenhill & Co. | 2,214 |



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| | |
|---|---|
| H&R Block Inc. | 1,357 |
| Hanesbrands Inc. | 133 |
| Harley Davidson | 3,799 |
| Hartford Financial | 2,024 |
| Helix Energy Solutions Group | 2,296 |
| Hewitt Associates | 2,826 |
| Home Depot | 1,515 |
| Honeywell Intl Inc. | 2,167 |
| HSBC Holdings PLC | 5,542 |
| Impala Platinum | 2,615 |
| Ingersol Rand | 1,116 |
| Innovative Solutions | 3,393 |
| Intel Corp | 5,375 |
| Intuit | 1,992 |
| Iron Mountain Inc. | 1,405 |
| Ishares MSCI Index Fund | 31,664 |
| Jacobs Engineering Group | 3,278 |
| Jefferies Group | 3,012 |
| John Hancock Bank & Thrift | 1,436 |
| Johnson & Johnson | 38,532 |
| JP Morgan Chase | 7,815 |
| Kansas City Southern | 3,344 |
| Kensey Nash Corp. | 2,186 |
| Kraft Foods | 1,807 |
| Laboratory Corp. America | 2,368 |
| Las Vegas Sands Corp. | 1,704 |
| Lloyds TSB Group PLC | 2,564 |
| Lowes Cos Inc | 10,548 |
| Madison Cnty Tenn Sch & Pub Impt | 50,990 |
| Manhattan Assocs. | 3,760 |
| Marathon Oil | 3,047 |
| Marriott Intl. Inc. | 3,165 |
| Masco Corp. | 680 |
| McDonalds Corp. | 2,414 |
| McGraw-Hill | 5,242 |
| Medtronic Inc | 12,703 |
| Merrill Lynch | 2,707 |
| Methanex | 2,158 |
| Metorex | 2,814 |
| MGM Mirage | 3,026 |
| Microsoft Corp | 20,210 |



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| | |
|---|---|
| Midcap Spdr S&P 400 Index | 126,762 |
| Midcap Spdr Tr Unit Ser 1 | 50,197 |
| Molina Healthcare | 2,267 |
| Montgomery Cnty Tenn Ref FSA Go Unltd DTD | 51,181 |
| Moodys | 1,653 |
| MPS Group | 1,917 |
| MSCI EAFE Index Fd | 59,370 |
| Nara Bancorp Inc. | 2,064 |
| Nautilus Group | 1,864 |
| News Corp. | 2,015 |
| Nordstrom | 2,746 |
| Norsk Hydro | 2,591 |
| Occidental Petroleum | 2,282 |
| Office Depot | 1,009 |
| OSI Restaurant Partners | 1,791 |
| Paychex | 1,855 |
| Pepsico Inc | 11,896 |
| Pfizer | 1,191 |
| Philadelphia Cons. Hlds Corp. | 3,038 |
| Plantronics | 2,888 |
| Portugal Telecom | 2,565 |
| Posco ADR | 3,142 |
| Praxair | 3,550 |
| Procter & Gamble | 26,146 |
| Progressive Corp. Ohio | 2,422 |
| Public Svc. Enterprise Group | 2,594 |
| Qualcomm Corp | 11,388 |
| Quanta Services | 3,436 |
| Quest Diagnostics | 978 |
| Research in Motion | 1,974 |
| Rio Tinto PLC | 3,660 |
| Sappi Ltd. | 2,912 |
| Sara Lee Corp. | 656 |
| Sasol Ltd. | 2,563 |
| Schlumberger Ltd. | 1,477 |
| Sealed Air Corp. | 2,632 |
| Shaw Group | 3,567 |
| Shelby Cnty Tenn Pub Impt & Sch-Ser B DTD | 51,348 |
| Sigma-Aldrich | 8,416 |
| Simpson Mfg. | 1,930 |
| SK Telecom Ltd. | 2,483 |



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| | |
|---|---|
| Solvay SA | 2,385 |
| Sothebys | 3,097 |
| Sprint Nextel | 1,202 |
| Starbucks | 2,947 |
| STI Classic Fd - Intl Equity Index | 58,021 |
| STI Classic Fd - Largecap Value Equity | 102,735 |
| STI Classic Fd -Small Cap Val Equity | 43,018 |
| STI Classic Fd-Largecap Relative Value | 183,314 |
| Suncor Energy | 1,610 |
| SunTrust Banks | 1,074,076 |
| Syngenta | 2,581 |
| Sysco Corp | 6,221 |
| Talbots Inc. | 2,233 |
| Target Corp | 13,061 |
| Technitrol Inc. | 3,354 |
| Telefonica De Espana SA | 2,706 |
| Telekomunik Indonesia Spons ADR | 2,985 |
| Templeton Instl Fnds/Foreign Equity Ser | 31,299 |
| Tenn. St. Sch Bd Auth Second PG-Ser A DTD | 50,764 |
| Tetra Technologies Inc. | 2,914 |
| Texas Instrs Inc | 6,015 |
| Thor Industries | 2,589 |
| Tipton Cty Tenn First Util Dist Wtwrks & Gas | 50,143 |
| Transatlantic Holdings | 1,042 |
| Transocean Inc. | 862 |
| Triad Hospitals | 1,063 |
| Triumph Group Inc. | 3,335 |
| TXU Corp. | 1,640 |
| Tyco Intl. | 5,221 |
| U.S. Bancorp | 2,061 |
| Unionbancal Corp. | 1,230 |
| United Technologies Corp | 15,774 |
| UnitedHealth Group | 1,327 |
| UPM-KYMMENE | 2,230 |
| Varian Med. Sys. | 1,688 |
| Varian Semiconductor | 3,318 |
| Vulcan Materials | 1,237 |
| Wachovia | 2,777 |
| Walgreen Co. | 9,439 |
| Wal-Mart | 4,792 |
| Washington Mutual | 1,889 |



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| | |
|---|---|
| Wellpoint Inc. | 10,266 |
| Wells Fargo & Co. | 3,051 |
| Whole Foods | 3,275 |
| Wilson Cnty Tenn Cnty Dist Sch | 50,783 |
| Wyeth | 27,750 |
| Wyndham Worldwide | 346 |
| Yara Intl. | 2,357 |
| Zale Corp. | 1,116 |
| Zimmer Holdings | 2,714 |
| Total Listed Securities | $ 3,841,805 |
| | |
| Unlisted Securities | |
| DTC International Equity Fund | $477,639 |
| DTC Small/Mid Cap U.S. Equity Fund | 440,409 |
| Total Unlisted Securities | $918,048 |
| | |
| Real Estate Owned | |
| Personal residence | $ 1,500,000 |
| | |
| Assets Pledged | |
| Personal Residence | $250,000[1] |

[1] Personal residence is pledged up to $250,000 to secure an available Line of Credit; however, there was no balance on the Line of Credit as of April 30, 2007.



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AFFIDAVIT

I, Gustavus Adolphus Puryear IV, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

6/15/07
(DATE)

(NAME)

(NOTARY)

ALICE ROGAN
STATE OF TENNESSEE NOTARY PUBLIC
DAVIDSON COUNTY, TENN.
My Commission Expires JAN. 3, 2011

Mr. Miller.

**STATEMENT OF BRIAN STACY MILLER, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF ARKANSAS**

Mr. MILLER. Thank you, Senator Feinstein. Thank you so much for taking the time to have this hearing this afternoon. We know it got bumped from this morning.

Senator FEINSTEIN. I don't think your mic is turned on.

Mr. MILLER. Is that it now? The light is on.

Senator FEINSTEIN. Yes. If the light's on, it's on. Pull it a bit closer to you. Thank you.

Mr. MILLER. Thank you, Senator.

I wanted to thank you for taking the time to have this hearing this afternoon. Also, I want to thank President Bush for giving me this opportunity, and my two home State Senators. I told Senator Lincoln—I hugged her as she left—that I almost cried when she said those words about me. It's kind of difficult sometimes to sit up and listen to people say such nice things. But I want to thank Senator Lincoln and Senator Pryor.

Today I have my children with me and I have my wife with me. My wife's name is Monique, and both of my daughters' names are Alexandria and Arianne. They're 13-year-old twins. They were very thankful to be here today also.

Senator FEINSTEIN. Well, we welcome them. It's great to have you here. Thank you.

That completes it?

Mr. MILLER. Yes.

[The biographical information follows:]

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**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

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

   Brian Stacy Miller

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

   United States District Judge for the Eastern District of Arkansas

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

   Justice Building
   625 Marshall Street
   Little Rock, Arkansas 72201

   Residence: Helena, Arkansas

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

   1967; Pine Bluff, Arkansas

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

   I am married to Monique Nichols. She is a High School science teacher at Barton High School; 9546 Highway 85 South; Lexa, Arkansas 72355

   I have two dependent children.

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

   August 1992 to May 1995; Vanderbilt Law School; Doctor of Jurisprudence; May 1995

   August 1990 to May 1992; University of Central Arkansas; Bachelor of Science, May 1992



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June 89 to May July 90; Phillips College of the University of Arkansas; Associate of Arts, May 1991

While on board the USS New Jersey I took courses through the City College of Chicago; no degree awarded.

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

Employment:

January 2007 to present
Arkansas Court of Appeals
625 Marshall Street
Little Rock, Arkansas 72201
Judge

1995 to 2006
Martin, Tate, Morrow & Marston, P.C.
6410 Poplar Ave., Suite 1000
Memphis, Tennessee 38119
Associate Attorney

1998 to 2006
Miller Law Firm
622 Pecan Street
Helena, Arkansas 72342
Solo Law Practice

2000 to 2006
Phillips County, Arkansas Prosecuting Attorney's Office
620 Cherry Street
Helena, Arkansas 72342
Deputy Prosecuting Attorney

1999 to 2005
City of Helena, Arkansas
98 Plaza Street
Helena-West Helena, Arkansas 72390
City Attorney



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1994 to 1995
Employers Security Company
1719 West End Ave.
Nashville, Tennessee 37203
Security Guard

July – August, 1994
Martin, Tate, Morrow & Marston, P.C.
6410 Poplar Ave., Suite 1000
Memphis, Tennessee 38119
Summer Law Clerk

Summer 1994
Rives & Peterson
505 North 20th Street
Birmingham, Alabama 35203
Summer Law Clerk

Summer 1994
Starnes & Atchison LLP
100 Brookwood Place, Suite 7
Birmingham, Alabama 35209
Summer Law clerk

Summer 1993
U.S. Representative Blanche Lambert
355 Dirksen Senate Office Building
Summer Intern

Summer 1993
Spain & Gillon, L.L.C.
2117 2nd Ave. North
Birmingham, Alabama 35203
Summer Law Clerk

Other affiliations:

2000 to present
Southern Bancorp
605 Main Street
Arkadelphia, Arkansas 71923
Director

2002 to present
First Bank of the Delta, N.A.
400 East Plaza Street



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West Helena, Arkansas 72390
Director

2007 to present
Boys and Girls Club of Phillips County, Arkansas
P.O. Box 511
Helena, Arkansas 72342
Director

Approximately 2002 to 2006
Southern Good Faith Fund
2304 West 29th Avenue
Pine Bluff, Arkansas 71603
Director

Approx. 2000 to 2005
Delta State Bank [merged with First Bank of the Delta, N.A.]
128 Main Street
Elaine, Arkansas 72333
Director

Approximately 2001 to 2002
KIPP Delta College Preparatory School
215 Cherry Street
Helena, Arkansas 72342
Director

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

I enlisted in the U.S. Naval Reserve on November 29, 1984 and entered active duty in the U.S. Navy on June 17, 1985 and was honorably released from active duty on June 16, 1989. During my active duty service, I was a Boatswains Mate aboard the USS New Jersey BB-62. I received an honorable discharge on November 28, 1992 with the rank of E-4.

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.

Military:
Good Conduct Medal
Sea Service Ribbon (2)
Battle Efficiency Ribbon



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00321 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Academic:
Graduated with honors from the University of Central Arkansas
Named one of eight university outstanding students
Named political science department outstanding student
Alpha Chi National Honor Society
Named Phillips College Distinguished Alumni

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

American Bar Association

Arkansas Bar Association
House of Delegates, 2006 to present
Law School Committee, 2007 to present

Arkansas Supreme Court Committee on Criminal Practice
2007 to present

Memphis Bar Association
Publications Committee, 2006

National Bar Association

Phillips County Bar Association

Tennessee Bar Association

11. **Bar and Court Admission**:

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

Tennessee: 1995 to present

Arkansas: 1996 to present

There have been no lapses in membership.

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

Tennessee State Courts, 1995



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00322 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Arkansas State Courts, 1996

United States Court of Appeals for the Sixth Circuit, August 1996

United States Court of Appeals for the Eighth Circuit, August 1996

United States District Court for the Western District of Tennessee, November 1995

United States District Court for the Northern District of Mississippi, August 1996

United States District Court for the Eastern and Western District of Arkansas, August 1996

There have been no lapses in membership.

12. **Memberships**:

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

Alpha Phi Alpha Fraternity, Incorporated

Trucking Industry Defense Association

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

Alpha Phi Alpha Fraternity, Incorporated is service fraternity. Although it does not discriminate on any basis, I am aware of no female members. I joined the fraternity in college and served as a graduate member in 2004 and 2005. I am not an active member.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00323 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

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

None

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

None

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

None

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

May 2007; Commencement Address, Phillips College of the University of Arkansas; Topic: Seizing opportunity and following dreams
Campus Drive

May 2006; Commencement Address, KIPP Delta College Preparatory School; Topic: Overcoming life's obstacles and following dreams

May 2005; Commencement Address, Elaine High School; Topic: The Spirit of Elaine



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00324 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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May 2003; Key Note Speaker, Helena-West Helena Central High School JROTC Banquet; Continuing education and following dreams
Delivered at Lilly Peter Auditorium

May 2000; Commencement Address, Helena-West Helena Central High School; .
Topic: Continuing education and following dreams
Delivered at Central High School

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

I co-hosted a community affairs radio show, The Martin-Miller Report, on local radio from approximately 2000 to 2007. My co-host, Robert Martin, was a member of the city council and would discuss the actions of the Helena City Council. It was broadcast on the first and third Saturdays of each month from 5:00 p.m. to 5:30 p.m. The Station is KJIW FM 94.5 and it is owned by Elijah Mondy, 200 Moore Street, Helena, Arkansas 72342, 870-338-2700. I have no tapes or transcripts of any of the broadcasts.

I was briefly interviewed in 2007 on two occasions by George Bingham who has a public access television program called *In The Community With George Bingham*. On the first occasion, I spoke about my recent appointment to the Arkansas Court of Appeals. On the second occasion, I spoke about the activities at the Race for the Cure event that I was attending.

Newspaper article; Helena-W. Helena board ordered to redraw zones, Arkansas Democrat-Gazette; Michelle Hillen, June 26, 2005.

Newspaper article; Jury declares Jenkins 'not guilty' of murder, Daily World Steve Russell, December 20-22, 2002.

Newspaper article; Helena-W. Helena district should be redrawn, lawsuit argues, Arkansas Democrat-Gazette, Linda Satter, August 7, 2002

Article in Memphis Bar Association Magazine, Law Inspires Dreams, Memphis Lawyer, Volume 23, Issue 3; Liz Landrigan, May/June 06

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.

On January 1, 2007, I began service on the Arkansas Court of Appeals. I was appointed by Governor Mike Huckabee for a term ending December 31, 2008. This court is a court of statewide appellate jurisdiction.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00325 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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From 2002 to 2006 I served as a Holly Grove, Arkansas City Judge. I was appointed by Mayor Lula Tyler. This court heard criminal misdemeanors.

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

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

CA06-515. *Barry Ward v. Hickory Springs Manufacturing Co. and Liberty Mutual Insurance Co*; January 31, 2007

CA06-696. *Jessica James v. Arkansas Department of Health & Human Services*; January 31, 2007

CACR06-574. *Adrian Grissom v. State of Arkansas*; February 7, 2007

CA06-525. *John Coleman v. Pro Transportation, Inc. and Commerce & Industry Ins. Co*; February 7, 2007

CA06-640. *Di'Anne G. Hale-Hines v. Paul F. Hale*; February 7, 2007

CACR06-751. *Marcus Anderson v. State of Arkansas*; February 14, 2007

CA06-572. *Michael Rose d/b/a Best Way Pawn & Used Cars, Inc. v. Mike W. Ford*; February 14, 2007

CA06-411. *James B Burton and Sonja Burton v. Steve Hankins and Lisa Hankins*; February 21, 2007

CA06-569. *Dorothy Collins v. St. Vincent Doctors; St. Vincent Infirmary et al.*; March 7, 2007

CA06-866. *Maria S. Rodriguez v. M. McDoniel Co., Inc. and Liberty Mutual Insurance Company*; March 7, 2007

CACR06-642. *Richard Richardson v. State of Arkansas*; March 14, 2007

CA06-569. *Dorothy Collins v. St. Vincent Doctors; St. Vincent Infirmary et al.*; March 14, 2007

CA06-1293. *Andrea McLin v. Arkansas Department of Health & Human Services*; March 14, 2007

CACR06-359. *Tania Leann Nesler v. State of Arkansas*; April 4, 2007

CACR06-770. *Pamila Sue Champlin and Mark Treat v. State of Arkansas*; April 4, 2007

CA06-309. *Delores Hales and Brad Hughes v. Arkansas Department of Health and Human Services*; April 4, 2007



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00326 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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CA06-646. *James Penny v. Liberty Bank of Arkansas and Larry L. Hossfeld*; April 4, 2007

CACR06-1015. *Bruce Moore v. State of Arkansas*; April 11, 2007

CA06-711. *Transplace Stuttgart, Inc. and Hartford Underwriters Insurance Co. v. Marty Carter, Employee, and C-Claw, Inc., Employer*; April 25, 2007

CA06-971. *Carl Eugene Montgomery v. Linda Sue Montgomery*; April 25, 2007

CA06-1349. *Joseph Beattie v. Arkansas Department of Health and Human Services*; April 25, 2007

CACR06-1101. *John Kevin George v. State of Arkansas*; May 2, 2007

CA06-1003. *Erica Williams v. Arkansas Department of Human Services*; May 2, 2007

CA06-1097. *Rick Powell and Fred Nutt v. Tab Townsell*; May 2, 2007

CA06-1183. *Denea M. Hardin v. Holiday Inn-Airport, and Wausau Underwriters Insurance*; May 9, 2007

CA06-1482. *Christopher McCarty v. Arkansas Department of Health and Human Services*; May 9, 2007

CACR06-1398. *Edward Glover v. State of Arkansas*; May 23, 2007

CA06-838. *David Hamilton and Pritam Hamilton v. Ford Motor Credit Co.;* May 23, 2007

CA06-1169. *Glenn Mechanical, Inc. v. Lucy Gibney*; May 30, 2007

CACR06-1247. *Roland Ester v. State of Arkansas*; June 6, 2007

CACR06-1491. *George Clifford Swan v. State of Arkansas*; June 13, 2007

CA06-1210. *Area Agency on Aging NW and Risk Management Resources v. Rhonda Bakanoff*; June 13, 2007

CA06-1330. *Marcella Reed v. Dollar General Stores*; June 20, 2007

CA07-90. *Robin Morgan v. Arkansas Department of Health and Human Services*; June 20, 2007

CACR06-577. *Samantha Meredith Tomberlin v. State of Arkansas*; June 27, 2007

CACR06-1240. *James Nowlin v. State of Arkansas*; June 27, 2007

CACR07-87. *Jerry Davis v. State of Arkansas*; June 27, 2007



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00327 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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CA06-904. *Sylva Croney and Jacqueline Croney v. Buddy Lane, et al.*; June 27, 2007

CA06-947. *Jill Fields v. Jeremy M. Ausburn and Daniell N. Ausburn*; September 5, 2007

CA06-1181. *Michael L. Veloria v. Zimdahl Electric and Fremont Pacific Insurance Co.*; September 5, 2007

CA07-92. *Delois Smith v. Jefferson Comprehensive Care System, Inc. and Commerce & Industry Insurance Co.*; September 12, 2007

CACR06-1230. *Dennis J. Cheatham v. State of Arkansas*; September 26, 2007

CACR06-1457. *Wendell B. Steele v. State of Arkansas*; September 26, 2007

CA06-1394. *Bernard Burgess v. Don French and Coretta French*; September 26, 2007

CA07-377. *Lakesha Shaffers v. Arkansas Department of Health and Human Services*; September 26, 2007

CACR07-132. *Antoine Demetris Baker v. State of Arkansas*; October 3, 2007

CA07-127. *Mary Rodriguez v. Lakewood Plaza Nursing Center*; October 3, 2007

CA07-518. *Krista Russell v. Arkansas Department of Health and Human Services*; October 3, 2007

CA06-1453. *Bill Baldridge v. Susan L. Baldridge*; October 10, 2007

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

In Arkansas, appeals to the Supreme Court from the court of appeals are taken pursuant to petitions for review. Only one case in which I participated was accepted by the Supreme Court. That case is *Economy Inn & Suites and CCMSI v. Nimisha Jivian,* 97 Ark. App. 115 (2006); *Economy Inn & Suites and CCMSI v. Nimisha Jivian*, __ S.W.3d__ , 2007 WL 756732, Ark.App., March 14, 2007 (NO. CA06-158); *Economy Inn & Suites and CCMSI v. Nimisha Jivian*, __ S.W.3d__ 2007 WL 1847618, Ark., June 28, 2007 (NO. 06-1448).

Copies of the court of appeals opinion and the Supreme Court opinion are attached.

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

None, other than the one case listed in response to question b.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00328 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

None of my unpublished opinions were reversed on appeal or were affirmed with significant criticism of my substantive or procedural rulings.

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

Approximately 85% of my opinions were unpublished. All opinions, both published and unpublished, are posted on the court of appeals web site: www.state.ar.us/opinions/coa_opinions_list.cfm.

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

CA06-240. *Linda Annette Short d/b/a R&L Professional Management v. Revona Dee Freeman*; January 24, 2007

CACR05-1243. *Franklin Drennan and Ricky Dhasun Peoples v. State of Arkansas*; January 31, 2007

CA06-258. *Sheila Judkins v. Donnie Duvall, Michael Wayne Duvall, Susanna Duvall, Bobby Judkins, Lola Judkins, Office of Child Support Enforcement and Arkansas Department of Human Services*; January 31, 2007

CACR06-387. *Desmond D. Miller, Sr. v. State of Arkansas*; January 31, 2007

CA06-486. *Michelle Christine Archer v. Kirby Logan Archer*; January 31, 2007

CA06-730. *Conagra Poultry Company v. Brenda Young, from the Arkansas Workers' Compensation Commission*; February 7, 2007

CA06-759. *Nina Delt and Clarence Delt v. Grant Paddock Bowers, David Bowers, Minta Jane Bowers, United Automobile Aerospace & Agriculture Implement Workers of America and UAW Local 716*; February 7, 2007

CA06-410. *Joseph Lamb v. Lonoke County and AAC Risk Management Services*, February 7, 2007

CA06-466. *Wilma V. Adams and Leonard E. Adams v. Jerry Atkins, Robert P. Vickers, and Gloria Vickers*; February 7, 2007



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00329 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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CA06-420. *Arkansans for Animals, Inc. v. Chad Spears and State of Arkansas*; February 14, 2007

E06-144. *Department of Veterans Affairs v. Director, Department of Workforce Services and Martha E. Britton*; February 14, 2007

CAFR06-546. *Lonnie Newton, Jr. v. State of Arkansas*; February 14, 2007

CA06-668. *Mary E. Miller, Special Administrator of the Estate of Vincent Guy Miller, Deceased v. Centerpoint Energy Resource Corporation*; February 28, 2007

CA06-514. *Audrianna Grisham, P.A. v. City of England*; Feburary 21, 2007

CA06-854. *Dudley Cobble v. Ayers Drywall, Inc. and AIG Claims Services*; February 21, 2007
CA06-450. *Denise Worley, Administratrix of the Estate of Dale Worley, Deceased v. Cincinnati Insurance Companies*; February 21, 2007

CACR05-1372. *Jerry Eaton v. State of Arkansas*; February 28, 2007

CA06-867. *Jeffrey Ridenhour, 2004 Dodge Pickup v. State of Arkansas*; February 28, 2007

CA06-717. *Kenny E. Goodwin v. Unifund CCR, Assignee of Providian National Bankk*; February 28, 2007

CA06-248. *Judy Cavin, Jonathon Cavin, and Brandon Cavin v. Boyce Davis*; March 7, 2007

CA06-591. *Tommy Hodges and Central Crossing, L.L.C. v. John F. Jenkins Contracting, Inc.*; March 7, 2007

CACR06-169. *Ricky L. Smith v. State of Arkansas*; March 7, 2007

CACR06-697. *Rommell Gill and Patrick Gill v. State of Arkansas*; March 7, 2007

CA06-495. *Melinda Miller v. Arkansas Department of Human Services*; March 7, 2007

CACR05-775. *Jimmy D. Bumgardner v. State of Arkansas*; March 14, 2007

CA06-543. *Russell A. Weaver v. nabors Drilling USA and Richards & Associates, Inc.*; March 14, 2007



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00330 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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CA06-911. *International Paper Company and Sedgwick CMS v. Jeffery Hunter*; March 14, 2007

CA06-726. *Paul Schmidt v. Gary Stearman*; March 14, 2007

CACR06-870. *Thomas Jermaine Davis v. State of Arkansas*; March 21, 2007

CA06-893. *Howell Riley and Christie Riley v. Arkansas Department of Health and Human Services*; March 21, 2007

CA06-921. *Southern Telephone Const. Co., Legion Insurance Co., Second Injury Fund and Death & Permanent Total Disability Fund v. Gratton Harris*; March 21, 2007

CA06-980. *Linda Gulley v. St. Edward Mercy Medical Center and Second Injury Fund*; March 21, 2007

CA06-1094. *Terry King, Carolyn King, and Leslie King Stripling v. Arkansas Department of Health and Human Services*; March 21, 2007

CA06-1434. *Sheila Lane v. Arkansas Departmetnt of Health and Human Services*; April 4, 2007

CA06-721. *First Arkansas Bail Bonds, Inc. v. State of Arkansas*; April 4, 2007

CA06-891. *Raymond J. Berryman and Sarah J. Berryman v. Fadil Bayyari, as Trustee of the Fadil Bayyari Revocable Truste, and Springdale School District No. 50*; April 11, 2007

CACR06-982. *Rickey Alan Caldwell v. State of Arkansas*; April 25, 2007

CACR06-999. *Billy Ray Scott v. State of Arkansas*; April 25, 2007

CA06-733. *Odell Pollard v. Roy Newman, d/b/a Newman Electric*; April 25, 2007

CACR06-652. *Dallas Gene Roy v. State of Arkansas*; May 2, 2007

CA06-899. *Sheila Hill v. White River Health Systems, Inc.*; May 2, 2007

CA06-975. *Alicia Aguilar and Juan Aguilar v. Medardo Galdamez*; May 2, 2007

CA06-865. *Beth Riddle, Joseph Riddle, and Julia Riddle v. Richard Udouj, Special Administrator of the Estate of Olivia Udouj, Deceased, and Michael Udouj and Richard Udouj, Trustees of the Olivia Udouj Trust*; May 9, 2007



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00331 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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CA06-969. *Daniel Latham v. Arkansas Department of Health and Human Services*; May 9, 2007

CACR06-863. *Karon D. Trotter, Jr. v. State of Arkansas*; May 9, 2007

CA06-714. *Cyndall Sharp v. M.J. Keeler*; May 9, 2007

CA06-1185. *Jerry Swink v. Riceland Foods and Liberty Mutual*; May 9, 2007

CA06-782. *Ollie Cox v. Cedar Creek and Crum& Forster*; May 9, 2007

CA06-738. *Royal Oaks Vista, L.L.C. and John Hawks v. James Maddox, et al.*; May 9, 2007

CA06-940. *Baxter County Regional Hospital v. Arlene Denise Dixon*; May 23, 2007

CACR06-1007. *Darrell Bernard Dansby v. State of Arkansas*; May 23, 2007

CA06-948. *Sunbelt Business Brokers of Arkansas, Inc. and Marvin Winston v. Nancy James*; May 23, 2007
CACR06-1030. *Joseph Franklin Ford v. State of Arkansas*; May 23, 2007

CA06-728. *Teena L. Draper v. Dub Clenney Construction, Inc.*; May 23, 2007

CACR06-736. *Reggie Joe Patterson v. State of Arkansas*; May 30, 2007

CA06-1026. *Kristy Beverlin and William Beverlin v. Arkansas Department of Health and Human Services*; May 30, 2007

CACR06-1214. *Willie D. Coleman v. State of Arkansas*; May 30, 2007

CACR06-1290. *Roderick Grady v. State of Arkansas*; June 6, 2007

CA06-1163. *Paul A. Dee, Jr. v. Erin Dee*; June 6, 2007

CACR06-1120. *William Ray Pittman v. State of Arkansas*; June 6, 2007

CA06-878. *Virginia P. Bailey v. Marilyn McRoy*; June 6, 2007

CACR06-731. *Byrian Foote v. State of Arkansas*; June 6, 2007

CA06-978. *Gail Parkerson v. Richard McMurtrey, Sandra McMurtrey, and Ernie's Wrecker & Body Shop, Inc.*; June 6, 2007



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00332 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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CA06-1148. *Ricky L. Eppes v. Arkansas Homecare, Inc. and Companion Property & Csualty Co.*; June 6, 2007

CA06-1234. *James E. Franks, Judy Franks, Mark Branscum, Robert F. Lucas and James Alex Franks v. Mountain View, Arkansas Planning and Zoning Commission, et al.*; June 13, 2007

CA06-1450. *Joe Heflin v. Firestone Tube Company and Gallagher Bassett Services*; June 13, 2007

CA06-1002. *Kimberly Dawn Sykes v. Justin Warren*; June 13, 2007

CACR06-1320. *James Ryan v. State of Arkansas*; June 20, 2007

CA06-1451. *State of Arkansas, Office of Child Support Enforcement v. Tyaleah M. Leach*, June 20, 2007

CA06-1191. *Pathy Sellars v. St. Vincent Health Services and Preferred Professional Insurance*; June 20, 2007

CA06-1378. *Catherine R. Waltz v. Jeanie Waltz Golden, as Administratrix of the Estateof Charles Waltz*; June 20, 2007

CA06-823. *Teresa Allen v. Chad P. Allen*; June 20, 2007

CACR06-1286. *Richard Glenn Bell, Jr. v. State of Arkansas*; June 20, 2007

CACR05-507. *Harold E. Merriweather v. State of Arkansas*; June 27, 2007

CACR05-1348. *Rodney Dale Edgin v. State of Arkansas*; June 27, 2007

CA06-1370. *Cavalry Spv, LLC v. FAirl Anderson*; June 27, 2007

CACR06-864. *James Alan Thomas v. State of Arkansas*; June 27, 2007

CA06-1099. *Kristie Munoz Williams v. Homer Munoz*; June 27, 2007

CA06-1207. *Brad Stumon v. Katrina Yates*; August 29, 2007

CACR06-841. *Roderick L. Hickman v. State of Arkansas*; August 29, 2007

CA06-1258. *Tommy L. Gullahorn v. Gail A. Gullahorn*; August 29, 2007

CACR06-776. *James Earl Bradford v. State of Arkansas*; September 5, 2007

CACR06-957. *Burlie Ray Britton v. State of Arkansas*; September 5, 2007



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00333 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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CA06-137. *Misty Rhine v. Arkansas Department of Human Services*; September 5, 2007

CACR06-821. *Luwalhati Lalota a/k/a Lyn Johnson v. State of Arkansas*; September 12, 2007

CA06-1134. *Letesha Dean Morgan v. Deluxe Video Services, Inc. et al.*; September 12, 2007

CACR06-1014. *Robert Earl Thompson v. State of Arkansas*; September 12, 2007

CA06-705. *Glenn David Woods and Leann B. Woods v. Beverly Tapper*; September 12, 2007

CA06-1238. *Jon G. Morse v. Teri Morse Chapman*; September 12, 2007

CACR05-1132. *Sedric Anderson v. State of Arkansas*; September 26, 2007

CA05-1276. *Virginia Totten Werts v. State of Arkansas*; September 26, 2007

E06-257. *Andy Clark v. Arkansas Department of Workforce Services*; September 26, 2007

CACR06-1318. *John Leelyn Seely v. State of Arkansas*; September 26, 2007

CACR06-1298. *Pamela T. Shelnut v. State of Arkansas*; September 26, 2007

CA07-427. *Arkansas Department of Health and Human Services v. Steven Mitchell and Sarah Mitchell*; September 26, 2007

CACR06-1463. *Robert Lieblong v. State of Arkansas*; October 3, 2007

CACR07-124. *Felanta D. Williams v. State of Arkansas*; October 3, 2007

CA07-152. *Candelario M. Sierra v. Griffin Gin, AG-Comp SIF Claims*; October 10, 2007

CA06-1430. *Rymor Builders, Inc. v. Tanglewood Plumbing Company, Inc.*; October 10, 2007

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



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00334 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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description of that system.) Please identify each such case, and for each provide the following information:

I took my seat on the bench in January 2007. Because I practiced primarily in Phillips County, Arkansas, I have a standard note to the Chief Staff Attorney that, during my first year on the bench, she assign no cases to me that are appealed from Phillips County, Arkansas.

I also have a standard note to the Chief Staff Attorney that, during my first year on the bench, she assign no cases to me involving the firm of Mitchell, Williams, Selig, Gates, Woodyard, PLLC. I worked closely with that firm during my days in private practice and wanted no appearance of conflict.

Finally, I was outside counsel to Wal-Mart Stores, Inc. while in private practice. Consequently, I have a standard note that no Wal-Mart cases should be assigned to me.

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

None

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

See above.

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

See above.

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

See above.

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

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

From 2000 to 2006, I served as City Attorney for Lake View, Arkansas. I was appointed by Mayor Leon Phillips.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00335 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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From 2000 to 2006, I served as Deputy Prosecuting Attorney, Phillips County, Arkansas. I was appointed by the Phillips County Quorum Court.

From 1999 to 2001, I served as City Attorney, Edmondson, Arkansas. I was appointed by Mayor Patricia Henderson.

From 1999 to 2005, I served as City Attorney, Helena, Arkansas. I was elected November 1998 and Re-elected November 2002.

I have no unsuccessful candidacies for elected office or nominations for appointed office.

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

In 2006, I served on the campaign committee of Paul Suskie, who unsuccessfully ran in the Democratic primary for Arkansas Attorney General. Paul is a good friend of mine and was my study partner at the University of Central Arkansas. I had no responsibilities and essentially just allowed him to list me on his web site as a supporter.

In 1998 and 2002, I helped in the successful campaigns of my father, Dr. Robert D. Miller, Jr., for mayor of Helena, Arkansas. I helped by campaigning door-to-door and with advertising.

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

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

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

I did not serve as a clerk to a judge.

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

From 1998 through 2005 I operated a solo law practice:
Miller Law Firm
622 Pecan Street
Helena, Arkansas 72342



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00336 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

1995 to 2006
Martin, Tate, Morrow & Marston, P.C.
6410 Poplar Ave., Suite 1000
Memphis, Tennessee 38119
Associate Attorney

1998 to 2006
Miller Law Firm
622 Pecan Street
Helena, Arkansas 72342
Solo Law Practice

2005 to 2006
East Arkansas Family Health Center
215 East Bond Street
West Memphis, Arkansas 72301
General Legal Counsel

2000 to 2006
Phillips County, Arkansas Prosecuting Attorney's Office
620 Cherry Street
Helena, Arkansas 72342
Deputy Prosecuting Attorney

1999 to 2005
City of Helena, Arkansas
98 Plaza Street
Helena-West Helena, Arkansas 72390
City Attorney

b. Describe:

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

I graduated from Vanderbilt Law School in May 1995 and began working as an associate attorney with Martin, Tate, Morrow & Marston, Memphis, Tennessee, in August 1995. My practice consisted primarily of litigation defense with emphasis on trucking defense and employment discrimination defense. I also represented shopping centers in commercial eviction cases.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00337 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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In July 1998, I moved home to Helena, Arkansas to help my father run for mayor. I remained with Martin, Tate, Morrow & Marston part time, ran for Helena City Attorney, and opened a solo practice, the Miller Law Firm.

In January 1999, I was sworn in as Helena City Attorney. In that position, I prosecuted all of the city's misdemeanor cases and represented the city in minor law suits. I also provided legal advice to the city council and mayor. I also continued to practice at the Miller Law Firm and with Martin, Tate, Morrow & Marston. I defended large companies in tort litigation and I represented individuals in divorces, social security disability cases and in personal injury cases.

In 2000, I was appointed Deputy Prosecuting Attorney for Phillips County, Arkansas, by the Phillips County Quorum Court. I prosecuted a number of felony cases and became very familiar with criminal practice. I continued to operate the Miller Law Firm and to work part time for Martin, Tate, Morrow & Marston. In addition to continuing to represent corporate defendants and individuals in the areas listed above, I began defending products liability cases and represented doctors in medical malpractice cases.

After relinquishing all of my public positions, I merged my solo practice at the Miller Law Firm with my practice at Martin, Tate, Morrow & Marston in January 2006. From January 2006 to January 2007, I began building my practice by representing clients in premises liability defense cases and acting as local counsel in two toxic tort cases.

I resigned from Martin, Tate, Morrow & Marston in January 2007 to take a seat on the Arkansas Court of Appeals.

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

My primary clients were larger companies in defense cases but I also represented individuals in domestic relations cases, personal injury plaintiffs' cases and in social security disability cases. I did not specialize except to the extent that I represented a number of large trucking companies in civil litigation.

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



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00338 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Ninety-five percent of my practice was in litigation. Between January 1999 and January 2006, I appeared in court at least three times a week, every week. During criminal jury terms, I appeared every day for weeks at a time.

i. Indicate the percentage of your practice in:
   1. federal courts: 15%
   2. state courts of record: 55%
   3. other courts: 30%

ii. Indicate the percentage of your practice in:
   4. civil proceedings: 60%
   5. criminal proceedings: 40%

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

I have tried approximately 55 cases to verdict or judgment.

I was the juvenile court prosecutor from 2000 to 2006. I prosecuted approximately twenty-five to thirty of these cases to a verdict. All were non-jury cases. Juvenile court is a court of record but, due to the confidentiality rules pertaining to juveniles, those records are not available.

In addition I prosecuted fourteen (14) criminal jury cases to a verdict. In each of these cases I was co-counsel, as my partner in the prosecuting attorney's office, Todd Murray, and I split all of our cases equally. I conducted opening statement and the first closing argument. Mr. Murray always did the rebuttal closing argument. We split the witnesses equally.

Also, to the best of my memory, I prosecuted fourteen (14) civil cases to a verdict. I was sole counsel in six; lead counsel in two; and associate counsel in six cases.

i. What percentage of these trials were:
   1. jury: 38%
   2. non-jury: 62%

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

I have not practiced before the Supreme Court of the United States.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00339 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    a. the date of representation;

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

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

    1. State of Arkansas v. Brian Winston, Phillips County Docket No. 2000-020. Phillips County Circuit Court. Judge LT Simes, II.

    In approximately 2000-2001, I represented the state in a capital murder prosecution of a Pizza Hut employee who killed his two co-employees and dumped their bodies in the Pizza Hut freezer. The defendant was found guilty on both counts and sentenced to life in prison without parole.

    Co-counsel:
    Todd Murray
    620 Cherry Street
    Helena, Arkansas 72342
    870-338-5584

    Opposing counsel:
    Don Etherly
    423 Rightor Street
    Helena, Arkansas 72342
    870-338-6487

    Raymond Galloway
    417 Rightor Street
    Helena, Arkansas 72342
    870-338-6731.

    2. State of Arkansas v. Jerome Lewis, Phillips County Docket No. 2004-31. Phillips County Circuit Court. Judge LT Simes, II.
    In approximately 2004-2005, I represented the state in a rape case in which the defendant, who was a crack user, was charged with raping two of his daughters and sexually assaulting a third daughter. The rapes came



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00340 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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to light when one of his daughters was impregnated. The defendant was found guilty and sentenced to fifty years in prison.

Co-counsel:
Todd Murray
620 Cherry Street
Helena, Arkansas 72342
870-338-5584

Opposing counsel:
Ray Waters
301 Locust Street
Augusta, Arkansas 72006
870-347-5675

3. State of Arkansas v. Elbert Holder, Phillips County Docket No. 2001-242. Phillips County Circuit Court. Judge LT Simes, II.

In approximately 2001 to 2005, I represented the state in a capital murder case in which the defendant hired a hit man to kill his girlfriend to cover up an insurance fraud. The defendant was found guilty and sentenced to life without parole. His conviction was reversed on appeal and the defendant pled guilty to murder in the first degree and was sentenced to forty years in prison.

Co-counsel:
Todd Murray
620 Cherry Street
Helena, Arkansas 72342
870-338-5584

Opposing counsel:
Louis Etoch
727 Cherry Street
Helena, Arkansas 72342
870-338-3591

4. State of Arkansas v. Thomas Greg Jenkins, Phillips County Docket No. 2001-249. Phillips County Circuit Court. Judge LT Simes, II.

In approximately 2001 to 2003, I represented the state in a capital murder case in which defendant was charged as the hit man for Elbert Holder in the killing of Holder's girlfriend. The defendant was found not guilty and released.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00341 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Co-counsel:
Todd Murray
620 Cherry Street
Helena, Arkansas 72342
870-338-5584

Opposing counsel:
Lewellan Marczack
Arkansas Public Defender Commission
101 East Capitol, Suite 201
Little Rock, Arkansas 72201
501-682-9070.

5. State of Arkansas v. Abraham Grant, Phillips County Docket No. 2001-272. Phillips County Circuit Court. Judge LT Simes, II.

In approximately 2001 to 2003, I represented the state in a capital murder case in which defendant was charged with shooting his mother-in-law in the head in front of his wife, while his mother-in-law was playing cards with several other people. The defendant was found guilty and sentenced to life without parole.

Co-counsel:
Todd Murray
620 Cherry Street
Helena, Arkansas 72342
870-338-5584

Opposing counsel:
Don Etherly
423 Rightor Street
Helena, Arkansas 72342
870-338-6487

6. State of Arkansas v. Theodis Kelley, Phillips County Docket No. 99-238. Phillips County Circuit Court. Judge LT Simes, II.

In approximately 1999 to 2005, I represented the state in a murder case in which defendant was charged with killing his girl friend with a shot gun slug for cheating on him while he was in prison. He killed her in front of her toddler daughter. The defendant was found guilty and sentenced to forty years in prison. The case was overturned on appeal because the state failed to give the defendant a mental evaluation. On re-trial, the defendant was found guilty and sentenced to serve fifty-five years in prison.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00342 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Co-counsel:
Todd Murray
620 Cherry Street
Helena, Arkansas 72342
870-338-5584

Opposing counsel:

Don Etherly
423 Rightor Street
Helena, Arkansas 72342
870-338-6487

Raymond Galloway (on re-trial)
417 Rightor Street
Helena, Arkansas 72342
870-338-6731

7. Nellie Brownlee et al. v. Cooper Tire & Rubber Company, No. 2:99 CV00212 GH (E.D. Ark.); Donald Whitaker v. Cooper Tire & Rubber Company, No. 2:99 CV 00220 (E.D. Ark.). U.S. District Court for the Eastern District of Arkansas. Judge George Howard.

I was associate counsel for Cooper Tire & Rubber Company in 2000. In this products liability case, the plaintiffs asserted that Cooper Tire's tire production process was flawed, which caused the tread on the tire purchased (used) by the plaintiff to separate. Four people were killed in the accident and two young men were paralyzed. A confidential settlement was reached just prior to trial.

Co-counsel:
Brad Jessen
Kirkman Dougherty
Hardin, Jessen & Terry, PLC
P.O. Box 10127
Fort Smith, Arkansas 72917-0127
479-452-2200.

Lead counsel:
David Dial, Earl Gunn, and Fred Sager
Weinberger, Wheeler, Hudgins, Gunn & Dial
900 East Paces Ferry Road
Atlanta Georgia 30326
404-876-2700



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00343 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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W. Wray Eckl
Drew, Eckl & Farnham, LLP
P.O. Box 7600
Atlanta, Georgia 30357-0600
404-876-0992

Opposing counsel:
Sandy Huckabee
213 West Main Street
P.O. Box 1323
Cabot, Arkansas 72023
501-941-5500

Elliott Dion Wilson
423 Rightor Street
Helena, Arkansas 72342
870-338-6487

Bruce Kaster
Suite 3, 125 N.E. First Avenue
Ocala, Florida 34470
352-622-1600

8. Gerelene Abernathy Roseburrow, Beatrice Tate, Helen Broadway, Dorothy Freeman and Jessie Harrison v. The Reliable Insurance Company, Inc., Unitrin, Inc., Old Reliable Casualty Company of America, Gene McIntosh, Lee County, Arkansas Circuit Court Docket No. CV-2003-75; Henrietta Arnold and Laroy Bowers v. The Reliable Insurance Company, Inc., Michael D. Fowler and Gene McIntosh, Lee County, Arkansas Circuit Court Docket No. CV-2004-73; James Caffey v. The Reliable Life Insurance Company, Inc., Michael Fowler and Clyde Eugene McIntosh, Lee County, Arkansas Circuit Court Docket No. CV-2005-29; Dave Caffey and Emmer Jean Stanley v. The Reliable Life Insurance Company, Inc., Michael Fowler and Gene McIntosh, Lee County, Arkansas Circuit Court Docket No. CV-2004-159; and Norma Jean Scott and Ella Ruth Scott v. The Reliable Life Insurance Company, Inc., Michael Fowler and Larry Hornbeak, Lee County, Arkansas Circuit Court Docket No. CV-2005-20. Judges Harvey Yates and LT Simes were the presiding judges.

These were direct actions against three insurance companies in which the plaintiffs claimed that the insurance companies encouraged their agents to defraud plaintiffs. Counsel for plaintiffs represented hundreds of other potential plaintiffs whom counsel alleged were similarly situated. These cases were resolved prior to trial in a global confidential settlement. During 2005 and 2006, I was co-counsel for the insurance companies.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00344 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Co-counsel:
Charles Griffin
Griffin & Associates
125 South Congress Street, Suit 1515
P.O. Box 968
Jackson, Mississippi
601-354-0603, 601-354-0603.

Counsel for the insurance agents:
R.T. Beard, III, John Baker and Derrick W. Smith
Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.
425 West Capitol Ave., Suite 1800
Little Rock, Arkansas 72201
501-688-8800.

Counsel for the plaintiffs:
B. Michael Easley
Easley, Hudson & Houseal
510 E. Cross Street
P.O. Box 1115
Forrest City, Arkansas 72335
870-633-1447

Albert G. Lewis, III
Lewis & Mitchell, L.L.C.
611 Helen Keller Blvd.
P.O. Box 020111
Tuscaloosa, Alabama 35404
205-633-0003

9. Arkansas Department of Environmental Quality v. Helena Chemical Company et al., Phillips County, Arkansas Circuit Court Docket No. CIV-2006-246. Judge Harvey Yates presiding.

This was a multi-million dollar suit by the State of Arkansas against chemical companies to recover the cost of cleaning up environmental contamination.

Harry Stephens Farms, Inc. et al. v. Helena Chemical Company et al.; U.S. District Court Eastern District of Arkansas Case No. 2-06-CV-00166. Judge James Moody.

During 2006, I was associate counsel for Helena Chemical Company in this case, a companion case to previous listed case, in which the plaintiff claimed that defendants contaminated his farm. This case is pending.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00345 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Co-counsel:
Alan Cates and John Baker
Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.,
425 West Capitol Ave., Suite 1800
Little Rock, Arkansas 72201
501-688-8800

Kim Burke
Taft, Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202-3957
513-357-9369

Opposing counsel:

William Snowden
Arkansas Department of Environmental Quality
P.O. Box 8913
Little Rock, Arkansas 72219
501-682-0889.

Louis A. Etoch and Donald E. Knapp, Jr.
727 Cherry Street
Helena, Arkansas 72342
870-338-3591

David Solomon
425 Cherry Street
Helena, Arkansas 72342
870-338-7427

10. Linda McMickle, Administratrix of the Estate of Calvin McMickle, Deceased v. David Griffin, David Taylor and Tyler Farms, A Partnership, Phillips County, Arkansas Circuit Court Docket No. CIV-2001-149. Judge Harvey Yates presided.

In approximately 2003 to 2006, I represented David Griffin, David Taylor and Tyler Farms in this multi-million dollar wrongful death case in which decedent's estate sued a tractor driver and a farming partnership for the death of her husband, whose neck was severed when he drove into the back of the tractor. This was tried to a jury and we received a defense verdict. It was appealed to the Arkansas Court of Appeals and was reversed and a new trial has been ordered.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00346 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Co-counsel:
Phil Hickey and Fletcher Long
Butler, Hickey, Long & Harris
2216 North Washington
Forrest City, Arkansas 72335
870-633-4611

Opposing counsel:
Steve Boyd and Mike Easley
Easley, Hudson & Houseal
510 E. Cross Street
P.O. Box 1115
Forrest City, Arkansas 72335
870-633-1447

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

I have never lobbied for a client.

The most significant legal work that I have engaged in is as follows:

Serving as city attorney for the cities of Edmondson, Helena and Lakeview was significant because it afforded me the chance to help people and communities that needed help. Neither position paid very much (Edmondson paid $350 per month, Lakeview paid $300 per month and Helena paid $800 per month) but I felt like the communities needed me. In those positions, I counseled the elected officials regarding the needs of the citizens, such as crime prevention and city ordinances. I also spent a great amount of time with the police officers explaining their duties and obligations to the citizens. Finally, many of the citizens in these communities felt comfortable coming to me to discuss problems they were having with the elected officials and asking me to mediate disputes.

My work as deputy prosecuting attorney in Phillips County was also significant. Phillips County has approximately 28,000 residents and my family has lived there since my great-grandfather was emancipated in 1860. I knew many of the crime victims and their families, and I knew many of the perpetrators and their families. Because of this, many of the parties to the cases in which I prosecuted expressed to me that they believed the process was fair. In fact, several returning prisoners who I prosecuted have told me that they understood that I had a job to do and they felt they received a fair trial. I love and



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00347 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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believe in the legal system and statements such as this gave me an extreme sense of professional satisfaction.

Finally, my work with the city of Helena was very important to me because Helena is my hometown and because my father was mayor of Helena at the time that I assumed the position as Helena City Attorney. I moved home from Memphis to help my father and I would do it again. It was one of the most satisfying experiences of my life.

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

    Besides giving informal training the police officers at the Helena Arkansas Police Department, I have never taught a course.

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

    None.

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

    No.

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

    See attached Financial Disclosure Report

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

    See attached Net Worth Statement



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00348 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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26. **Potential Conflicts of Interest**:

a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

Parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during my initial service in the position to which you have been nominated might include prior clients or attorneys with whom I once worked, including members of my former law firm. I have notified my fellow directors on the First Bank board and the Southern Bancorp board that I will step down if confirmed.

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

I will view each case immediately upon its assignment to me to see if I have a conflict with the specific case. If I have an actual conflict or an appearance of a conflict, I will immediately report it to the chief judge and ask that the case be reassigned. In all circumstances I will fully comply with the Code of Conduct for United States Judges and applicable policies and procedures.

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

I live in Phillips County, Arkansas, which is one of the poorest communities in the country. Since moving home in 1998, I have both counseled and formally represented a number of clients for free. It was done to help them and I have kept no records. I have represented clients in having names changed. I represented an elderly couple in the adoption of their grandson. I have represented clients in divorces and domestic disputes. I have advised clients on the legal aspects of business creation. While I was practicing, pro bono activities consumed approximately 5% to 8% of my time. This does not include the countless numbers of cases in which I reduced or zeroed out fees because my clients could not afford to pay.

Prior to 1998, when I was practicing in Memphis full time, I accepted a formal appointment by the Memphis Bar Association's pro bono panel to represent a terminally ill young man whose mother was buried in the wrong cemetery plot. We petitioned the court to exhume her body for identification. The petition was granted.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00349 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Through my work with Southern Bancorp, I am involved in a number of initiatives whereby private capital is used to help underserved communities. Southern is a bank holding company that reinvests a substantial portion of the profits into the communities it serves. Since 2000, we have built affordable housing for poor families; provided start up capital to small and minority businesses; provided counseling assistance to entrepreneurs; provided job training and career enhancement training; and have provided matching funds to poor families for college savings. We also provided low interest loans to the KIPP Delta College Preparatory School in Helena to help build its primary and secondary schools.

28. **Selection Process**:

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

There was no formal selection commission process. In April 2007, I spoke with Congressman John Boozman's chief of staff regarding my interest in the appointment. I then called the offices of Senators Blanche Lambert Lincoln and Mark Prior to inform both Senators of my interest in the appointment. In June 2007, I was called by White House Counsel's office and notified that my name was submitted for consideration. I interviewed with two members of the Office of White House Counsel and one member of the Department of Justice on July 5, 2007. On August 10, 2007, I was notified that the White House had approved me to go forward in the process. I was contacted by the Department of Justice concerning the nomination paperwork. My nomination was submitted to the Senate on October 16, 2007.

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

No.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00350 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Rev. 1/2006

# FINANCIAL DISCLOSURE REPORT
## NOMINATION FILING

*Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)*

| 1. Person Reporting (last name, first, middle initial) | 2. Court or Organization | 3. Date of Report |
|---|---|---|
| Miller, Brian S | Eastern Dist., Arkansas | 10/18/2007 |
| **4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)** | **5a. Report Type (check appropriate type)** | **6. Reporting Period** |
| District Judge-Nominee | ☒ Nomination, Date 10/16/2007<br>☐ Initial ☐ Annual ☐ Final<br>5b. ☐ Amended Report | 01/01/2007 to 10/13/2007 |
| **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.** | |
| 625 Marshall Street<br>Little Rock, Arkansas 72201 | 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.)*

☐ NONE *(No reportable positions.)*

| POSITION | NAME OF ORGANIZATION/ENTITY |
|---|---|
| 1. JUDGE | ARKANSAS COURT OF APPEALS |
| 2. DIRECTOR | SOUTHERN BANCORP |
| 3. DIRECTOR | FIRST BANK OF THE DELTA, NA |
| 4. DIRECTOR | BOYS AND GIRLS CLUB OF PHILLIPS COUNTY |
| 5. | |

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

☒ NONE *(No reportable agreements.)*

| DATE | PARTIES AND TERMS |
|---|---|
| 1. | |
| 2. | |
| 3. | |

| FINANCIAL DISCLOSURE REPORT<br>Page 2 of 6 | Name of Person Reporting<br>Miller, Brian S | Date of Report<br>10/18/2007 |
|---|---|---|

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

**A. Filer's Non-Investment Income**

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

| DATE | SOURCE AND TYPE | INCOME (yours, not spouse's) |
|---|---|---|
| 1. 2007 | STATE OF ARKANSAS/SALARY | $ 136,500 |
| 2. 2007 | SOUTHERN BANCORP/DIRECTOR FEES | $ 3,200 |
| 3. 2007 | FIRST BANK OF THE DELTA, NA/DIRECTOR FEES | $ 6,000 |
| 4. 2006 | MARTIN,TATE, MORROW & MARSTON , P.C./ASSOCIATE ATTORNEY SALARY | $ 95,000 |
| 5. 2006 | STATE OF ARKANSAS/DEPUTY PROSECUTING ATTORNEY SALARY | $ 3,500 |

**B. Spouse's Non-Investment Income** - *If you were married during any portion of the reporting year, complete this section.*
*(Dollar amount not required except for honoraria.)*

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

| DATE | SOURCE AND TYPE |
|---|---|
| 1. 2007 | BARTON HIGH SCHOOL/TEACHING SALARY |
| 2. 2006 | BARTON HIGH SCHOOL/TEACHING SALARY |
| 3. 2006 | ELAINE HIGH SCHOOL/TEACHING SALARY |
| 4. | |
| 5. | |

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

☐ NONE *(No reportable reimbursements.)*

| SOURCE | DESCRIPTION |
|---|---|
| 1. EXEMPT | |
| 2. | |
| 3. | |
| 4. | |
| 5. | |

| FINANCIAL DISCLOSURE REPORT<br>Page 3 of 6 | Name of Person Reporting<br>Miller, Brian S | Date of Report<br>10/18/2007 |
|---|---|---|

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

☐ NONE *(No reportable gifts.)*

| SOURCE | DESCRIPTION | VALUE |
|---|---|---|
| 1. EXEMPT | | |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |

**VI. LIABILITIES.** *(Includes those of spouse and dependent children. See pp. 32-34 of Instructions.)*

☐ NONE *(No reportable liabilities.)*

| CREDITOR | DESCRIPTION | VALUE CODE |
|---|---|---|
| 1. SALLIE-MAE | STUDENT LOAN | L |
| 2. FIRST BANK OF THE DELTA, NA | LOAN FOR INVESTMENT PROPERTY LOCATED AT 116 MILITARY ROAD, HELENA, ARKANSAS | K |
| 3. | | |
| 4. | | |
| 5. | | |

| FINANCIAL DISCLOSURE REPORT<br>Page 4 of 6 | Name of Person Reporting<br>Miller, Brian S | Date of Report<br>10/18/2007 |
|---|---|---|

## VII. INVESTMENTS and TRUSTS -- *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets)<br>Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | (1) Amount Code 1 (A-H) | (2) Type (e.g. div., rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | If not exempt from disclosure | | | |
| | | | | | | (2) Date Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
| 1. JOHNSON & JOHNSON | A | Dividend | J | T | EXEMPT | | | | |
| 2. STARBUCKS | | None | J | T | | | | | |
| 3. ALTRIA | | None | J | T | | | | | |
| 4. AT&T | | None | J | T | | | | | |
| 5. FORD | | None | J | T | | | | | |
| 6. GOOGLE | | None | J | T | | | | | |
| 7. CITIGROUP | | None | J | T | | | | | |
| 8. KRAFT | | None | J | T | | | | | |
| 9. THE TRAVELERS | | None | J | T | | | | | |
| 10. DODGE & COX STOCK FUND | | None | J | T | | | | | |
| 11. OAKMARK FUND | | None | K | T | | | | | |
| 12. OAKMARK GLOBAL FUND | | None | K | T | | | | | |
| 13. SCHWAB HEALTHCARE FUND | | None | J | T | | | | | |
| 14. SCHWAB TOTAL STOCK MARKET FUND | | None | K | T | | | | | |
| 15. OAKMARK EQUITY & INCOME FUND | | None | K | T | | | | | |
| 16. PROGRESSIVE INSURANCE | | None | J | T | | | | | |
| 17. CASH | | None | J | T | | | | | |

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

| FINANCIAL DISCLOSURE REPORT<br>Page 5 of 6 | Name of Person Reporting<br>Miller, Brian S | Date of Report<br>10/18/2007 |
|---|---|---|

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

III. NON-INVESTMENT INCOME

2006 SOUTHERN BANCORP/DIRECTOR FEES 4,200

2006 FIRST BANK OF THE DELTA/DIRECTOR FEES 8,000

2005 MARTIN, TATE, MORROW & MARSTON, PC/PART-TIME ASSOCIATE ATTORNEY SALARY 36,781

2005 CITY OF HELENA/CITY ATTORNEY SALARY 10,336

2005 STATE OF ARKANSAS/PROSECUTING ATTORNEY SALARY 17,500

2005 PHILLIPS COUNTY, ARKANSAS/PROSECUTING ATTORNEY SALARY 18,525

2005 HELENA-WEST HELENA SCHOOL DISTRICT/FEES FOR LEGAL SERVICES 21,480

2005 CITY OF LAKEVIEW,ARKANSAS/CITY ATTORNEY SALARY 3,000

2005 CITY OF HOLLY GROVE, ARKANSAS/CITY JUDGE SALARY 3,600

2005 FIRST BANK OF THE DELTA/DIRECTOR FEES 8,200

2005 SOUTHERN BANCORP/DIRECTOR FEES 4,000

VII. INVESTMENTS AND TRUSTS

1/3 INTEREST IN INVESTMENT PROPERTY (116 MILITARY ROAD). B(2) = J C(1)=K C(2)=Q

| FINANCIAL DISCLOSURE REPORT<br>Page 6 of 6 | Name of Person Reporting<br>Miller, Brian S | Date of Report<br>10/18/2007 |
|---|---|---|

## IX. CERTIFICATION.

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

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

Signature Brian Miller Date 10-18-07

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

## FINANCIAL STATEMENT

### NET WORTH

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

| ASSETS | | | | LIABILITIES | | | |
|---|---|---|---|---|---|---|---|
| Cash on hand and in banks | | 21 | 832 | Notes payable to banks-secured | | 24 | 264 |
| U.S. Government securities-add schedule | | | | Notes payable to banks-unsecured | | 89 | 816 |
| Listed securities-add schedule | | 139 | 892 | 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 | | 68 | 764 |
| Real estate owned-add schedule | | 160 | 000 | Chattel mortgages and other liens payable | | | |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 48 | 000 | | | | |
| Cash value-life insurance | | | | | | | |
| Other assets itemize: | | | | | | | |
| | | | | | | | |
| | | | | | | | |
| | | | | Total liabilities | | 182 | 844 |
| | | | | Net Worth | | 186 | 880 |
| Total Assets | | 369 | 724 | Total liabilities and net worth | | 369 | 724 |
| CONTINGENT LIABILITIES | | | | GENERAL INFORMATION | | | |
| As endorser, comaker or guarantor | | | | Are any assets pledged? (Add schedule) | NO | | |
| On leases or contracts | | | | Are you defendant in any suits or legal actions? | NO | | |
| Legal Claims | | | | Have you ever taken bankruptcy? | NO | | |
| Provision for Federal Income Tax | | | | | | | |
| Other special debt | | | | | | | |

## FINANCIAL STATEMENT

### NET WORTH SCHEDULES

| | |
|---|---|
| Listed Securities | |
| Altria | $ 132 |
| AT&T | 8,537 |
| Citigroup | 4,793 |
| Dodge & Cox Intl. Stock Fund | 16,669 |
| Ford Motor Co. | 8,690 |
| Google | 12,670 |
| Johnson & Johnson | 2,981 |
| Kraft Foods | 5,848 |
| Oakmark Equity & Income Fund | 18,505 |
| Oakmark Fund | 4,891 |
| Oakmark Global Select Fund | 15,741 |
| Schwab Health Care | 5,349 |
| Schwab Total Stock Market Fund | 20,932 |
| Progressive Insurance Company | 14,145 |
| The Travelers Cos | 9 |
| Total Listed Securities | $ 139,892 |

| | |
|---|---|
| Real Estate Owned | |
| Personal residence | $ 103,000 |
| Investment property | 50,000 |
| Undeveloped lot | 3,000 |
| Undeveloped lot | 3,000 |
| Undeveloped lot | 1,000 |
| Total Real Estate Owned | $ 160,000 |

| | |
|---|---|
| Real Estate Mortgages Payable | |
| Personal residence | $ 36,064 |
| Home Equity Line of Credit | 12,800 |
| Investment Property | 19,900 |
| Total Real Estate Mortgages Payable | $ 68,764 |

**AFFIDAVIT**

I, Brian Stacy Miller, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

10-19-07
(DATE)

(NAME)

(NOTARY)

OFFICIAL SEAL
KESHA SIMPSON
NOTARY PUBLIC-ARKANSAS
PHILLIPS COUNTY
My Commission Expires 09-25-2011

Senator FEINSTEIN. All right.

Now for the hard part. I'm going to begin with Mr. Puryear, if I might, with a question. In a 2004 article in *Corporate Legal Times*—excuse me. I wanted to ask another question here.

Your current employer, the Corrections Corporation of America, has apparently been named as a defendant in more than 400 cases since 2000 in the Middle District of Tennessee. That is the same court to which you've been nominated. How would you handle the obvious conflict of interest posed by cases involving CCA?

Mr. PURYEAR. Senator, thank you for the question. Let me say as an initial matter, that there's no question, as a shareholder in the company and as an executive officer of the company in the immediate past, during my initial term on the bench, if I were fortunate enough to be confirmed, I would not be hearing any cases involving Corrections Corporation of America, for obvious reasons. Perhaps somewhere with the passage of time and not having any shares that could change, but I can't envision a set of circumstances under which it would in the near term.

Senator FEINSTEIN. That's the next question. So you would recuse yourself from any case involving the corporation. Is that correct?

Mr. PURYEAR. Correct.

Senator FEINSTEIN. And you would maintain your shares?

Mr. PURYEAR. At present I have shares.

I do not intend to—there are some shares that are bound up by resale agreements and things like that. But over time I would plan to divest from the company.

Senator FEINSTEIN. Over what period of time?

Mr. PURYEAR. Well, I have divested, as of today, I believe, all of the shares—except for restricted shares and shares that are subject to a resale agreement—that I can, pursuant to a planned sale over the last 6 months. So I anticipate quickly, after the separation of my employment, being able to dispose of the rest of those shares.

Let me add this, Senator. I believe that the numbers that were provided to the Committee might be slightly exaggerated. Our records, and the public records that I've examined, show about 181 cases against CCA since 2000. Over that same period of time, 15,000 cases were filed in the Middle District of Tennessee. We average about 27 cases a year against CCA in the Middle District since 1992. During that same time period, there's more than 2,000 cases, on average, filed each year.

So shifting those cases that involve CCA to other judges will not likely present any sort of undue hardship to them, in my taking on other cases that they would otherwise handle. I think that could be easily accomplished, Senator.

Senator FEINSTEIN. Do you have any other potential conflict of interest?

Mr. PURYEAR. Obviously, any companies in which I have any direct-share ownership in, I would recuse myself from consideration of those cases. Any company that I've served as a fiduciary, such as I'm on the board of directors of a local bank, a small community bank in Nashville, I would not hear cases involving that institution. Any nonprofits that I am also in a fiduciary relationship with, I'd recuse myself. I don't think that any of those entities have ever

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been sued in the Middle District of Tennessee, so I don't anticipate that would require recusal, only if a case came up would it.

Senator FEINSTEIN. Thank you. So I just want to understand. Your plan is to recuse yourself for the duration of time that you own an interest in this company.

Mr. PURYEAR. Correct, Senator. I would do so.

Senator FEINSTEIN. However long that may be.

Mr. PURYEAR. However long that may be. I think, without knowing when that could change, if ever, it would not be my intent, as somebody who is closely associated with the management of that company, to hear cases concerning that company for an extended period of time, even if I were divested.

Senator FEINSTEIN. I appreciate that. Thank you. Mr. Puryear. Thank you, Senator.

Senator FEINSTEIN. Mr. Honaker, if I might, I think it's fair to say right up front that your nomination has become quite controversial. So without a softball, let me jump right to the heart of it. As a State legislator, you were the author of the Human Life Protection Act. You introduced the bill in 1991, and when it was defeated you reintroduced it in 1992. You told a press conference that *Rowe* was "in shambles" and that your bill was "a direct challenge to *Rowe*".

As you know, the *Rowe* decision recognized a constitutional right to privacy. Did your legislation adhere to the constitutional right of privacy recognized in *Rowe*?

Mr. HONAKER. Thank you for that question, Senator. I might begin by saying that it was a great honor to serve three terms in the Wyoming legislature and to serve with great people who were interested in the best interests of the State of Wyoming.

I introduced that bill in 1991, together with 20 other co-sponsors, Democrat and Republican, men and woman, African Americans, Hispanics, and whites. That bill, it's true, was a challenge to existing precedent. I did that in my role as a legislator. The role of a legislator is so far different from the role of a judge, as you well know, with the separation of powers.

As a sitting District Judge, if confirmed, I can commit to you—and I do—under oath that I have great respect for the rule of law, that I would faithfully apply the precedent of all higher courts, whether it be *Rowe* v. *Wade* or whether it be any other existing precedent of the higher courts. That is the duty of a District Judge. I recognize the right to privacy and I recognize the precedent of the U.S. Supreme Court.

Senator FEINSTEIN. My time is up. But, respectfully, you didn't answer my question. My question was, did your legislation adhere to the constitutional right of privacy recognized in *Rowe*.

Mr. HONAKER. Senator, the legislation, as you correctly stated, was a legislative challenge to *Rowe* v. *Wade*. A legislator properly observes the rule of law by bringing issues before the courts that can be properly reconsidered or revisited by the courts. The role of a District Judge would be absolutely contrary to that. A District Judge would honor and apply the precedent of higher courts. So I believe in either context, which are two very different contexts, that I respected the rule of law in my respective roles.

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Senator FEINSTEIN. That's actually not my question either, but if that's your answer, so be it.

Senator Specter.

Senator SPECTER. Thank you, Madam Chairwoman. By your response, were you seeking to take the issue back to the Supreme Court of the United States?

Mr. HONAKER. Senator, the purpose of the legislation in that time period, which was not introduced only in Wyoming but was introduced in many States, was to allow the Supreme Court to reconsider that precedent, should they have wished to have done so.

Senator SPECTER. When you say there was an effort made in other States, how many States?

Mr. HONAKER. I recall, Senator, that Utah, Idaho, and South Dakota, in our region, also considered similar legislation within that timeframe.

Senator SPECTER. When you say "consider", was similar legislation introduced in other States?

Mr. HONAKER. I believe so, Senator, but I can't say that for sure.

Senator SPECTER. There has been considerable publicity about South Dakota. Do you recollect what happened in South Dakota?

Mr. HONAKER. I'm sorry, Senator. I didn't understand your question.

Senator SPECTER. There was considerable publicity about what happened in South Dakota. Do you recall what occurred with respect to legislation coming out of South Dakota?

Mr. HONAKER. The Wyoming legislation was in 1991. I know that this South Dakota legislation was much more recently than that. I believe that it was similar. But I have to say, Senator, since I left the legislature, I have not been involved in that issue at all.

Senator SPECTER. And when did you leave the legislature?

Mr. HONAKER. I left the legislature in 1993.

Senator SPECTER. And you've had no further contact with the issues involved in *Rowe* v. *Wade*?

Mr. HONAKER. I really haven't, Senator. The only further involvement I would have had was in 1994, when a political action committee took that 1991 legislation and sought to put it on the ballot as an initiative, and there was a civil action filed by Maryland Planned Parenthood to keep it off the ballot. I was retained, for a fee, by the Pro-Life Political Action Committee to defend that action, which I did in the Supreme Court of Wyoming, and prevailed. However, the issues in that case were access to the ballot issues and did not, per se, deal with the issue of abortion.

Senator SPECTER. You say you prevailed?

Mr. HONAKER. We did.

Senator SPECTER. So that it was placed on the ballot?

Mr. HONAKER. The initiative was placed on the ballot where the people of Wyoming could vote on it, and then it was voted down at the next general election. So far as I know in Wyoming, Senator, that was the end of this issue.

Senator SPECTER. And are you saying that that was the end that you had anything to do with this issue?

Mr. HONAKER. It was, Senator. I've practiced law in the Federal courts of Wyoming for 32 years. My involvement in the abortion issue was not other than the initiative case in the courts. It's not

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a major part of my career. It was one issue that came up during my service as a legislator. It was a personal political viewpoint that I took. I've checked those viewpoints at the door of the courthouse for 32 years as a lawyer. As a judge, I would check those personal viewpoints at the door of the courthouse as well.

Senator SPECTER. There are occasions where an interpretation of facts before the court has nuances. What is the strongest assurances you can give this Committee that you would follow not only the letter, but the spirit, of the law as interpreted by the Supreme Court of the United States?

Mr. HONAKER. I think, Senator, the strongest assurance that I can give you is that I have tried cases in the courts over 32 years. I understand the need for lawyers on both sides of an issue, particularly a controversial issue, to make it a complete and full record if a case were to be appealed.

I would, as a District Judge, if confirmed, give lawyers great latitude in making the record they need to make and in presenting the evidence that they need to present. My part would be to make sure that all relevant and admissible evidence came into the record, and then to apply as faithfully as possible the precedent of the Supreme Court in the Tenth Circuit.

Senator SPECTER. Well, my question to you was the letter and spirit of the *Rowe* v. *Wade* decision and the cases which have followed it.

Mr. HONAKER. I think, Senator, that the spirit of that case is the right to privacy, and I recognize the right to privacy. I would apply the precedent of the Supreme Court with regard to that right.

Senator SPECTER. And again, the letter and the spirit?

Mr. HONAKER. Yes, sir.

Senator SPECTER. And beyond the Tenth Circuit, the Supreme Court of the United States?

Mr. HONAKER. Absolutely.

Senator SPECTER. Thank you. Thank you, Madam Chair.

Senator FEINSTEIN. You're very welcome, Senator. Just to continue this, a few more questions on the subject. This Human Life Protection Act which you authored, Mr. Honaker, does not include an exception for the health of the mother. As you know, *Rowe* requires such an exception.

Do you believe—I'm asking you for your personal belief right now—that both the life and the health of a mother must be protected in order for a law regulating abortion to be constitutional?

Mr. HONAKER. That's a very fair question, Senator. Certainly, I have always had the personal belief that the life of the mother should be protected. I have had the personal concern that the health of the mother is not defined specifically enough that I have accepted, in a political context, that viewpoint. As a District Judge, if confirmed, if that is the law of the land, then I would apply it.

Senator FEINSTEIN. Well, it is the law of the land and it's the way it is in *Rowe*, which is the health of the mother. So you are saying, if I understand you, that the term "health" is sufficiently vague for you, that you do not include it.

Mr. HONAKER. Senator, you asked me for my personal viewpoint. My legal viewpoint is that the health of the mother is included in

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the *Rowe* framework, and I would apply it. I would honor and respect that part of the *Rowe* decision, as well as all of the decision.

Senator FEINSTEIN. All right.

Now, you wrote a letter back to Sharon Breitweiser, and I wanted to ask you about a part of that letter. After you were nominated to be a Federal Judge, you wrote this letter. In it, you wrote that if a case involving abortion came before you, "the losing party would appeal to the Tenth Circuit, and perhaps on to the U.S. Supreme Court, and nobody would remember what the trial judge did anyhow."

Now, this sounds to me like you believe that the District Court judgment doesn't make a difference because it could always be appealed and no one would remember what the District Court actually did. That's the way it sounds to me. Is that a correct interpretation?

Mr. HONAKER. I appreciate the opportunity to clarify what I said, Senator. The intent behind what I said was to clearly convey to Ms. Breitweiser that I was absolutely committed to the rule of law and to applying a precedent of higher courts. Any litigant on the abortion issue, or any other issue, who would come into my court would receive the full benefit of the precedent of the U.S. Supreme Court and the Tenth Circuit. Certainly if someone disagreed with the precedent they could appeal.

I've always said, as in the *Gideon* cases, or the *Miranda* cases, or the *Rowe* case, none of us can name who that District Court judge was or which way he ruled. But the truth is, that in my court, if confirmed, precedent would be faithfully applied. If someone appealed, it would be up to a higher court to overturn or modify precedent, but it wouldn't be up to me.

The letter, I hope read as a whole, clearly conveys that impression. I feel that that one particular part perhaps was not well written and was misinterpreted.

Senator FEINSTEIN. Well, it's a very strange phrase to use in a letter after you were nominated for a Federal District Court, to say, well, the findings of the District Court won't be remembered by anyone, because it's just simply not true.

Mr. HONAKER. Having spent my life in the courts representing the interests of all sorts of people of all sorts of walks of life, I have great respect for the decisions and findings of our Federal and State courts. If I conveyed any impression that I didn't respect the findings of a Federal District Court judge, that would be inconsistent with everything I've done in my career. I entirely do.

Senator FEINSTEIN. You were quoted in the *Daily Rocket Miner newspaper* as saying that the abortion issue is "not settled until it's settled right". What did you mean by that?

Mr. HONAKER. I, as a politician and as a State legislator, expressed my personal viewpoint that the abortion issue should be settled in a pro-life way. That was a personal viewpoint that legislators and individuals take in this country. There are people on both sides of this issue that are good people and good citizens, and I took that position as an individual and as a legislator.

As a judge, in a separate branch of government, honoring the separation of powers, I would certainly apply the precedent of the U.S. Supreme Court, including *Rowe* v. *Wade*.

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Senator FEINSTEIN. My time is up.

Senator, would you like an opportunity?

Senator SPECTER. One additional item, Madam Chairwoman.

That is, there is a letter from one of his colleagues, a man named Eric M. Alden from Wheatland, Wyoming, a letter which appeared in the Casper Star Tribute on March 28, 2007 endorsing the candidate, the nominee, and noting as follows: "I served in the State House in 1991 along with Mr. Honaker and I was on the other side of the abortion issue from him."

Then the final paragraph: "I was pleased to see that Dick Honaker had been selected to this position. I believe he has the potential to be one of the finest trial judges ever to serve in the State. His commitment to fairness is second to none. I can truthfully say there is no person I would rather have as a judge on a case, no matter what side of any issue I was on, than Dick Honaker."

I would ask consent that the full text of the letter be included in the record.

Senator FEINSTEIN. Without objection.

[The letter appears as a submission for the record.]

Senator SPECTER. Thank you. Senator Feinstein. I feel badly that we've left a couple of people out of this conversation. I'm trying to think of some hard balls to throw at you, but I don't come up with any.

So let me ask one question to both of you. This Committee's recent investigation into the Department of Justice has uncovered evidence of political considerations improperly entering into the administration of justice.

How can you assure us that, if politically sensitive cases come before you, and in any case before you, you will be able to disregard your own personal views and allegiances and decide the cases only on the law and the facts before you? Who would like to go first?

Mr. Miller.

Mr. MILLER. Senator, I'll take that one. What I would say to this Committee, is look at my record. Look at the opinions I've written while serving on the Arkansas Court of Appeals. What you will find, as I believe you will find, is that I have followed the law and have been fair. In cases involving large companies, I have ruled in favor of large companies, I've ruled in favor of—I've written opinions in favor of plaintiffs, depending on where the law is and what the rules are.

I believe you can look at my record, both on the bench and before I began serving on the Arkansas Court of Appeals. What you will find is, and the same thing that Senator Lincoln was speaking of, my colleagues will speak to that, that I've always been fair. I've never taken one side over the other. I can assure this Committee that I'll do the same, if you approve me.

Senator FEINSTEIN. Thanks, Mr. Miller.

Anybody else? Mr. Hall.

Mr. HALL. Thank you, Senator.

It is the bound duty of every District Court judge to apply the law, follow the rule of law, and to set aside all personal and political concerns. I take that responsibility and that oath very seriously, and will if I am lucky enough to be confirmed. I have spent some part of my life in the political arena and complained about

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activist judges that made decisions based upon political or their personal considerations. It affects the credibility of our judiciary. It strikes at the heart of our separation of powers. You have my commitment that I would follow the duty as a trial judge and I would simply set those concerns aside and apply the law.

Senator FEINSTEIN. Thank you.

Mr. Puryear, would you like to make a comment?

Mr. PURYEAR. I would just like to echo what Mr. Hall said. I commit to the Committee that, if confirmed, I would follow the law, the relevant precedent, and the Constitution, which is the oath that a judge takes as to the Constitution as the highest authority, and will do my level best to ensure fairness to all litigants that come before me.

Senator FEINSTEIN. OK.

Mr. Honaker.

Mr. HONAKER. Senator, in many cases the trial judge stands between a citizen and his government. Whether the government is on one side of a case or not, it's the duty of the District Judge to apply the law fairly and impartially without respect to persons and I'm committed to doing that.

Senator FEINSTEIN. Thank you.

Now, Mr. Hall, you raised the question of judicial activism. Retired Supreme Court Justice Sandra Day O'Connor, of whom I am a great fan, has written "the breadth and intensity of rage currently being leveled at the judiciary may be unmatched in American history." She added that "this situation presents a grave threat to the independent judiciary."

How do each of you define "judicial activism"? Mr. Hall?

Mr. HALL. In my opinion, judicial activism is simply a judge ignoring precedent and rendering a decision that is based upon either political views or their own personal view of how society should exist or operate. As I previously said, I think there is no place for that in a judicial setting.

The rule of law is clear. My duty is to apply the law established by acts of Congress, by the Supreme Court, and by the Eleventh Circuit Court of Appeals, in my case. So I realize that it is important for me to make a commitment both to this Committee, but to myself, that I can very quickly set aside any political or other opinions and simply deal with the facts that are before me in the case and apply the law of the land as it exists at that time.

Senator FEINSTEIN. Thank you.

Mr. HALL. Thank you.

Senator FEINSTEIN.

Mr. Honaker? We'll go right down the line.

Mr. HONAKER. Senator, I think that a judicial activist can be conservative, liberal, moderate, or of any viewpoint. But the essence of judicial activism is the substitution of one's own personal viewpoints or opinions for the laws written by Congress. I would not legislate from the bench, I would apply the law as written by Congress and as interpreted by the higher courts.

Senator FEINSTEIN. If I might just make one editorial comment. I remember the Ranking Member, distinguished as he is, asking some very piercing questions of Supreme Court nominees on the

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subject of precedent. I think you even used the word "super precedent".

Senator SPECTER. Super-duper precedent.

[Laughter.]

Senator FEINSTEIN. Super-duper precedent. And everybody said they would agree with it. Then, of course, they didn't. But, anyway.

Senator SPECTER. Well, I'm glad you brought that up, Madam Chairwoman, because that opens up this hearing probably well into the evening.

Senator FEINSTEIN. Well, I don't want to do that.

Senator SPECTER. I'll withdraw the comment.

Senator FEINSTEIN. Going right down the line. Mr. Puryear?

Mr. PURYEAR. Thank you, Senator. I think I would define judicial activism as when a judge substitutes his or her own political beliefs, regardless of the nature of those beliefs, for duly enacted laws in the Congress or for the Constitution of the United States. In all things, I will be guided by the Constitution and the enacted laws of Congress in what I do, if confirmed as a District Judge, as applied to the facts in front of me. Thank you.

Senator FEINSTEIN. Mr. Miller?

Mr. MILLER. Senator, I can't improve upon what my colleagues have already said. I would just echo exactly what they've said before me.

Senator FEINSTEIN. Thank you. Thank you.

Senator.

Senator SPECTER. Thank you, Madam Chairwoman.

Mr. Puryear, the Alliance for Justice sent a letter dated October 30, 2007 opposing your nomination on two grounds. It charged that you have made "public comments" that "indicate hostility toward civil rights lawsuits in general, and to those—prisoners in particular." The one-sided example was a quote from a legal periodical: "Litigation is an outlet for inmates," and said it's "something they can do in their spare time."

Are you hostile toward civil rights lawsuits?

Mr. PURYEAR. Senator, I am not. The question that provoked the answer that you read was about some of the more extreme examples of frivolous inmate litigation, which examples do exist. That does not diminish the fact that there are numerous meritorious claims that inmates file. In fact, as the general counsel for CCA, I have authorized significant payments in some of those cases. I've implemented a compliance program to try to prevent those cases from arising, and to ensure that we have an anonymous means of reporting for staff, so that those abuses do not occur.

As a member of the National Prison Rape Elimination Commission, on which I serve as a volunteer, I'm well aware of the abuses and the losses of life that can occur in correctional facilities. There are human beings on both sides of the sliding doors and mistakes can happen. So, I am not hostile to prisoners rights, Senator.

Senator SPECTER. So do you say that you think that the courthouse doors ought to be open to people who have complaints about civil rights?

Mr. PURYEAR. Yes, Senator, they should.

Senator SPECTER. And then how do you define "frivolous"?

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00367 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

Mr. PURYEAR. Frivolous, I think, is a difficult thing to define. I leave it to Congress to enact statutes that address those issues. I know that—

Senator SPECTER. Well, it's not a matter of leaving it to Congress. You may have to leave it to the inmate. How does an inmate know what frivolous is—

Mr. PURYEAR. Correct. A frivolous lawsuit, Senator, would be a lawsuit that—for example, applying the Rule 11 standard, that either lacked a factual basis for being brought or lacked a factual basis for—

Senator SPECTER. I don't know that the inmates understand Rule 11.

Mr. PURYEAR. Right.

Senator SPECTER. Not many lawyers understand Rule 11. Not many people know what Rule 11 is.

On this statement that "litigation is an outlet for inmates, it is something they can do in their spare time", is it your position that you think the courts ought to be open for civil rights litigation and that—well, tell me what your position is.

Mr. PURYEAR. My position is that the courts should be open for civil rights lawsuits of all types, including those brought by inmates. In fact, prior to coming to CCA I represented an inmate, pursuant to a court appointment, in a civil rights case.

Senator SPECTER. Did you win?

Mr. PURYEAR. We did not win. But I fought as zealously as I could on behalf of my client.

Senator SPECTER. What was the essence of the complaint?

Mr. PURYEAR. The essence of the complaint was two-fold. The first component of the complaint dealt with the fact that his security classification was being altered in an upward manner because of a conviction shown on an FBI rap sheet that he contended were false, and indeed some of them were false. Once learning of the falsity of some of those convictions, the prison administrators had not inquired reasonably to confirm whether the other rap sheet convictions were, in fact, true.

The second component of this lawsuit was a claim for retaliation. He asserted that he'd been placed into administrative segregation, denied access to his legal materials as a consequence of his raising issues around what was contained in his rap sheet.

We tried that case through a jury in District Court in Nashville, and ultimately the jury was not persuaded by the claims that we made. But it was a hard-fought contest. I was proud to be a part of it, and I did everything that I could to try to secure victory, as any lawyer would, for his client.

Senator SPECTER. The Alliance for Justice also contended that your position with Corrections Corporation of America would cause "docket management problems" by requiring recusal in numerous cases. What's your response to that?

Mr. PURYEAR. Well, Senator, the numbers that were provided to the Committee by the Alliance for Justice, I don't know what their source was, but it's not consistent with the numbers that I'm aware of. In fact, since 2000, 181 lawsuits have been filed in the Middle District of Tennessee against CCA. Over that same time period, I

believe over 15,000 cases have been filed in the Middle District of Tennessee.

Right now, when I last checked a month ago, CCA has six cases pending in the Middle District of Tennessee, with four active District judges and four senior District judges. I do not think it will work an undue burden to allocate those cases involving CCA to the other judges within the District, and I would take other cases in which there was not an apparent conflict in order to equalize the caseload.

Senator SPECTER. Do you think the number is sufficiently small as not to be a problem so that other judges can handle it, even if you have to recuse yourself?

Mr. PURYEAR. Yes, Senator. In fact, I think the number is probably much smaller than it would be for some of the large law firms in Nashville that undoubtedly have more than six cases pending at any one time in the District Court of Tennessee.

Senator SPECTER. The Private Corrections Institute, further, raises a question about your lack of sufficient litigation experience for the job. How much litigation experience have you had?

Mr. PURYEAR. Well, Senator, my experience directly in litigation and related to litigation has been many—fold and diverse. I've spent 7 years as the general counsel for a large public company.

Senator SPECTER. How many cases have you tried?

Mr. PURYEAR. I've tried two cases, two jury trials, one as the sole trial lawyer and one as the associate counsel.

Senator SPECTER. Non-jury trials?

Mr. PURYEAR. Pardon me?

Senator SPECTER. Non-jury trials?

Mr. PURYEAR. Non-jury. Well, there was a component of one of those jury trials that was decided by the judge. I cannot think of any—there was one non-jury trial where we had to withdraw on the eve of trial because a rule that would no longer apply concerning calling of a partner as a witness in a case. There was a bench trial where we sat behind the trial lawyers and assisted them as they tried the case, but no additional trial experience beyond those.

Of course, as a law clerk in the Fifth Circuit, we spent a year reviewing District Court cases. That was what we did, is we reviewed the record, we reviewed evidentiary rulings, and that was certainly an instructive experience at the outset of my legal career. More recently, as general counsel at CCA, we've had to make a number of decisions, and I've attended trials where I've not actually been the counsel of record, where I've had to make decisions about whether to settle cases or not.

Senator SPECTER. Well, thank you very much, Mr. Puryear. I wanted to give you a chance to respond to these issues which were raised, and I appreciate your answers.

Mr. PURYEAR. Thank you, Senator.

Senator SPECTER. Thank you for the extra time.

Senator FEINSTEIN. You're very welcome, Senator.

I have something I'd like you to respond to, too. "As CCA's general counsel", this is a statement that the Committee has received, "Mr. Puryear has taken an active role in hiding damaging information about the company from the public, including the govern-

mental agencies that contract with the company. Such actions are antithetical to the ethical qualities that should be displayed by a Federal judge."

There are two examples that they cited. "Following a hostage-taking at CCA's Boyd County Florida jail in 2004 which resulted in a prisoner and a nurse hostage being shot by a S.W.A.T. team member, CCA refused to release an After-Action Report related to the incident. Mr. Puryear arranged to have a private law firm conduct the report to protect CCA from liability and stated that the proprietary report would never become a public record." This was reported in the News Herald November 14, 2004.

"Further, Mr. Puryear put the company's Quality Assurance Division under CCA's Legal Department so any quality assurance audits would not be subject to public records laws due to attorney/client privilege. While Mr. Puryear may have been just doing his job as CCA's chief lawyer, this certainly is not behavior worthy of a Federal judicial candidate."

Could you respond, please?

Mr. PURYEAR. Yes. Thank you, Senator. The hostage-taking episode, as I understand it, what the author of that comment is accusing me of, is accusing me of attempting to protect the work product protections of the company which I represent, and to that I plead "guilty". After an incident that occurred within the prison, we knew litigation was going to be coming. We sent in a group of outside lawyers to figure out what happened and what the underlying facts were to share their impressions about the defensibility of that lawsuit.

The only request that I received was a telephone call, asking me if I would turn over the report from a third party, the private—affiliated with Private Corrections Institute, and I said that I would not. The issue was never litigated. That is the position. So I was doing my best to protect the work product privileges that attach to investigations performed under the supervision of lawyers in anticipation of litigation.

The Quality Assurance Division was moved to my office several years ago, primarily to move it out of the Operations Division of the company so that there would be an independent reporting mechanism for quality assurance to the Board of Directors and the CEO of the company through me. The reason was to improve the quality of our operations. Our quality assurance audits, the raw audits, are available.

To my knowledge, I don't know that we've ever denied those to any public entity that has requested them, any governmental entity or any customer. There may be mental impressions that get shared by the auditors about possible litigation concerns which would not be a part of the underlying audit report, but I'm not aware that we've ever withheld an audit report from any customer.

Senator FEINSTEIN. Actually, there are a number of allegations here. I'm going to ask that you review them and respond in writing to the Committee.

Senator FEINSTEIN. Could I ask this question? How much stock do you own in CCA?

Mr. PURYEAR. As of right now, I think I own—

Senator FEINSTEIN. In a percent, please.

Mr. PURYEAR. Oh. In a percentage of the company?

Senator FEINSTEIN. If you can.

Mr. PURYEAR. I couldn't. It is minuscule as of right now. But I couldn't even begin to approximate the percentage. It's not a percent of the company, it's way, way south of that. It's a large, you know, multi-billion dollar capitalized company and I have only the shares that are restricted shares and a few stock options that are tied up with resale agreements until my separation of employment. And by "few" I mean whatever that number is. I don't know exactly what the number is, but I've liquidated the other holdings.

Senator FEINSTEIN. Yes.

Let me ask you about another case. This goes back to 2004, while you were serving as the lawyer for CCA. Apparently a female prisoner at the company's Metro Division in Nashville was beaten to death. Estelle Richardson, 34, was in a solitary confinement cell when she was found unresponsive. An autopsy revealed a skull fracture, four broken ribs, and liver damage. A medical examiner ruled her death a homicide, saying her injuries were consistent with blunt force trauma and could not have been self-inflicted.

In 2005, four CCA guards were indicted on murder charges in connection with Richardson's death. The charges were dropped by prosecutors because they could not determine the exact time the injuries were inflicted. CCA quietly settled a civil lawsuit by Richardson's family in '06.

So the question this individual is raising is, who murdered Estelle Richardson? Mr. Puryear, who had inside knowledge about Richardson's death through internal CCA records and a suit filed by her family, was only interested in protecting CCA's interests. What about the public interest in knowing who beat Estelle Richardson to death? What about bringing her killers to justice, whether they were CCA guards or other prisoners?

Mr. PURYEAR. There are a range of possible explanations for what happened to Ms. Richardson. It was awful, what happened. I remember getting the phone call informing me about the death of an inmate in one of our segregation units in my hometown. We did settle that case with the family of Ms. Richardson. I'm not at liberty to discuss the amount; there are minors involved, and that's one of the main reasons why that settlement has been kept confidential. But there were a range of alternative explanations, many of which would not have involved a beating death that could have explained what happened.

Senator FEINSTEIN. So you settled it for money. Is that what you're saying?

Mr. PURYEAR. CCA settled the case. I can't comment beyond that. But I can say that the four correctional officers who were originally charged with homicide in connection with the death, I can say this. The plaintiff's expert, the family's expert, and the company's expert that examined the medical records concluded that the medical examiner made a mistake, that it was not a death that resulted from a beating within anything close to the timeframe that had been assumed by the medical examiner.

So, four innocent correctional offices who had nothing whatsoever to do with her death, which is clear from the record, were exonerated. It's to the great credit of the District Attorney General of

Nashville that he chose to drop those charges in the face of evidence from both the family and from us that those four offices had nothing to do with her passing. And again, there are a variety of possible explanations for what happened. I don't know what happened, Senator, but I do know that those four correctional officers were not involved and that the District Attorney General did a courageous thing to not charge innocent people after that evidence was brought to light.

Senator FEINSTEIN. Well, when you say there are a variety of explanations for what happened, I trust you're not saying that this inmate fractured her own skull, and damaged her own liver, and broke her own ribs.

Mr. PURYEAR. Senator, the rib fractures, for instance, would be consistent with CPR being performed, which was performed, and the liver injury could also be explained that way. That does commonly happen. The head injury was—

Senator FEINSTEIN. Common? Common?

Mr. PURYEAR. The head injury—

Senator FEINSTEIN. You said it commonly happens giving CPR?

Mr. PURYEAR. Having ribs broken, if it's administered. It happens. At least, that's what I am told by the experts.

Senator FEINSTEIN. It's common?

Mr. PURYEAR. That's what I'm told by the experts who were engaged in this case. The head injury was of indeterminate length before her death, at least more than a few days before the inmate passed away, according to some of the medical experts that were engaged to work on this on both sides. They agreed on that point, so there was not a beating the night before, which is what the original charges were.

There is the possibility—well, there are any number of possible explanations, including fights with other inmates, a fight with unknown correctional officers, self-inflicted wounds, medication issues. She had a history of seizures. I do not know what happened, Senator. I don't think that the family knows what happened. The case was settled. The civil case was settled, and fortunately four correctional officers, that everyone involved agreed were innocent, were cleared of responsibility by the District Attorney General.

Senator FEINSTEIN. So a finding of blunt force trauma by a medical examiner and a finding of homicide, you are essentially saying you dispute.

Mr. PURYEAR. The family's medical expert would dispute the finding of homicide on the grounds that the medical examiner found it. Yes. Yes, Senator.

Senator FEINSTEIN. OK.

Do you have any other questions, Senator? I'm finished.

Senator SPECTER. Thank you very much. I have no further questions.

Senator FEINSTEIN. All right. I have no further questions either. Gentlemen, thank you very much.

The hearing is adjourned. Oh, if I may, I'd like to, before I do that, put in the record a statement by the Chairman of the Committee, Senator Leahy, and indicate that we will keep the record open for 2 weeks for written questions.

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

Senator FEINSTEIN. The hearing is adjourned.

[Whereupon, at 3:51 p.m. the Committee was adjourned.]

[Questions and answers and submissions for the record follows.]

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00373 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

QUESTIONS AND ANSWERS

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March 5, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Attached are my responses to written questions from Senator Kennedy, Senator Biden, Senator Feinstein, Senator Durbin, and Senator Cardin.

Sincerely,

Richard Honaker

RICHARD HONAKER

RH:k

cc: The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

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**Responses of Richard H. Honaker**
**Nominee to the U.S. District Court for the District of Wyoming**
**to the Written Questions of Senator Edward M. Kennedy**

**1. You were quoted in the *Daily Rocket Miner* newspaper as saying that the abortion issue is "not settled until it's settled right". When Senator Feinstein asked you about this statement at your confirmation hearing, you said that it "expressed [your] personal viewpoint that the abortion issue should be settled in a pro-life way." As you know, however, whether or not *Roe v. Wade* is settled precedent is a constitutional issue, not just a political one. Your strong statement suggests an unwillingness to accept rulings of the nation's highest court. Yet you have said that you would be able to set aside your strongly held beliefs in order to serve on the bench.**

Response: The quote Senator Feinstein raised was from 1991 or earlier. As I explained in my confirmation hearing, "I, as a politician and as a state legislator, expressed my personal viewpoint that the abortion issue should be settled in a pro-life way." That was my viewpoint at that time, when the issue seemed opened by the Supreme Court's 1989 decision in *Webster*. After the Court's 1992 decision in *Casey*, it seemed clear that the issue was closed. I have had nothing to do with the issue since that period of time.

As a state-level politician, while I did not always like the result of an election, I always accepted the result, content that democracy had been observed and the people had spoken. As a trial lawyer, while I have not always liked a jury's verdict or a judge's decision, I have long ago learned to accept those verdicts and decisions and to live with them, content that the judicial system had worked. My career demonstrates a lifelong commitment to the rule of law, and I am certainly willing to accept the rulings of the nation's highest court.

**a. How can you assure the public that, if confirmed, you will you faithfully apply legal precedents?**

Response: I have sworn to do so. Applying legal precedents is what I have done for 32 years as a lawyer, and I am absolutely committed to faithfully applying legal precedents as a judge. I respect our system of law, and recognize that a judge is fully subject to the rule of law.

I believe that it further testifies to my principled commitment to the rule of law and to equal justice under the law that I was elected by my peers to serve as president of the Wyoming State Bar and the Wyoming Trial Lawyers Association, that I serve on the national board of the American Board of Trial Advocates and am co-chair of its committee on judicial independence, and that I serve as vice-chair of the Board of Professional Responsibility, sitting in judgment on attorney ethics cases. In addition, I have received the unanimous "Well Qualified" rating



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of the American Bar Association's Standing Committee on the Judiciary, and my nomination has received the bi-partisan support of Wyoming's legal community, and the support of Wyoming's federal judiciary.

**b. Can you provide a concrete example of a time when you have advocated a legal position with which you did not agree?**

Response: The time would be during my years as a public defender. I represented wrongfully accused citizens, but I also represented some individuals who seemed utterly devoid of any conscience. When I was the State Public Defender, I had to personally take on the cases that no public defender would touch. The worst cases were the sexual assault/murders of small children. I represented a teen-age defendant in Evanston, Wyoming charged with the first degree murder of a seven-year old girl, dumping her body in a river. And I represented a drifter in Douglas, Wyoming, who murdered a four-year old girl in a city park, and her grandfather found her. In both of these cases, and in others, it was my responsibility to thoroughly investigate and prepare the case, and to construct formidable defenses, bolstered by suppression motions. And in both cases, though I knew a jury could return a verdict of death, I accomplished my purpose of avoiding the death penalty for these defendants. In these cases, I always tried to find something redeeming in my client, because I had to communicate with them and have their confidence, and I always had to find evidence I could ethically present to a judge or jury that potentially could create a reasonable doubt.

**2. In a 1992 speech you stated that "In the abortion debates, [I say] that abortion is the killing of an innocent, living human being, and it's wrong, and no one should have the right to do what is wrong...." You also have compared the abortion debate to the debate over slavery, suggesting that the Supreme Court's decision establishing the legal right to an abortion in *Roe v. Wade* was analogous to its infamous *Dred Scott* decision. You said, "[i]n these debates, one side [the anti-abortion or anti-slavery side] advances an absolute value. The other side advances an ethical choice based on varying situations.... But this nation was founded upon absolutes. It could not have been otherwise."**

**a. Do you still believe that *Roe v. Wade* is analogous to the *Dred Scott* decision?**

Response: I do not. The decision of a woman not to bear a child is not analogous to the decision of one human being to enslave another and to pursue that "slave" across state lines. As a passionate young legislator, I was using rhetoric to advance a political position, and I regret having drawn that analogy at that time.



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**b. The clear implication of these statements is that *Roe v. Wade*, like the *Dred Scott* decision, was based on a flawed interpretation of the Constitution. Is that still your view?**

Response: *Roe v. Wade* has been the law of the land for 35 years. It is settled law, and I accept it. *Roe* was strengthened by the *Casey* decision in 1992. Sixteen years later *Casey* is settled law, and I accept it.



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**Responses of Richard H. Honaker**
**Nominee to the U.S. District Court for the District of Wyoming**
**to the Written Questions of Senator Joseph R. Biden, Jr.**

**1. In a speech before the Wyoming Christian Legal Society in 1992, you said, "...in our law schools, Charles Evans Hughes' statement has become true: 'The law is only what the judges say it is.' Law students don't study the law; they study what the judges say the law is. They study appellate opinions. They don't concern themselves with the source of the law, with the source of justice." What, in your view, is the source of justice? Please explain what role, if any, judicial precedent, including opinions of higher federal courts, should play in decision-making by a federal district court.**

Response: In that speech I quoted President Kennedy's statement that "...the rights of man come not from the generosity of the state but from the hand of God." President Kennedy also said, in his Inaugural Address, that "here on earth God's work must truly be our own." I agree that the source of justice can be conceived of in both metaphysical and practical terms. As a prosecutor and defender and civil litigator, representing clients over the course of a 32-year career in the federal and state courts, I know that, practically speaking, the source of justice is found in judges and juries.

Judicial precedent plays a central role in decision-making by a federal district court. The judge has a duty to come to each case with an open mind, to provide a fair and impartial tribunal marked by an atmosphere of civility and professionalism, to give the litigants wide latitude to present their cases and make their records, to ensure that only relevant and admissible evidence comes before the jury, to decide all motions and issues of law based upon a fair reading of the law and faithful application of the precedent of higher courts, and to instruct the jury based upon precedent and sound principles of law. The faithful application of precedent is an essential component of the rule of law, and, in my view, adherence to the rule of law is an issue of judicial integrity. I have been committed to this noble process throughout my career, and I will continue to be committed to it if confirmed as a federal trial judge.

**2. In a letter dated March 24, 2007, in reference to your record on abortion, you said, "In any event, on such a controversial subject, the losing party would appeal to the Tenth Circuit, and perhaps on to the United States Supreme Court, and nobody would remember what the trial judge did anyhow. Trial judges simply don't make substantive constitutional law." What is your view of the federal district court's role in our legal system? What impact, if any, do you believe federal district courts have on constitutional law?**

Response: The intent of the March 24, 2007 letter was to convey my commitment to approach each case with an open mind and to decide cases fairly



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and impartially. I regret the quoted statement, which conveyed an inaccurate impression that federal trial judges do not decide important constitutional questions. A federal district judge, committed to extending the protections and liberties of the Constitution of the United States to citizens who are being denied those protections or liberties, can make substantive constitutional law – subject to review by the higher courts – and does have enormous power to do positive things for our citizens. It is not power, so much as it is duty. If confirmed, I would take that duty very seriously.

I have tried many cases to judges and juries, and also have handled more than 50 appellate matters. The review of an appellate court is limited to the record made in the trial court. I have a great appreciation for the necessity of a complete record, and for how that record ought to be made. First and foremost, the federal district court must be a fair and impartial tribunal in which litigants are given wide latitude to introduce relevant evidence and to thoroughly present their theory of the case, both by evidence and by law. I believe in wide latitude in argument, limited only by the widely accepted boundaries set by case law. The trial judge has an obligation to present a complete and orderly record to the circuit court. At the same time, the federal trial judge has an obligation to apply the precedent of the circuit court and the United States Supreme Court on all issues of federal constitutional and statutory law, both substantive and procedural, and the precedent of his or her State's supreme court on all issues of substantive state law. Where there is a lack of applicable precedent, the federal trial judge must exercise wisdom to identify and apply sound rules of law, consulting the precedent of other circuits and of state courts that have considered the particular issue – but keeping his or her eyes firmly upon the north star of the Constitution of the United States.

**3. You have criticized the principle of neutrality – the principle that the First Amendment prevents the government from acting with the purpose of advancing religion or promoting a particular point of view on religious matters. In a speech before the Wyoming Christian Legal Society you said, "Neutrality was not neutrality at all. It was a calculated method of moving American society away from its Christian base and toward a secular base. It was a calculated method of pushing Christians into a corner from which they could have little or no impact on society. The idea of neutrality relied upon the myth that law and government can function with relying upon shared moral premises. The upshot of neutrality was that some moral premises could be considered in the formulation of law and policy, but that Christian moral premises could not." What, in your view, is the proper application of the protections of religious liberty enshrined in the First Amendment?**

Response: What I was attempting to communicate in my speech was a concern that the Court's Establishment Clause tests, including the neutrality test, not be interpreted so as to justify hostility toward religious believers. Justice Breyer, for one, has also taken up this concern, articulating it in his recent concurrence in *Van Orden v. Perry*, 545 U.S. 677, 699 (2005):



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> "[T]he Court has found no single mechanical formula that can accurately draw the constitutional line in every case. Where the Establishment Clause is at issue, tests designed to measure 'neutrality' alone are insufficient, both because it is sometimes difficult to determine when a legal rule is 'neutral,' and because 'untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.'" (citations omitted).

I have not litigated an Establishment Clause case, and I do not claim to fully understand the complexities of the various Establishment Clause "formulas" -- as Justice Breyer calls them -- that the Court has used in detail. One thing, however, is crystal clear: that my duty, as a trial judge, would be to apply the precedent of the Supreme Court in Establishment Clause cases. Were such a case to come before me, I would do my very best to study the Court's Establishment Clause jurisprudence, and apply it as accurately and completely as possible.

**4. You have said that *Roe v. Wade* contravenes the "higher law of God." As a federal judge, would you apply the Supreme Court's holding in *Roe* even if it conflicts with your personal beliefs?**

Response: I do not recall having made such a statement, and I do not believe that. I reiterate my testimony before the Committee that, if confirmed, I shall apply the letter and spirit of *Roe* as the settled law of the land.

I was only 35 years old when I came to the Wyoming legislature as a Democrat, representing a blue collar constituency of mining families who often were characterized as "pro-union" and "pro-life." My constituents elected me three times, by increasingly larger margins.

My record demonstrates that I have long accepted *Roe* as settled law. My legislative efforts on the subject of abortion ended on February 20, 1992, when the "Human Life Protection Act" failed introduction in the Wyoming House. *Casey* was decided by the United States Supreme Court on June 29, 1992, and, in my view, foreclosed any further attempts to revisit *Roe* through state legislation.

In 1994, I was retained to represent a group of citizens who sought to put the 1991 bill on the ballot as an initiative. The Wyoming Supreme Court ruled in my clients' favor in *Wyoming NARAL v. Karpan*, 881 P.2d 281 (Wyo. 1994), and the initiative went on the ballot where it was defeated. As I testified, that vote settled the issue in Wyoming.



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**Responses of Richard H. Honaker**
**Nominee to the U.S. District Court for the District of Wyoming**
**to the Written Questions of Senator Dianne Feinstein**

**1. In a 1992 speech to the Christian Legal Society, you said that "the most basic question for those who would define justice in this society" is, "are we one nation under God, or are we a nation under men?"**

- ***What did you mean by this statement?***

  Response: The quoted statement was meant to communicate the American political ideal articulated best in the Declaration of Independence: that certain unalienable rights come not from men – in that they could be taken away by men or by government – but from an absolute source. President Kennedy reiterated the same ideal in his Inaugural Address, saying that "...the rights of man come not from the generosity of the state but from the hand of God." An integral part of American political philosophy has always been that citizens have certain fundamental rights that cannot be arbitrarily taken away by government. Those rights are guaranteed by the Constitution of the United States, and in particular, the Bill of Rights.

- ***Do you support the Supreme Court's precedent on the separation of church and state? Do you believe it is settled law?***

  Response: Yes, I do. And yes, I believe it is settled law.

**2. In the same speech to the Christian Legal Society, you said that "the Supreme Court no longer talks about America as a Christian nation or about the Christian underpinnings of the law." You spoke approvingly of 19th-century Supreme Court cases that said this country is a "Christian nation," and harshly criticized the Supreme Court for its more recent rulings that require government to be neutral toward religion.**

- ***Given your strong support of outdated Supreme Court cases and your criticism of prevailing Supreme Court precedent, what in your record demonstrates that you will follow current Supreme Court precedent on church-state issues?***

  Response: Our country has changed demographically and in many other ways since those early Supreme Court opinions in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) and *United States v. MacIntosh*, 283 U.S. 605 (1931). Our country's religious heritage has broadened, has deepened, and has become much more rich and diverse. In that 1992 speech, I traced some of those historical changes as chronicled by Supreme Court opinions, but did not propose – and would not propose now -- that the Court should revert to its earlier opinions. I do not believe America is a "Christian nation" or should be a "Christian nation."



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I believe America is a nation in which people of all faiths, or of no faith at all, live together as equals under the Constitution and laws of the United States.

What I was attempting to communicate in my speech was a concern that the Court's Establishment Clause tests, including the neutrality test, not be interpreted so as to justify hostility toward religious believers. Justice Breyer, for one, has also taken up this concern, articulating it in his recent concurrence in *Van Orden v. Perry*, 545 U.S. 677, 699 (2005):

> "[T]he Court has found no single mechanical formula that can accurately draw the constitutional line in every case. Where the Establishment Clause is at issue, tests designed to measure 'neutrality' alone are insufficient, both because it is sometimes difficult to determine when a legal rule is 'neutral,' and because 'untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.'" (citations omitted).

I have not litigated an Establishment Clause case, and I do not claim to fully understand the complexities of the various Establishment Clause "formulas" -- as Justice Breyer calls them -- that the Court has used in detail. One thing, however, is crystal clear: that my duty, as a trial judge, would be to apply the precedent of the Supreme Court in Establishment Clause cases. Were such a case to come before me, I would do my very best to study the Court's Establishment Clause jurisprudence, and apply it as accurately and completely as possible.

You ask what in my record demonstrates that I will follow precedent. I would hope that members of the Committee will carefully consider my record as a lawyer in the federal and state courts and as a leader of my state's Bar. That record demonstrates a lifelong commitment to the rule of law, including respect for the precedent of higher courts and for all litigants. Applying legal precedents is what I have done for 32 years as a lawyer, and I am absolutely committed to applying legal precedents as a judge. I respect our system of law, and recognize that a judge, too, is subject to the rule of law.

I believe that it further testifies to my principled commitment to the rule of law that I was elected by my peers to serve as president of the Wyoming State Bar and the Wyoming Trial Lawyers Association, that I serve on the national board of the American Board of Trial Advocates and am co-chair of its committee on judicial independence, and that I serve as vice-chair of the Board of Professional Responsibility, sitting in judgment on attorney ethics cases. In addition, I have received the unanimous "Well Qualified" rating of the American Bar Association's Standing Committee on the Judiciary, and my nomination has



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00382 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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received the bi-partisan support of Wyoming's legal community, and the support of Wyoming's federal judiciary.

**3. In a 1994 speech you criticized the Democratic party for favoring "hiring quotas for minorities" and "special interests for gays." You also derided what you call "fringe anti-family groups which seek special rights."**

- ***What did you mean by "hiring quotas for minorities"?***

  Response: This was a partisan political speech given at a Republican rally during a 1994 Republican primary campaign for a state legislative seat. Many of the phrases used were purely rhetorical. I cannot now recall whether there were specific issues in 1994 that would have provided a context for my use of this phrase. My understanding of a "hiring quota" is that it is a rigid, inflexible program in which a fixed number of jobs are exclusively reserved for a certain group, without consideration of any factor other than the group's race. I expect that is the sense in which I used the phrase in 1994, and that is the sense in which the Supreme Court has condemned the use of quotas, both before and after 1994. See, for example, *Richmond v. Croson*, 488 U.S. 469 (1989), and *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

- ***What are your current views on affirmative action?***

  Response: My views are consistent with the views expressed by Justice O'Connor in her opinion for the Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

- ***If confirmed, will you adhere to the Supreme Court's precedent in Grutter v. Bollinger?***

  Response: Yes, I will.

- ***What "special rights" were you referring to?***

  Response: I do not recall.

- ***Do you believe that gay and lesbian Americans are entitled to the same rights under the law as all other Americans?***

  Response: Absolutely. In the course of my career, I have represented gays and lesbians in seeking redress of their legal rights, and it has been my honor to do so. I am committed to the principle of equal justice under the law for all citizens.



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My commitment to equal justice under the law is best demonstrated by the clients I have represented – people from all walks of life. I have represented women who have been victims of abusive relationships, employment discrimination, medical malpractice, and negligence. I have represented people with diverse racial and ethnic backgrounds, religious beliefs, and sexual orientations. I have represented unions and businesses. I have represented miners and oilfield workers and railroaders and doctors and sheepherders and teachers and children and senior citizens in nursing homes.

**4. You testified that the issue of abortion was "one issue that came up during my service as a legislator." It would be useful to know about the other issues that you worked on as a State representative. Presumably, you drafted and sponsored various other pieces of legislation.**

- ***Will you commit to providing the Committee the text of all bills of which you were the author, sponsor, or lead co-sponsor in the Wyoming House of Representatives?***

  Response: Upon receiving this request, I promptly requested complete textual data from the Wyoming Legislative Service Office. The director of that office, Dan J. Pauli, has written to me and explained why the LSO cannot satisfy my request. I attach Mr. Pauli's letter to me of February 27, 2008, and include it as a part of my response.

  I have done the next best thing in order to be responsive to the request. Attached are the complete digest entries from the House Journal and Senate Journal of the Wyoming Legislature for each bill I authored, sponsored or co-sponsored during the years I served in the Wyoming House of Representatives. The subject of each bill is expressed in its title. With this data, I have also included a list of the bills for each year.

- ***If you are unable to provide the text of all bills, will you provide a list and a summary of all legislation of which you were the author, sponsor, or lead co-sponsor?***

  Response: Please refer to the response above.



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**Responses of Richard H. Honaker**
**Nominee to the U.S. District Court for the District of Wyoming**
**to the Written Questions of Senator Richard J. Durbin**

**1. As a Wyoming state legislator, you introduced multiple bills designed to serve as challenges to the *Roe v. Wade* case. At your nomination hearing, you testified that despite your personal and legislative opposition to *Roe v. Wade*, you would "faithfully apply the precedent of all higher courts" as a judge.**

Response: I appreciate the opportunity to clarify that, as a young Democratic legislator, I did introduce a bill in 1991 designed to serve as a challenge to Roe v. Wade. The same bill failed introduction in 1992.

**a. Do you believe *Roe v. Wade* is the settled law of the land?**

Response: Yes, I do.

**b. Do you believe *Griswold v. Connecticut* is the settled law of the land?**

Response: Yes, I do.

**2. In a 1992 speech, you stated that people who support abortion rights are ethically similar to people who once supported slavery in the United States. You stated that during the debate over slavery, "Abraham Lincoln would say that one man cannot have property in the life of another, that slavery is wrong, and that no one should have the right to do what is wrong" and you called the other side "pro-choice" explaining: "I say 'pro-choice' because many of the pro-choicers, like Illinois Senator Stephen Douglas, were personally opposed to slavery, but felt that new states and territories ought to have the right to choose."**

**Please explain why you believe that people who are "pro-choice" on abortion rights are ethically similar to people who you say were "pro-choice" about slavery.**

Response: I regret having made that comparison in 1992. I do not believe that people who are pro-choice on abortion rights are "ethically similar" to people who favored the potential extension of slavery into new states. The decision of a woman not to bear a child is not analogous to the decision of one human being to enslave another and to pursue that "slave" across state lines. As a passionate young legislator, I was using rhetoric to advance a political position, and I regret having drawn that analogy at that time.

**3. In light of your anti-abortion track record, many abortion rights organizations oppose your nomination. In a March 24, 2007 letter to the executive director of NARAL Pro-Choice Wyoming, you wrote you could be fair in cases involving abortion rights and would set aside your personal, political opinions as a judge. But**



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**you went on to write: "In any event, on such a controversial subject, the losing party would appeal to the Tenth Circuit, and perhaps to the United States Supreme Court, and nobody would remember what the trial judge did anyhow. Trial judges simply don't make substantive constitutional law."**

**I question your narrow vision of the role of federal district court judges. Throughout our nation's history, federal district court judges have played an essential role in interpreting our Constitution and ensuring our rights and liberties.**

**For example, while serving as a federal district court judge in Alabama from 1955-1979, Judge Frank M. Johnson, Jr. issued many decisions involving substantive constitutional law. In 1955, he struck down the Montgomery, Alabama law that required Rosa Parks and other African Americans to sit in the back of public buses, because the law violated their constitutional rights to due process and equal protection. In 1965, Judge Johnson permitted Dr. Martin Luther King, Jr. to lead the voting rights march from Selma to Montgomery. And he issued many other rulings that safeguarded the constitutional rights of African Americans, voters, the mentally ill, criminal defendants, and prison inmates. As a federal district court judge, Judge Johnson helped change the legal and social fabric of our nation through his constitutional rulings.**

a. **Do you believe Judge Frank Johnson overstepped his role as a federal district court judge by issuing substantive constitutional legal rulings?**

   Response: Absolutely not. I have enormous respect for Judge Frank Johnson, and U.S. District Judges Elbert Tuttle and John M. Wisdom, for courageously extending the protections of the United States Constitution to African-American citizens who were being systematically denied their rights in the state courts. I have enormous respect for the perseverance of Attorney General Robert F. Kennedy in administering a Justice Department that prioritized civil rights. These were defining events in my generation, and they emphasize for me the great power of federal trial judges to do good by extending Constitutional protections and liberties to all citizens, without regard to poverty or wealth, weakness or power, race or gender or religion or sexual orientation or any economic, social or political factor. The example of Judge Johnson is inspiring to me.

b. **Do you stand by your statement that "trial judges simply don't make substantive constitutional law?"**

   Response: No. The example provided is one illustration of why my statement was wrong.

**4. In a 2005 speech, you criticized President Bush for stating, in his 2005 inaugural address, that America's ideal of freedom has been sustained by "the truths of Sinai,**



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00386 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**the Sermon on the Mount, the words of the Koran, and the varied faiths of our people." You wrote:**

> **"By 'the words of the Koran,' the President was obviously referring to the Islamic faith. And yet, anyone who has studied history of the western world knows that the Koran and the Islamic faith played no role in the Reformation or in the development of Western political thought. It certainly played no role in the colonization of America, in the battle of independence, in the drafting of the Constitution, or in the establishment of freedom on these shores. We welcome a plurality of religious faiths in our country, but current cultural trends and changes simply cannot be allowed to rewrite the history of the past."**

**a. Do you believe President Bush's comments about the Koran in his 2005 inaugural address were an attempt to "rewrite the history of the past"?**

Response: No, I do not believe that President Bush's comments were an attempt to rewrite history. I believe that the President was trying to emphasize the way in which all faiths do join together in this country to help sustain freedom.

**b. Do you disagree with President Bush that "the varied faiths of our people" have helped sustain America's ideal of freedom?**

Response: No, I do not. In the speech referred to, I was speaking specifically about certain aspects of our nation's past. I hope and believe that the past is simply one aspect of our nation's lifeblood that, along with the present and the future, will continue to enrich our nation and sustain its ideals of liberty, diversity, mutual respect, justice, and peace.

**c. In your 2005 speech, you also stated: "We would like to see political liberty established in an Islamic country – Iraq – but the question is, how will political liberty sustain itself in the absence of a Judeo-Christian base?" Is it your belief that Muslims and others who do not practice religion in the Judeo-Christian tradition are less capable of safeguarding political liberty?**

Response: Absolutely not. I have a daughter who has made two trips to Baghdad in the past year as part of our country's effort to help establish democratic self-government in Iraq. As an American who enjoys the blessings of political liberty, I would like to see nothing more than the spread of liberty throughout the world. I am confident that such liberty can spread and be sustained regardless of a country's history or religion. I believe strongly in the First Amendment rights of all persons of all faiths, or of no faith at all, to freely exercise their beliefs.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00387 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**5. The U.S. Supreme Court has interpreted the Establishment Clause of the First Amendment of the Constitution to ensure government neutrality when it comes to religion. The Supreme Court has stated: "The touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."**

**You have criticized this approach. In a 1992 speech, you stated:**

> **"Neutrality was not neutrality at all. It was a calculated method of moving American society away from its Christian base and toward a secular base. It was a calculated method of pushing Christians into a corner from which they could have little or no impact upon society. . . . Autonomy is the new secular religion sanctioned by the United States Supreme Court. The Supreme Court no longer talks about America as a Christian nation. . ."**

**a. Is it still your belief that the Supreme Court has been "pushing Christians into a corner from which they could have little or no impact upon society"?**

Response: No, I do not believe that. What I was attempting to communicate in my speech was a concern that the Court's Establishment Clause tests, including the neutrality test, not be interpreted so as to justify hostility toward religious believers. Justice Breyer, for one, has also taken up this concern, articulating it in his recent concurrence in *Van Orden v. Perry*, 545 U.S. 677, 699 (2005):

> "[T]he Court has found no single mechanical formula that can accurately draw the constitutional line in every case. Where the Establishment Clause is at issue, tests designed to measure 'neutrality' alone are insufficient, both because it is sometimes difficult to determine when a legal rule is 'neutral,' and because 'untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.'" (citations omitted).

I have not litigated an Establishment Clause case, and I do not claim to fully understand the complexities of the various Establishment Clause "formulas" -- as Justice Breyer calls them -- that the Court has used in detail. One thing, however, is crystal clear: that my duty, as a trial judge, would be to apply the precedent of the Supreme Court in Establishment Clause cases. Were such a case to come before me, I would do my very best to study the Court's Establishment Clause jurisprudence, and apply it as accurately and completely as possible.

**b. If the Supreme Court were to talk about America as a "Christian nation," wouldn't it fly in the face of the Supreme Court's admonition that government sponsorship of a religious message "sends the ancillary message**



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**to members of the audience who are non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community"?**

Response: Yes, it would. I agree with Justice O'Connor's concern. Our country has changed demographically and in many other ways since those early Supreme Court opinions in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) and *United States v. MacIntosh*, 283 U.S. 605 (1931). Our country's religious heritage has broadened, has deepened, and has become much more rich and diverse. In that 1992 speech, I traced some of those historical changes as chronicled by Supreme Court opinions, but did not propose – and would not propose now -- that the Court should revert to its earlier opinions. I do not believe America is a "Christian nation" or should be a "Christian nation." I believe America is a nation in which people of all faiths, or of no faith at all, live together as equals under the Constitution and laws of the United States.

**6. In a 1992 speech, you criticized a line from the Supreme Court's decision in *Planned Parenthood v. Casey* that said: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Here's what you said about that line: "This is a wholesale abandonment of the concept that a fabric of common values binds this nation together. This statement means that there are no absolute truths, no absolute rights and wrongs, and that each individual, without accountability or responsibility, is free to define truth for himself. Each man becomes a law unto himself."**

**Please explain in more detail why you believe this line in the *Casey* decision signifies "a wholesale abandonment of the concept that a fabric of common values binds this nation together" and why it means that "each man becomes a law unto himself."**

Response: I believe my quarrel with the phrase was purely semantic, and I surely overstated its effect with hyperbole. I firmly believe that the individual liberties and rights of the people, as enunciated in the Bill of Rights and elsewhere in the Constitution, must be fully and faithfully recognized and protected. I also believe in the American system of ordered liberty in which a free people is subject to the rule of law.

**7. In a 1992 speech, you stated: "It doesn't take a legal scholar to perceive that the nation's highest court, its universities and law schools, its political institutions, and its news media have moved radically away from a Christian base toward a secular base in which man, not God, is the creator of values, of rights, of law, and of justice. . . . Historically, such an intellectual movement away from the concept of higher law, though the movement initially espouses liberty and autonomy, leads to tyranny, to totalitarianism."**

**Is it your belief that the United States is on a path to tyranny and totalitarianism?**



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00389 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Response: I do not believe the United States is on any such path.

**8. You are a board member of the Home School Legal Defense Association, whose website asserts: "the argument for gay rights is an argument that fundamentally erodes the very premise of all human rights as rights." In a 1994 speech, you criticized "special interests for gays." The Human Rights Campaign – one of the leading gay rights organizations in America – has written to the Senate Judiciary Committee indicating it is "deeply concerned" about your nomination.**

**Is it your belief that laws prohibiting hate crimes, employment discrimination, and other adverse actions against gays and lesbians constitute "special interests for gays" and that such laws erode the premise of human rights? If so, please explain why. If not, please provide examples of what you consider to be "special interests for gays" and what you meant by that term.**

Response: Absolutely not. I was wrong when I criticized "special interests for gays" in a political speech in 1994.

My commitment to equal justice under the law is best demonstrated by the clients I have represented – people from all walks of life. I have represented women who have been victims of abusive relationships, employment discrimination, medical malpractice, and negligence. I have represented people with diverse racial and ethnic backgrounds, religious beliefs, and sexual orientations. I have represented unions and businesses. I have represented miners and oilfield workers and railroaders and doctors and sheepherders and teachers and children and senior citizens in nursing homes.

I believe that it further testifies to my principled commitment to the rule of law and to equal justice under the law that I was elected by my peers to serve as president of the Wyoming State Bar and the Wyoming Trial Lawyers Association, that I serve on the national board of the American Board of Trial Advocates and am co-chair of its committee on judicial independence, and that I serve as vice-chair of the Board of Professional Responsibility, sitting in judgment on attorney ethics cases. In addition, I have received the unanimous "Well Qualified" rating of the American Bar Association's Standing Committee on the Judiciary, and my nomination has received the bi-partisan support of Wyoming's legal community, and the support of Wyoming's federal judiciary.

I am concerned that the website for Home School Legal Defense Association contains the quoted assertion. As a board member, I have asked the organization to eliminate it. My interest in HSLDA has always been in its primary mission of defending the constitutional rights of parents to choose viable educational alternatives for their children, including home schooling. Through HSLDA's efforts, home schooling is now a valid educational alternative in all 50 states, and



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00390 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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that took 20 years of lobbying and litigation that sought to apply *Wisconsin v. Yoder* and other Supreme Court precedent.

**9. In a 1994 speech, you criticized Democrats and the Democratic Party. You said: "The Democratic Party has aligned itself with a 'government knows best' mentality, a growing welfare state, and fringe anti-family groups which seek special rights. . . . Instead of being advocates for the people, the Democrats are advocates for government. When Democrats say 'people,' read 'government.'"**

**Do you continue to hold these views about Democrats and the Democratic Party?**

Response: No. This was a partisan political speech given at a Republican rally during a 1994 Republican primary campaign for a state legislative seat. Many of the phrases used were purely rhetorical. I was a registered Democrat from 1972 to 1994. I was press secretary to a three-term Democratic Governor of Wyoming, Ed Herschler, in 1978. I served three terms in the Wyoming legislature, from 1987-93, as a Democrat. I believe the positive impression of me among Wyoming Democrats is reflected by the fact that my nomination has been endorsed by prominent Democrats in Wyoming, including two-term Democratic Governor Michael J. Sullivan and former Democratic national committeeman and congressional candidate Robert P. Schuster.

**10. Canon 3 of the Code of Conduct for U.S. Judges states: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."**

**In light of your views about abortion, the separation of church and state, and the Democratic Party, many litigants might reasonably question your impartiality with regard to these subjects. If you are confirmed, please indicate if you would agree to recuse yourself upon request of a litigant in a case involving the following:**

**a. abortion rights**

Response: If confirmed, I am committed to complying with Canon 3, which provides an objective test for recusal, based upon reasonableness. I would give fair and serious consideration to any request for recusal, and would determine that issue based upon the objective test of Canon 3, together with consideration of all applicable case law.

**b. the separation of church and state**

Response: If confirmed, I am committed to complying with Canon 3, which provides an objective test for recusal, based upon reasonableness. I would give fair and serious consideration to any request for recusal, and would determine that



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00391 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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issue based upon the objective test of Canon 3, together with consideration of all applicable case law.

**c. the Democratic Party (such as a voting rights or redistricting matter)**

Response: If confirmed, I am committed to complying with Canon 3, which provides an objective test for recusal, based upon reasonableness. I would give fair and serious consideration to any request for recusal, and would determine that issue based upon the objective test of Canon 3, together with consideration of all applicable case law.

**11. At your nomination hearing, you stated: "I think that a judicial activist can be conservative, liberal, moderate, or of any viewpoint. But the essence of judicial activism is the substitution of one's own personal viewpoints or opinions for the laws written by Congress."**

**Please provide examples from Supreme Court opinions of the last half century that you believe constitute "conservative judicial activism" and examples that you believe constitute "liberal judicial activism" and explain the basis of your reasoning for each example.**

Response: A judge who substitutes application of the law for his or her own political ideology – whatever that political ideology is – acts as an "activist," in contravention of his or her duty to apply the law faithfully and to resist policy-making. I am not presently aware of nor can I cite Supreme Court opinions of the last half century that exemplify this kind of activism.

**12. In a 1992 speech, you stated "we are seeing vicious political battles over judicial appointments which would not have occurred had the Court not politicized itself by creating rights rather than construing them."**

**a. At the time you made this speech, which rights did you believe the Supreme Court had created rather than construed?**

Response: This speech was given in the immediate aftermath of the 1991-92 legislative activity on the subject of abortion. The reference was to my disagreement with *Roe v. Wade*. Despite having taken that position at that time, I have sworn before this Committee that I will faithfully apply United States Supreme Court precedent, including the letter and spirit of *Roe v. Wade*.

**b. Since the time you delivered this 1992 speech, do you believe there are additional rights the Supreme Court has wrongfully created? If so, please identify them.**

Response: No, I do not.



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**Responses of Richard H. Honaker**
**Nominee to the U.S. District Court for the District of Wyoming**
**to the Written Questions of Senator Benjamin L. Cardin**

**(1) In the Wyoming House of Representatives, you were the author and primary sponsor of the Human Life Protection Act of 1991, which criminalized abortion from the moment of conception, and only provided narrow exceptions for rape, incest, or the life of the woman. The bill contained no health exception, and only allows the rape and incest inceptions to be invoked if the woman reports the incidents to authorities within five days of its occurrence.**

**Part of the findings in the bill stated that "this state has a compelling interest in protecting the lives of unborn children throughout pregnancy....Unborn children are human beings, and abortion is the taking of the life of an unborn child who is a member of the human race."**

**(a) Were these legislative findings consistent with *Roe v. Wade* as you understand the decision?**

Response: No. As I have testified, the legislation, if enacted, was intended to provide a legal challenge to Roe.

**(b) If not, please discuss which findings and provisions of this legislation are inconsistent with *Roe* and subsequent Supreme Court cases that affirmed *Roe*.**

Response: Because the legislation was intended to provide a legal challenge to Roe, I would readily concede that there were a number of findings and provisions that were inconsistent with Roe and its progeny, including Casey. I have not studied that issue since 1991-92, nor have I studied any Supreme Court cases on the issue after the 1992 Casey case.

If confirmed, I shall apply the letter and spirit of Roe, and of subsequent Supreme Court cases affirming Roe, as the settled law of the land.

My record demonstrates that I have long accepted Roe as settled law. My legislative efforts on the subject of abortion ended on February 20, 1992, when the "Human Life Protection Act" failed introduction in the Wyoming House. Casey was decided by the United States Supreme Court on June 29, 1992, and, in my view,



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foreclosed any further attempts to revisit *Roe* through state legislation.

In 1994, I was retained to represent a group of citizens who sought to put the 1991 bill on the ballot as an initiative. The Wyoming Supreme Court ruled in my clients' favor in *Wyoming NARAL v. Karpan*, 881 P.2d 281 (Wyo. 1994), and the initiative went on the ballot where it was defeated. As I testified, that vote settled the issue in Wyoming.

**(2) You stated in a letter to a Wyoming pro-choice group that if an abortion case came to you as a judge, "the losing party would appeal to the Tenth Circuit, and perhaps on to the U.S. Supreme Court, and nobody would remember what the trial judge did anyhow."**

**(a) Does this properly represent your view of the role of a trial judge?**

Response: No, it does not. The intent of the March 24, 2007 letter was to convey my commitment to approach each case with an open mind and to decide cases fairly and impartially. I regret the quoted statement, which conveyed an inaccurate impression that federal trial judges do not decide important constitutional questions. A federal district judge, committed to extending the protections and liberties of the Constitution of the United States to citizens who are being denied those protections or liberties, can make substantive constitutional law – subject to review by the higher courts – and does have enormous power to do positive things for our citizens. It is not power, so much as it is duty. If confirmed, I would take that duty very seriously.

I have tried many cases to judges and juries, and also have handled more than 50 appellate matters. The review of an appellate court is limited to the record made in the trial court. I have a great appreciation for the necessity of a complete record, and for how that record ought to be made. First and foremost, the federal district court must be a fair and impartial tribunal in which litigants are given wide latitude to introduce relevant evidence and to thoroughly present their theory of the case, both by evidence and by law. I believe in wide latitude in argument, limited only by the widely accepted boundaries set by case law. The trial judge has an obligation to present a complete and orderly record to the circuit court. At the same time, the federal trial judge has an obligation to apply the precedent of the circuit court and the United States Supreme Court on all issues of federal constitutional and statutory law, both substantive and procedural, and the precedent of his



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State's supreme court on all issues of substantive state law. Where there is a lack of applicable precedent, the federal trial judge must exercise wisdom to identify and apply sound rules of law, consulting the precedent of other circuits and of state courts that have considered the particular issue.

**(b) In your view, what effect does an incorrect decision that is not appealed have on the litigants, the court, the community, and the precedents of the court?**

Response: An unjust effect.

**(c) How would this view about the role of the trial judge affect an indigent or *pro se* petitioner appearing before you who may be unable to easily appeal your decision?**

Response: If confirmed, I would be the first federal judge in Wyoming who also served as a public defender. I represented indigent criminal defendants and also was appointed to assist *pro se* petitioners. I was committed then and am committed now to ensuring that indigent and pro se petitioners receive every measure of due process.

**(d) How would this view of the role of the trial judge affect a woman appearing before you, who is applying for an emergency judicial bypass order to waive parent consent for an abortion, when the woman needs an expedited decision on the merits based on the law?**

Response: I am committed to faithfully applying the precedent of the United States Supreme Court and the Tenth Circuit on all issues of federal constitutional and statutory law, and the precedent of the Wyoming Supreme Court on all issues of substantive state law. That woman hypothetically appearing before me would receive every measure of justice and expediency. She would receive the benefit of having all binding precedent faithfully applied in her case, including *Roe v. Wade* and its progeny. In Wyoming, the state juvenile courts have exclusive jurisdiction over such judicial bypass procedures, and they must hold an expedited hearing within five days of the filing of an application. Should a state court fail to provide federal constitutional protections to such a litigant, however, and should she then come before a United States District Court for relief, I can promise you that, if confirmed, I would give her all the federal relief to which she is



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00395 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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entitled under the Constitution of the United States as interpreted by the Tenth Circuit and the United States Supreme Court.

**(e) In your view what burdens does your philosophy place on parties who would have difficulty effectively appealing your decision to the Tenth Circuit?**

Response: Again, I regret the quoted statement, which conveyed an inaccurate impression. The philosophy I intended to express in the letter was a philosophy of deciding cases fair and impartially. In that letter I wrote:

> "I want you to know that I take very seriously the obligation of a United States District Judge to honor the people of Wyoming and the people of the United States by faithfully applying the precedent of the United States Supreme Court and the Tenth Circuit on all issues of federal constitutional and statutory law, and by faithfully applying the precedent of the Wyoming Supreme Court on all issues of substantive state law. That is the essence of the rule of law, and every judge is every bit as bound by the rule of law as is every citizen.
>
> "As a practical matter, it is unlikely that any case involving the abortion issue would ever come before the United States District Court in Wyoming. If it did, I can promise you that I would set aside any personal political opinions I have held in the past, and would listen carefully to the evidence and faithfully apply the law to the issues presented."

**(3) You have stated that "liberty springs from Christianity."**

**(a) Does that mean that other religions, in your view, have not contributed to the advancement of liberty?**

Response: Absolutely not. Our nation, and its tradition of advancing liberty both at home and abroad, have been strengthened by a broad diversity of religious values and beliefs. Our traditions are enriched and advanced by diversity.

**(b) Does liberty, in your view, spring from any non-religious sources? If so, which ones?**

Response: Yes. In our country, liberty springs from a constitutional republic ingeniously designed by a Constitution that



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00396 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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is not a religious document. While guaranteeing its citizens the right to freely express diverse religious beliefs, the Constitution also protects its citizens from any government-imposed religious orthodoxy.

**(c) As a judge, what type of weight would you give religious sources when making your decision?**

Response: I cannot imagine a scenario in which I would consider any religious source in the context of a decision. In my 32-year career as a trial lawyer, I have never relied upon a religious source for the development of any legal argument. I believe that my long record in the courts, and the bi-partisan support my nomination has from Wyoming's legal profession – both lawyers and judges – demonstrates that, as a judge, I would not inject religious matters into the legal decision-making process.

**(4) You have stated that "autonomy is the new secular religion sanctioned by the United States Supreme Court. The Supreme Court no longer talks about America as a Christian nation or about the Christian underpinnings of the law."**

**(a) How would this view impact your work as a federal district court judge?**

Response: When I made that statement 16 years ago, I was a passionate young legislator speaking to a breakfast gathering of Christian lawyers. Looking back with greater maturity and insight, I recognize that some of the statements I made were overly broad and even hyperbolic. I do not believe the United States Supreme Court has sanctioned any religion whatsoever.

I believe America is a nation in which people of all faiths, or of no faith at all, live together as equals under the Constitution and laws of the United States. In my practice I have represented people of many faiths, and people of no faith at all, and as a judge, if confirmed, I pledge to provide a fair and impartial tribunal for people of all or no religious persuasions.

**(b) How would you decide a case where your personal religious views conflict with a statute enacted by Congress, or a binding precedent of a court?**

Response: It is the absolute duty of a federal trial judge to give full effect to statutes enacted by Congress, and to faithfully apply



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00397 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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all binding precedent. I am committed to fulfilling that duty without equivocation. In my 32-year career as a lawyer, I have never taken my personal religious views into a courtroom, and I would not do so as a judge.

**(c) Would you faithfully apply rulings of the Supreme Court on church-state separation issues, even if they contradicted your own personal religious views regarding the proper role of religion in the law?**

Response: Absolutely.

**(d) Based on your previous statements, do you understand that a litigant before you might be concerned that you could issue an impartial ruling based on the law, irrespective of your religious beliefs?**

Response: If confirmed, I will seek to be understanding of the concerns of any litigant appearing in my court. I intend to approach each case with an open mind, and to decide cases fairly and impartially. The appearance of fairness and impartiality is of critical importance to providing an atmosphere in which justice can be done. I would hope that my long record of having represented a wide range of individuals in diverse actions would give that litigant comfort in the fact that I could decide his or her case fairly and impartially.

My commitment to equal justice under the law is best demonstrated by the clients I have represented – people from all walks of life. I have represented women who have been victims of abusive relationships, employment discrimination, medical malpractice, and negligence. I have represented people with diverse racial and ethnic backgrounds, religious beliefs, and sexual orientations. I have represented unions and businesses. I have represented miners and oilfield workers and railroaders and doctors and sheepherders and teachers and children and senior citizens in nursing homes.

I believe that it further testifies to my principled commitment to the rule of law and to equal justice under the law that I was elected by my peers to serve as president of the Wyoming State Bar and the Wyoming Trial Lawyers Association, that I serve on the national board of the American Board of Trial Advocates and am co-chair of its committee on judicial independence, and that I serve as vice-chair of the Board of Professional Responsibility, sitting in judgment on attorney ethics cases. In addition, I have received the



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00398 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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unanimous "Well Qualified" rating of the American Bar Association's Standing Committee on the Judiciary, and my nomination has received the bi-partisan support of Wyoming's legal community, and the support of Wyoming's federal judiciary.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00399 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**BILLS SPONSORED OR CO-SPONSORED BY RICHARD HONAKER**

**1987 General Session**

HB0015 – Child safety restraints – tax exemptions.
HB0023 – Sales tax exemption – public recreation.
HB0080 – Use of urinalysis tests.
HB0108 – Worker's compensation-third party recoveries.
HB0109 – Worker's compensation-coemployee liability.
HB0199 – Special malt beverage permits.
HB0200 – Worker's compensation – contested cases.
HB0201 – Worker's compensation-total disability.
HB0203 – Martin Luther King, Jr birthday – holiday.
HB0241 – Red Desert task force study.
HB0277 – Worker's compensation-third party suits.
HB0278 – Liens – house trailers.
HB0332 – Licensing of exhibitions, circuses, etc.
HB0384 – State preference law.
HB0385 – Labor-industry council.
HB0466 – Licensing board – lay midwives.
HB0008 – Mine land reclamation costs.
SF0009 – Speed limit.
SJR0006 – Oil import fee.

**1987 Special Session**

XHB0001 – Speed limit increase.

**1988 Budget Session**

HB0022 – Publishing game & fish orders.
HB0023 – Drinking age increase.
HB0059 – Sovereign immunity.
HB0073 – Governmental claims act – 2.
HB0080 – Public works – work hours.
HB0081 – Worker's compensation-coemployee liability.
HB0087 – Worker's compensation – rate surcharge.
HB0096 – Worker's compensation – intentional tort.
HB0099 – Worker's compensation – employer rates.
HB0100 – Worker's compensation-third party recoveries.
HB0110 – Parental consent for abortions upon minors.
HB0193 – Implementation of tier system.
HB0202 – Registration of real estate mortgages.
HB0210 – Insurance – reporting requirements-2.
HB0221 – Hazardous wastes-joint and several liability.
HJR0012 – Level of assessment – const amend.
HJR0020 – Constitutional tier system.
SF0050 – Employment time sharing.



47450.341

**1989 General Session**

HB0008 – Exemption from execution.
HB0063 – Worker's comp-coemployee liability.
HB0133 – Funding for dinosaur display.
HB0154 – Hazardous wastes-joint and several liability.
HB0168 – Industrial siting permit requirements.
HB0223 – Parental consent for abortions upon minors.
HB0301 – Implied consent – tests results.
HB0321 – Exemption from execution – 2.
HB0433 – Crime victim restitution.
HB0435 – Child support – parents of minor father.
HB0436 – UCCC – credit service charge.
HB0458 – Trona ore valuation.
HB0462 – Underground storage tanks.
HB0470 – Firearms regulation.
HB0492 – Interest on judgments.
HJR0012 – Repeal constitutional convention call.
HJR0013 – Balanced budget and line item veto.

**1990 Budget Session**

HB0041 – Health care services-provider access.
HB0048 – Restitution to crime victims.
HB0103 – Purchase of recycled materials.
HB0139 – Worker's compensation-employer rates.
HB0146 – Worker's compensation-coemployee liability.
HB0152 – Worker's compensation-telephone service.
HB0159 – Worker's compensation-temporary disability-2.
HB0160 – Drug free school zones.
HB0161 – State board of education membership.
HB0162 – Waste facilities-bonds.
HB0163 – Uniform sentencing commission.
HB0173 – Waste disposal facility siting.
HB0174 – Worker's compensation-employer fraud.
HB0191 – Roadways maintenance accountability.
HJR0005 – Physical education programs.
HJR0007 – Worker's compensation-private coverage.
SF0072 – Peace officer-felony conviction.
SF0091 – Controlled substances-penalties.
SF0101 – License suspensions for youth offenders.
SF0106 – Commercial vehicle fees-reduction.
SJR0007 – Federal health care funding.



47450.342

**1991 General Session**

HB0065 – Bond elections-restrictions.
HB0066 – State insect.
HB0071 – Minimum liability insurance for motorists.
HB0094 – Retiree benefits adjustment.
HB0095 – Restitution to crime victims.
HB0113 – Triple trailer ban.
HB0145 – Child pornography.
HB0152 – Law enforcement member retirement.
HB0178 – Probation before conviction.
HB0189 – Ownership of wildlife-exotic species.
HB0201 – Juries-civil cases.
HB0202 – Sale of state lands-public hearing.
HB0205 – Medicaid coverage expansion.
HB0206 – Mediation-confidentiality and immunity.
HB0221 – Human life protection act.
HB0236 – Excise taxes.
HB0238 – Solid waste recycling districts.
HB0239 – Drug free school zones.
HB0242 – Basic health insurance.
HB0350 – Insurance rate filing.
HB0385 – International coal marketing incentive act.
HJR0009 – Consumptive use of wildlife.
SF0080 – Tobacco sales to minors.
SF0102 – POST commission.
SF0110 – Annexation.
SF0150 – Triple trailer ban.

**1992 Special and Budget Session**

HB0011 – Joint child custody act.
HB0050 – Worker's compensation-temporary disability-2.
HB0073 – Pay-per-call telephone services.
HB0084 – Attorney's fees determination.
HB0115 – Handicapped parking enforcement.
HB0188 – Juvenile court-closed proceedings.
HB0191 – Taxable costs in civil actions.
HB0198 – Concealed weapons-permits.
HB0200 – Link deposits and investments-amendments.
HB0207 – Human life protection act.
HB0216 – Midwifery exemption-medical practice act.



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Gus Puryear
10 Burton Hills Boulevard
Nashville, TN 37215

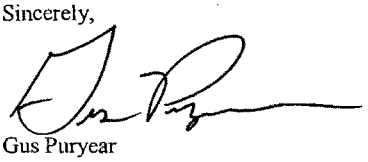
The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

March 5, 2008

Dear Mr. Chairman:

Attached are my responses to your written questions, questions from Senator Kennedy, questions from Senator Feingold, and a letter from Senator Feinstein. I am also enclosing a letter to you addressing my corrections to the transcript, as requested in your letter of February 25, 2008.

Sincerely,



Gus Puryear

cc:
The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

**Responses of Gustavus Adolphus Puryear IV**
**Nominee to the U.S. District Court for Middle District of Tennessee**
**To the Written Questions of Chairman Patrick Leahy**

1. **In July 2004, while you served as Executive Vice President and General Counsel of Corrections Corporation of America, Estelle Richardson, a female inmate at the company's Metro Detention Facility in Nashville, Tennessee, was beaten to death. She was in a solitary confinement cell when she was found unresponsive; an autopsy revealed a skull fracture, four broken ribs and liver damage. Tennessee's Chief Medical Examiner, Dr. Bruce Levy, ruled her death a homicide, saying her injuries were consistent with blunt force trauma and could not have been self-inflicted.**

**When asked about Ms. Richardson's death at your confirmation hearing, you testified "[T]here were a range of alternative explanations [for Ms. Richardson's death], many of which would not have involved a beating death that could have explained what happened." You testified that Ms. Richardson's rib fractures and the liver injury, in particular, could also have been consistent with CPR being performed, which you said "does commonly happen."**

**In a February 21, 2008, letter, Dr. Levy, who performed the autopsy on Ms. Richardson disputes your testimony that the cause of death could not be determined, citing his ruling that the case of Ms. Richardson's death was "Blunt force injuries of the head: and the manner of death was "Homicide." Both rulings are reflected in Ms. Richardson's autopsy report and death certificate.**

**In his letter, Dr. Levy's letter describes your testimony regarding CPR as a possible cause of the injuries as "misleading at best" and writes, "While CPR has been reported to cause minor injuries in some patients, both the location and severity of Ms. Richardson's injuries were not consistent with attempted resuscitation. Mr. Puryear's claim makes even less sense when taken in context with the more serious fatal head injuries, which line up with the rib fractures perfectly. There is no doubt in my mind that both the fatal head injuries and the rib fractures/liver damage were inflicted on Ms. Richardson while in custody and not the result of CPR." In addition, none of the publicly available pleadings in the civil lawsuit settled by CCA reference CPR as a possible cause of Ms. Richardson's injuries.**

**I am attaching Dr. Levy's letter and the autopsy and investigation reports he sent to the Committee. How do you explain the inconsistency between your testimony and Dr. Levy's autopsy report and ruling?**



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Response: The inconsistency between the autopsy report and my testimony arises from the inconsistency of the autopsy with the medical evidence developed by both the Richardson family and CCA over a two year period. Below, I will detail the process through which CCA and the Richardson family's investigations arrived at a conclusion at odds with the medical examiner.

At the outset, I want to make clear that the death of Estelle Richardson was profoundly distressing to me personally and professionally. The circumstances surrounding the initial report of her death were truly disturbing: a female inmate in solitary confinement dies of apparent head injuries mere hours after she had to be extracted from her cell by four corrections officers (a cell extraction is categorized as a "use of force" incident in corrections). Her death led to both federal and local criminal investigations of CCA and its employees, as well as civil litigation.

At my direction, CCA fully cooperated with all law enforcement authorities. Throughout the process, the four corrections officers who were under suspicion in connection with Ms. Richardson's death were placed on administrative leave and were not in the facility.

The four corrections officers who were indicted for homicide in connection with the Richardson death steadfastly maintained their innocence. Meanwhile, in the course of preparing for the civil litigation, both CCA's medical expert (a specialist in traumatic brain injuries who serves as the Deputy Chief Medical Examiner of the State of Tennessee) and the Richardson family's medical experts (a neurosurgery expert from Stanford University Medical School and a former Chief Medical Examiner of the Commonwealth of Kentucky) concluded that Ms. Richardson's death did not result from a brain injury within 24 hours of her death, and thus could not have been caused by the four officers who performed the cell extraction hours before her death.

I understand that the Committee has been provided a transcript of the settlement hearing in the federal civil case, which is now publicly available. In that hearing, the Richardson family's lawyer, David Randolph Smith, disputed the medical evidence underlying the criminal prosecution and noted that Ms. Richardson had a seizure disorder. He also opined that the homicide cases would likely "fall apart," as indeed they did. In a separate letter to this Committee dated February 25, 2008, Mr. Smith further stated:

> [T]he circumstances and cause of Ms. Richardson's tragic death were complex and debated. Dr. Levy, the Tennessee medical examiner, attributed the cause of death to a recent traumatic brain injury (skull fracture). That opinion was contested vigorously by the defense and our own experts attributed the death to a seizure and concluded that the skull fracture was not caused by the four



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> guards who had been indicted. ... There were also issues on whether CPR may have caused the liver and rib injuries.

(Emphasis added.)

I stated at my hearing that I had been advised that the broken ribs and liver injury could have been caused by the cardiopulmonary resuscitation ("CPR") that was performed on Ms. Richardson when she was found non-responsive in her cell. This was based on my recollection of an oral report made by CCA's medical expert, Dr. McCormick. In addition to Mr. Smith's letter, which notes that this was an issue, the Committee also has a letter from Dr. McCormick to one of CCA's lawyers expressing in writing his view that these injuries are "almost certainly" attributable to CPR, though he cannot make a definitive conclusion because the medical examiner neither performed a microscopic examination of the injured tissue nor retained tissue samples that could be used to determine the precise timing of the injuries. Dr. McCormick also opines that such injuries commonly occur with CPR, and cites extensive medical literature to that effect.

It is unlikely that anyone will ever know the definitive cause of Ms. Richardson's rib and liver injuries. It is known, however, that CCA cooperated fully with all law enforcement investigations into the death, and that CCA cooperated fully with the Richardson family in the civil litigation. It is known that the Richardson family voluntarily dismissed its civil actions against the four corrections officers who were under indictment. It is known that the Richardson family and CCA settled the dispute over the exact causes of the death and CCA's liability, if any, in connection with those possible causes. It is known that the District Attorney General met with both CCA's and the family's medical experts. Last, it is known that the District Attorney General, who had access to Dr. Levy's opinions and all of the police investigatory materials relating to this matter, then dismissed the charges against the four corrections officers.

Unfortunately, the medical findings by both the family's and CCA's experts do not permit a definitive conclusion as to how Ms. Richardson died. In my testimony to the Committee, I relied in good faith on these opinions. My opinion that there is substantial uncertainty regarding the cause of Ms. Richardson's death was also shared by the lead lawyer for the Richardson family as expressed in his letter to the Committee. In sum, the inconsistency between my testimony and the autopsy is merely derivative of an inconsistency between the autopsy and the conclusions of the other medical experts retained by CCA and the Richardson family.

**2. Ms. Richardson's death occurred in 2004 while she was an inmate under your company's care, yet in your testimony nearly 4 years later you raise a wide variety of possible explanations, all inconsistent with the Medical Examiner's autopsy and report. You testified: "There is a possibility—well,**



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00406 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**there are any number of possible explanations, including fights with other inmates, a fight with unknown correctional officers, self-inflicted wounds, medication issues. She had a history of seizures. I do not know what happened, Senator."**

**A. What investigation did you or CCA undertake upon learning of Ms. Richardson's death? Did your investigation determine or rule out any cause of death? Why or why not?**

Response: First, CCA fully cooperated with law enforcement investigations into her death, and CCA believed that these investigations would determine the cause of her death, and who, if anyone, was responsible for it. Based on the initial reports surrounding Ms. Richardson's death, CCA believed that this investigation would conclude rapidly; however, state and federal investigations continued for more than two years.

In addition, CCA's outside lawyers investigated the possible causes of death through examination of records, interviews of cooperative witnesses, depositions taken during the civil case, and consultations with medical experts; this process also involved more than two years' work.

CCA's medical expert consulted directly with one of the Richardson family experts, Dr. Nichols (the former Chief Medical Examiner of the Commonwealth of Kentucky) to help determine a cause of death in a cooperative manner. Their shared conclusions are discussed above, in response to Question 1. In sum, the only "cause of death" that could be ruled out by CCA and the Richardson family was the one that was being used to prosecute the four corrections officers, namely that Ms. Richardson allegedly died from a head injury that could have occurred within 24 hours of her death. The experts consulted by the Richardson family and CCA agreed that the head injury was at least three days old, and there were still substantial issues surrounding what role, if any, that injury played in her death.

I agree with the view that David Randolph Smith, the lead lawyer for the Richardson family, expressed in his February 25, 2008 letter to this Committee: "In a nutshell our extensive investigation and expert analysis ... indicated that the circumstances and cause of Ms. Richardson's tragic death were complex and debated." After extensive law enforcement investigations, investigations by the Richardson family's lawyers and CCA's lawyers, and protracted and cooperative discovery efforts by the Richardson family and CCA, the exact cause of Ms. Richardson's head injury and the precise role that injury played in her death are not known.



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**B. When did you first learn that Ms. Richardson had died? What steps did you take to determine what happened?**

Response: As I testified at my hearing, the time and place of my learning of her death is seared into my memory. It was the morning of July 5, 2004, at around 9:00 a.m. I was told that detectives from the police department had been on the scene for some time. CCA cooperated fully and allowed these detectives access to any information, so that they might determine what happened. Additional steps relating to the criminal investigations and our efforts to understand what happened are detailed in response to Questions 1 and 2A.

**C. What steps did you or CCA take to ensure that what happened to Ms. Richardson would not happen to other inmates?**

Response: As soon as police investigators disclosed to CCA personnel on July 5, 2004 that they believed that four corrections officers involved in a cell extraction the day before Ms. Richardson's death may have been responsible for that death, CCA immediately placed the officers on administrative leave and kept them out of the facility. CCA then cooperated fully with the investigations by various law enforcement agencies and the plaintiffs' efforts in civil discovery.

As neither CCA nor the Richardson family knows with any certainty exactly what happened to Ms. Richardson, it would be difficult to know what steps could be taken to prevent it from recurring; however, CCA did implement certain remedial measures as result of what was learned from the circumstances surrounding the death.

Examples of actions that I understand the facility properly emphasized in the wake of the Richardson death included: following CCA policy concerning special needs medical assessments, both as to timing and documentation; additional in-service training regarding use of force policy (especially as it related to approval of uses of force, reporting of such uses, and the requirement that photographs be taken of an inmate following such a use of force); additional in-service training concerning video camera procedures; a written directive to medical staff requiring signed documentation by an inmate when she refuses medical treatment; and a written directive that inmates must be seen by the facility physician on the date of a scheduled appointment.

More broadly, as a result of this incident and certain other, unrelated incidents, within two months CCA's Chief Executive Officer decided that additional resources should be committed to the Company's Quality Assurance Department (which had approximately three employees at the time). He transferred the department to the Office of General Counsel to



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give it independence from the Operations Department, which supervises facility operations. Under my leadership, the Quality Assurance department was completely reorganized. I placed a former Director of the Federal Bureau of Prisons in charge of the department and instructed him to design a new audit program. The department hired two five-person teams to conduct annual audits of each facility's operations. In addition, an analysis group staffed by employees with backgrounds in statistics was created within the department to review data collected from facilities and attempt to recognize trends that could point to management issues or other concerns within a facility.

Also within two months CCA's then-Chief Operating Officer resigned. That individual did not have a background in corrections. A new position, Chief Corrections Officer, was created and was filled by Richard P. Seiter. Dr. Seiter was serving as an Associate Professor in the Department of Sociology and Criminal Justice at St. Louis University. Dr. Seiter has had a distinguished career in corrections: he served in a variety of positions with the Federal Bureau of Prisons, including Warden and Assistant Director; he served from 1983-1988 as Director of the Ohio Department of Rehabilitation and Correction; and he has authored two textbooks on corrections management. Dr. Seiter has since reorganized the operations departments at CCA, implemented unit management and direct supervision within the Company's facilities, and sought to standardize procedures throughout CCA. Virtually every policy and procedure at CCA has since been re-written, and new training programs are in place.

3. **Please describe the steps taken by CCA personnel when Ms. Richardson was found unresponsive in a solitary cell, including whether and how quickly she received medical treatment on site and from whom? How soon after being found was she transported to Southern Hills Medical Center? How quickly did CCA call the local police and what law enforcement investigation of the circumstances surrounding the fatality occurred?**

Response: While I was not at the scene when these events occurred, and thus have no first-hand knowledge of these events, I can give you my understanding based upon the facility's documentation regarding this matter. It is my understanding that breakfast was served in Pod 1 of the Segregation Unit (where Ms. Richardson was housed) around 4:35 a.m. on July 5, 2004. Ms. Richardson came to her cell door and received her breakfast tray. When the corrections officers came back to her cell a while later to pick up her breakfast tray, Ms. Richardson was laying on her bed and did not respond when officers called her name. The officers entered her cell, checked her pulse, and immediately called a medical emergency (at 5:32 a.m.). Medical personnel and other corrections officers from the facility arrived immediately thereafter. 911 was called and the facility's medical personnel and corrections officers administered CPR and placed an Automated External Defibrillator on Ms. Richardson after checking Ms.



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Richardson for a pulse and breathing. Paramedics arrived at approximately 5:43 a.m. and Ms. Richardson was thereafter transported to the hospital. Police officers arrived at the facility a short time thereafter and began their investigation; they were at the facility before I learned of the event at around 9:00 a.m.

While I was not privy to the investigation conducted by law enforcement, I do know that the state investigation of Ms. Richardson's death began on the morning of July 5, 2004, and the investigation continued by state and federal investigators for more than two years. Over that period, numerous CCA employees were interviewed by investigators and gave grand jury testimony, thousands of documents were produced by CCA to investigators, and CCA cooperated fully in the investigation.

**4. You testified that if confirmed you would recuse yourself from cases involving CCA during the period in which you divested your interest in the company and for an extended period thereafter.**

**A. Would your recusal include cases involving CCA's executives, subsidiaries and employees?**

Response: Yes.

In all cases, I would abide by the then-current statutes and Code of Conduct for United States Judges to ensure the absence of actual or apparent partiality and to ensure that the litigants receive due process of law. With respect to any action involving a CCA executive or employee not arising out of or related to their official activities for CCA (e.g., a personal bankruptcy appeal by a CCA employee), I would assess the facts of such a case with reference to relevant statutes and the Code of Conduct for United States Judges and make my decision accordingly. Applying these criteria, and given my personal relationship with current CCA executives, I would almost certainly recuse myself from any case involving a CCA executive in his or her entirely personal capacity for the foreseeable future due to the possible appearance of bias. After the passage of time and natural turnover in executive positions at CCA, this concern would likely dissipate.

**B. Will you also recuse yourself from any cases involving the private prison industry, even if they do not directly involve CCA?**

Response: I would not create an automatic recusal rule for such cases, but instead I would resolve any potential conflict of interest by complying with relevant statutes and the Code of Conduct for United States Judges. In the case presented in the question (which is exceedingly unlikely given that there are no other private prison operators conducting business in the Middle District of Tennessee), I do not believe that a typical case



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involving other private prison operators would pose any actual conflict of interest, assuming I did not hold any direct financial interest in the operator. But one can envision hypothetical cases where appearance concerns might counsel in favor of recusal (e.g., a case that required interpreting a state statute that controls prison privatization generally). In the absence of concrete parties, facts and claims, I thus believe it would not be wise for me to opine definitively on this question.

**C. Will you recuse yourself from lawsuits brought by prisoners, even if they do not directly involve CCA?**

Response: I would not create an automatic recusal rule for lawsuits brought by a prisoner, but instead would look to the facts and circumstances of an individual case and apply the appropriate statutes and canons of the Code of Conduct for United States Judges to determine whether any recusal was necessary. I think it unlikely that recusal would be necessary, but would not want to opine on any individual case without knowing the particular parties, facts, and claims pleaded in that matter.

One way to think of this would be to consider the case of a public defender who is appointed as a district judge; a judge with such a background would likely consider the issue of recusal on a case-by case basis, rather than a blanket recusal from all criminal cases.

I think it important to know that my exposure to corrections over the past seven years has made me aware that there are, in fact, individuals in corrections who commit grievous crimes against inmates – ranging from physical abuse to sexual exploitation. Indeed, it is my personal belief that some individuals may be attracted to careers in corrections because they seek to control and exploit others, and, no matter how careful a corrections employer is in attempting to screen out such individuals, some may wind up being hired. I also know that some corrections officers become compromised by simple errors in judgment, and that those errors can have terrible consequences.

I have also seen first-hand the good that can come from corrections. I remember encountering an inmate at a facility who tied beautiful flies for fishing. The delicacy and precision of his work caught my eye, even though I had never before fly-fished. We talked about how he became interested in that hobby; how long it took him to tie various flies; and, ultimately, why he was in prison, when he hoped to get out, and what his dreams were for the future. I have likewise met former inmates who now work for CCA as counselors, who have movingly described their rehabilitation. So I have seen the humanity of those who are, and have been, incarcerated, and I understand that the hope for rehabilitation that



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must be carefully nurtured in environments that are not always conducive to it.

In private practice, I saw a jury simply refuse to credit the testimony of a former inmate, who was my client, in spite of the fact that the corrections officials involved were effectively impeached and lacked credibility themselves – at least in my judgment. So I am aware that many in our society may never give an ex-inmate a fair shake.

In short, I think my experiences will make me particularly sensitive to issues raised in inmate lawsuits. And, there are other, objective actions that I believe demonstrate my personal commitment to the humane treatment of inmates:

- Volunteering to serve as an appointee of the National Prison Rape Elimination Commission;
- Defending the civil rights of an inmate in a lawsuit against a Tennessee Department of Corrections warden and other staff;
- Instituting an aggressive, new quality assurance program while at CCA to promote inmate welfare and ensure high-quality operations;
- Settling meritorious inmate lawsuits for substantial monetary awards; and
- Implementing CCA's first corporate compliance program and drafting the company's first Code of Ethics and Business Conduct, which includes standards of conduct to protect inmates and provides for anonymous reporting by employees of possible mistreatment of inmates by staff.

I close with a statement I made on the record, long prior to this nomination, when commenting on my visits to corrections facilities operated by CCA:

> [T]here is a human dimension to our business, not just for our employees, but also the inmates entrusted to our care. So you're aware, every day, that this company has to conduct itself with absolute integrity, because the lives of the people we're housing depend on it, the lives of the people who work for us depend on it, the lives of those outside of our facility who depend on us to protect them depend on it. So you're acutely aware of that dimension and of the good that can come from corrections.

Greg Land, "No More Get Out of Jail Free," GC South October 2005 at 21.



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**Responses of Gustavus Adolphus Puryear IV**
**Nominee to the U.S. District Court for the Middle District of Tennessee**
**To the Written Questions of Senator Edward M. Kennedy**

**1. During the hearing on your nomination, Senator Feinstein asked you several questions about the death in 2004 of Estelle Richardson, a female inmate in solitary confinement at a facility operated by your client, Corrections Corporation of America. An autopsy showed that Ms. Richardson had a fractured skull, multiple broken ribs, and liver damage. The Chief Medical Examiner for the State of Tennessee ruled her death a homicide caused by "blunt force injuries to the head," and in 2005, four CCA guards were indicted on murder charges in connection with her death. The charges were dropped by prosecutors, apparently because they could not determine the exact time the injuries were inflicted, and CCA settled a civil lawsuit by Richardson's family in 2006.**

**a. You testified that experts for CCA and Ms. Richardson's family concluded "that [Ms. Richardson's] was not a death that resulted from a beating within anything close to the timeframe that had been assumed by the medical examiner." Do you dispute that Ms. Richardson's death was a homicide?**

Response: Despite the intense investigatory efforts of law enforcement authorities, various medical experts, lawyers engaged by CCA, and lawyers engaged by the Richardson family, it was not possible to determine with certainty the medical cause of Ms. Richardson's death. I personally do not know the cause of Ms. Richardson's death. I can only state that her death was a profoundly distressing event to me personally and professionally. Because I do not know whether Ms. Richardson's death was a homicide, I would neither dispute nor concur with the opinion that her death was a homicide, although there is substantial evidence that it was not.

Four corrections officers involved in a cell extraction hours before Ms. Richardson's death were indicted for homicide, though they steadfastly maintained their innocence. In the course of preparing for the civil litigation, both CCA's medical expert, Dr. William McCormick (a specialist in traumatic brain injuries who serves as Deputy Chief Medical Examiner of the State of Tennessee), and the family's medical experts (a neurosurgery expert from Stanford University Medical School and the former Chief Medical Examiner of the State of Kentucky) concluded that Ms. Richardson's death did not result from a brain injury within 24 hours of her death, and thus could not have been caused by the four officers who performed the cell extraction hours before her death.

I understand that the Committee has received a transcript of the settlement hearing in the federal civil case, which is now publicly available. In that



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hearing, the Richardson family's lawyer, David Randolph Smith, disputed the medical evidence underlying the criminal prosecution and noted that Ms. Richardson had a seizure disorder. He also opined that the homicide cases would likely "fall apart," as indeed they did. In a separate letter to the Judiciary Committee dated February 25, 2008, Mr. Smith further stated that:

> [T]he circumstances and cause of Ms. Richardson's tragic death were complex and debated. Dr. Levy, the Tennessee medical examiner, attributed the cause of death to a recent traumatic brain injury (skull fracture). That opinion was contested vigorously by the defense and our own experts attributed the death to a seizure and concluded that the skull fracture was not caused by the four guards who had been indicted. ... There were also issues on whether CPR may have caused the liver and rib injuries.

(Emphasis added.)

It is known that CCA cooperated fully with all law enforcement investigations into the death, and that CCA cooperated fully with the Richardson family in the civil litigation. It is known is that the Richardson family voluntarily dismissed its civil actions against the four corrections officers who were under indictment. It is known that the Richardson family and CCA settled the dispute over the exact causes of the death and CCA's liability, if any, in connection with those possible causes. It is known that the District Attorney General met with both CCA's and the family's medical experts. Last, it is known that the District Attorney General, who had access to the medical examiner's opinions and all of the police investigatory materials relating to this matter, then dismissed the charges against the four corrections officers.

Unfortunately, the medical findings by both the family's and CCA's experts do not permit a definitive conclusion as to how Ms. Richardson died. In my testimony to the Committee, I relied in good faith on these opinions. My opinion that there is substantial uncertainty regarding the cause of Ms. Richardson's death is also shared by the lead lawyer for the Richardson family in his letter to the Committee.

**b. You testified that the correctional officers suspected of beating Ms. Richardson to death were "exonerated." It appears that there was never any final legal determination of these officers' guilt or innocence, because there was never a trial at which they could be either acquitted or found guilty. Instead, it appears that prosecutors determined that evidence was insufficient to support a prosecution. What did you mean when you stated that the officers had been exonerated? Do you agree that a prosecutor's decision not to press charges is different from a jury finding of innocence?**



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00414 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Response: When I stated that the officers had been exonerated, I meant that they had been relieved of the criminal charges against them. I was using this term according to its common, colloquial meaning.

I do agree that a prosecutor's decision not to prosecute a previously indicted defendant is different from a jury's verdict of "not guilty."

c. **You also testified that Ms. Richardson's injuries "would be consistent with CPR being performed . . . and the liver injury could also be explained that way. That commonly does happen." The Chief Medical Examiner for the State of Tennessee, who performed the autopsy on Ms. Richardson, informed the Committee that "[t]here is no doubt in my mind that both the fatal head injuries and the rib fractures/liver damage were inflicted on Ms. Richardson and not the result of CPR." Please describe in detail the reasons you believe that injuries to the skull, ribs, and liver like those suffered by Ms. Richardson "commonly" result from CPR? Do you have any evidence suggesting that Ms. Richardson's injuries were inflicted in this manner? If so, please provide to the Committee any evidence you have to support this view.**

Response: I appreciate the opportunity to clarify the record. I do not believe I testified that that the skull injury was caused by CPR, nor do I have any reason to believe that to be true.

I did testify that I had been advised that the broken ribs and liver injury could have been caused by the cardiopulmonary resuscitation ("CPR") that was performed on Ms. Richardson when she was found non-responsive in her cell. This was based on my recollection of an oral report made by CCA's medical expert, Dr. McCormick. The Committee now has a letter from Dr. McCormick to one of CCA's lawyers expressing in writing his view that these injuries are "almost certainly" attributable to CPR, though he cannot make a definitive conclusion because the medical examiner neither performed a microscopic examination of the injured tissue nor retained tissue samples that could be used to determine the precise timing of the injuries. Dr. McCormick also opines that such injuries commonly occur with CPR, and cites extensive medical literature to that effect.

In addition to Dr. McCormick's cited authorities, the American Heart Association's website with information on CPR notes that "[e]ven properly performed chest compressions can cause ribs to break in adult victims." American Heart Association National Center, "Is it True that I Could Break Someone's Ribs by Doing CPR?" (created Feb. 9, 2006) available at http://my.americanheart.org/jive/entry.jspa!externalID+115&categoryID=10. "Rib fractures are the most common complication associated with CPR and may occur in up to 50 percent of patients." M.D. Ziegenfuss & D.V. Mullany, "Traumatic Liver Injury Complicating Cardiopulmonary Resuscitation. The



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Value of a Major Intensive Care Facility: A Report of Two Cases," 6 Critical Care and Resuscitation 102, 104 (2004).

Finally, in a letter to the Committee dated February 25, 2008, David Randolph Smith, the lead lawyer for the Richardson family in the civil litigation, states in his discussion surrounding the "complex and debated" cause of Ms. Richardson's death: "There were also issues on whether CPR may have caused the liver and rib injuries."

To be sure, it is unlikely that anyone will ever know definitively what caused the rib and liver injuries.

**d. You testified that "there are any number of possible explanations" for Ms. Richardson's death, "including fights with other inmates [and] self-inflicted wounds," among other things. Please explain in detail why you believe that Ms. Richardson, who was in solitary confinement, could have been involved in a fight with other prisoners. In addition, please explain in detail why you believe Ms. Richardson might have fractured her own skull and ribs. Please also provide the Committee with any evidence you have to support these contentions.**

Response: With respect to my statement regarding "fights with other inmates," it is important to remember that there were disputes concerning the timing of Ms. Richardson's primary skull injury, and that there were older brain injuries. As noted in the letter from Dr. McCormick to Dr. Levy, dated April 18, 2006 (attached to the letter from James F. Sanders to the Committee dated February 26, 2008), Dr. McCormick believed the brain contusions resulting from the primary skull injury could not have occurred within 72 hours of her death "with a more probable date of 2 to 3 times that interval." The conclusion that these brain contusions occurred at least three days prior to death was shared by the Richardson family's experts.

Furthermore, my recollection of what I learned about the medical experts' opinions is that they believed Ms. Richardson had some other, older head injuries that likely occurred weeks before her death. For at least those injuries, there would be a range of possible third parties who could be responsible (inmates or officers) as Ms. Richardson was placed in solitary confinement on June 17, or about 18 days prior to her death. Ms. Richardson had a history of altercations with other inmates, which is part of the reason she was placed into solitary confinement.

Of course, as discussed later, it also seems clear to CCA's and the Richardson family's experts that the brain injuries or injury by themselves did not cause her death (otherwise, she would have died closely after such an injury or injuries was sustained, not days later). My recollection of the expert opinions, however, is that one possible explanation for Ms. Richardson's death is that



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the cumulative effect of the brain injuries – both the older, less severe injuries and the more recent, primary injury – when combined with her medical history of seizures, may have contributed to a significant, fatal seizure on the morning of July 5, 2004. So it would have been more accurate for me to have testified that "previous fights with other inmates may have played a role in her death." I did state that some contact with an unknown corrections officer could have been a possible explanation, too.

Concerning the possibility that Ms. Richardson's death could have involved a self-inflicted injury, based on what Dr. McCormick related to me (and others), the primary skull fracture was a deceleration injury. Dr. Levy has publicly affirmed this view, too (telling the press that Ms. Richardson's head was likely slammed into a hard object, such as a wall). Put differently, the "blunt force trauma" to the head was the result of a head in motion striking an object; not an object in motion striking the head. My understanding of the medical experts' opinions is that this raises the possibility that Ms. Richardson could have unintentionally struck her own head against an object or concrete floor (as in the case of a seizure or fall). That was at least one theory that our expert expressed to me, and I was attempting to offer the Committee, on behalf of my current client, the entire range of possible explanations for her death.

In that regard, I believe that it is instructive to look to what the Richardson family's lawyer has told the Committee about the range of possible causes in his letter dated February 25, 2008:

> In a nutshell our extensive investigation and expert analysis (including a neurosurgery expert from Stanford University Medical School, Dr. Tse, and the former Chief Medical Examiner of the State of Kentucky, Dr. Nichols) indicated that the circumstances and causes of Ms. Richardson's tragic death were complex and debated. Dr. Levy, the Tennessee medical examiner, attributed the death to a recent traumatic brain injury (skull fracture). That opinion was contested vigorously by the defense and our own experts attributed the death to a seizure and concluded that the skull fracture was not caused by the four guards who had been indicted. From the standpoint of the plaintiff there was still a very strong case on death being caused from lack of timely medical treatment and a real fact issue on when the skull fracture occurred.

(Emphasis added.) As you can see, the potential causes of death were sufficiently "complex and debated" that several explanations – many of which may still have posed the risk of civil liability for CCA – are still presented, including a seizure and lack of timely medical treatment.



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Finally, as should be clear, I do not believe Ms. Richardson fractured her own ribs, and there is no evidence to support that conclusion.

**e. Some suggest that your testimony that Ms. Richardson's death might have been caused by CPR reveals that you would not be able to separate yourself from your role as an advocate in cases involving the treatment of inmates in order to impartially weigh evidence as a federal judge. What is your response to this concern?**

Response: I appreciate the opportunity to clarify the record. I did not testify that CPR caused Ms. Richardson's death and I do not hold that belief.

Nonetheless, I appreciate the broader context of this question, as it raises a number of important issues. When a judicial nominee is questioned in detail about the facts and circumstances of an event giving rise to litigation for one of his clients years before, that questioning forces the nominee to consider his ethical duties to his current and former client with respect to that matter, and not just his own self-interest. As you know, I am still CCA's lawyer, and owe CCA my duty of professional loyalty. If I appeared to defend CCA with respect to the questions about Ms. Richardson's death, that is because I take my professional obligations seriously.

I think the only legitimate issue that could be raised from this testimony is whether I could be fair in resolving a case in which I acted as the lawyer. The self-evident answer to that question is "no," and that is the very reason why judges recuse themselves from all matters in which they were involved as lawyers. Moreover, to ensure that there is no perception of partiality involving my current and former client, CCA, I reiterate that I will recuse myself from cases involving CCA in the event I am confirmed.

As to the broader suggestion, about whether I could be fair regarding cases involving the treatment of inmates generally, I think it important to know that my exposure to corrections over the past seven years has made me aware that there are, in fact, individuals in corrections who commit grievous crimes against inmates – ranging from physical abuse to sexual exploitation. Indeed, it is my personal belief that some individuals may be attracted to careers in corrections because they seek to control and exploit others, and, no matter how careful a corrections employer is in attempting to screen out such individuals, some may wind up being hired. I also know that some corrections officers become compromised by simple errors in judgment, and that those errors can have terrible consequences.

I have also seen first-hand the good that can come from corrections. I remember encountering an inmate at a facility who tied beautiful flies for fishing. The delicacy and precision of his work caught my eye, even though I had never before fly-fished. We talked about how he became interested in



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that hobby; how long it took him to tie various flies; and, ultimately, why he was in prison, when he hoped to get out, and what his dreams were for the future. I have likewise met former inmates who now work for CCA as counselors, who have movingly described their rehabilitation. So I have seen the humanity of those who are, and have been, incarcerated, and I understand that the hope for rehabilitation that must be carefully nurtured in environments that are not always conducive to it.

In private practice, I saw a jury simply refuse to credit the testimony of a former inmate, who was my client, in spite of the fact that the corrections officials involved were effectively impeached and lacked credibility themselves – at least in my judgment. So I am aware that many in our society may never give an ex-inmate a fair shake.

In short, I think my experiences will make me particularly sensitive to issues raised in inmate lawsuits. And, there are other, objective actions that I believe demonstrate my personal commitment to the humane treatment of inmates:

- Volunteering to serve as an appointee of the National Prison Rape Elimination Commission;
- Defending the civil rights of an inmate in a lawsuit against a Tennessee Department of Corrections warden and other staff;
- Instituting an aggressive, new quality assurance program while at CCA to promote inmate welfare and ensure high-quality operations;
- Settling meritorious inmate lawsuits for substantial monetary awards; and
- Implementing CCA's first corporate compliance program and drafting the company's first Code of Ethics and Business Conduct, which includes standards of conduct to protect inmates and provides for anonymous reporting by employees of possible mistreatment of inmates by staff.

I close with a statement I made on the record, long prior to this nomination, when commenting on my visits to corrections facilities operated by CCA:

> [T]here is a human dimension to our business, not just for our employees, but also the inmates entrusted to our care. So you're aware, every day, that this company has to conduct itself with absolute integrity, because the lives of the people we're housing depend on it, the lives of the people who work for us depend on it, the lives of those outside of our facility who depend on us to protect them depend on it. So you're acutely aware of that dimension and of the good that can come from corrections.

Greg Land, "No More Get Out of Jail Free," GC South October 2005 at 21.

**2. You have acknowledged that, if confirmed, you would be required to recuse yourself from cases involving your client CCA, in which you hold stock. You**



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**disputed, however, that this recusal would create a case management problem for the court, and stated that you believe about 181 cases involving CCA have been filed in the Middle District of Tennessee since 2000.**

**a. Does your estimate also include cases involving CCA operations or facilities that have been filed against CCA's CEO or former CEO, the Prison Realty Trust, and CCA wardens? If not, please explain in detail why not.**

Response: My estimate did not include the cases filed against CCA's CEO, former CEO, and Prison Realty Trust. CCA's former CEO was no longer a related party by the midpoint of 2000. Likewise, Prison Realty Trust (which did not conduct corrections activities, but instead was a holder of real estate) was merged into CCA in 2000 and ceased to be a separate entity. The cases naming the former CEO and Prison Realty Trust would have largely been federal securities cases that would not be recurring. Finally, many cases naming wardens were included, to the extent that they also named CCA – which they often do (unless the case is a habeas corpus case).

**b. Attached is a list of cases that appear to involve CCA or CCA officials, which have been filed since 2000. Do you agree that this list accurately reflects the cases against CCA that have been filed since 2000? If not, please explain in detail what information you believe is inaccurate. If there are additional cases that should be included on this list but are not, please identify those them.**

Response: I do agree that the list accurately reflects cases filed against CCA, Prison Realty Trust, CCA's former CEO, CCA's current CEO and various CCA wardens.

What cannot be determined from this PACER list, due to common codes used for civil rights cases and habeas corpus petitions, is whether the cases naming wardens are actually civil rights cases against CCA or are habeas corpus petitions where the real party in interest is a governmental entity, not CCA. Although the custom in a habeas case is to name the warden of the facility holding the person, that does not make CCA (or the warden) the real party in interest. Most such cases would be handled by the Tennessee Attorney General's office with respect to Tennessee inmates. Only by checking the individual pleadings in each case naming a warden would it become clear whether such was the case.

Assuming that every case presented on the attached PACER list did, in fact, involve CCA (even though this almost certainly overstates the frequency of cases), there were 273 cases filed against CCA during the more than eight-year period from January 1, 2000 to February 12, 2008.



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Of these cases, PACER also shows that 105 were dismissed on the very same day they were filed (apparently by a magistrate judge pursuant to the Prison Litigation Reform Act), and thus did not require a district judge's efforts. Accordingly, over more than eight years, 168 cases actually required assignment to a district judge for responsive pleadings - an average of just under 21 cases per year.

This compares to about 15,000 cases filed since 2000 in the Middle District. I do not believe that my recusal from CCA cases would impose a substantial burden on the other district judges in the Middle District of Tennessee.

**3. You stated at your hearing that you would recuse yourself from cases involving any company that you have served as a fiduciary, including the community bank in Nashville for which you serve as a member of the Board of Directors, and "any nonprofits" with which you have a fiduciary relationship. Please identify the specific institutions to which you referred in your answer.**

Response: I serve as a director of Nashville Bank & Trust Company. The non-profit institutions to which I referred are: American Red Cross, Nashville Chapter; Antiques & Garden Show of Nashville; Boy Scouts of America, Middle Tennessee Council; Cheekwood Botanical Gardens & Museum of Fine Art; Exchange Club of Nashville; and First Presbyterian Church, Nashville.

**4. You've stated that you're a member of Nashville's Belle Meade Country Club, a private club that did not admit African American members until 1994. In addition, the club reportedly grants voting privileges to male members, but not female members.**

**a. Is it true that the Belle Meade Country Club does not permit female club members to vote? If not, please explain why, and state whether you have ever sought to change this policy. If you do not know the reasons for this policy, please obtain a response from the club and provide that answer to the committee.**

Response: Belle Meade Country Club has a membership that includes people of different genders, races, religions, national origins, and sexual orientation. The club has several different membership categories, and all members and their families, regardless of category, are permitted to utilize the club's facilities. When I joined the club in 2001, I did so with the belief that it was not restrictive with respect to gender, race, national origin, religion, or sexual orientation.

I understand that the only category that may vote is the "Resident Member" category. (I am not a Resident Member, so I may not vote, either, nor may I propose new members. I am also not permitted to be



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involved in the governance of the club.) At present, there are no women who are in this membership category; however, I understand that the bylaws of the club do not restrict eligibility for the "Resident Member" category except by age (18 years and older) and geography (within 100 miles of Nashville). Thus, I do not believe there is a policy to restrict a woman from being proposed as a "Resident Member." I am not aware, nor have I been made aware, that any woman has been proposed or has sought to be proposed as a "Resident Member."

Given my understanding that at least three judges bound by the Code of Conduct for United States Judges are currently members of Belle Meade Country Club, I had assumed and still assume that there are no issues with respect to Canon 2(c) of the Code of Conduct for United States Judges. If confirmed, I will consult immediately with the General Counsel's Office at the Administrative Office of the U.S. Courts, and/or seek a confidential advisory opinion from the Committee on Codes of Conduct, to confirm this understanding regarding Canon 2(c) and the current practices of Belle Meade Country Club. In the event my assumption and understanding should be mistaken, I will set about taking the actions required pursuant to Canon 2(c), up to and including resignation from the club.

**b. Please inform the Committee of the racial diversity of the Belle Meade Country Club, in terms of the number of minority members in comparison to the total number of members. If you do not know, please inquire with the Club and provide the Committee with a response.**

Response: I am advised that the club does not track its members based on race, nor does it respond to such requests. I am personally aware that there are minority members, but I do not myself know the number. Should the club respond to my inquiry, I will forward any such response.

**c. Why were no African Americans admitted as members of the Club until 1994? Has the club ever had a policy against admitting African American members? If you do not know, please inquire with the Club and provide the Committee with a response.**

Response: I understand that there were no African Americans admitted prior to 1994; however, I was not an Associate Member until 2001, and thus cannot opine on this question based on my personal knowledge. I will forward any response I may receive from the Club.

**d. It is essential for federal judges to be, and to be perceived as, impartial decisionmakers who will treat all parties fairly. What can you say to assure the public that, if you are confirmed, your affiliation**



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00422 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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**with the Belle Meade Country Club will not prevent you from doing so?**

Response: I strongly agree that federal judges must be impartial and be perceived as impartial. I would hope that my membership in a club that has among its members people of different genders, races, faiths, national origins, and sexual orientation would not cause people to question my impartiality. Nevertheless, as I committed to do earlier, if confirmed I will seek to make sure that my understanding of the application of Canon 2(c) to the membership policies of the club is correct, and, if not, will take such actions as are required by the canon, up to and including resignation from the club.



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**Responses of Gustavus Adolphus Puryear IV**
**Nominee to the U.S. District Court for the Middle District of Tennessee**
**To the Written Questions of Senator Russ Feingold**

**1. With respect to your litigation experience, please expand on the information provided in your questionnaire by providing the following information for both federal and state cases:**

**a. The number of cases where you personally drafted a motion for summary judgment or a response to such a motion.**

Response: As the question relates to my litigation experience when I was counsel of record in private practice (1994-97), I cannot recall all such instances. I do specifically recall at least four such cases. I also recall drafting two post-judgment motions and memoranda of law, which were essentially identical to motions for summary judgment. As general counsel of a corporation over the past seven years, I have reviewed and edited numerous motions for summary judgment.

b. **The number of cases where you personally presented an oral argument to the court in connection with dispositive or discovery motions.**

Response: Again, I cannot recall all such instances. I personally argued at least two dispositive motions as a lawyer in private practice. As to discovery motions, the state courts within Davidson County held "motion day" on virtually every Friday. I would estimate that I was in state court at least every third or fourth Friday during private practice on a discovery or discovery-related motion, which I would have argued. I cannot recall a total number of such arguments. I also recall personally presenting oral arguments on discovery-related motions in state courts in at least four counties elsewhere in Tennessee. I recall personally presenting discovery motions to at least two U.S. Magistrate Judges in federal court. In addition, I have reviewed numerous such motions over the past seven years as general counsel to a corporation.

**c. The number of cases in which you personally participated in voir dire and jury selection.**

Response: Two.

**d. The number of cases in which you personally made an opening argument, examined or cross-examined witnesses, or presented a closing argument.**

Response: Excluding cases in General Sessions court, I presented an opening argument in one case, examined or cross-examined witnesses in two cases, and presented a closing argument in one case.

e. **The number of cases in which you personally drafted an appellate brief.**

Response: I recall four, and I have reviewed and edited numerous briefs since becoming general counsel of a corporation more than seven years ago.

**f. The number of cases in which you personally presented an oral argument to an appellate court.**

Response: One.

**Feel free to provide any further explanation you think would be useful to the Committee in connection with this question.**

Response: The American Bar Association's Standing Committee on the Federal Judiciary unanimously found me "Qualified" for this appointment.

While engaged in the private practice of law, I have tried two jury cases, one in federal court as first chair and one in state court as second chair. (I have excluded from this calculation trials handled in General Sessions Court, as such trials are bench trials regarding smaller amounts.) In addition, I have handled the appellate argument of a commercial litigation matter. I have been in numerous motion hearings, including evidentiary hearings in federal court, such as hearings in support of temporary restraining orders.

I also believe I have had other experiences that relate to my ability to serve as a district judge. In my case, I have served as a law clerk to a distinguished federal court of appeals judge. I have also served as counsel to a U.S. Senate committee's special investigation, which was an intense project in many ways similar to preparing for a major trial. For more than seven years I have served as the chief legal officer of a major corporation that today employs more than 16,000 people and cares for more than 73,000 inmates. In that role, I have been exposed to a broad and diverse set of substantive legal issues: federal tax issues; state and federal criminal investigations; state and federal employment issues; insurance litigation; federal civil rights matters; federal securities laws issues; complicated, multi-jurisdictional litigation; federal regulatory matters; and more. I believe this experience has exposed me to more areas of the law than most traditional litigation practices, and this broad experience would help inform my judgment about the wide diversity of cases that come before a federal district judge if I am confirmed.

**2. At your hearing, you testified that you planned to divest yourself over time of stock in Corrections Corporation of America ("CCA"), your current employer. You also stated that you would continue to recuse yourself from cases involving CCA for "an extended period of time" after the divestiture is complete.**

**a. Please explain more fully what you understand your ethical responsibility to be in connection with cases filed by CCA in your court. At what point do you**



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**believe it will be appropriate to begin hearing such cases, and how would you go about deciding that that point has arrived?**

Response: I reiterate that, though I will completely divest my remaining financial interest in CCA, I will recuse myself from all cases involving CCA for an "extended period of time" after my divestment. That recusal would also cover officers and employees of CCA being sued for their actions as officers and employees.

Upon further consideration, I have concluded that there are no circumstances under which I would hear a CCA case prior to five years from my divestment, leaving open the possibility that it may be a substantially longer period of time. To me, some of the critical issues with respect to my recusal from CCA cases would include the following factors: the length of time since complete divestment from CCA; whether senior management of CCA is comprised of people with whom I worked; whether any such matter could still relate to facts and circumstances that may have been known to me while at CCA; and whether sufficient time has passed that the bar and public have ceased to perceive me as a zealous advocate for CCA.

Facts outside of my control could have an impact on my assessment of these issues. Two hypothetical situations may help illuminate this thought: What if CCA were acquired by a private equity firm and current executive management were completely replaced, and the corporate headquarters relocated, but two prisons remained in the Middle District of Tennessee? What if a new management team at CCA divested its prison operations and decided to provide information technology consulting services to public prison systems? I am hesitant to commit to any defined period of time beyond five years, as these factors beyond my control could shape my analysis of the recusal issue. I would, of course, consult with the Administrative Office of the Courts and the then-current statutes and Code of Conduct for United States Judges to ensure that there would be no rules violation or actual or apparent partiality. This, combined with disclosure to the parties, should ensure a fair and impartial judicial proceeding conducted in accordance with due process of law.

**b. Does your promise to recuse yourself extend to cases involving CCA's executives or employees but not the corporate entity?**

Response: Yes.

There is the possibility that there could be actions involving a CCA executive or employee not arising out of or related to their official activities for CCA (e.g., a personal bankruptcy appeal by a CCA employee). In such purely personal cases, I would assess the facts of such a case with reference to relevant statutes and the Code of Conduct for United States Judges, and make my decision accordingly. Applying these criteria, and given my personal relationship with current CCA executives, I would almost certainly recuse myself from any case involving a CCA executive in his or her personal capacity for the foreseeable future due to the possible appearance of partiality. After the passage



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of time and natural turnover in executive positions at CCA, these concerns would likely dissipate.

**3. The Estelle Richardson case discussed at your hearing has engendered a great deal of controversy. You testified at your hearing that Ms. Richardson's rib and liver injuries may have been caused by the administration of CPR and you characterized the four corrections officers involved in the case as "innocent." You also testified that possible explanations for Ms. Richardson's injuries include "fights with other inmates, a fight with unknown correction officers, self-inflicted wounds, medicatiou issues."**

**a. Please explain in detail your role and involvement in CCA's handling of this matter, including its investigation of the initial incident, its involvement in the criminal investigation, and its defense of the civil action brought by Ms. Richardson's family.**

The death of Estelle Richardson while incarcerated at the Metropolitan Davidson County Detention Facility in Nashville was a profoundly distressing event to me both personally and professionally. As I recalled at the hearing, the place and time I learned of her death are seared into my memory. The circumstances surrounding the initial report of her death were truly disturbing: a female inmate in solitary confinement dies of apparent head injuries mere hours after she had to be extracted from her cell by four corrections officers (a cell extraction is categorized as a "use of force" incident in corrections). Her death led to both federal and local criminal investigations of CCA and its employees, as well as civil litigation.

As general counsel to CCA, my responsibility was to represent CCA. At all times, acting in consultation with executive management at CCA and its board of directors, I provided general supervision of CCA's approach to the handling of the criminal investigations related to Ms. Richardson's tragic death, as well as civil litigation brought on behalf of Ms. Richardson's family. At my direction, CCA fully cooperated with all law enforcement authorities. CCA believed that these investigations would determine the cause of her death. CCA's outside lawyers (under my direction and supervision) also investigated the possible causes of death through examination of records, interviews of cooperative witnesses, depositions taken during the civil case, and consultations with medical experts; this process involved more than two years' work. In fact, CCA's and the Richardson family's lawyers cooperated during the discovery process of the civil litigation, as all parties were seeking to understand the truth about what happened.

I was CCA's representative at a mediation between the Richardson family and CCA on February 22, 2006. The civil case between CCA and the Richardson family did settle that evening shortly before midnight. Criminal charges against the four corrections officers who were employees of CCA were ultimately dismissed in the light of the medical evidence developed jointly by the Richardson family and CCA.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00427 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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In short, while I was acting as the lead CCA lawyer on this matter, CCA cooperated fully with all law enforcement investigations into the death, and CCA cooperated with the Richardson family in the civil litigation. The Richardson family voluntarily dismissed its civil actions against the four corrections officers who were under indictment and the Richardson family and CCA settled the dispute over the exact causes of the death and CCA's liability, if any, in connection with those possible causes.

**b. News reports suggest that Ms. Richardson had been isolated from other inmates prior to her death. What evidence is there that her injuries resulted from fights with other inmates?**

Response: With respect to my statement regarding "fights with other inmates," it is important to remember that there were disputes concerning the timing of Ms. Richardson's primary skull injury, and that there were other, older brain injuries. As noted in the letter from Dr. McCormick to Dr. Levy, dated April 18, 2006 (attached to the letter from James F. Sanders to the Committee dated February 26, 2008) Dr. McCormick believed the brain contusions resulting from the primary skull injury could not have occurred within 72 hours of her death "with a more probable date of 2 to 3 times that interval." The conclusion that these brain contusions occurred at least three days prior to death was shared by the Richardson family's experts.

Furthermore, my recollection of what I learned about the medical experts' opinions is that they believed Ms. Richardson had some other, older head injuries that likely occurred weeks before her death. For at least those injuries, there would be a range of possible third parties who could be responsible (inmates or officers) as Ms. Richardson was placed in solitary confinement on June 17, or about 18 days prior to her death. Ms. Richardson had a history of altercations with other inmates, which is part of the reason she was placed into solitary confinement.

Of course, it also seems clear to CCA's and the Richardson family's experts that the brain injuries or injury by themselves did not cause her death (otherwise, she would have died closely after such an injury or injuries was sustained, not days later). My recollection of the expert opinions, however, is that one possible explanation for Ms. Richardson's death is that the cumulative effect of the brain injuries – both the older, less severe injuries and the more recent, primary injury – when combined with her medical history of seizures, may have contributed to a significant, fatal seizure on the morning of July 5, 2004. It would have been more accurate for me to have testified that "previous fights with other inmates may have played a role in her death." I did state that some contact with an unknown corrections officer could have been a possible explanation, too.

**c. What steps did CCA take to determine who among its employees may have been responsible for Ms. Richardson's death?**



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00428 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Response: CCA fully cooperated with various law enforcement investigations into her death, and CCA believed that these investigations would determine the cause of her death and who, if anyone, was responsible. CCA's outside lawyers also investigated the possible causes of death through examination of records, interviews of cooperative witnesses, depositions taken during the civil case, and consultations with medical experts; this process involved more than two years' work.

**d. Are the four officers who were initially charged in the case still employed by CCA? Was any disciplinary action taken against them in connection with this case?**

Response: CCA immediately placed the four corrections officers on administrative leave upon learning on July 5, 2004 that they were under suspicion for homicide. Although the criminal charges against them were later dismissed, they did not return to work for CCA.

**e. What evidence is there that Ms. Richardson's injuries were self-inflicted?**

Response: Concerning the possibility that Ms. Richardson's death could have involved a self-inflicted injury, based on what Dr. McCormick related to me (and others), the primary skull fracture was a deceleration injury. Dr. Levy has publicly affirmed this view, too (telling the press that Ms. Richardson's head was likely slammed into a hard object, such as a wall). Put differently, the "blunt force trauma" to the head was the result of a head in motion striking an object, not an object in motion striking the head. My understanding of the medical experts' opinions is that this raises the possibility that Ms. Richardson could have unintentionally struck her own head against an object or concrete floor (as in the case of a seizure or fall). That was at least one theory that our expert expressed to me, and I was attempting to offer the Committee, on behalf of my current client, the full range of possible explanations for her death.

In that regard, it is instructive to look to what the Richardson family's lawyer has told the Committee about the range of possible causes in his letter dated February 25, 2008:

> In a nutshell our extensive investigation and expert analysis (including a neurosurgery expert from Stanford University Medical School, Dr. Tse, and the former Chief Medical Examiner of the State of Kentucky, Dr. Nichols) indicated that the circumstances and causes of Ms. Richardson's tragic death were complex and debated. Dr. Levy, the Tennessee medical examiner, attributed the death to a recent traumatic brain injury (skull fracture). That opinion was contested vigorously by the defense and our own experts attributed the death to a seizure and concluded that the skull fracture was not caused by the four guards who had been indicted. From the standpoint of the plaintiff there was still a very strong case on death being caused from lack of timely medical treatment and a real fact issue on when the skull fracture occurred.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00429 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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(Emphasis added.) As you can see, the potential causes of death were sufficiently "complex and debated" that several non-homicidal explanations – many of which may still have posed the risk of civil liability for CCA – were presented, including a seizure and lack of timely medical treatment.

**f. Did CCA provide all reports and investigations of this matter carried out by its employees or by persons it retained to state authorities? If not, why not?**

Response: As part of CCA's cooperation with state and federal authorities, CCA produced more than 33,000 pages of documents. CCA did not waive its attorney-client and work product privileges, and thus did not produce those documents involving attorney-client communications or attorney work product.

**4. The Committee has received a letter from Bruce P. Levy, M.D., the Chief Medical Examiner of the State of Tennessee. The letter is attached. Dr. Levy takes strong issue with your testimony concerning the Richardson case. Please respond in detail to Dr. Levy's allegations.**

The inconsistency between my testimony and the autopsy report and ruling arises from the inconsistency of the autopsy with the medical evidence developed by both the Richardson family and CCA over a two year period, and thus requires some explanation of that process.

In the course of preparing for the civil litigation, both CCA's and the Richardson family's medical experts concluded that Ms. Richardson's death did not result from a brain injury within 24 hours of her death, and thus could not have been caused by the four officers who performed the cell extraction the day before her death.

I understand that the Committee has been provided a transcript of the settlement hearing in the federal civil case, which is now publicly available. In that hearing, the Richardson family's lawyer, David Randolph Smith, disputed the medical evidence underlying the criminal prosecution and noted that Ms. Richardson had a seizure disorder. He also opined that the homicide cases would likely "fall apart," as indeed they did. In a separate letter to this Committee dated February 25, 2008, Mr. Smith further stated that:

> [T]he circumstances and cause of Ms. Richardson's tragic death were complex and debated. Dr. Levy, the Tennessee medical examiner, attributed the cause of death to a recent traumatic brain injury (skull fracture). That opinion was contested vigorously by the defense and our own experts attributed the death to a seizure and concluded that the skull fracture was not caused by the four guards who had been indicted. ... There were also issues on whether CPR may have caused the liver and rib injuries.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00430 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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(Emphasis added.)

I stated at my hearing that I had been advised that the broken ribs and liver injury could have been caused by the cardiopulmonary resuscitation ("CPR") that was performed on Ms. Richardson when she was found non-responsive in her cell. This was based on my recollection of an oral report made by CCA's medical expert, Dr. McCormick. In addition to Mr. Smith's letter, which notes that this was an issue, the Committee also has a letter from Dr. McCormick to one of CCA's lawyers expressing in writing his view that these injuries are "almost certainly" attributable to CPR, though he cannot make a definitive conclusion because the medical examiner neither performed a microscopic examination of the injured tissue nor retained tissue samples that could be used to determine the precise timing of the injuries. Dr. McCormick also opines that such injuries commonly occur with CPR, and cites extensive medical literature to that effect.

In any event, it is unlikely that anyone will ever know definitively what caused the rib and liver injuries. What is known, however, is that CCA cooperated fully with all law enforcement investigations into the death, and that CCA cooperated fully with the Richardson family in the civil litigation. It is known is that the Richardson family voluntarily dismissed its civil actions against the four corrections officers who were under indictment. It is known that the Richardson family and CCA settled the dispute over the exact causes of the death and CCA's liability, if any, in connection with those possible causes. It is known that the District Attorney General met with both CCA's and the family's medical experts. Last, it is known that the District Attorney General, who had access to Dr. Levy's opinions and all of the police investigatory materials relating to this matter, then dismissed the charges against the four corrections officers.

Unfortunately, the medical findings by both the family's and CCA's experts do not permit a definitive conclusion as to how Ms. Richardson died. In my testimony to the Committee, I relied in good faith on these opinions. In fact, my opinion that there is substantial uncertainty regarding the cause of Ms. Richardson's death is also shared by the lead lawyer for the Richardson family in his letter to the Committee. In sum, the inconsistency between my testimony and the autopsy is merely derivative of an inconsistency between the autopsy and the conclusions of the other medical experts retained by CCA and the Richardson family.

**5. The Committee has also received letters from attorneys James F. Sanders and David Randolph Smith, both of whom were involved in the civil case arising out of Ms. Richardson's death. Did you request that they write to the Committee to support your nomination? Please describe in detail the contacts you have had with these two attorneys since you were nominated for this judicial position.**

Response: I did not ask Mr. Smith to write to the Committee in support of my nomination. I received a copy of his letter from the Department of Justice after it was transmitted to the Committee. Since my nomination I have had no contact with Mr.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00431 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Smith until after I received a copy of his letter to the Committee, at which point I called to express my appreciation for the sentiments he expressed in it.

Since my nomination, Mr. Sanders and I have had telephone discussions concerning an unrelated legal matter.

After my hearing, I had two or three telephone discussions with Mr. Sanders concerning the inquiries regarding the death of inmate Estelle Richardson that were being made with respect to my nomination. I was seeking confirmation as to my recollection of facts from that matter, which had concluded approximately two years before. We discussed the situation that these inquiries put me in, as one wanting to disclose all available information to the Committee yet not wanting to risk the abrogation of any of CCA's rights. We also discussed the fact that some of my answers provided as a nominee would raise issues regarding CCA's conduct that could implicate CCA's interests. In that context, Mr. Sanders expressed his view that the information apparently being provided to the Committee may not be complete, and he volunteered to write a letter to the Committee and provide any factual information that may be helpful to the Committee in knowing the truth about what was involved in the matter. We agreed that Mr. Sanders should discuss this possible course with corporate counsel for CCA other than me, and that I should not be involved in deciding whether such information would be provided.

I did not review his letter, and I did not know of its contents (directly or indirectly), and I did not provide him with any instructions as to its content or what to disclose. I received a copy of the letter after it was transmitted to the Committee.

**6. At the hearing, you pointed to your service on the National Prison Rape Elimination Commission as evidence that you are not hostile to prisoner rights.**

**a. Please describe in detail your work on the Commission.**

Response: The National Prison Rape Elimination Commission is a bipartisan panel created by the National Prison Elimination Act of 2003, 42 U.S.C. § 15601 et seq., the primary sponsors of which were Senators Kennedy and Sessions. The Commission is charged with studying federal, state and local governmental policies and practices relating to sexual violence behind bars. Prisoners get sentenced to prison, not sexual abuse. Sexual abuse is morally and legally wrong, and I agreed to serve on the Commission to help solve this problem. The Majority Leader of the United States Senate appointed me to the Commission in December 2003.

Upon completion of its study, the Commission will report its findings, conclusions, and recommendations to the Congress, the President, and the U.S. Attorney General. These recommendations will include draft standards for the prevention of prison sexual violence that it is hoped will be implemented by the U.S. Bureau of Prisons and become a new national standard for various types of corrections institutions across



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the country. These standards will attempt to enhance the prevention, detection, reduction and punishment of prison sexual assault by inmates and by staff.

My involvement as a Commissioner involved work in the original, organizational meetings to establish procedures for the Commission to follow in pursuit of its final report, including findings, conclusions, recommendations, and draft standards. I was involved in various interviews in connection with hiring senior staff for the Commission (some by telephone). Following a major staff transition, the Commission held a two or three day management retreat to attempt to get the Commission's progress back on track.

Commissioners have reviewed various proposals for studies concerning prison sexual violence and the means of eliminating it. We have held eight public hearings and one public meeting for the purpose of learning more about the scope of the problem of sexual violence in prison, the nature of the problem, and the means to reduce it.

We authorized certain expert committees to address specific areas for drafting standards: Classification and Technology; Confidential Reporting and Data Collection; Investigations and Staff Sexual Misconduct; Medical and Mental Health; Training; Juvenile Facilities; and Immigration Detention Facilities. I have helped recruit one well-known corrections expert to serve on an expert committee, and the Commissioners are kept abreast of committee development through regular written communications and conference calls.

We are currently in a stage where we are reviewing "draft" standards that have been prepared by staff based upon the work performed at public hearings and meetings, as well as the expert committees. For example, on Monday, February 25, 2008, the Commission conducted a meeting to review suggested draft standards; the meeting lasted all day and I participated via conference call.

We anticipate that draft standards will be released for public comment in the near future.

**b. How many meetings or hearings has the Commission held and how many have you attended?**

Response: There have been eight hearings, and I have attended four. Unfortunately, I had schedule conflicts with the remaining four. I was provided with written materials for review from those hearings that I missed. There has also been one public meeting at Notre Dame Law School, which I attended. As discussed earlier, those hearings comprise only a portion of the work done by commissioners. The Commission also has semi-regular non-public conference calls, and we have had a number of executive business meetings.

**c. Have you provided the Committee with all public statements you made in connection with your service membership on the Commission? If not, please do so.**



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Response: All public proceedings of the Commission are available at its website, www.nprec.us. The website also has all public statements made by the Commission. In the light of the length of the hearing transcripts, I am having the Commission deliver the transcripts in electronic form to you. During the hearings, I did ask questions, but I did not understand these questions to be the sort of public statements requested by the Committee.

**7. There have been reports that a country club to which you belong, the Belle Meade Country Club in Nashville, does not give its female members the same voting rights as men. Is that true? If so, when did you learn of this, and have you taken any steps to seek equal treatment of women by the club?**

Response: Belle Meade Country Club has a membership that includes people of different genders, races, national origins, religions, and sexual orientation. The club has several different membership categories, and all members and their families, regardless of membership category, are permitted to use the club's facilities. When I joined the club in 2001, I did so with the belief that it was not restrictive with respect to gender, race, national origin, religion or sexual orientation.

I understand that the only membership category that may vote is the "Resident Member" category. (I am not a Resident Member, so I may not vote, either, nor can I propose new members. I am also not permitted to be involved in the governance of the club.) At present, there are no women who are in this membership category; however, I understand that the bylaws of the club do not restrict eligibility for the "Resident Member" category except by age (18 years and older) and geography (within 100 miles of Nashville). Thus, I do not believe there is a policy to restrict a woman from being proposed as a "Resident Member." I am not aware, nor have I been made aware, that any woman has been proposed or has sought to be proposed as a "Resident Member."

Given my understanding that at least three judges bound by the Code of Conduct for United States Judges are currently members of Belle Meade Country Club, I had assumed and still assume that there are no issues with respect to Canon 2(c) of the Code of Conduct for United States Judges. If confirmed, I will consult immediately with the General Counsel's Office at the Administrative Office of the U.S. Courts, and/or seek a confidential advisory opinion from the Committee on Codes of Conduct, to confirm this understanding regarding Canon 2(c) and the current practices and policies of Belle Meade Country Club. In the event my assumption is mistaken, I will set about taking the actions required pursuant to Canon 2(c), up to and including resignation from the club.



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Gus Puryear
10 Burton Hills Boulevard
Nashville, TN 37215

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

March 5, 2008

Dear Senator Feinstein:

Thank you for serving as the Chair of the Judiciary Committee's hearing on my nomination to serve as U.S. District Judge for the Middle District of Tennessee. I write to respond to your letter dated February 26, 2008, in which you asked certain follow-up questions, and to which you attached certain allegations presented to you by a group known as the Private Corrections Institute, Inc. ("PCI"). I appreciate your willingness to let me respond to the allegations raised by PCI. I will try to respond in a narrative fashion to both your follow-up questions and the PCI allegations.

1. **The Estelle Richardson Matter**

The death of Estelle Richardson on Monday, July 5, 2004 was a profoundly distressing event to me personally and professionally. Her two young children were left without a mother; I can only begin to imagine the suffering her death has caused them to endure. As the father of two young children, I mourn her children's loss. As I recalled at the hearing, the place and time I learned of her death are seared into my memory: I had just arrived at a lake near Nashville with my wife, children, and another family when my cell phone rang.

The circumstances surrounding the initial report of her death were truly disturbing: a female inmate in solitary confinement dies of apparent head injuries mere hours after she had to be extracted from her cell by four corrections officers (a cell extraction is categorized as a "use of force" incident in corrections). Her death led to both federal and local criminal investigations of CCA and its employees, as well as civil litigation.

As general counsel to CCA, my responsibility was to represent CCA. At all times, acting in consultation with executive management at CCA and its board of directors, I provided general supervision of CCA's approach to the handling of the criminal investigations related to Ms. Richardson's tragic death, as well as civil litigation brought on behalf of Ms. Richardson's family. At my direction, CCA fully cooperated with all law enforcement authorities. CCA believed that these investigations would determine the cause of her death, and who, if anyone, was responsible for it. CCA's outside lawyers (under my direction and supervision) also investigated the possible



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causes of death through examination of records, interviews of cooperative witnesses, depositions taken during the civil case, and consultations with medical experts; this process involved more than two years' work. In fact, CCA's and the Richardson family's lawyers cooperated during the discovery process of the civil litigation, as all parties were seeking to understand the truth about what happened.

I was CCA's representative at a mediation between the Richardson family and CCA on February 22, 2006. The civil case between CCA and the Richardson family did settle shortly before midnight on that date. Criminal charges against the four corrections officers who were employees of CCA were ultimately dismissed in the light of the medical evidence developed jointly by the Richardson family and CCA.

In short, while I acted as the lead CCA lawyer on this matter, CCA cooperated fully with all law enforcement investigations into the death, and CCA cooperated with the Richardson family in the civil litigation. The Richardson family voluntarily dismissed its civil actions against the four corrections officers who were under indictment; further, the Richardson family and CCA settled the dispute over the exact causes of the death and CCA's liability, if any, in connection with those possible causes.

a. Investigatory Efforts

Your first two questions concern the nature of CCA's efforts to find out what happened to Ms. Richardson. First, CCA fully cooperated with law enforcement investigations into her death, and CCA believed that those investigations would identify the cause of her death. The initial reports CCA received suggested that this would not be a difficult case to resolve. Law enforcement began its investigation before I was even informed of Ms. Richardson's death on the morning of July 5, 2004. The investigation did not conclude as quickly as was expected. Federal and state investigations continued for more than two years. Numerous CCA employees were interviewed by investigators and/or gave grand jury testimony, CCA produced thousands of documents to investigators, and CCA cooperated fully in the hopes that justice would be served.

In addition, CCA's outside lawyers also investigated the possible causes of death for a two-year period through the examination of records, interviews of cooperative witnesses, depositions taken during the civil case, and consultations with medical experts. As discussed, CCA's and the Richardson family's lawyers and retained experts cooperated fully in an attempt to determine the truth about what happened.

b. Cause of Death and CPR

Your next two questions concern inconsistencies between my testimony on Ms. Richardson's cause of death, including injuries to her ribs and liver, and the autopsy findings. The explanation for such inconsistencies is that the autopsy findings are at odds with the conclusions of CCA's and the Richardson family's medical experts.



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As you know, four corrections officers involved in a cell extraction hours before Ms. Richardson's death were indicted for homicide, though they steadfastly maintained their innocence. In the course of preparing for the civil litigation, both CCA's medical expert, Dr. William McCormick (a specialist in traumatic brain injuries who serves as Deputy Chief Medical Examiner of the State of Tennessee), and the family's medical experts (a neurosurgery expert from Stanford University Medical School and the former Chief Medical Examiner of the State of Kentucky) concluded that Ms. Richardson's death did not result from a brain injury within 24 hours of her death, and thus could not have been caused by the four officers who performed the cell extraction hours before her death.

I understand that the Committee has received a transcript of the settlement hearing in the federal civil case, which is now publicly available. In that hearing, the Richardson family's lawyer, David Randolph Smith, disputed the medical evidence underlying the criminal prosecution and noted that Ms. Richardson had a seizure disorder. He also opined that the homicide cases would likely "fall apart," as indeed they did. In a separate letter to the Judiciary Committee dated February 25, 2008, Mr. Smith further stated:

> [T]he circumstances and cause of Ms. Richardson's tragic death were complex and debated. Dr. Levy, the Tennessee medical examiner, attributed the cause of death to a recent traumatic brain injury (skull fracture). That opinion was contested vigorously by the defense and our own experts attributed the death to a seizure and concluded that the skull fracture was not caused by the four guards who had been indicted. ... There were also issues on whether CPR may have caused the liver and rib injuries.

(Emphasis added.)

I stated at my hearing that I understood that the broken ribs and liver injury could have been caused by the cardiopulmonary resuscitation ("CPR") that was performed on Ms. Richardson when she was found non-responsive in her cell. This was based on my recollection of an oral report made by CCA's medical expert, Dr. McCormick. In addition to Mr. Smith's letter, which notes that this was an issue, the Committee now also has a letter from Dr. McCormick to one of CCA's lawyers expressing in writing his view that these injuries are "almost certainly" attributable to CPR, though he cannot make a definitive conclusion because the medical examiner neither performed a microscopic examination of the injured tissue nor retained tissue samples that could be used to determine the precise timing of the injuries. Dr. McCormick also opines that such injuries commonly occur with CPR, and cites extensive medical literature to that effect.

It is unlikely that anyone will ever know definitively what caused the rib and liver injuries. What is known, however, is that CCA cooperated fully with all law enforcement investigations into the death, and that CCA cooperated fully with the Richardson family in the civil litigation. It is known that the Richardson family voluntarily dismissed its civil actions against the four corrections officers who were under indictment. It is known



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that the Richardson family and CCA settled the dispute over the exact causes of the death and CCA's liability, if any, in connection with those possible causes. It is known that the District Attorney General met with both CCA's and the family's medical experts. Last, it is known that the District Attorney General, who had access to the medical examiner's opinions and all of the police investigatory materials relating to this matter, then dismissed the charges against the four corrections officers.

Unfortunately, the medical findings by both the family's and CCA's experts do not permit a definitive conclusion as to how Ms. Richardson died. In my testimony to the Committee, I relied in good faith on these opinions. My opinion that there is substantial uncertainty regarding the cause of Ms. Richardson's death is also shared by the lead lawyer for the Richardson family in his letter to the Committee. As CCA's lawyer, I regret that this uncertainty leaves a cloud over CCA; however, I know that the far greater tragedy is that the children of Estelle Richardson will likely never know exactly why their mother died.

2. **Recusal Issue**

I reiterate that, though I will completely divest myself from my remaining financial interest in CCA, I will recuse myself from all cases involving CCA for an extended period of time after my divestment. That recusal would also cover officers and employees of CCA being sued for their actions relating to CCA. On any recusal decision, I will, of course, abide by the then-current statutes and Code of Conduct for United States Judges to ensure both that there is no actual or apparent partiality and that the litigants receive due process of law.

In response to your question concerning how long this "extended period of time" would be, I simply cannot answer precisely today; however, in no event would that period be less than five years. Though I am aware that some judges have established defined time periods before they will hear cases involving their former law firms, some also recuse themselves for the duration of their careers. To me, some of the critical issues with respect to my recusal from CCA cases would include the following factors: the length of time since complete divestment from CCA; whether senior management of CCA is comprised of people with whom I worked; whether any such matter could still relate to facts and circumstances that arguably may have been known to me while at CCA; and whether sufficient time has passed that the bar and public have ceased to perceive me as a zealous advocate for CCA.

Facts outside of my control could have an impact on my assessment of these issues. Two hypothetical situations may help illuminate this thought: What if CCA were acquired by a private equity firm and the current executive management were completely replaced and the corporate headquarters relocated, but two prisons remained in the Middle District of Tennessee, run by wardens I did not know? What if a new management team at CCA divested its prison operations and decided to provide information technology consulting services to public prison systems? I am hesitant to commit to recuse myself beyond a five-year minimum, as these factors beyond my



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control could shape my analysis of the recusal issue. I want to assure you that I will be driven by a desire to err on the side of recusal with this issue.

With respect to the attached PCI materials concerning the administration of justice issues allegedly raised by this recusal, I believe we fully discussed this matter at the hearing. Whether the number of cases filed against CCA since 2000 is 165 (as one press source has noted) or more than 400 (as PCI contends), that number must be seen within the context of a judicial district in which approximately 15,000 total cases were filed in that same period. Many of those filings against CCA may also have been dismissed quickly (in answering questions for Senator Kennedy, I have determined that more than 100 cases apparently filed against CCA since 2000 were dismissed on the day they were filed, without being referred to a district judge). My recusal will not impose a "substantial burden" on the other district judges if I am confirmed.

3. **Objectivity in Prisoner Cases**

I expressed at the hearing my view that all civil rights lawsuits, including inmate lawsuits, deserve a fair hearing. I reiterate my support of the right of inmates to assert civil rights claims. If confirmed as a judge, I will strive to be fair and impartial and to fulfill my sworn duty to the Constitution and laws of the United States in all cases, including those brought by inmates.

At the hearing, I had an opportunity to provide context for the single quotation on which PCI relies to assert that I would not be fair to inmate lawsuits. Furthermore, PCI's own presentation notes that I have authorized substantial payments to inmates who brought meritorious claims against CCA. I clearly know that there are serious, meritorious inmate lawsuits.

I think it important for you to know that my exposure to corrections systems over the years has made me very much aware that there are, in fact, individuals in the corrections field who commit grievous crimes against inmates – ranging from physical abuse to sexual exploitation. Indeed, it is my personal belief that some individuals may be attracted to careers in corrections because they seek to control and exploit others, and, no matter how careful a corrections employer is in attempting to screen out such individuals, some may wind up being hired. I also know that some corrections officers become compromised by simple errors in judgment, and that those errors can have terrible consequences.

I have also seen first-hand the good that can come from corrections. I remember encountering an inmate at a facility who tied beautiful flies for fishing. The delicacy and precision of his work caught my eye, even though I had never before fly-fished. We talked about how he became interested in that hobby; how long it took him to tie various flies; the names of the flies; and, ultimately, why he was in prison, when he hoped to get out, and what his dreams were for the future. I have likewise met former inmates who now work for CCA as counselors, who have movingly described their rehabilitation by the corrections system. Experiences like this have allowed me to see the humanity of



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those who are, and have been, incarcerated, and have convinced me that the hope of rehabilitation must be carefully nurtured in environments that can be difficult.

In private practice, I saw a jury simply refuse to credit the testimony of a former inmate, who was my client, in spite of the fact that the corrections officials involved were effectively impeached and lacked credibility themselves – at least in my judgment. So I am aware that many in our society may never be willing to believe an ex-inmate, much less give that person a fair shake.

In short, I think my experiences will make me particularly sensitive to issues raised by inmate lawsuits. I think my exposure to the corrections arena has given me an awareness of the risks posed to those inmates. I regret that the discussion of a particular case at our hearing, as opposed to my general experiences while at CCA, made it difficult for me to express some of my personal convictions, and I appreciate this opportunity to share these thoughts with you.

Of course, you need not rely solely on my personal assurances on this issue. There are other, more objective actions that I believe help demonstrate my personal commitment to the humane treatment of inmates:

- Volunteering to serve as an appointee of the National Prison Rape Elimination Commission;
- Defending the civil rights of an inmate in a lawsuit against a Tennessee Department of Corrections warden and other staff;
- Instituting an aggressive, new quality assurance program while at CCA to promote inmate welfare and ensure high-quality operations;
- Settling meritorious inmate lawsuits for substantial monetary awards; and
- Implementing CCA's first corporate compliance program and drafting its first Code of Ethics and Business Conduct, which includes standards of conduct to protect inmates and provides for anonymous reporting by employees of possible mistreatment of inmates by staff.

Finally, long prior to this nomination, when commenting on my visits to corrections facilities operated by CCA, I made the following statement:

> [T]here is a human dimension to our business, not just for our employees, but also the inmates entrusted to our care. So you're aware, every day, that this company has to conduct itself with absolute integrity, because the lives of the people we're housing depend on it, the lives of the people who work for us depend on it, the lives of those outside of our facility who depend on us to protect them depend on it. So you're acutely aware of that dimension and of the good that can come from corrections.

Greg Land, "No More Get Out of Jail Free," GC South October 2005 at 21.



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4. **Protecting Privileged Information**

At the hearing we discussed an after-action report concerning the hostage-taking incident at the Bay County Jail in 2004. In reviewing the PCI materials you have attached with respect to the Bay County hostage report, PCI does not assert that withholding any such after-action report was an improper assertion of CCA's rights. In fact, PCI acknowledges that I was "doing my job" as CCA's lawyer.

Your first follow-up question concerns whether the report was provided to Bay County. First, there was never a written report supplied to CCA; the outside counsel to CCA provided an oral report based on the notes and documents prepared in his investigation, and he shared his understanding of what had transpired and his mental impressions surrounding the defenses CCA could make in the litigation likely to result. So, there was not a written report to provide to Bay County. Nevertheless, and at the request of Bay County authorities, CCA did provide a written statement concerning remedial measures that were being undertaken at the Bay County Jail as a result of what had been learned about the hostage-taking episode.

You also ask whether, if Florida authorities conducted their own investigation, such a report would have been protected from disclosure by the work product doctrine. In fact, the Bay County Sheriff's Department and the Florida Department of Law Enforcement conducted their own investigations. So such a report may already exist. Although I am not an attorney licensed to practice in Florida, I believe state agencies may also assert work product protections. See Fla. Stat. Ann. § 119.07(1). In addition, there may be other grounds for withholding such a document under state law. The investigation related to the way in which physical security systems at the facility were defeated by a criminal act, and thus may not be a public record. See Fla. Stat. Ann. § 119.07 (6) (b) (exception for records for "active criminal intelligence information and active criminal investigative information"); Fla. Stat. Ann. § 109.071 (exception for records relating directly to the "physical security of a facility").

In response to your final question in this area, I do generally agree that factual information about a violent incident in a prison should be available to the public regardless of who operates the prison, provided such information does not compromise a criminal investigation or the ability of the prison to operate it securely (as might be the case in discussing how certain physical security features were defeated).

5. **Experience**

As you note, PCI has also raised issues relating to my qualifications. The American Bar Association's Standing Committee on the Federal Judiciary unanimously found me "Qualified" for this appointment.

As discussed at my hearing, while engaged in the private practice of law, I have tried two jury cases, one in federal court as first chair and one in state court as second chair. (I have excluded from this calculation trials handled in General Sessions Court, as



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such trials are bench trials regarding smaller amounts.) In addition, I have handled the appellate argument of a commercial litigation matter. I have been in numerous motion hearings, including evidentiary hearings in federal court, such as hearings in support of temporary restraining orders.

I also believe that I have had other experiences that relate to my ability to serve as a district judge. I served as a law clerk to a distinguished federal court of appeals judge. I also served as counsel to a U.S. Senate committee special investigation, which was an intense experience very much like preparing for a major trial. Most significantly, for more than seven years I have served as the chief legal officer of a major corporation that today employs more than 16,000 people and cares for more than 73,000 inmates. In that role, I have been exposed to a broad and diverse set of substantive legal issues: federal tax issues; state and federal criminal investigations; state and federal employment issues; insurance litigation; federal civil rights matters; federal securities laws issues; multi-jurisdictional litigation; and federal regulatory matters, to name a few. I believe this experience has exposed me to more areas of the law than most traditional litigation practices, and this broad experience would help inform my judgment about the wide diversity of cases that come before a federal district judge if I am confirmed.

I thank you for your letter and for your consideration of these responses.

Sincerely,



Gus Puryear



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SUBMISSIONS FOR THE RECORD

**Mark D. Anselmi**

1924 Parkview - Rock Springs, WY 82901 - (307) 362-2525 - Cell (307) 389-5200

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

July 11, 2007

RE: Nomination of Richard Honaker
United States District Court, District of Wyoming

Dear Senator Leahy:

As a lifelong Democrat, I write this letter in full support of the pending nomination of Richard Honaker as United States District Judge for the District of Wyoming. I am not sure if you remember me, but I remember you well. My father, Don Anselmi, was a long-time chairman of the Wyoming Democratic Party. On one of your trips to Teton County, I took you fishing on Flat Creek. We had the honor of spending time with President Clinton, as well, during his trips to Wyoming. I have been committed to the ideals of the Democratic Party all my life, and remain active in our state party.

As a businessman in Rock Springs, Wyoming – we own and operate the Best Western Outlaw Inn – I first met Richard Honaker in 1980 when he came here to represent a defendant in a highly publicized criminal trial.

It was evident during our initial interactions that Dick was an intelligent, wise, and articulate man with an enjoyable personality. He quickly became a good friend to me and to my family. Our sons attended the same boarding school in Virginia, which allowed our families to spend time together at various sporting events. I have enjoyed watching his children mature – his two daughters being accomplished young ladies.

I have observed Dick Honaker over the years in his capacity as a lawyer and as a state legislator. His ability to think things through rather than follow the latest fads is one of his strongest attributes. He has always been quite thoughtful and, for that reason, I have sought his guidance on a number of occasions. Although he has never been hesitant to state what he believes, he has always been willing to listen intently to opposing views. He and I may or may not agree on various issues; however, he has always respected my position as I have respected his.

Although I would be sad to see Dick leave our community, the qualities he will bring with him in his capacity as United States District Judge will be of enormous benefit to Wyoming and our nation. Thank you for considering my views on this matter which is of great importance to us here in Wyoming.

Respectfully submitted,

Mark D. Anselmi

**Richard J. Barrett, P.C.** **Law Offices**

**Richard J. Barrett**
*Attorney at Law*

**2515 Warren Avenue, Suite 501**
**Cheyenne, WY 82001**

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February 7, 2007

Richard H. Honaker
Honaker Law Offices, LC
214 Winston Drive
P.O. Box 366
Rock Springs, WY 82902

Dear Dick:

Brandi Wilson-White, an attorney in the Justice Department, contacted me a few days ago regarding the U.S. District Court judgeship. She asked me a series of very specific questions about you. We visited for several minutes. I provided detailed responses. She asked several follow-up questions. Suffice it to say that I explained why you would be an ideal federal judge. I emphasized your legal abilities, poise, calm and thoughtful disposition, intellectual prowess, compassion, reliability, diligence, and respect for your fellow man. I compared your potential favorably to the performance of my father on the appellate bench and opined that you would bring honor to the federal judiciary. From a litigant's perspective, I noted that you would be timely and prompt in your work and sensitive to the needs of attorneys and their clients. I predicted that you would move your docket at a brisk and efficient pace without compromising full and fair access to the justice system. I opined that you have the skill, talent and intellect to be one of the finest trial judges in the country. I gave specific examples of how you have proved to be a difference maker in your professional and personal life.

I was asked whether your pro-life efforts would make you a target of pro-choice activists during confirmation hearings. I observed that you are so highly respected by people of every political stripe, including colleagues and legislators, an attack by pro-choice groups would backfire. I expressed my respect for your pro-family efforts in the legislature, and I noted that you were widely admired by pro-choice and pro-life legislators on both sides of the aisle. I stated that we you would excel on the bench precisely because of your convictions and principles. I predicted that pro-choice forces would not surface to oppose your nomination. Good luck and God speed.

Best regards,

Rich

Richard Barrett

**UNITED STATES DISTRICT COURT**
DISTRICT OF WYOMING
CLARENCE A. BRIMMER
U.S. DISTRICT JUDGE
2120 Capitol Avenue - Room 2603
CHEYENNE, WYOMING 82001
(307) 433-2160
(307) 634-6072

November 7, 2006

Richard Honaker, Esq.
P.O. Box 366
Rock Springs, WY 82902

Dear Dick:

Thank you for your letter of October 30, 2006, expressing an interest in service on the federal trial bench. I am sure that Judge Johnson, Judge Downes, and I, would certainly appreciate your presence. From the resume that you enclosed, you are clearly qualified, and I certainly think that Senator Thomas (and Senator Enzi, if the senior senator chooses to include him in the decision) will want to consider your application. You shouldn't feel inadequate in any way; your experience in criminal litigation is undoubtedly greater that I had at the time of my appointment.

I would be glad of the opportunity to write a letter to the Senator on your behalf. But, other applicants have also asked me to do just that. I have not agreed to do so, however, because I think that the decision of the Senator as to the name that he recommends to the President is basically a political decision. A selection of appointees has always been regarded in that manner. Of course, the federal judiciary is prohibited from taking a stand in politics. Since such a letter would apparently be interpreted that way by the public, I have decided that I'd better not do that and have declined the request of others, as I must do also in your case.

However, in view of your obvious qualifications I urge you to submit your application and to submit other endorsements with it. Wishing you good luck in that endeavor, I am,

Sincerely yours,

CLARENCE A. BRIMMER,
U.S. District Judge

CAB:cjt

**UNITED STATES DISTRICT COURT**
DISTRICT OF WYOMING
CLARENCE A. BRIMMER
U.S. DISTRICT JUDGE
2120 Capitol Avenue - Room 2603
CHEYENNE, WYOMING 82001
(307) 433-2160
(307) 634-6072

April 3, 2007

Richard H. Honaker, Esq.
214 Winston Drive
P.O. Box 366
Rock Springs, WY 82902

Dear Dick:

I returned last night from nearly a month in Rochester, Minnesota, where my wife and I were going through the Mayo Clinic and have learned from the accumulation of papers that you now have been nominated by the President to fill my position on the United States District Court of Wyoming. Congratulations on this attainment. I plan to call you about it but want to put in writing formally my views that you are very well-qualified for the position and should and will be confirmed by the Senate.

My staff and I will be more than happy to assist you in anyway that we can during this long process.

With hearty congratulations and all good wishes for a speedy confirmation, I am,

Sincerely yours,

CLARENCE A. BRIMMER,
United States District Judge

CAB:cjt

**JACQUELINE K. BROWN, ATTORNEY**
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442 South Park Street
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February 7, 2008

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

The Honorable Arlen Spector
Ranking Member
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

Dear Senators Leahy and Spector:

I am a practicing attorney in Casper, Wyoming. I was very pleased to learn that the Senate will be proceeding with hearings on Richard Honaker's nomination to be a Wyoming Federal Judge.

Wyoming is a big state with a small population. Thus, it is like a small town. We do not have that many attorneys in the entire state, thus, we all tend to know each other. In Wyoming your business is made or broken by your reputation. I have been practicing here for over 8 years.

Richard Honaker is known as a principled, intelligent and fair attorney who would make an excellent federal judge. I would strongly recommend that you confirm his nomination. He will serve the judiciary well.

Thank you for your time and attention to this matter.

Sincerely,

Jacqueline K. Brown
Attorney at Law

JOSEPH B. BLUEMEL
ATTORNEY AT LAW
510 SAPPHIRE STREET
P .O. BOX 47
KEMMERER, WYOMING 83101
TELEPHONE: (307) 877-9091 FACSIMILE: (307) 877-9092

July 11, 2007

Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary United States Senate
Washington, DC 20510

*By Fax To: 202-224-9516; Original via U.S. Mail*

Re: Appointment of Richard H. Honaker to be United States District Judge for the District of Wyoming

Dear Senator Leahy:

I am writing to express to you my support, both individually and as president of the Wyoming State Bar, for the appointment of Richard H. Honaker to be United States District Judge for the District of Wyoming. I am a lifelong democrat and a solo practitioner in rural Wyoming who was honored to have been elected this bar position nearly two years ago. As you probably are aware, Wyoming is a small state in many ways. I often tell folks that Wyoming is a small town with a very long main street because I consider people who live in other communities throughout Wyoming to be my neighbor. The neighbor analogy is even more true when discussing fellow members of the Wyoming Bar. It is true that in the practice of law in Wyoming if one attorney does not personally know another attorney that is encountered in a matter they call a friend of theirs in that area and find out about the opposing counsel.

I consider Richard Honaker to be my neighbor even though he lives nearly 100 miles from me. As with most of our neighbors we develop personal relationships over the years. By the fact that he and I are both honored to be members of the same profession we are even closer neighbors. Our personal relationship began when I began practicing law as a prosecutor and Richard was doing a lot of criminal defense work in his private practice. Richard's successful practice evolved and during that evolution he has gained a reputation in the state as being a top flight trial lawyer who has tried cases of nearly every type. My "neighborly" relationship with Mr. Honaker has evolved over the more than twenty years I have been practicing law from one where he and I were on opposite sides of litigation to me succeeding Mr. Honaker as president of the Wyoming State Bar and at times, working with him or consulting with him on legal matters.

As is true with neighbors and attorneys, Richard and I do not always agree on every issue or point of law. Even though Richard is a republican and I am a democrat, I wholly support his nomination and appointment to serve on the Federal Bench. Richard is a main stream Wyoming

lawyer who has been a part of Wyoming's Main Street of lawyers. It is my opinion he is one of the best and the brightest of Wyoming's attorneys. He has diligently defended the constitutional and legal rights of his clients in both criminal and civil matters while upholding the integrity of our profession in its truest sense. I have reappointed him to serve on the Board of Professional Responsibility to police Wyoming's lawyers. I have a great deal of respect for Richard Honaker and support his appointment to the Federal Bench as do all the members of the Wyoming State Bar I have visited with concerning his appointment. I am not aware of any members of the Wyoming legal community who have any objection to Richard's appointment.

It is my opinion that should you and your colleagues approve and confirm Mr. Honaker's appointment as United States District Judge for the District of Wyoming he will benefit the people of Wyoming and any party who appears in his courtroom. I am confident that Richard Honaker has the demeanor and attitude, as well as acumen and intelligence to be a fine District Court Judge. If I may be of any assistance to you, your staff or the judiciary committee in the proceedings concerning the appointment of Mr. Honaker, I would be honored.

Sincerely,

JOSEPH B. BLUEMEL

JBB/dah
cc: Senator Enzi
Senator Barrasso

**CASPER LAW OFFICE, LLC**
**123 W. 1ST ST., STE. 125**
**P.O. BOX 1986**
**CASPER, WYOMING 82602**
**(307) 472-5150**
**FAX: (307) 472-3390**

**STACY E. CASPER**

February 8, 2008

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Comittee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

RE: R. Honaker Judicial Nomination

The Honorable Patrick J. Leahy:

I am writing in support of the appointment of Richard Honaker to the federal bench. Although politically I do not necessarily agree with his political views, he is a well-known and well-respected attorney among the Wyoming bar. As a member of the Wyoming Trial Attorneys Association, I am aware that Dick has been very involved in trial practice and has created an excellent reputation for being a fair, knowledgeable, hard working trial attorney who would make an outstanding trial judge. Thanking you for your attention to this matter, I remain

Sincerely,

**CASPER LAW OFFICE, LLC**



Stacy E. Casper

SEC:mei
CC: File

Casper Star-Tribune, Mar. 28, 2007

LETTERS&COMMENTARY

Wednesday, March 28, 2007 Letters editor Daniel Sandoval can be reached at (307) 266-0549,

## Colleague knows nominee's mettle

**Editor:**

I would like to comment on the response by some to the announcement of the selection of Dick Honaker as the nominee for U.S. district judge for Wyoming. I have noticed an effort to measure his suitability for this post solely on his position on an abortion bill 16 years ago when he served in the Legislature. This approach does a grave injustice to him, to our state and to our society. How many times have people bemoaned the lack of willingness to serve in important elected positions because of personal attacks on account of honest differences of opinion?

I served in the state House in 1991 along with Mr. Honaker. I was on the other side of the abortion issue from him. I also observed his work on scores of other issues in hundreds of other bills. He was a dedicated, intelligent and articulate legislator. He was one of the most thoughtful and decent people I served with. To measure this man based on his position on a single issue, no matter how divisive that issue may be, is unfair and shortsighted.

I was very pleased to see that Dick Honaker had been selected to this position. I believe he has the potential to be one of the finest trial judges ever to serve in this state. His commitment to fairness is second to none. I can truthfully say that there is no person I would rather have as a judge on a case, no matter what side of any issue I was on, than Dick Honaker.

**ERIC M. ALDEN, Wheatland**

**COTTON LAW OFFICES**
**C. John Cotton, Attorney at Law**
**222 South Gillette Avenue**
**Suite 601**
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February 7th, 2008
**Via Federal Express Tracking No. 8555 8732 1938 0200**

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
U.S. Senate Committee Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

RE: ***Appointment of Richard H. Honaker as United States District Court Judge for the District of Wyoming***

Dear Sirs:

I would also like to add my voice to the numerous Wyoming attorneys who urge the speedy appointment of Richard H. Honaker as the new United States District Judge for the District of Wyoming. Mr. Honaker has impeccable credentials and character, and has a temperament and demeanor well suited for that of a District Judge. Mr. Honaker has had extensive experience in both criminal and civil law and would be a tremendous asset to the Judicial system in this district.

Sincerely,

C. John Cotton, Esq.

CJC/sh
cc: file

# CHAPMAN VALDEZ

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**Tom Sedar**


February 7, 2008

Patrick J. Leahy
Chairman, U.S. Senate Committee
On the Judiciary
And
The Honorable Arlen Specter
Ranking Member U.S. Senate Committee
On the Judiciary
152 Senate Dirksen Building
Washington, DC 20510

Re: Richard H. Honaker

Dear Senators Leahy and Specter:

I've had the privilege of knowing Dick Honaker since we began law school in Laramie, Wyoming in 1973. During law school, Dick and I worked together for the State Planning Office of Wyoming Governor Ed Herschler and co-authored a Wyoming handbook on how Wyoming communities could apply for and receive grants for infrastructure development. Upon our graduation from law school, Dick and I remained friends and colleagues. When I became the first state wide public defender for the State of Wyoming in 1978, Dick was my appellate counsel for the Wyoming Public Defender Program and he and I authored the Wyoming Public Defender's Manual, parts of which are still in use by Wyoming public defenders today 30 years later. I was pleased to recommend Dick as my replacement as State Public Defender and he became the second State PD in 1980. He went on to become president of the Wyoming Trial Lawyers Association and the Wyoming State Bar Association. He has a wide variety of experience and practice.

Dick is an honorable, talented and compassionate lawyer. He has the training, education, experience, and most importantly, the temperament to be a federal jurist.

I have had the honor and privilege to be around Dick and his family for over 30 years now and can attest to his good character, good judgment and good values. We have been blessed in Wyoming with talented, fair and experienced judges. Dick will fit nicely into that mold.

As a trial lawyer, Dick has been very successful. As a member of the Wyoming Legislature, he was always well respected and thoughtful. As a man, a husband, a father and friend, Dick has the love and admiration of all of us who know him well.

I humbly request that you give Dick fair consideration and recommend him to the whole senate for confirmation.

You will be able to look back with pride at this judicial choice if you approve Dick Honaker's appointment.

With best regards, I am

Sincerely,

Frank R. Chapman
FRC/mh

Dear Editor,

The coverage of the nomination of Richard Honaker to the federal district court for Wyoming opens some interesting avenues of inquiry. What has been missed, in my judgment, is a deeper sense of the man, a feel for his judicial temperament, some knowledge of him both personally and professionally. I write to provide some perspective for each of these elements, as I have known and worked with him for over 25 years.

Dick Honaker is unequivocally a superb choice to join the federal bench. The misdirected and harsh comments concerning the abortion issue and his legislative career miss their mark. His duty as a legislator was to advocate issues of concern to him and to his constituents. He did that job with passion and vigor. His duty as an attorney is similar: to advocate for his clients with every ounce of energy at his command. He is known throughout the legal community as a consummately professional lawyer.

A Wyoming federal trial judge is highly unlikely to even hear an abortion case. Even if he or she did, the losing party would appeal to the Tenth Circuit and beyond. A federal trial judge just does not create substantive constitutional law. The docket will be 65 percent criminal cases and 35 percent civil cases. I would be surprised if there were three abortion cases before the Wyoming federal courts in the last three decades.

What matters most for the federal bench is how Dick Honaker will make his decisions. There his personal attributes blaze into light. He is a deep thinker and intellectual. I have spent hours in his personal library, whose shelves are covered with books from a lifetime of reading and collecting legal references – biographies of great justices and leaders, an original copy of the Federalist papers, and histories of western civilization.

Dick Honaker will approach the law as the citizens of Wyoming would wish, with a reverence for the constitution, and strict adherence to precedence and the law as written by Congress. There is no room in this approach for imposition of his personal views, however strongly held. He is calm and has an equanimity about him that will lend itself to the deliberative process, and he has an essential fairness that we would all seek in a judge.

To suggest that his legislative career somehow disqualifies him for the bench is to say that we want judges made from milquetoasts, who have never made their mark or entered the arena. Further, it is to ignore his brilliant mind, his extensive legal training, his superb education and even more, his dedication to his craft. He is so highly respected that he has trained members of the legal profession in other countries, and will next do so in Portugal.

Dick Honaker is one of Wyoming's prodigal sons, educated in Laramie and returning home from Harvard to serve Wyoming people seeking justice. He is willing to sacrifice to serve, giving up a well established law practice to take on the challenges of administering justice. To sully his good name with ill informed speculation is to make a mockery of the process by which we qualify judges for the bench. Somehow we have allowed national partisan and single issue rancor to distort, right out of the chute, a sense of fairness for this nominee, a full sense of the full measure of the man. Dick Honaker is at the peak of his prowess, fit and ready to join the judiciary.

Whatever issue of the day may momentarily color our perceptions of the judiciary, the truth is that the rest of the world envies America's system of justice, which rests on a foundation of great judges. From the founding of the Republic, our federal judges have assured the survival of our three branch system. Wyoming will be proud to have Dick Honaker serve in these esteemed ranks.

(s) Fred Parady

Daily Rocket-Miner
TUESDAY, APRIL 3, 2007

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United States Senate

WASHINGTON, DC 20510–5004

MICHAEL ENZI
WYOMING

COMMITTEES:
Health, Education, Labor and Pensions
*Ranking Member*
Banking, Housing and Urban Affairs
Small Business
Budget

February 27, 2008

Honorable Patrick J. Leahy
Honorable Arlen Specter
Committee on the Judiciary
The United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510-0001

Dear Chairman Leahy and Ranking Member Specter:

I appreciate your decision to hold a hearing on the nomination of Richard Honaker to be a District Judge for the District of Wyoming. I would like to submit these letters of support for the nomination of Mr. Honaker for his official nominations record. I made this request when I testified at the February 12 hearing to introduce his nomination. The letters show a broad array of support from both Democrats and Republicans in our state and make it clear that Mr. Honaker is well respected and well qualified to serve on the federal bench. If you require further information, please do not hesitate to contact me.

Thank you for your consideration of Mr. Honaker's nomination.

Sincerely,

Mike Enzi

Michael B. Enzi
United States Senator

MBE:jb

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February 8, 2008

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, DC 20510

Re: Richard Honaker

Dear Senator Leahy and Senator Specter:

Richard Honaker would be an excellent District Judge. I am a Democrat and I whole-heartedly support him without reservation. I have known him and associated with him throughout my thirty-two years of law practice. During that time, I have served as an assistant to Senator Gale McGee (D-Wyoming), the treasurer in the campaign of Senator Ed Herschler (D-Wyoming), and in other roles in Wyoming's Democratic Party. Throughout my legal and political career, I have always found Richard Honaker to be fair-minded, even-handed and highly ethical.

If I may provide further information, please telephone me at 307-634-4000.

Sincerely,

James E. Fitzgerald

JEF/jp

# DAVIS & CANNON

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HAYDEN F. HEAPHY, JR.
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July 16, 2007

The Honorable Patrick J Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Fax (202) 224-9516

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Fax (202) 224 9102

Re: Richard Honaker

Dear Senator Leahy and Senator Specter:

I am writing you about the nomination of Richard Honaker as Judge for the United States District Court for the District of Wyoming. I have represented parties on the opposite side of Dick in two rather hotly contested cases. I disagree with his position on reproductive rights, yet I support his nomination. He has extensive experience as a trial attorney, a good knowledge of the law, and a respect for the rule of law. He appreciates the importance of running a court with efficiency and compassion, in the great tradition of Judge Clarence Brimmer, whom he would be replacing. I believe Dick Honaker has the qualities that would make him a good judge.

Sincerely,

Kate M. Fox

Kate M. Fox

Cc: Tessa L. Platt

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*ADMITTED IN COLORADO
**ADMITTED IN MONTANA

E. E. LONABAUGH
(1861-1936)

A. W. LONABAUGH
(1896-1971)

RETIRED:
E. E. LONABAUGH

February 6, 2008

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

***RE: Judicial Nomination***
***Richard Honaker***

Dear Senators Leahy and Specter:

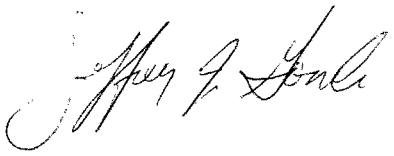
I am writing in support of Richard Honaker being confirmed as the next Federal District Court Judge for the District of Wyoming.

I have known Richard for over twenty (20) years. Quite honestly, I cannot say enough good about him. He is extremely bright, and a very good lawyer. More important attributes in my mind, however, include things like being very loyal, dedicated, and committed to his family, community, country, and having a genuine love and concern for people in general. In addition to being a successful attorney, he and his wife have raised a beautiful family. And, he has also found time to do his civic duty, serving in the State Legislature, and in other capacities in his community.

Richard has prepared well for this moment, yet another opportunity to serve all of the citizens in Wyoming. He has all of the gifts, talents, and attributes to be an exceptional, kind, wise, and compassionate judge. I cannot think of a better nominee to fill this important assignment.

Very truly yours,

LONABAUGH AND RIGGS, LLP



By: Jeffrey J. Gonda

JJG

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SCOTT W. MEIER, P.C. *
JOHN M. WALKER

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HOWARD V. SCOTLAND, III
IAN D. SHAW

HAROLD E. MEIER
MARY A. THRONE
Of Counsel

PARALEGALS
Cecilia Gutierrez
Linda Huckfeldt
Tammy Gamino

*ALSO ADMITTED IN COLORADO

July 13, 2007

The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate
Washington D.C. 20510
**Fax 202-224-9516**

RE: Nomination of Richard H. Honaker
United States District Court, District of Wyoming

Dear Senator Leahy:

I am writing in support of Richard H. Honaker to the position of District Court Judge for the District of Wyoming. I have known Dick Honaker for approximately 30 years. He is a highly regarded trial lawyer, respected member of his community, and a committed father and husband. I believe Dick Honaker possesses those qualities necessary to serve in this most important role as a federal trial judge.

My experience with Dick Honaker is based primarily upon my dealings with him as a member of the Wyoming State Bar. He was an outstanding President of the Wyoming State Bar during his recently concluded term in 2003. In addition to this leadership role, Dick has also served as a President of the Wyoming Trial Lawyer's Association, and the Wyoming Chapter of the American Board of Trial Advocates. Dick continues to serve the State Bar Association in his current assignment as Vice Chairman of the Wyoming Board of Professional Responsibility.

Dick Honaker has earned the respect of the practicing bar of this State because of his high standards of competence, integrity, and professionalism. Over the course of his 30 years as an active trial lawyer in both Federal and State court, Dick has tried numerous cases concerning tort, contract, and employment law issues.

Our firm has had litigation with Mr. Honaker over the years involving primarily tort and contract claims which were handled to the high standard of quality and integrity reflective of Dick's practice of the law. Throughout his practice, Dick Honaker has consistently demonstrated a strong work ethic, a passion for trial work and a deep appreciation for our civil and criminal justice system.

In my opinion, Dick Honaker is extremely well-qualified to serve this Country as District Court Judge for the District of Wyoming because of his vast trial experience, intelligence, integrity, and sound judgment.

In addition to his extensive experiences in the courtrooms of this State as a trial lawyer, Dick Honaker has also served the State with distinction as a former member of the Wyoming Legislature. His experience as a legislator adds to the overall depth of his experiences and qualifications to serve as a member of the judiciary.

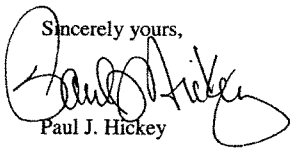
In all of my professional dealings with Dick Honaker over these past 30 years, I have found him to be balanced, thoughtful, insightful, and compassionate. He will discharge the responsibilities of the office of Federal Judge with distinction.

I have learned of some opposition to Dick Honaker's appointment from some who believe positions he may have taken some years ago as a legislator regarding abortion should disqualify him from appointment. I disagree. I know Dick Honaker will apply controlling law to the cases pending before him. He fully understands the principle of *stare decisis* and his opinions will be well-based in law, logic, and common sense.

I urge you and the members of your committee to vote in favor of his nomination and recommend his confirmation to the full Senate at your earliest opportunity.

Thank you for the great service that you provide not only the State of Vermont but to our Country.

Sincerely yours,



Paul J. Hickey

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JOHN R. HURSH

LEGAL ASSISTANT
Marie Wilson

February 7, 2008

The Honorable Patrick J. Leahy
Chairman

The Honorable Arlen Spector
Ranking Member

U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

Re: United States District Court Judge for the District of Wyoming Nomination - Richard Honaker.

Dear Senators Leahy and Specter:

I am given to understand that the nomination of Richard Honaker as a United States District Court Judge for the District of Wyoming has been called up for hearing before the Senate Judiciary Committee on February 12, 2008.

Please accept this letter as one of recommendation for Mr. Honaker to the position of United States District Court Judge for the District of Wyoming. I have known Richard Honaker for many years both personally and professionally and he would be a fine Federal Judge. On working with him on cases and while I was a member of the Judiciary Committee of the Wyoming House of Representatives, I found him to be extremely intelligent and very fair minded. He has the type of temperament that we need in a Federal Judge and I would respectfully request your favorable consideration for his nomination as made by our late Senator Craig Thomas.

Thank you for your consideration.

Yours truly,

John R. Hursh

# UNITED STATES DISTRICT COURT
# DISTRICT OF WYOMING

Alan B. Johnson
U.S. District Judge

(307) 433-2170
Fax (307) 433-2175
*wyojudgeabj@wyd.uscourts.gov*

October 26, 2006

Mr. Richard H. Honaker
Honacker Law Offices, LC
P.O. Box 366
Rock Springs, WY 82901

Re: Expression of Interest

Dear Dick:

Thank you for considering me for your application expressing your interest in serving Wyoming as a member of the federal judiciary. You would bring so much to the Court with your fine intellect and broad experience. I have enjoyed my experiences here and in the First Judicial District very much, and I know that you would feel the same.

I have prepared a brief letter for your use, if you wish, for inclusion in the packet that you send forward to the Senator. I hope that your cover letter cover some of the same thoughts that you have expressed in the cover letter to me. I couldn't agree more.

Best wishes to Shannon and to you. Your interest in the bench is and should be good news to the bar and to the citizens of Wyoming. I know that it is good news to me.

Yours very truly,

ALAN B. JOHNSON
United States District Judge

ABJ/abj
Attach

2120 Capitol Avenue, Room 2242 ✦ Cheyenne, WY 82001

# UNITED STATES DISTRICT COURT
# DISTRICT OF WYOMING

Alan B. Johnson
U.S. District Judge

(307) 433-2170
Fax (307) 433-2175
*wyojudgeabj@wyd.uscourts.gov*

October 26, 2006

The Honorable Craig Thomas
c/o Ms. Bobbi Brown, State Director
Office of Senator Craig Thomas
P.O. Box 22201
Casper, WY 82602

Re: Application of Richard Honaker

Dear Senator Thomas:

Richard "Dick" Honaker has informed me of his plan to submit his expression of interest to be considered to fill the vacancy created upon Judge Brimmer's acceptance of senior status. My acquaintance extends back approximately thirty-one years to the period when he worked as an Assistant Attorney General. My respect for the capacity of Mr. Honaker to assume a leadership role grew when he was appointed by Governor Herschler to serve as the State's second Public Defender, supervising the training and assignments of 30 attorneys spread over Wyoming providing criminal defense for the indigent in the trial courts and Supreme Court. Dick was 3 years out of law school at the time of this appointment. During this period I was privileged to have been asked to perform the wedding ceremony for Dick and Shannon at her parent's home, north of Cheyenne.

After experiencing State government Mr. Honaker embarked upon a successful and productive law practice centered at Rock Springs. That practice has provided opportunities for Dick to represent Wyoming litigants at all levels of courts in the State and Federal court systems. Despite the demands of a busy practice he has served as President of the Wyoming State Bar and President of the Wyoming Trial Lawyers, each position requiring years of devoted effort and hard work. Dick has more recently turned his considerable talents to writing and teaching, areas that are both important for judicial office.

With his remarkable intellect Mr. Honaker is a thoughtful and considerate listener. He presents a warm and attentive demeanor to all persons, without regard to their station



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00465 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

47450.407

in life. Professionally he exhibits a devotion to the rule of law and a commitment to its application to resolve the issues of the day.

Shannon and Dick have raised an accomplished and talented family, possessing strong Wyoming values and virtues.

Yours very truly,



ALAN B. JOHNSON
United States District Judge

ABJ/abj

2120 Capitol Avenue, Room 2242 ✦ Cheyenne, WY 82001

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TIMOTHY J. KIRVEN
BENJAMIN S. KIRVEN

WILLIAM J. KIRVEN (1920-2005)

MAILING ADDRESS:
P.O. BOX 640
TELEPHONE: 307-684-2248
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February 6, 2008

Honorable Patrick J. Leahy, Chairman
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

Honorable Arlen Specter, Ranking Member
U.S. Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

RE: Nomination of Richard H. Honaker

Gentlemen:

I am writing with respect to the nomination of Richard H. Honaker for United States District Court Judge for the District of Wyoming. I have known Dick Honaker for more than twenty years as a colleague and fellow member of the Wyoming State Bar. I have also had the privilege of serving with Dick Honaker as an officer of the Wyoming State Bar.

Dick Honaker epitomizes the type of individual with character, integrity, and superlative skills as a lawyer that Wyoming has come to expect to have on the federal bench. These traits and skills would serve the federal judiciary well as Dick Honaker is an individual meticulous in his research and communication abilities. He possesses fairness and integrity that is beyond reproach.

Dick Honaker has the qualities and the skills to serve the District of Wyoming with distinction. I wholeheartedly endorse his nomination and ask you to consider it favorably.

Sincerely,
KIRVEN and KIRVEN, P.C.

Timothy J. Kirven

TJK:nmb

HATHAWAY & KUNZ, P.C.
HON. STANLEY K. HATHAWAY (1924-2005)
BRENT R. KUNZ • RICK A. THOMPSON • MICHAEL ROSENTHAL • JOHN E. MASTERS
ASSOCIATES: KEVIN D. BOHNENBLUST • MELINDA S. MCCORKLE

November 8, 2006

The Honorable Craig Thomas
United States Senator From Wyoming
c/o Ms. Bobbi Brown
Dick Cheney Federal Building
100 East B Street, Suite 2201
Casper, Wyoming 82601

Re: Recommendation of Dick Honaker to be Federal District Court Judge

Dear Craig:

Congratulations and best wishes to you on your reelection. By overwhelming numbers, the People of Wyoming have once again affirmed their faith and confidence in your representation of Wyoming and the United States. Your service and contributions are gratefully appreciated.

In your role as Wyoming's Senior Senator, and as you did with your previous recommendations that led to the appointments of the U.S. Attorney, Marshall, and 10th Circuit Court of Appeals Judge, you will make the recommendation to the President for the appointment of Wyoming's next Federal District Court Judge. Your use of the Wyoming Bar Advisory Committee is prudent. I know that you will get excellent advice from them. I compliment you on your wisdom in your previous recommendations. I also thank you for your support of the President's nominations to the Supreme Court.

As you consider the numerous candidates who may express an interest in being the next Federal District Court Judge, I respectfully recommend Richard H. Honaker to be your nominee for appointment as the successor to Judge Brimmer. Like Judge Brimmer, Dick has the experience and background to serve in this critically important position. Dick is exceptionally well qualified, and would continue the pattern of excellence of our Wyoming judges.

For close to thirty years, I have been directly involved with Dick in the practice of law in Wyoming. Our experience includes the joint representation of clients, litigating against one another in the representation of clients, lobbying Dick when he served as a Legislator, working together on Wyoming State Bar issues, and supporting the Wyoming Republican Party. Considering his character and experience, I endorse Dick without reservation to be the next Federal District Court Judge.

Like you, Dick is honest, trustworthy, and ethical in all aspects of his life. With Dick, what you see is what you get. He epitomizes the virtues that are so vital to protect and enhance our freedom and liberty. Dick is a steady, consistent, diligent, and reliable "work horse." He

SENDER'S E-MAIL ADDRESS: BRENT@HKWYOLAW.COM
2515 WARREN AVE., SUITE 500 • P.O. BOX 1208 • CHEYENNE, WY 82003-1208 • 307.634.7723 • FAX: 307.634.0985 • WWW.HKWYOLAW.COM
LEGAL ASSISTANTS: DIANA M. GORMAN • MICHELLE D. OLSON, CLA • HOLLY A.H. KURZ

always gets the job done. Dick is eminently blessed with common sense. He is soft spoken, but firm. Dick is thoughtful, but decisive.

As you have seen firsthand in your government service, there is a trend for the Judiciary to usurp the constitutionally mandated Separation of Powers. Consistent with the philosophy you share with President Bush, Dick will interpret the law and not make it. Dick believes that Judges should apply the facts to the laws established by our State Legislatures and Congress.

Dick has been very successful in his private practice of law. Despite his success as one of Wyoming's best attorneys, and the productive and financially rewarding years that are ahead of him, Dick is willing to give up his practice to serve our country. He is not interested in the job because of the prestige of being a Judge, the lifetime appointment, the compensation or the retirement benefits. Dick is a candidate to be appointed because he recognizes a duty to share knowledge, experience, and time to assure the continued viability of our great nation.

At your convenience, I would welcome the opportunity to share with you my detailed experiences with Dick, and additional reasons for my recommendation of him to you.

Thank you for the privilege of making this recommendation. My thoughts and prayers are with you in your extraordinary representation of Wyoming and our nation.

Sincerely,

Brent R. Kunz

BRK/dmg

HK WYO LAW
HATHAWAY & KUNZ, P.C.
HON. STANLEY K. HATHAWAY (1924-2005)
BRENT R. KUNZ • RICK A. THOMPSON • MICHAEL ROSENTHAL • JOHN E. MASTERS
ASSOCIATE: MATTHEW D. KAUFMAN • LUCAS BUCKLEY

February 8, 2008

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

RE: Nomination of Richard H. Honaker for the position of Federal District Judge for the District of Wyoming

Dear Senators Leahy and Specter:

As a member of the Wyoming State Bar, I urged your favorable consideration of Dick Honaker to be confirmed as a Federal District Judge for the District of Wyoming. Dick is exceptionally well qualified, and would continue the pattern of excellence of our outstanding Wyoming judges.

For close to thirty years, I have been directly involved with Dick in the practice of law in Wyoming. Our experience includes the joint representation of clients, litigating against one another in the representation of clients, and working together on Wyoming State Bar issues.

Dick is honest, trustworthy, and ethical in all aspects of his life. He epitomizes the virtues that are so vital to protect and enhance our freedom and liberty. Dick is a steady, consistent, diligent, and reliable. He always gets the job done. Dick is eminently blessed with common sense. He is soft spoken, but firm. Dick is thoughtful, but decisive.

I understand that some special interest groups oppose his confirmation because as a legislator and an attorney he advocated positions that are contrary to their political views. These fears are unwarranted. He strongly believes in the Constitutionally mandated Separation of Powers. Dick will interpret the law and not make it. Dick believes that Judges should apply the facts to the laws established by our State Legislatures and Congress.

Dick has been very successful in his private practice of law. Despite his success as one of Wyoming's best attorneys, and the productive years and financially rewarding years that are ahead of him, Dick is willing to give up his practice to serve our country. He is not interested in the job because of the prestige of being a Judge, the lifetime appointment, the compensation or the retirement benefits. Dick is a candidate because he recognizes a duty to share knowledge, experience, and time to assure the continued viability of our great nation.

Sincerely,

Brent R. Kunz

SENDER'S E-MAIL ADDRESS: BRENT@HKWYOLAW.COM
2515 WARREN AVE., SUITE 500 • P.O. BOX 1208 • CHEYENNE, WY 82003-1208 • 307.634.7723 • FAX: 307.634.0985 • WWW.HKWYOLAW.COM
LEGAL ASSISTANTS: HOLLY A.H. KURZ • DAWN D. SWAUGER

Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
On Judicial Confirmation Hearing
February 12, 2008

Today, the Committee holds another hearing to consider President Bush's judicial nominations. I thank Senator Feinstein for agreeing to chair this hearing. It has been especially difficult to schedule given the important matters that have been under consideration before the Senate so far this year. Indeed, the hearing had to be postponed from this morning when a series of Senate votes were scheduled on amendments to the Foreign Intelligence Surveillance Act legislation. We regret the inconvenience to the nominees, their families, and to Senators who wished to attend.

Today's hearing focuses on four nominees for lifetime appointments to the Federal bench— James Randall Hall for the Southern District of Georgia, Richard H. Honaker for the District of Wyoming, Gustavus Adolphus Puryear, IV for the Middle District of Tennessee, and Brian Stacy Miller for the Eastern District of Arkansas.

All of these nominees have the support of their home-state Senators. With this hearing I have fulfilled my commitment to Senator Enzi by including the Honaker nomination in today's hearing despite the controversy that this nomination has generated.

We are building on the progress we made last year in reviewing judicial nominations. In 2007, the Committee reported out 40 lifetime appointments to the Federal courts and the Senate confirmed all 40 of them. That is more than were confirmed by the Republican-led Senate in 1997, 1999, and 2000 when they were considering President Clinton's nominations, and more than the Republican-led Senate confirmed in any of the last three years with a Republican President, in either 2004, 2005 or 2006.

At the end of the Clinton administration, the Republican-led Senate returned to the President without action 17 of his appellate court nominees. I do not intend to duplicate that record any more than I intend to see the Senate pocket filibuster more than 60 of President Bush's judicial nominees, as Republicans did with President Clinton's. We have considered nominations – even those I do not support – openly and on the record.

In the less than three years that I have chaired this Committee during President Bush's administration, the Senate has confirmed 23 circuit court nominations and 140 total Federal judicial nominees. During the four full years Republicans were in charge during the Bush administration the total number of nominees confirmed was just 158.

The Administrative Office of the U.S. Courts currently lists 45 judicial vacancies. Nineteen of them – almost half – have no nominee. In addition, several of the nominees do not have the support of their home state Senators. Of the vacancies deemed by the Administrative Office to be judicial emergencies, the President has yet to send us nominees for eight of them, more than a third. Of the circuit court vacancies, four, nearly a third, are without a nominee and more than half of the current circuit court nominees do



47450.413

not have the support of both home-state Senators.

If this President had worked with the Senators from Michigan, Rhode Island, Maryland, California, New Jersey, and Virginia, we could be in position to make even more progress. Instead we have lost precious time to nominations like that of Duncan Getchell and Claude Allen of Virginia. Those nominations were both withdrawn by the President after months of wasted time and effort.

We have helped cut the circuit vacancies from a high water mark of 32 in the early days of this administration, to as few as 13 in 2007. Contrast that with the Republican-led Senate's lack of action on President Clinton's moderate and qualified nominees that resulted in increasing circuit vacancies during the Clinton years from 17 when he was inaugurated to 26 at the end of his term.

Our work is complicated by our efforts to restore the Justice Department and restock its offices, which were decimated by resignations in the wake of the U.S. Attorney firing scandal. That work on executive nominations has been and remains a top priority.

# # # # #

**PENCE AND MACMILLAN LLC**

**Rebecca A. Lewis**
**1818 Hunters Court**
**Steamboat, CO 80487**
**Phone: 970-879-5177**
**Fax: 307-745-8669**
**E-mail: beckyalewis@aol.com**
**www.pencesandmacmillan.com**

21 July 2007

The Honorable Patrick Leahy
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Arlen Specter
Committee on the Judiciary
United States Senate
Washington, DC 20510

**Re: Richard Honaker**
**Appointee for Federal Judgeship in Wyoming**

Dear Members of the Committee of the Judiciary:

I am writing to support the nomination and to encourage the approval of Richard Honaker as a judge in the U.S. District Court, District of Wyoming.

I have known Mr. Honaker for over twenty years. I am an attorney in Wyoming and have had numerous cases in which he was the opposing counsel. He was always very well prepared and a formidable opponent, yet he was polite and accommodating when appropriate. He was timely in his work, respecting and meeting deadlines. I do not recall a situation where he ever asked for an extension to complete matters required by the Court. He worked hard for his clients, but did so within the rules and, more importantly, did so with respect for other counsel and parties.

I also knew Dick as President of the Wyoming Bar Association. As President, he knew how to lead an organization which is not amenable to being led. He understood the issues of the practice of law in Wyoming, which is different from a lot of states since the legal community is so small and close. That knowledge is also important for a judge.

**Laramie office:**
**501 Garfield Str.**
**Laramie, WY 82073-1285**
**307-745-3434**

**Sheridan office:**
**1101 Sugarview Dr., Ste 200**
**Sheridan, WY 82801**
**307-674-8500**

**Rawlins office:**
**501 West Buffalo**
**Rawlins, WY 82301**
**307-324-5422**

Dick currently is a member of the Board of Professional Responsibility, having been appointed by the Wyoming Supreme Court to that Board. This is the Board that handles ethical complaints against lawyers. I am Bar Counsel which is similar to a prosecutor in a criminal matter. Therefore, I have had an opportunity to see him "judge" the conduct of attorneys and believe he has been decisive, just, and fair.

One of the most important characteristics Dick possesses is that he clearly has the appropriate judicial demeanor. I have never seen him lose his temper, even in very nasty and adversarial cases in which other attorneys were acting less than professionally. Dick always remains calm, but firm in his position.

Dick's political views are quite far from mine, including his support of anti-abortion laws. I disagree with that position, but that does not affect my support for him. I am rather on the liberal side and am a Democrat. I still support Dick. The reason is that I believe he will not let his personal feelings about a case affect his rulings or handling of the case. He will be fair and he will apply the law, whether he agrees with it or not. The key is whether he can apply the law, not whether he agrees with it.

Based on my knowledge of Dick, both personally and professionally, I believe he would be an asset to the Federal judgeship in Wyoming and should be approved.

Very truly yours,

Rebecca A. Lewis

**Laramie office:**
**501 Garfield Str.**
**Laramie, WY 82073-1285**
**307-745-3434**

**Sheridan office:**
**1101 Sugarview Dr., Ste 200**
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**307-324-5422**

STATE OF TENNESSEE
**DEPARTMENT OF HEALTH**
**OFFICE OF THE STATE MEDICAL EXAMINER**
CENTER FOR FORENSIC MEDICINE
850 R.S. GASS BLVD.
NASHVILLE, TN 37216-2640
(615) 743-1801 (Voice)
(615) 743-1890 (Fax)

*Bruce P. Levy, M.D., Chief*
*Medical Examiner*

February 21, 2008

Senator Patrick Lehay
Chair, Senate Judiciary Committee

VIA FAX: 202-228-0861

Dear Senator Lehay:

This is with regard to the nomination hearing of Gustavus Puryear IV to be a federal judge in Nashville.

I serve as the Chief Medical Examiner for the State of Tennessee and the County Medical Examiner for Metropolitan Nashville/Davidson County, positions I have held for the past decade. I am also a board certified forensic pathologist. I personally performed the autopsy on Estelle Richardson, an inmate who died as a result of injuries sustained while a prisoner at a Corrections Corporation of America (CCA) facility in Nashville, TN in 2004.

I was frankly stunned by Mr. Puryear's testimony to the committee regarding her death. It is my understanding that he told the committee that the cause of her death could not be determined. That is completely incorrect. After I completed my investigation and autopsy I ruled the cause of death of Estelle Richardson as "Blunt force injuries of the head," and ruled the manner of her death as "Homicide." Her autopsy report and death certificate both reflect these opinions, which have remained unchanged since her death in 2004.

He further went on to testify that her rib fractures and liver damage could have been caused by CPR (cardiopulmonary resuscitation), which he called a common occurrence during such resuscitation. This is misleading at best. While CPR has been reported to cause minor injuries in some patients, both the location and severity of Ms. Richardson's injuries were not consistent with attempted resuscitation. Mr. Puryear's claim makes even less sense when taken in context with the more serious fatal head injuries, which line up with the rib fractures perfectly. There is no doubt in my mind that both the fatal head injuries and the rib fractures/liver damage were inflicted on Ms. Richardson while in custody and not the result of CPR.

The committee should be very concerned about a nominee for federal judge who is less than truthful when answering questions from the Senate Judiciary Committee. It appears from his testimony that Mr. Puryear was either not answering truthfully or was completely uninformed about the circumstances surrounding Ms. Richardson's death and her official autopsy report, which is hard to believe as an attorney representing CCA.

I would expect that Mr. Puryear, serving as an attorney and advocate for CCA to make such one-sided statements. However, as a nominee for federal judge, I would expect him to adopt the more neutral position we expect from our judges. That he would make such statements during his nomination hearing seriously calls into question his credibility and impartiality.

As medical examiner, I work with the court system on a regular basis. I have had the honor and privilege of working with many fine judges in local, state and federal courts for over fifteen years. The Senate should be very concerned about appointing a nominee who has difficulty in separating the advocate role of an attorney and the neutral referee role of a judge. I hope Mr. Puryear's statements before the Committee earlier this week were an isolated misjudgment and not the alarming statements they appear to be.

I have included a copy of my autopsy and investigation reports for your review. I am happy to answer any questions you might have, and am willing to come to Washington, D.C. if it would be helpful.

Thank you for your serious consideration!

Kind regards,

Bruce D. Levy, M.D.
Chief Medical Examiner, State of Tennessee
County Medical Examiner, Metropolitan Nashville and Davidson County

TENNESSEE DEPARTMENT OF HEALTH AND ENVIRONMENT
OFFICE OF THE MEDICAL EXAMINER
850 R.S. Gass Blvd., Nashville TN 37216-2640
(615) 743-1800
REPORT OF INVESTIGATION BY COUNTY MEDICAL EXAMINER

MEC 04-2166
*State Number: 04-19-1730*

**DECEDENT:** Estelle Richardson
**RACE:** Black **SEX:** Female **AGE:** 34 Years **MARITAL STATUS:**
**HOME ADDRESS:** 332 Cedar Drive ; Nashville , TN

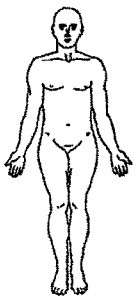
**OCCUPATION:** **DATE OF BIRTH:** 12/05/69

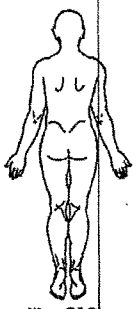
**TYPE OF DEATH:** ☐ Apparent Natural/Unattended ☐ Motor Vehicle Cremation: N
☐ Casualty ☐ Other
☐ Homicide/Suspected Homicide ☐ Suddenly when in apparent health
☒ In Prison ☐ Suicide

**COMMENT:**
**AGENCY INVESTIGATOR AND COMPLAINT #:** City Police Dept.

**DESCRIPTION OF BODY:** ☐ Clothed ☐ Unclothed ☐ Partly Clothed Circumcised?
Eyes: Hair: Mustache: Beard:
W ight: (Lbs.) Length: (In.) Body Temp:
Rigor? Livor Color: Fixed?

**Marks & Wounds**





| Probable Cause of Death | Manner of Death | | Disposition Of Case |
|---|---|---|---|
| Blunt force injuries of head | ☐ Accident<br>☒ Homicide<br>☐ Suicide<br><br>Cremation Approved: N | ☐ Natural<br>☐ Could Not Be Determined<br>☐ Pending Investigation | Medical Examiner Jurisdiction: Accepte<br>Autopsy Ordered: Autopsy<br>Toxicology: Y<br>Responsible for Death Certificate:<br>☒ Medical Examiner<br>☐ Other Physician<br><br>Funeral Home: Riley Funeral Home |

I hereby declare that after receiving notice of death described herein, I took charge of the body and made inquiries regarding the cause of death in accordance with Section 38-7-101-117 Tennessee Code Annotated and that the information contained herein regarding such death is true and correct to the best of my knowledge and belief.

August 24, 2004 — Date
Davidson — County of Appointment
Signature of County Medical Examiner

ME Report Form for MEC04-21\w Estelle Richardson Page 2

| | Last Seen Alive | Injury or Illness | Death | Discovery | Medical Examiner Notified | Vi w of Body | Police Notified |
|---|---|---|---|---|---|---|---|
| Date | | 07/04/2004 | 07/05/2004 | | | 07/05/2004 | |
| Time | | Unknown | 06:18 AM | | | 09:00 AM | |

| | Location | City or County | Type of Premises (hospital, hotel, highway, etc.) |
|---|---|---|---|
| Injury or onset of illness | 6115 Harding Place | Nashville | Prison |
| Death | Southern Hills Medical Center | Nashville | Hospital |
| Viewing of body by Medical Examiner | 850 R.S. Gass Blvd | Nashville | O.M.E. |

MEDICAL ATTENTION AND HOSPITAL, INSTITUTIONAL CARE OR HOME HEALTH CARE

| Name of Physician or Institution | Address | Diagnoses | Dates |
|---|---|---|---|
| | | | - |

(35) CIRCUMSTANCES OF DEATH

| | Name | Address |
|---|---|---|
| Found Dead By | | |
| Last Seen Alive By | | |
| Wit ss to Injury or Illness | Unknown | |
| Witness to Death | Dr. Steve Aaronson | Southern Hills Medical Center ; , TN |
| Next of Kin | Diane Buie (Sister) | Estella Buie (mother) 517-882-5649 ; Lansing, MI |

(36) NARRATIVE SUMMARY OF CIRCUMSTANCES SURROUNDING DEATH
The decedent is a 34 yr. old b/f that was reportedly a prisoner at CCA Detention Facility. The decedent was reportedly found unresponsive at approximately 05:15 hrs, and was transported to Southern Hills Medical Center where she expired. The decedent reportedly has no known medical history. The decedent was transported to the M.E.O. for further investigation. Sherrie L. Saint, Investigator

**TENNESSEE DEPARTMENT OF HEALTH AND ENVIRONMENT**
**OFFICE OF THE STATE MEDICAL EXAMINER**
**Center for Forensic Medicine**
**850 R.S. Gass Blvd.**
**Nashville, Tennessee 37216-2640**

**CASE: MEC04-2166**
**County: DAVIDSON**

**AUTOPSY REPORT**

**NAME OF DECEDENT:** RICHARDSON, ESTELLE **RACE:** B **SEX:** F **AGE:** 34

**HOME ADDRESS:** 332 Cedar Drive, Nashville TN

**DATE AND TIME OF DEATH:** July 5, 2004 at 6:18 a.m.

**DATE AND TIME OF AUTOPSY:** July 5, 2004 at 9:00 a.m.

**COUNTY MEDICAL EXAMINER:** Bruce P. Levy, M.D.

**ADDRESS:** 850 R.S. Gass Blvd., Nashville, TN 37216-2640

**DISTRICT ATTORNEY GENERAL:** Honorable Victor S. Johnson

**ADDRESS:** Washington Square, Suite 500, 222 2nd Avenue North, Nashville, TN 37201-1649.

---

**PATHOLOGIC DIAGNOSES**

1. Blunt force injuries of head:
   a. Focal area of alopecia.
   b. Subgaleal hemorrhage.
   c. Skull fracture, linear, non-displaced.
   d. Epidural, subdural and subarachnoid hemorrhages.
   e. Cerebral contusions, multiple, bilateral.
2. Blunt force injuries of torso:
   a. Multiple rib fractures, displaced.
   b. Subcapsular hematoma of liver.
3. Atherosclerotic cardiovascular disease:
   a. Aortic atherosclerosis, slight.
   b. Coronary artery atherosclerosis, slight to moderate.
4. Pulmonary anthracosis.

(Continued)

5. Leiomyoma uteri.
6. Exogenous obesity.

| | |
|---|---|
| **CAUSE OF DEATH:** | Blunt force injuries of head |
| **MANNER OF DEATH:** | Homicide |
| **CIRCUMSTANCES OF DEATH:** | Assaulted by other person(s) |

*I hereby certify that I, Bruce P. Levy, M.D. have performed an autopsy on the body of Estelle Richardson on the fifth day of July 2004 at 9:00 am in the State of Tennessee Center for Forensic Medicine. The purpose of this report is to provide a certified opinion to the County Medical Examiner and District Attorney General. The facts and findings to support these conclusions are filed with the Tennessee Department of Health.*

## EXTERNAL EXAMINATION

The partially clothed body is that of a well-developed, obese black female, measuring 63-1/2 inches and weighing 179 pounds, whose appearance is consistent with the reported age of 34 years. The head hair is black in color and tightly curled, measuring 1 inch long. The irides are brown and the pupils are round. The sclerae are anicteric and the conjunctivae are slightly congested without petechiae. The ears, nose and mouth are unremarkable. Natural teeth are in fair repair.

The anterior torso is symmetric with slight protuberance of the abdomen that contains stretch marks. The breasts are symmetric and unremarkable without palpable masses. The posterior torso is unremarkable. The upper extremities are symmetric and unremarkable. The lower extremities are symmetric with slight drying of the skin distally. External genitalia are those of a mature female.

Rigor mortis is full and symmetric. Livor mortis is purple in color, posterior in distribution, and blanching. The body is warm to touch in the torso and cool to touch in the extremities.

**CLOTHING:** The body is clothed in an orange-colored shirt.

**THERAPEUTIC PROCEDURES:** There are three EKG pads on the body.

**SCARS:** There is a 1 inch horizontally oriented linear scar immediately beneath the umbilicus. There is a 5 inch horizontally oriented linear scar of the pelvic region.

**TATTOOS:** None.

**INJURIES:**

**BLUNT FORCE INJURIES OF HEAD:** There is a 1/2 inch in diameter patch of alopecia on the left temporal/parietal aspect of the scalp above and behind the left ear.

There is an area of moderate subgaleal hemorrhage involving the left temporal and left parietal regions that measures 3-1/2 x 2-1/2 inches.

There is a linear skull fracture involving the left temporal bone extending across the floor of the left middle fossa.

Th re are three small patches of epidural hemorrhage in the right middle fossa. There is slight subdural hemorrhage located in the right middle fossa that measures less than 5 ml in total volume. There are multiple areas of subarachnoid hemorrhage involving both frontal poles, both temporal poles and at the bases of the frontal and temporal lobes, greatest over the right temporal lobe.

There are multiple cerebral contusions. There is a broad area of contusion with necrosis of the cortex at the base of the right temporal lobe. There are additional smaller areas of contusion involving the base of both frontal lobes.

**BLUNT FORCE INJURIES OF TORSO:** There are no visible external injuries of the chest, abdomen or back.

There are fractures of left ribs three through six laterally. The fractures of the third through fifth ribs ar slightly displaced with moderate hemorrhage into the intercostal muscles. The fracture of the sixth rib is non-displaced with slight associated hemorrhage.

There is a 2-1/4 x 2 inch subcapsular hematoma on the anterior surface of the left lobe of the liv r.

*The above injuries, having been described, will not be repeated.*

## INTERNAL EXAMINATION

**HEAD:** Aside from the injuries described above, the scalp and skull are unremarkable.

Th 1240 gram brain is injured with an otherwise unremarkable gyral pattern. The distribution of cranial nerves at the base of the brain is normal. The cerebral vessels are unremarkable and normally distributed. Coronal sections through the cerebral hemispheres, except for the injuries described above, reveal a normal distribution of gray and white matter without focal lesions. The ventricles are of normal configuration and size. Horizontal sections through the cerebellum and brain stem reveal a normal distribution of gray and white matter without focal lesions.

**NECK:** There are no hemorrhages into the musculature or soft tissues of the neck. The hyoid, larynx, and trachea are intact without obstructions. The tongue is unremarkable without injury. The cervical vertebrae are palpably intact.

**BODY CAVITIES:** All organs are in their normal anatomic locations. The pleural, pericardial, and peritoneal cavities have smooth and glistening surfaces. Typical quantities of translucent fluid ar present within the body cavities.

**CARDIOVASCULAR SYSTEM:** The great vessels are normally distributed without thromboemboli. There are slight atherosclerotic deposits of the aorta. The coronary artery ostia are normally placed and free of significant atherosclerotic obstruction.

Th 250 gram heart has a smooth, glistening, intact epicardial surface. The right dominant coronary arteries are normally distributed and contain slight to moderate atherosclerotic deposits. Maximal occlusions of the left anterior descending, left circumflex and right coronary arteries ar 50%, 35% and 35%, respectively. The myocardium is homogeneous red-brown in color without focal lesions. The left and right ventricles are 1.4 and 0.2 cm. in thickness at the lateral walls, respectively, and symmetric. The endocardial surfaces and four cardiac valves are unremarkable. Th papillary muscles and chordae tendineae are normal. The mitral and tricuspid valves measure 8.2 and 9.7 cm. in circumference, respectively.

**RESPIRATORY SYSTEM:** The right and left lungs weigh 295 and 200 grams, respectively. The lungs are normally lobated. The pleural surfaces are glistening and intact with marked black anthracotic pigment deposits. The pulmonary arteries are free of thromboemboli. The bronchi are unremarkable. The parenchyma is pink/tan in color and well aerated without focal lesions or consolidations. There is slight vascular congestion in dependent segments.

**DIGESTIVE SYSTEM AND LIVER:** The esophagus is unremarkable with a sharp gastroesophageal junction. The unremarkable stomach is empty. The duodenum, small intestines, appendix, and large intestines are unremarkable.

The 1610 gram liver is injured with an otherwise unremarkable capsule. The parenchyma is red-brown in color and soft without focal lesions. The unremarkable gallbladder contains approximately 40 ml. of bile. The extrahepatic bile ducts are patent and unremarkable. The pancreas is unremarkable.

**RETICULOENDOTHELIAL SYSTEM:** The 115 gram spleen is unremarkable. There is a normal distribution of unremarkable lymph nodes.

**GENITOURINARY SYSTEM:** The right and left kidneys weigh 120 and 130 grams, respectively. The subcapsular surfaces are smooth. The cortices are of normal thickness with sharp corticomedullary junctions. The calices, pelves, and ureters are patent and unremarkable. The unremarkable urinary bladder contains approximately 40 ml. of urine.

The vagina is unremarkable without abrasions, contusions or lacerations. The uterus, fallopian tubes and ovaries are unremarkable and appropriate for age.

**ENDOCRINE SYSTEM:** The pituitary, thyroid, parathyroid and adrenal glands are unremarkable.

**MUSCULOSKELETAL SYSTEM:** Aside from the injuries described above, the musculoskeletal system is unremarkable. There are increased quantities of subcutaneous and intra-cavity adipose tissue.

**TOXICOLOGY:** The following specimens are submitted for possible toxicologic analysis: blood, bile, urine and vitreous humor. A separate report will be issued.

**HISTOLOGY:** The following specimens are submitted for histologic examination: Heart, bronchus, lungs, liver, spleen, kidney, thyroid gland, adrenal gland, scalp with alopecia and brain. A separate report will be issued.

**SUMMARY OF CASE**

This 34-year-old female was a prisoner at a local detention facility. She was reportedly found unresponsive at 5:15 a.m. on July 5, 2004. She reportedly has a psychiatric history. She was transported to Southern Hills Medical Center where she expired. An autopsy was ordered.

Autopsy revealed significant blunt force injuries of the head and torso. A urine drug screen performed at the medical examiner's office was weakly positive for tricyclic antidepressants. Specimens were obtained for histology and formal toxicology testing.

**MEC04-2166** **RICHARDSON, ESTELLE** **PAGE 6/6**

Histology confirmed th initial autopsy findings without significant additional pathology. Toxicology was positive for doxepin (Sinequan) and paroxetine (Paxil). While both medications were present in levels above normal therapeutic concentrations, they are less than lethal levels reported for these medications.

In my opinion, this person died as a result of blunt force injuries to the head. The manner of death is homicide.

Signature _____ Date 8/24/04

Bruce P. Levy, M.D.
Chief Medical Examiner

BPL/lmr
T: 07/07/2004

**OFFICE OF THE MEDICAL EXAMINER**
**FORENSIC MEDICAL**

**REPORT OF MICROSCOPIC EXAMINATION**

**Name of Deceased:** RICHARDSON, ESTELLE **MEC04-2166**

**Date of Report:** August 12, 2004

**HEART:** Sections of both ventricles and the conduction system are examined. The epicardial surfaces are unremarkable. The myocardium of both the left and right ventricles are unremarkable without significant ischemic or inflammatory changes. The endocardial surfaces are unremarkable. Sections through the area of the sinoatrial and atrioventricular nodes fail to reveal any significant pathology.

**BRONCHUS:** The mucosal surface is lined by normal appearing respiratory epithelium. The submucosa and submucosal glands are unremarkable without significant inflammation. The muscle and cartilage are unremarkable.

**LUNGS:** Sections of all lobes of both lungs are examined. The overall architecture of the lungs is normal. There is atelectasis of central pulmonary segments. The pleural surfaces are unremarkable. The pulmonary vessels are unremarkable. Bronchi have increased numbers of lymphoid collections, otherwise are unremarkable. Alveolar walls are thin and delicate. There are variable numbers of pigment containing macrophages within alveolar spaces without other significant inflammation. There are black anthracotic pigment deposits. An intrapulmonary lymph node is unremarkable.

**LIVER:** The liver capsule is unremarkable. The hepatocytes contain a granular to foamy cytoplasm without significant vacuoles or inclusions. There is no significant hepatocyte necrosis. Portal areas are unremarkable. There is no increased portal fibrosis. There is slight vascular congestion of the unremarkable hepatic sinusoids.

**SPLEEN:** The splenic capsule is unremarkable. Red pulp consists of a mixture of red blood cells and inflammatory cells in a sinusoidal matrix. White pulp follicles are normal in number and distribution with variably active germinal centers.

**KIDNEY:** Glomeruli and tubules are unremarkable. There is vascular congestion. Arterioles adjacent to the glomeruli are not prominent. The urinary collecting system is lined by normal appearing transitional epithelium.

**THYROID GLAND:** The overall architecture of the thyroid gland is normal. Thyroid follicles are lined by simple epithelium and contain variable amounts of colloid. There is no neoplasia or significant inflammation.

(Continued)

**MEC04-2166** **RICHARDSON, ESTELLE** **PAGE 2/2**

**ADRENAL GLAND:** The overall architecture of the adrenal gland is normal. Adrenal cortex and medulla are present and unremarkable. Arterioles in the periadrenal adipose tissue contain slight medial hypertrophy.

**BRAIN:** Sections of the cerebral cortex, hippocampus, cerebellum and brain stem are examined. There is vascular congestion of the arachnoid membranes in the region of the brain stem without significant hemorrhage or inflammation. There is normal layering of the cerebral cortex. There is disruption of the cerebral cortex with hemorrhage and an acute inflammatory response. The white matter tracks are slightly edematous. The architecture of the hippocampus is unremarkable. There is slight increased eosinophilia of the cytoplasm of the neurons. The architecture of the cerebellum is normal. Purkinje and granular cell layers are present with slight increased eosinophilia of the Purkinje cells. Sections of the midbrain and medulla reveal a normal distribution of white matter tracks and deep nuclei without ischemic, inflammatory or neoplastic changes. There is slight edema. The substantia nigra is appropriately pigmented. The ventricular system is lined by simple epithelium and is unremarkable.

**SKIN, SCALP:** The epidermal surface is intact. There is mononuclear cell inflammation surrounding dermal structures, and there is edema between the collagen bundles. Acute hemorrhage is present within the deeper layers of the dermis.

Bruce P. Levy, M.D.

BPL/lmr

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| | | | |
|---|---|---|---|
| **Client:** | 225 - Forensic Medical | **Case ID:** | 04-2166 |
| **Report To:** | Dr. Bruce Levy | **Laboratory ID:** | 4318463 |
| | Forensic Medical | **Collected:** | 07/05/04 00:00 |
| | 850 RS Gass Blvd | **Received:** | 07/07/04 09:56 |
| | Nashville, TN 37216 | **Completed:** | 07/26/04 16:52 |
| | | **Reported:** | 07/26/04 17:05 |
| **Reason:** | Post-mortem | | |
| **Specimen Type:** | Femoral Blood | | |

E. RICHARDSON

**Test(s) Ordered:**
40250 - Ethanol/Volatiles
40599FM6 - Profile-ME Comprehensive Blood
01783 - Paroxetine (Paxil)
70591 - Confirmation Tricyclics

| Drug Class | Result | Quantitation | Reporting Threshold |
|---|---|---|---|
| Alcohol - Volatiles | NEGATIVE | | 0.01 % |
| Amphetamines | NONE DETECTED | | 50 ng/mL |
| Stimulants | NONE DETECTED | | 50 ng/mL |
| Paroxetine | POSITIVE | | |
| **Paroxetine** | **POSITIVE** | 1100 ng/mL | 1 ng/mL |
| Barbiturates | NONE DETECTED | | 50 ng/mL |
| Sedatives/Hypnotics | NONE DETECTED | | 50 ng/mL |
| Methadone | NONE DETECTED | | 50 ng/mL |
| Benzodiazepines | NONE DETECTED | | 25 ng/mL |
| Cannabinoids (Marijuana) | NONE DETECTED | | 1 ng/mL |
| Cocain Metabolite | NONE DETECTED | | 10 ng/mL |
| Opiates | NONE DETECTED | | 50 ng/mL |
| Synthetic Narcotics | NONE DETECTED | | 50 ng/mL |
| Phenothiazines | NONE DETECTED | | 1 ng/mL |
| Salicylate | NONE DETECTED | | |
| Salicylate | NONE DETECTED | | 5 mg/L |
| **Tricyclic Antidepressants** | **POSITIVE** | | |
| Amitriptyline | NONE DETECTED | | 50 ng/mL |
| Nortriptyline | NONE DETECTED | | 50 ng/mL |
| Clomipramine | NONE DETECTED | | 50 ng/mL |
| Desmethylclomipramine | NONE DETECTED | | 50 ng/mL |

I certify that the specimen identified by this accession number has been handled and analyzed in accordance with all applicable requirements.

Certified by:
Date: 7/27/04



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47450.429

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| | | | |
|---|---|---|---|
| **Client:** | 225 - Forensic Medical | **Case ID:** | 04-2166 |
| **Report To:** | Dr. Bruce Levy | **Laboratory ID:** | 4318463 |
| | Forensic Medical | **Collected:** | 07/05/04 00:00 |
| | 850 RS Gass Blvd | **Received:** | 07/07/04 09:56 |
| | Nashville, TN 37216 | **Completed:** | 07/26/04 16:52 |
| | | **Reported:** | 07/26/04 17:05 |
| **Reason:** | Post-mortem | | |
| **Specimen Type:** | Femoral Blood | | |

**Test(s) Ordered:**
40250 - Ethanol/Volatiles
40599FM6 - Profile-ME Comprehensive Blood
01783 - Paroxetine (Paxil)
70591 - Confirmation Tricyclics

| Drug Class | Result | Quantitation | Reporting Threshold |
|---|---|---|---|
| **Doxepin** | **POSITIVE** | 873 ng/mL | 50 ng/mL |
| **Desmethyldoxepin** | **POSITIVE** | 1020 ng/mL | 50 ng/mL |
| Imipramine | NONE DETECTED | | 50 ng/mL |
| Desipramine | NONE DETECTED | | 50 ng/mL |
| Protriptyline | NONE DETECTED | | 50 ng/mL |
| Trimipramine | NONE DETECTED | | 50 ng/mL |
| Atypical Antidepressants | NONE DETECTED | | 10 ng/mL |
| Antipsychotics | NONE DETECTED | | 10 ng/mL |
| Miscellaneous | NONE DETECTED | | 0.25 ng/mL |

I certify that the specimen identified by this accession number has been handled and analyzed in accordance with all applicable requirements.

Certified by:
Date: 7/27/04

----- END OF REPORT -----



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47450.430

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| | | | |
|---|---|---|---|
| **Client:** | 225 - Forensic Medical | **Case ID:** | 04-2166 |
| **Report To:** | Dr. Bruce Levy | **Laboratory ID:** | 4318464 |
| | Forensic Medical | **Collected:** | 07/05/04 00:00 |
| | 850 RS Gass Blvd | **Received:** | 07/07/04 09:56 |
| | Nashville, TN 37216 | **Completed:** | 07/07/04 13:57 |
| | | **Reported:** | 07/26/04 17:05 |
| **Reason:** | Post-mortem | | |
| **Specimen Type:** | Heart Blood | | |

**Test(s) Ordered:** 49999 - Sample Received

| Drug Class | Result | Quantitation | Reporting Threshold |
|---|---|---|---|

Testing not requested or indicated.

I certify that the specimen identified by this accession number has been handled and analyzed in accordance with all applicable requirements.

Certified by:
Date: 7/27/04

----- END OF REPORT -----



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| | | | |
|---|---|---|---|
| **Client:** | 225 - Forensic Medical | **Case ID:** | 04-2166 |
| **Report To:** | Dr. Bruce Levy | **Laboratory ID:** | 4318465 |
| | Forensic Medical | **Collected:** | 07/05/04 00:00 |
| | 850 RS Gass Blvd | **Received:** | 07/07/04 09:56 |
| | Nashville, TN 37216 | **Completed:** | 07/07/04 13:57 |
| | | **Reported:** | 07/26/04 17:05 |
| **Reason:** | Post-mortem | | |
| **Specimen Type:** | Bile | | |

**Test(s) Ordered:** 49999 - Sample Received

| Drug Class | Result | Quantitation | Reporting Threshold |
|---|---|---|---|

Testing not requested or indicated.

I certify that the specimen identified by this accession number has been handled and analyzed in accordance with all applicable requirements.

Certified by:
Date: 7/27/04

----- END OF REPORT -----



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47450.432

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| | | | |
|---|---|---|---|
| **Client:** | 225 - Forensic Medical | **Case ID:** | 04-2166 |
| **Report To:** | Dr. Bruce Levy | **Laboratory ID:** | 4318466 |
| | Forensic Medical | **Collected:** | 07/05/04 00:00 |
| | 850 RS Gass Blvd | **Received:** | 07/07/04 09:56 |
| | Nashville, TN 37216 | **Completed:** | 07/07/04 13:58 |
| | | **Reported:** | 07/26/04 17:05 |
| **Reason:** | Post-mortem | | |
| **Specimen Type:** | Vitreous | | |

**Test(s) Ordered:** 49999 - Sample Received

| Drug Class | Result | Quantitation | Reporting Threshold |
|---|---|---|---|

Testing not requested or indicated.

I certify that the specimen identified by this accession number has been handled and analyzed in accordance with all applicable requirements.

Certified by:
Dat : 7/27/04

----- END OF REPORT -----



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47450.433

**PACER FEDERAL DOCKET SEARCH RESULTS**

Cases involving CCA, CCA wardens/former wardens, Prison Realty Trust (a CCA spin-off), Transcor (a CCA subsidiary), CCA CEO John Ferguson or former CCA CEO Doctor Crants, from 1-1-2000 to 2-12-2008, Middle District of Tennessee.

Search ran: Mon Feb 18 13:34:39 2008

| Name | Court | Case No. |
|---|---|---|
| Filed NOS Closed | | |
| CORRECTIONS CORPORATION OF AMERICA | tnmdce | 1:2002cv00001 |
| 01/03/2002 550 08/02/2002 | | |
| Goins v. Corrections Corp, et al | | |
| CORRECTIONS CORPORATION OF AMERICA | tnmdce | 1:2002cv00004 |
| 01/08/2002 550 10/28/2002 | | |
| Talal v. Corrections Corp, et al | | |
| CORRECTIONS CORPORATION OF AMERICA | tnmdce | 3:2004mc00006 |
| 01/15/2004 999 01/15/2004 | | |
| Block v. Prison Realty Trust, et al | | |
| CORRECTIONS CORPORATION OF AMERICA | tnmdce | 3:2003cv00007 |
| 01/02/2003 550 01/02/2003 | | |
| Walden v. Corrections Corp | | |
| CORRECTIONS CORPORATION OF AMERICA | tnmdce | 3:2006cv00010 |
| 01/05/2006 550 12/08/2006 | | |
| Baxter v. Gardner et al | | |
| CORRECTIONS CORPORATION OF AMERICA | tnmdce | 1:2003cv00011 |
| 06/07/2004 550 09/01/2005 | | |
| Clark v. Corrections Corp, et al | | |
| CORRECTIONS CORPORATION OF AMERICA | tnmdce | 1:2000cv00013 |
| 02/10/2000 550 07/26/2000 | | |
| Hendley v. Myers, et al | | |
| CORRECTIONS CORPORATION OF AMERICA | tnmdce | 1:2001cv00013 |
| 01/31/2001 550 02/06/2001 | | |
| Henderson v. Corrections Corp | | |
| CORRECTIONS CORPORATION OF AMERICA | tnmdce | 1:2000cv00014 |
| 02/10/2000 550 03/14/2001 | | |
| Strode v. Campbell, et al | | |
| CORRECTIONS CORPORATION OF AMERICA | tnmdce | 1:2002cv00017 |
| 03/01/2002 550 03/01/2002 | | |
| Mitchell v. Corr Corp of America, et al | | |
| CORRECTIONS CORPORATION OF AMERICA | tnmdce | 1:2002cv00019 |
| 03/01/2002 550 05/30/2002 | | |
| Brewer v. Myers, et al | | |



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47450.434

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2002cv00020
03/06/2002 550 01/31/2003
Jackson v. Davis, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2002cv00021
03/07/2002 550 06/19/2002
Kennedy v. Myers, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2008mc00021
01/23/2008 01/25/2008
Harper v. Corrections Corporation of America et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2007cv00022
04/05/2007 550
McGill v. Stephan et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2003cv00024
02/28/2003 550 02/28/2003
Siboloski v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2005mc00025
03/01/2005 999 03/01/2005
Ashford v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2004cv00028
01/14/2004 550 01/14/2004
Battle v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2006cv00028
04/20/2006 550 08/10/2006
Sharkey v. Tennessee Department of Corrections et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2002cv00029
04/09/2002 550 04/09/2002
Hollingsworth v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2000mc00032
03/30/2000 999 03/30/2000
Smith v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2007cv00036
05/15/2007 440
Baksi v. Lindamood et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2007cv00039
05/25/2007 550
McGough v. Corrections Corporation of America et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2001cv00040
04/23/2001 550 10/22/2001
Chadwick v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2003cv00040
04/04/2003 550 04/04/2003
Wilkerson v. Coble, et al



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CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2006cv00041
01/19/2006 550 01/19/2006
Bostic v. Corrections Corporation of America et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2008cv00045
01/17/2008 550 01/17/2008
Smith v. State of Tennessee et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2000cv00046
04/17/2000 555 06/11/2001
Joyner v. Myers, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2004mc00046
06/24/2004 999 06/24/2004
Green v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2001cv00047
01/25/2002 550 09/30/2002
Moses v. O'Toole, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2005cv00050
07/20/2005 550 10/17/2005
Kemp v. Corrections Corporation of America et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2005cv00052
09/07/2007 550
Braden v. Corrections Corporation of America et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2003cv00053
04/30/2003 550 04/30/2003
Hollingsworth v. CCA, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2000cv00055
01/19/2000 550 05/26/2000
Fite v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2002cv00055
05/21/2002 550 05/31/2002
Ballinger v. Coble, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2003cv00059
05/13/2003 550 05/13/2003
Gilmore v. CCA, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2007cv00062
01/17/2007 550 01/17/2007
Poe v. Corrections Corporation of America et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2003cv00070
06/09/2003 550 06/09/2003
Polidoro v. Hilcrease, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2004cv00070
08/06/2004 550 08/06/2004
Caldwell v. Corrections Corp, et al



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CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2002cv00071
07/08/2002 440 03/17/2005
Schnaible v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2002mc00071
09/11/2002 999 09/11/2002
Collins v. Corrections Corp

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2001cv00072
07/03/2001 550 07/09/2001
Thomas v. Coble, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2003cv00072
06/10/2003 550 02/02/2004
Gilmore v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2007mc00073
07/09/2007 07/09/2007
Grandinetti v. Corrections Corporation of America et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2003mc00076
07/29/2003 999 07/29/2003
Meyer v. CCA, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2001cv00078
07/30/2001 550 06/10/2002
Thomas v. Coble, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2004cv00078
08/31/2004 440 02/07/2005
Lindsay, et al v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2003cv00087
08/13/2003 550 08/13/2003
Clark v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2000cv00614
06/28/2000 550 06/28/2000
Scales v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2004cv00625
07/15/2004 550 07/15/2004
Brown v. Corrections TN Dept, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2004cv00661
07/29/2004 440 04/20/2006
Vilella, et al v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2001cv00667
07/27/2001 550 07/27/2001
Gurley v. TN Dept of Corr, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2003cv00671
07/25/2003 440 10/28/2003
Stanton v. Corrections Corp, et al



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47450.437

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2004cv00696
08/09/2004 550 08/09/2004
Johnson, et al v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2000cv00731
08/02/2000 550 05/31/2001
Bucklin v. Transcor Inc., et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2000cv00770
08/14/2000 442 10/05/2000
Porter v. Hardeman Co Corr Fac, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2004cv00801
09/03/2004 440 09/15/2005
Gatewood v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2003cv00140
02/14/2003 550 02/14/2003
Jones v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2008cv00140
02/11/2008 550 02/11/2008
Harper v. Corrections Corporation of America et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2002cv00141
12/20/2002 550 04/12/2004
Sexton v. Myers, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2001cv00143
02/07/2001 550 02/12/2001
Reed v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2004cv00146
02/23/2004 550 10/05/2004
Battle v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2000cv00149
12/06/2000 550 12/06/2000
Boyd v. Rose, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2000cv00159
02/18/2000 550 08/04/2000
Battle v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2007mc00172
11/01/2007 11/06/2007
Smith v. State of Tennessee et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2003cv00178
02/27/2003 440 02/25/2004
Noel v. CCA, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2003cv00213
03/10/2003 550 03/10/2003
Escue v. CCA, et al



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CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2003cv00269
03/27/2003 550 07/17/2003
Gatewood v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2000cv00276
03/28/2000 550 03/29/2000
Funderburk, et al v. Wilkinson, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2005cv00301
04/13/2005 550 04/13/2005
Pride v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2005cv00302
04/13/2005 550 04/13/2005
Ashford v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2002cv00311
03/28/2002 550 03/28/2002
Williams v. Smith, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2005cv00319
04/19/2005 550 10/24/2006
Dale v. CCA, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2000cv00384
04/24/2000 550 05/02/2001
Vaughan v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2000cv00391
04/24/2000 550 04/24/2000
Fite v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2000cv00399
04/26/2000 550 02/20/2001
Smith v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2006cv00399
04/20/2006 550 04/20/2006
Buford v. Corrections Corporation of America et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2003cv00409
05/08/2003 190 01/24/2005
CCA v. Corrections

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2001cv00420
05/09/2001 550 05/09/2001
Smith, et al v. Sundquist, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2003cv00426
05/14/2003 550 05/14/2003
Strange v. State of Tennessee, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2003cv00427
05/14/2003 550 11/10/2003
Beauchamp v. CCA, et al



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CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2000cv00462
05/12/2000 550 05/15/2000
Summers v. Metro Development, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2000cv00463
05/12/2000 550 05/15/2000
Salisbury v. Cooper, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2002cv00466
05/10/2002 442 04/03/2003
Carver v. Corr Corp of America

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2003cv00467
05/22/2003 550 05/22/2003
Childress v. CCA, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2003cv00511
06/05/2003 550 10/16/2003
Parrish v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2003cv00512
06/06/2003 440 11/26/2003
Shearon v. Metropolitan Govern, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2005cv00524
07/06/2005 440 11/01/2005
Peterman v. Corrections Corporation of America

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2003cv00537
06/12/2003 550 11/09/2004
Pope v. Gardner, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2003cv00558
06/20/2003 550 06/20/2003
Brown v. CCA, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2006cv00559
05/30/2006 550 05/30/2006
Markum v. Corrections Corporation of America et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2004cv00578
06/28/2004 550 06/28/2004
Griffin v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 3:2005cv00582
07/26/2005 550 07/26/2005
Austin v. Corrections Corporation of America et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2001cv00088
09/04/2001 550 09/07/2001
Postell v. Corrections Corp

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2000cv00089
07/20/2000 440 11/08/2002
Taylor v. Corrections Corp, et al



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47450.440

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2000cv00090
07/21/2000 440 07/21/2000
USA, et al v. Corrections Corp, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2000cv00091
07/21/2000 440 06/07/2002
Smith v. Corrections Corp

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2002cv00093
09/03/2002 550 07/25/2003
Barnes v. McClain, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2002cv00094
09/10/2002 550 09/10/2002
Smith v. CCA

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2003cv00098
09/10/2003 550 09/10/2003
Clark v. CCA, et al

CORRECTIONS CORPORATION OF AMERICA tnmdce 1:2003cv00101
09/12/2003 550 09/12/2003
Smith v. CCA, et al

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VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00499 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00500 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00501 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00502 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC
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VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00503 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00504 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC
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VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00505 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00506 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC
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VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00507 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00508 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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PRISON REALTY TRUST INC tnmdce 1:2001cv00010
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10/04/2007 550 10/04/2007
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VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00509 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC
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DOTSON, STEVE tnmdce 1:2006cv00096
11/30/2006 550 11/30/2006
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GARDNER, BRIAN tnmdce 3:2003cv00165
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GARDNER, BRIAN tnmdce 3:2007cv00361
04/04/2007 550 02/11/2008
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VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00510 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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# McKELLAR, TIEDEKEN & SCOGGIN, LLC

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*Legal Assistants*
*Carrie Selfridge*
*Jessica Turner*

February 7, 2008

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

RE: *Nomination of Richard H. Honaker, Esq. for United States District Judge for the District of Wyoming*

Dear Chairman Leahy and Ranking Member Specter:

It is my honor and privilege to extend my highest recommendation to Richard H. Honaker, Esq. for the position of United States District Court Judge for the District of Wyoming. I have known Mr. Honaker for 25 years, having first met Mr. Honaker upon my graduation from law school in 1982.

In his 31 years of private practice, Mr. Honaker has been involved in an extremely active and very successful civil and criminal litigation practice. He is an excellent lawyer and an extremely intelligent individual. I have served as opposing counsel in numerous civil cases against Mr. Honaker. Although a fierce advocate for his clients, Mr. Honaker has always exhibited the highest legal and ethical standards.

Despite the fact that Mr. Honaker is currently a senior partner in a highly successful law firm, he has discussed with me on numerous occasions his heartfelt desire to become a United States District Court Judge. Mr. Honaker truly wishes to devote the remainder of his legal career in the service of the citizens of Wyoming and the legal profession by becoming a jurist. As members of the U.S. Senate Committee on the Judiciary, you are aware that leaving a lucrative private practice to become a United States District Court Judge is a financial sacrifice. Despite this, Mr. Honaker is eager to make this sacrifice in exchange for the privilege of serving the citizens of Wyoming.

Mr. Honaker is a legal scholar who will bring a depth of knowledge to the United States District Court Judge for the District of Wyoming which will serve the Court well. Based upon my 25 years of personal experience with Mr. Honaker, I can state without reservation that Mr. Honaker's character and ethics are beyond reproach.

Very truly yours,

William M. McKellar, Esq.

WMM/jlt

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FAX: (307) 864-9468

February 7, 2008

The Honorable Patrick Leahy
Chairman
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

Re: Richard Honaker

Dear Senator Leahy and Senator Specter,

I am writing this letter in support of the nomination of Richard Honaker as United States District Court Judge for the District of Wyoming. I have known him for almost 30 years, starting when I worked for him when he was State Public Defender and I was an Assistant Public Defender for Hot Springs and Washakie Counties in Wyoming. Since that time, I have had occasion to serve with him on various professional boards and committees, sought his advice on cases that I have handled and used his services as a mediator.

His nomination is not a political issue. I have been a registered Democrat almost all of my adult life. Dick Honaker is a people's attorney. He has successfully employed his intelligence, his trial skills and his common sense in representing unions and injured citizens.

I would not hesitate to appear before him as an attorney on either side of any issue, whether civil or criminal. As a citizen, I would be comfortable having him sit on my case. He is fair, just, and honorable. He will make an excellent judge for the citizens of the State of Wyoming. The members of my law firm, both Democrat and Republican, join in this endorsement.

Very Truly Yours,

Michael S. Messenger

MSM/hh

**~MITCHELL E. OSBORN~**
Attorney at Law
2515 Warren Avenue, Suite 501
Cheyenne, Wyoming 82001
307-635-7411
Fax: 307-635-1511

February 8, 2008

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

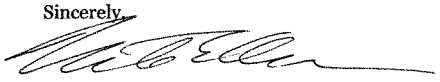
The Honorable Arlen Specter
Ranking Member
U.S. Senate Committee Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

RE: *Appointment of **Richard H. Honaker** as*
*United States District Court Judge for the District of Wyoming*

Dear Sirs:

I have practiced law in Wyoming for over 25 years. In that capacity, I would like to urge the speedy appointment of Richard H. Honaker as the new United States District Judge for the District of Wyoming. Mr. Honaker has impeccable credentials and character, and has a temperament and demeanor well suited for that of a District Judge. Mr. Honaker has had extensive experience in both criminal and civil law and would be a tremendous asset to the Judicial system in this District.

Sincerely,



Mitchell E. Osborn



47450.456

RHODES LAW FIRM, P.C.

*Diana Rhodes, Attorney at Law*
Trial Advocate

2515 Warren Ave., Suite 501
Cheyenne, WY 82001

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E-mail: diana@drhodeslaw.com

*Licensed in Wyoming and Colorado*

February 8, 2007

The Honorable Patrick J. Leahy
Chairman,
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

RE: RICHARD HONAKER, ESQ.; APPOINTMENT AS UNITED STATES DISTRICT COURT JUDGE FOR THE DISTRICT OF WYOMING

Dear Honorable Mr. Leahy and Honorable Mr. Specter:

With great pleasure, and without hesitation, I write to support the appointment by the U.S. Senate Committee on the Judiciary of Mr. Richard Honaker, Esq., as United States District Court Judge for the District of Wyoming. I have practice law for 18 years in Wyoming, and can attest to the qualifications of Mr. Honaker as a United States District Court Judge for the State of Wyoming.

In the practice of law, Mr. Honaker has exemplified the highest level of honor, integrity, and character of an attorney. He has earned the well-deserve reputation of being an attorney of the highest esteem by attorneys throughout Wyoming and the country. Mr. Honaker brings the qualifications required and desired of a United States District Judge by the U.S. Senate, as a person of the highest caliber, intellect, character, and skill.

Thank you for your consideration and appointment of Mr. Honaker. I am confident that the members of the Bar in the State of Wyoming greatly anticipate the appointment of Mr. Honaker to the U.S. District Court of the State of Wyoming.

Respectfully,

Diana Rhodes

Diana Rhodes, Esq.

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**SHIVELY, TAHERI & ROCHELLE, P.C.**

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LEGAL ASSISTANTS:
JUDY COX
GINGER BROWER, CLA
KAY WALLACE

Tuesday, July 24, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

***RE: Dick Honaker***

Dear Honorable Patrick Leahy and Honorable Arlen Specter:

I have known Dick Honaker for over twenty-five years, mainly as an opponent in cases, but I have also referred cases to Dick.

I have served as Chairperson and Vice Chairperson of the Natrona County Democratic Party (city of Casper, Wyoming) and I regret that the Democrats lost Dick to the Republican Party but it does not in any way diminish my esteem of Dick. I know that Dick followed his conscience.

Dick has the requisite judicial demeanor. He is considerate of all persons regardless of their station in life. He is not quick tempered. He is thoughtful of others.

I am sure that the opposition to Dick's nomination stems from his opposition to abortion and his views on right-to-life. I do not know his views on the death penalty but do know he served as Wyoming's state public defender and represented criminal defendants charged with murder and that all who were represented by Dick, regardless



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of guilt or innocence, received one of the best possible defenses. I do know that Dick can put aside his own personal beliefs and provide a representation that is one of the best in the state, if not the nation, and that he will not decide a case based on his own personal beliefs.

Wyoming and the judiciary will be well-served by Dick's appointment to the federal bench.

Very Truly Yours,

Ann M. Rochelle

AMR/klw

Cc: Dick Honaker
Tessa L. Platt



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HK WYO LAW

HATHAWAY & KUNZ, P.C.

HON. STANLEY K. HATHAWAY (1924-2005)
BRENT R. KUNZ • RICK A. THOMPSON • MICHAEL ROSENTHAL • JOHN E. MASTERS, OF COUNSEL
ASSOCIATES: MATTHEW D. KAUFMAN • LUCAS BUCKLEY

February 7, 2008

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

RE: Nomination of Richard H. Honaker for the position of Federal District Judge for the District of Wyoming

Dear Senators Leahy and Specter:

The nominee, Richard H. "Dick" Honaker has spent his entire legal career bringing honor to the legal profession. Dick Honaker is one of the finest attorneys this state has ever seen. He is respected and admired by the lawyers and jurists of our state. His universal respect and popularity has been proven by virtue of his election to lead the Wyoming State Bar and Wyoming Trial Lawyers Association at various stages of his legal career. He is also held in high regard by the public, having been elected to Wyoming's Citizen Legislature as a Republican from Sweetwater County, where Democratic registration significantly outnumbers Republican.

Having litigated many cases against Mr. Honaker, I can tell you that he has the intellect, temperament, and work ethic to be a first-rate Federal District Court Judge. He is balanced and has a great sense of humor. If past history is any indication of future behavior, Mr. Honaker will treat the litigants and their counsel in front of him fairly and with respect. Having handled both civil and criminal cases during his career, Dick Honaker has the experience and knowledge to skillfully handle the cases that will appear on his docket. His Harvard University education and Wyoming common sense will allow him to wrap his arms around any complicated factual or legal issue facing him in any type of case.

Perhaps the best recommendation I can give for Dick Honaker is if you are in front of him, you are going to get a fair shake. Please give us Dick Honaker. He will serve this district with distinction.

Very truly yours,

HATHAWAY & KUNZ, P.C.

Michael Rosenthal

MBR:hak

SENDER'S E-MAIL ADDRESS: MROSENTHAL@HKWYOLAW.COM
2515 WARREN AVE., SUITE 500 • P.O. BOX 1208 • CHEYENNE, WY 82003-1208 • 307.634.7723 • FAX: 307.634.0985 • WWW.HKWYOLAW.COM
LEGAL ASSISTANTS: HOLLY A.H. KURZ • DAWN D. SWAUGER
OFFICE ADMINISTRATOR: KELLY WEIDLICH • STAFF ACCOUNTANT: SHANNON AREFORD

ROBERT P. SCHUSTER, P.C.
ATTORNEY AT LAW

May 1, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Nomination of Richard Honaker
United States District Court, District of Wyoming

Dear Senator Leahy:

This letter is written in support of the nomination of Richard Honaker as United States District Court Judge for the District of Wyoming.

Mr. Honaker and I are of different political parties and share different views on certain political issues. I have been devoted to the Democratic Party my entire adult life, served as Wyoming's Committeeman on the Democratic National Committee, have been a member of the Executive Committee of the Wyoming Democratic Party, and was honored to be the Wyoming Democratic Party's nominee for the U.S. House of Representatives in 1994. Accordingly, this is not a partisan letter.

I have known Mr. Honaker for three decades. I believe the experiences we have shared over those years inform my ability to substantively comment regarding his suitability for this important nomination.

He is a splendid lawyer who has been consistently honored by the legal profession in this state and nationally. His resume would provide you with a list of his significant accomplishments---President of the Wyoming Bar Association, President of the Wyoming Trial Lawyers Association, serving on important Bar and Supreme Court committees, being listed in The Best Lawyers in America, and

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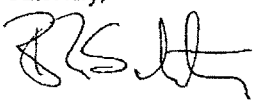
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receiving the American Bar Association's highest ranking. But that listing does not reveal that which I admire most about him as a lawyer---his extreme devotion and caring that he has provided, year after year, to his clients. He has done that which a number of lawyers would claim but not all do---represent regular people from his community who have been wronged or injured and to provide them with conscientious, determined, and skilled advocacy. His experience as a lawyer, then, will illuminate his ability as a judge.

His personal qualities are even more significant than his legal achievements. He has---throughout his life---defined integrity. He is honest, forthright, balanced, and without guile. But he also has great courage. After knowing him for 30 years I have complete confidence those qualities will make him an exceptional judge. He will fairly listen to lawyers but will also fairly hear clients; he will follow the law; he will not shirk from hard work or from hard decisions. Those who appear before him will receive neither haughtiness nor indifference but, instead, will receive informed, wise justice from a man with a wonderful heart.

I strongly endorse Mr. Honaker's nomination. If there is any other information that I can provide to you, I would be more than happy to do so.

Sincerely,



Robert P. Schuster
Robert P. Schuster, P.C.

RPS:pt



47450.462

LAW OFFICES OF
**SHIVELY, TAHERI & ROCHELLE, P.C.**

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FACSIMILE: (307) 266-3000

LEGAL ASSISTANTS:
JENNIFER WOLFE, CLA
GINGER BROWER

July 12, 2007

**VIA FACSIMILE (1-202-224-9516)**
**AND REGULAR U.S. MAIL**

The Honorable Patrick J Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Richard H. Honaker – Nominee for United State District Court Judge, District of Wyoming

Dear Senator Leahy:

I have been asked by a representative of the Office of Legal Policy, Department of Justice to write a letter supporting Richard Honaker's nomination to serve as a District Court Judge in the District of Wyoming. I have utterly no reservations about expressing my support for Dick's nomination. I say this even though Mr. Honaker and I are polar opposites philosophically on the issue of a woman's right to choose whether she will bear a child or not. I say this even though he and I represented or worked for the opposing factions when abortion was placed before the voters as a referendum issue in Wyoming several years ago.

Further, I have known Dick Honaker both as an opponent and an ally in various cases and causes over the last twenty-eight years and I know that as a trial judge he would follow the law, no matter how personally galling. He is honorable and ethical to his very core. He is invariably a gentleman. I cannot recall a time when I've heard him speak unkindly of another.

I do remember a time not all that long ago when Dick helped me. I had grown weary of the evasions and interference of the insurance companies whose insureds I had defended in civil trials for many years. I decided to change my practice and represent

injured people – a fairly radical move for someone who had passed 50. Without being asked Dick was there, repeatedly referring cases to me in areas where he knew I had some expertise. Those are not the actions of a hardened ideologue bent on destroying those who do not think as he does. They are the actions of someone interested in seeing that his client, who he was referring to me, had justice and the best representation he thought possible. When I was not always able to help Dick understood.

Dick's willingness to listen and to consider all arguments are qualities we need in our trial judges. Wyoming has been very fortunate in this regard. You will continue that tradition by voting to support Dick Honaker.

Sincerely,

Robert M. Shively

RMS/jac

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ALAN K. SIMPSON

United States Senator (Ret.)
WYOMING

October 20, 2006

The Hon. Craig Thomas
United States Senator
100 East B Street, Suite 2201
Casper, WY 82601

Dear Craig:

Congratulations on your resounding (like a bass drum!) victory November 7, 2006. So well deserved old friend!

Now hang on tight!

With Judge Brimmer taking senior status, you are in the process of considering who you may recommend that President Bush appoint to the federal trial bench for Wyoming.

Take a good look at Richard Honaker of Rock Springs for the appointment. I've been in your shoes before during this sort of thing, and, if it were up to me, Dick would be a very fine choice for the job.

On straight qualifications for the federal bench, Dick Honaker is one of the most qualified lawyers in the state. He's paid his dues. He's 55 years old, has tried cases in the federal and state courts for 30 years, and Wyoming's judges and lawyers speak very highly of him. Just four years ago, he was elected president of the Wyoming State Bar, and did an excellent job – especially with the young lawyers – of advancing our Wyoming bar traditions of ethics, camaraderie, and professionalism. He was a splendid spokesman for how law ought to be practiced "the Wyoming way," and we don't want to lose those special relationships and practices that we have been so fortunate to have here in Wyoming. As a bridge between my generation of lawyers, and the up and coming younger generation, Dick would help preserve those worthwhile Wyoming legal traditions. He is currently the vice-chair of the Board of Professional Responsibility, and sits on those ethical cases that involve Wyoming lawyers. On the Supreme Court's civil rules committee, he also assists in writing the rules of practice for our courts.

Dick Honaker has the right judicial philosophy – conservative and a strict constructionist. You'll remember (I sure as hell will never forget!) when I was on the "hot seat" in the Senate Judiciary Committee during the Robert Bork and Clarence Thomas hearings in the late 1980's. Even at that time, Dick Honaker was writing and actively supporting my efforts to confirm judges who were committed to interpreting the law and not rewriting it. Over the length of his career, Dick Honaker has held fast to the important idea that the people govern themselves through their

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elected representatives and not through un-elected judges. As a former state legislator, Dick has a clear perspective on the separation of powers. Interestingly enough, we don't currently have any federal judges who have had any legislative experience. It helps – ask Sandra Day O'Connor!!

Dick is also a Wyoming guy, as we are. He grew up in Laramie, and has practiced law in Cheyenne and Rock Springs. Dick's dad, Hayward, came back from the War and had the Grand Avenue Market in Laramie when we were at U.W. Dick's mother, Faye, is in her 80's and still lives in her own home in Laramie. Faye is a Henderson from Big Horn County, a sugar beet farming family – you may remember her brothers, Bobby, Jerry, and Bill from UW. Dick's blood runs Wyoming brown and gold through and through, and that's also good plasma to have in our federal judges! We need judges who embrace our Wyoming heritage and perspectives as they consider issues of how federal law ought to apply in Wyoming.

Some will say that prior judicial experience is important for a federal trial judge. Wyoming's history is to the contrary. Our best federal trial judges have been lawyers with a great deal of federal court practice experience – like "Bud" Brimmer and Ewing T. Kerr. State court judges will have had very little experience practicing law inside the federal system. Nearly half of Dick Honaker's trial practice has been in the federal courts, and he already has a good working relationship with all of the sitting federal judges and magistrates.

You also may have younger candidates expressing an interest in this appointment. Their time will come! Judges Alan Johnson and Bill Downes will likely take senior status in the next five to 10 years. Those younger candidates will thus have the benefit of gaining more experience – civil as well as criminal -- before the next vacancy occurs. Judge Brimmer was in his 50's when he was appointed, and that proved to be a good age for such an appointment. Lawyers in their 50's, like Dick Honaker, have gained maturity, experience, and insight in the law, and are still energetic and eagerly able to serve us well for a long time.

You have already considered Dick Honaker in the past, sending his name on to the White House five years ago as one of your three nominees for the Tenth Circuit. I earnestly hope you'll favorably consider him again, sending his name to the White House as your nominee for the U.S. District Court. As always, thanks for giving him every fair consideration. Let me know if I can furnish any further information regarding this fine person.

Best personal regards,

Friend Al

ROTHGERBER
JOHNSON &
LYONS LLP

Governor Michael J. Sullivan
Attorney at Law
msullivan@rothgerber.com

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Denver • Colorado Springs • Casper

July 17, 2007

VIA FACSIMILE: 202-224-9516

The Honorable Dianne Feinstein
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Feinstein:

I write to support the nomination of Richard Honaker as U.S. District Judge for the District of Wyoming. As a Democrat, I do so knowing that my philosophies might not always be the same as those of Richard. More importantly, however, I have known Richard Honaker as a supporter during my campaigns for Governor, during his service as a State Legislator and, as relates to the position for which he is nominated, as a trial lawyer of substantial skill and excellent reputation.

During the last 20 years I have had occasion to defend a number of significant cases in which Richard represented the other side. In each instance he was a worthy advocate and impressed me with his preparation, his keen legal sense and the calm, methodical and civilized way in which he approached litigation. He was not just distinguished by his civility, but by his integrity; he never once, has been anything but totally honest and straightforward. He has a wide legal and legislative background as well as a lifetime relationship with Wyoming which I believe will serve him well as Federal District Judge. Richard also possesses an intellectual curiosity coupled with compassion and sensitivity, valuable characteristics for a trial judge, and which contribute to a judicial temperament necessary to the just resolution of our citizens' most serious problems.

For the foregoing reasons and because of a level of admiration and respect I have for Richard Honaker, I urge your favorable consideration of him for this position on the Federal bench.

Very truly yours,

Rothgerber Johnson & Lyons LLP

Michael J. Sullivan

MJS:mi

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A Professional Corporation

RHONDA SIGRIST WOODARD*
DANIEL E. WHITE

*ALSO ADMITTED IN OHIO

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JOHN G. HANES
OF COUNSEL

MAILING ADDRESS:
PO BOX 329
CHEYENNE, WY 82003-0329

July 13, 2007

**Via Facsimile 202-224-9516**

The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Richard Honaker

Dear Senator Leahy:

I respectfully submit this letter in support of Richard Honaker for appointment as a judge on the United States District Court for the District of Wyoming. Our justice system would be well-served by his appointment.

Dick Honaker is an intelligent, talented and compassionate lawyer who has done an outstanding job representing his clients. I have heard only positive comments about Dick's legal abilities and his treatment of others.

From 1987 until approximately 1993, I had many opportunities to interact with Dick while he served in the Wyoming legislature. At that time, I represented the Wyoming Trial Lawyers Association and advocated for the preservation of the right of Wyoming citizens to receive fair treatment in Wyoming's civil justice system. Working with Dick Honaker was an absolute pleasure. He was smart, honest, insightful, articulate and worked hard to ensure that the legal system in Wyoming was fair and that the rights of members of the public were protected.

In the years after he left the legislature, I had the opportunity to watch Dick and hear him speak while he was involved with the Wyoming State Bar Association. I was impressed with his ability to connect with the members of the bar and the bench. Dick Honaker is a good listener and is interested in understanding the point of view of others.

Despite his incredible success in his legal career and his other pursuits, Dick has remained modest and unassuming. He has a calm demeanor and quiet competence that should assure litigants, attorneys and the public that the legal system is fair to all who appear in our courts.

I understand that there have been concerns raised by the National Organization for Women and other organizations because of Dick's personal views on women's reproductive rights. I personally support a woman's reproductive choices. I have been a contributor to NOW and Planned Parenthood. Although my personal beliefs on some issues differ from Dick Honaker's personal views, I strongly support Dick's appointment to the federal bench. I believe that as a federal judge, Dick will do his job and will apply the law fairly and impartially. During his thirty year career, he has demonstrated the highest level of ethics and integrity. There is every reason to believe that he will continue to do so on the bench.

We need judges with Dick's intelligence, effectiveness, demeanor and integrity. I urge you to give positive consideration to Richard Honaker's nomination to the U.S. District Court for the District of Wyoming.

Thank you for your consideration.

Sincerely,

Rhonda Woodard

Rhonda Sigrist Woodard

RSW/lp



47450.469

wyoming
STATE BAR
www.wyomingbar.org

February 7, 2008

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

RE: Nomination of Richard H. Honaker; United States District Court Judge for the District of Wyoming

Dear Chairman Leahy:

On behalf of the Officers and Commissioners of the Wyoming State Bar, I am pleased to provide this letter in support of the nomination of Richard H. Honaker for United States District Court Judge for the District of Wyoming.

As a noteworthy and distinguished member of the Wyoming State Bar since September 20, 1976, and after additionally serving as a former President, Richard Honaker has provided invaluable contributions and service to the successful achievements and acclaim of the Wyoming State Bar specifically, and the cause of jurisprudence and justice in general.

The temperament, analytical skill, and clear-eyed vision he has demonstrated in both his professional and personal life provides the basis for our unequivocal and steadfast support of his nomination.

No doubt you and your committee have been provided with voluminous background and historical data regarding Mr. Honaker's outstanding achievements and qualifications, however, as leaders of the Wyoming State Bar, we want to make sure that no doubt exists as to the personal and professional esteem in which Dick is held by his peers and fellow members of the bar.

Again, please accept this correspondence as our highest and strongest recommendation in support of our fellow advocate at the bar, Mr. Richard H. Honaker.

Respectfully,

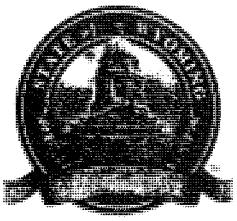
Gay V. Woodhouse, President
Wyoming State Bar

cc: File

P.O. Box 109 | 500 Randall Avenue | Cheyenne WY 82003 | (307) 632-9061 | Fax: (307) 632-3737

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00528 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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WYOMING LEGISLATIVE SERVICE OFFICE
DAN J. PAULI, *Director*

February 27, 2008

Mr. Richard H. Honaker
Honaker Law Offices, LC
214 Winston Drive
P.O. Box 366
Rock Springs, WY 82902

Re: Request for Legislative Records

Dear Mr. Honaker:

You contacted our office requesting information identifying each bill for which you were listed either as prime sponsor or as co-sponsor during the period 1987 through 1992 when you served in the Wyoming House of Representatives.

As the non-partisan staff office of the Wyoming Legislature, we serve as the repository for all legislative records for the state. Unfortunately, we are faced with practical problems in responding to your request, at least as to bills that you co-sponsored.

Prior to 1995 our legislative document system was part of the State's mainframe computer system. That system relied on a tape back up system. The State of Wyoming stopped maintaining that back up system several years ago and in fact we have been advised that the State IT division no longer has software that can read those tape back ups. We are further advised that it would take considerable time and expense for the State to resolve this and they do not see a pressing need to do so at present since there has been no general demand for access to those tape back up records.

What this means is that we have no electronic data base that we can search for records created prior to 1995. Unfortunately, I know of no easy way to search for bills for which you served as co-sponsor.

While we do have paper indexes for the years in question, those records will identify only prime sponsors. I have asked our staff to begin searching those indexes and we will provide information on those bills for which you were listed as prime sponsor as soon as possible.

Searching for those bills on which you were listed as co-sponsor would require an individual review of every bill for that period stored in the Secretary of State's archives, or a page by page review of thousands



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of pages in the digest records for those years. We can assist in making those records available, however, we do not have the staff resources available at this time to conduct that search.

Sincerely,

Dan J. Pauli
Wyoming Legislative Service Office Director

LEGISLATIVE SERVICE OFFICE • 213 State Capitol • Cheyenne, Wyoming 82002
TELEPHONE (307)777-7881 • FAX (307)777-5466 • E-MAIL lso@state.wy.us • WEB SITE http://legisweb.state.wy.us

# NOMINATIONS OF CATHARINA HAYNES, OF TEXAS, NOMINEE TO BE U.S. CIRCUIT COURT JUDGE FOR THE FIFTH CIRCUIT; JOHN A. MENDEZ, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF CALIFORNIA; STANLEY THOMAS ANDERSON, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TENNESSEE

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**THURSDAY, FEBRUARY 21, 2008**

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

The Committee met, pursuant to notice, at 10:04 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy (Chairman of the Committee) presiding.

Also present: Senator Warner.

## OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning, everyone. I want to thank everybody for being here. I especially want to welcome the senior Senator from Virginia who's joining us today and makes it possible to have the second hearing on judicial nominations in 2 weeks.

Senator Warner has always appreciated the importance of the judiciary and the significance of judicial nominees. I was pleased to work with Senator Warner when his support for Roger Gregory helped the Senate finally to confirm the first African-American to serve on the Fourth Circuit. Judge Gregory was the first judicial nominee confirmed during my earlier chairmanship in 2001.

Let me just say on a personal basis, for those of you that may be from Virginia, you have been privileged to have John Warner as your Senator. I say this as a member of the other party. I told Senator Warner, when he announced his retirement, that I've served here now with, including incumbent Senators, about 300 Senators. Some have resigned, some have died, some have left, some have been defeated. Some I have missed when they have left, some I have found it interesting that they have left.

John Warner is one I will miss as much as anybody I've ever served with. He is not only a true gentleman, he's a Senator's Senator. He is a man who does what Mike Mansfield, who was our Ma-



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jority Leader when I first came here told me on my very first day: you always keep your word. He has done that. Sometimes it's been on very difficult issues for him where he's had to take a very independent position.

I think, John, it'll probably be OK if I tell them that I've always referred to you, because I—of course, I'm a Vermonter, live in Vermont, but I have a home also in Northern Virginia that my family and I use when the Senate is in session. I've always referred to Senator Warner as my Senator-away-from-home. John, even after you retire, you will still be my Senator.

Senator WARNER. Thank you very much for those remarks. We indeed have had a wonderful relationship. This is my 30th year here in the Senate and we've traveled together in different parts of the world. I've sat in that seat I don't know how many times, but every single member of the Federal bench in Virginia, I've been involved in their confirmation and advise-and-consent procedure.

Chairman LEAHY. I might note that every time Senator Warner has recommended somebody and has come here and endorsed that person, whether we've had a Republican or a Democratic President, whether we've had a Republican-controlled Senate or Democratic-controlled Senate, when John Warner has recommended the person they've all been confirmed.

Senator WARNER. I thank the Senator for your remarks.

Chairman LEAHY. And today we're going to hear from Catharina Haynes, who I just met. She's been nominated from Texas for a judgeship on the Court of Appeals for the Fifth Circuit. I know that Senator Cornyn is very interested in seeing her nomination proceed. I told Judge Haynes that the reason we're doing this during a recess, is with the Senate schedule the way it is, there was a question whether we would be able to fit a time otherwise.

For those who have been watching the Today Show this morning, it's taking place just a few miles from my home in Vermont, the Sugarbush ski area. It's gorgeous up there and I want you to know it's only to fit this in that I was willing to come back during probably the best skiing time of the year. But I also told Senator Cornyn that we would have a hearing for you. One, I always keep my word on those things, and I just knew that otherwise, if we didn't do it now, it might not happen.

We're also going to hear from Stanley Thomas Anderson, whose nomination for U.S. District Court for the Western District of Tennessee, is one that Senator Alexander raised with me. Then we'll have John A. Mendez for appointment to the U.S. District Court for the Eastern District of California.

Each of these nominations have the support of their home State Senator. Recently, the President and several Republican Senators held, I thought, an unfortunate partisan political rally with judicial and executive nominees at the White House, insisting that they have these hearings.

I was surprised to see Judge Haynes at that photo opportunity. I thought it was unfortunate that she did that and allowed herself to be used in such a partisan political way, especially as I'd already announced her hearing for today. I mention that, because the facts are that during the last 7 years, despite the efforts of the administration to pack the Federal courts and tilt them sharply to the

right, this Committee and the Senate have worked hard to consider judicial nominees.

The fact that we are proceeding today during a congressional recess is yet another indication of our efforts. Last year, the Senate confirmed 40 judicial nominees. That topped the total achieved in any of the three preceding years when the Republicans controlled this Committee.

I mention that, not for bragging rights, but unfortunately there are some at the White House who think that when Democrats have been in control of this Committee that their nominees are slowed down, and of course they went fast under Republicans. It's been just the opposite. Nominees have gotten faster under Democratic control for President Bush than they did under Republican control.

There's also actually more judges than were confirmed in 1996, 1997, 1999, or 2000, when President Clinton was here and the Republicans slowed down his nominees. In the almost 3 years I've chaired the Committee, the Senate has confirmed 140 of President Bush's lifetime appointments to our Federal courts. We did 140 in 3 years. During 4 years with Republican leadership, they did 158. We actually moved faster year by year.

I said that we would treat this President's nominees more fairly than Republicans treated President Clinton's. I told President Bush that. I told him I had no intention of doing as his party had when they pocket filibustered more than 60 of President Clinton's nominees. I made it very clear to my own caucus, if I'm going to be Chairman of this Committee, I would not repeat that. I thought it was a shameful, wrong thing to do.

I would not want it done to a Republican President, I would not want it done to a Democratic President. So the other thing is, in the past, you could secretly hold up somebody by what you did in the so-called blue slips. For the first time in the history of the Senate under my chairmanship I've made such blue slips public, so we've done everything on the record. I also proceeded with a number of nominations I opposed, something that had never been done before under Republican leadership.

So we're going to consider a nominee to the Fifth Circuit, a court to which 12 of the 16 active judges have been appointed by Republican Presidents. We moved forward, as Democrats, on that. It's unfortunate that when President Clinton nominated people to that court they were blocked. Judge Jorge Rangle of Texas, or Enrique Moreno of Texas, or Allison Johnson of Louisiana were never given the kind of hearing that Ms. Haynes is having today.

In fact, those on the other side of the aisle refused to proceed on any nomination to the Fifth Circuit during President Clinton's entire second term. That's why I said, Ms. Haynes, I thought it was unfortunate that you allowed them to use you as a political poster person at the White House, especially as we had already noted your hearing.

President Clinton's Fifth Circuit nominees were pocket filibustered. I held hearings on all six of the Fifth Circuit nominees of this President during my chairmanship, and the Committee has voted on all the previous five. Vacancies on the Fifth Circuit are at an all-time low because we have not pocket filibustered as our predecessors did. Indeed, the vacancy for which Ms. Haynes has

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been nominated is the only one that exists on the Circuit. That's a lot different than when the chief judge of the Circuit had to declare a judicial emergency when previous Presidents' nominees are being pocket filibustered.

I mention that because the Circuit vacancies rose to 26 at the end of President Clinton's second term. They rose to a high of 32 with the additional resignations during the change of administration. By contrast, we have helped reduce those from 32 Circuit Court vacancies across the country to as low as 13 last year.

This may seem to be going long on this, but I do it because almost every week I hear from the White House, faxes from whatever the young person's name is, the President's press secretary, that are oftentimes in error that I want to give everybody the benefit of the doubt, that it's simply an error in arithmetic and not a flat-out lie.

So, unfortunately, valuable time has been wasted on nominations, such as the recently withdrawn nomination of Duncan Ghatto for one of Virginia's two vacancies on the Fourth Circuit. I mention that because we lost a year there, when the President had bipartisan recommendations from the two outstanding Senators from that State, for another nomination.

So, I'd hope you'll work with Senators Warner and Webb to name well-qualified consensus nominees before the Thurman rule comes into force. I'd much rather work with the White House. I realize we're in a political season, and I have to realize that the President's press secretary will not tell the truth on this, but I thought it was a good time to just lay it out.

Senator Warner, again, I can't tell you how—I should also mention that Senator Warner had a distinguished career in the Justice Department and as Navy Secretary. We first met when he was head of the Bicentennial Commission. I still have in my home in Vermont a plaque signed by you to the Bicentennial Commission.

Senator Warner, it's all yours.

**STATEMENT OF HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA**

Senator WARNER. Your State had a lot to do with the history of our great Nation. Mr. Chairman, I'd just ask unanimous consent that any remarks that the distinguished Ranking Member, Senator Specter, may wish to make be placed in the record at the appropriate place.

I've enjoyed—this is my 30th year in the Senate. You are about 4 years senior to me, in my recollection. We've always had a very cordial and strong working relationship. As you stated for the record, all of the nominees that I've been privileged to participate in the advice-and-consent role have been confirmed by this Committee and are now sitting in Virginia.

You mentioned the Fourth Circuit. I do hope that the White House will be forthcoming, and I thank you for your offer the other day, as Senator Webb and I have submitted a list of five nominees. We have sort of stuck by that list and I'm still optimistic that we can replace some vacancies on the Fourth Circuit.

But I wonder if the Chair would indulge me in a short personal story.

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Chairman LEAHY. I'll indulge the senior Senator from Virginia, the cradle of our country, with anything he wants.

Senator WARNER. Well, thank you. But I co-sponsored a bill to increase the salaries for the Federal judiciary. I think it's extremely important that Congress address that issue early on. I mention it for two reasons. First, is that I think it's a slightly amusing story. As you all know, all of us interview very carefully individuals before we forward the names to the President recommending they be appointed to the Judiciary. I had a marvelous man in the office about 3 months ago.

Coincidentally, he is now a partner in a firm that I was a partner in before I became Secretary of Navy. I jokingly asked him as we concluded our discussion and I said, what does your firm offer a law student coming out of my old school, where I went to law school, to enter your firm? And he said about $162,000 a year. I just sort of said to him jokingly—

Chairman LEAHY. I wish you wouldn't say that in front of my staff here!

[Laughter.]

Senator WARNER. But I've been in the Senate now, this is the 30th year, and I haven't advanced any salary-wise since when I left law school. But we've tied our salaries, in many respects, to the Federal judiciary. I also, Mr. Chairman, regrettably, for the first time experienced a very fine individual that I recommended, was confirmed by the Senate, has served several years in the Federal District Court, who came in to advise me of his retiring early on because of the need to work with his family expenses and so forth. So I think it's timely that we do this, and I commend you for your leadership on this subject. I would hope—the bill was reported out of the Committee this January, was it not?

Chairman LEAHY. It was. It was a very interesting thing. We had to kind of almost corral people to stay in here for a quorum, which I did. I said we would not take up anything else in the Committee until that bill was finished. It was finished. I've spoken with the chief justice. He actually called me at home to thank me, and I've spoken with him and my counterpart in the House. Both our Leaders, Republican and Democratic Leaders, are sponsors of it. I'm hoping we can get that through quickly.

Senator WARNER. Good. Well, I commend the Chair, and I do hope that can be achieved because it's extremely important.

The Senate has a unique role. It really creates the third branch of our government, the Federal judiciary, by virtue of the advice-and-consent process and the nominations coming from the President, so we have a particular responsibility for the welfare of those who publicly step up to do this service.

We are fortunate today. I had the opportunity to visit yesterday with Ms. Haynes and meet her husband this morning, a very distinguished career, my gracious. I had no law school career of my own that parallels that, I assure you. Judge Mendez, you went to the U.S. Attorney's Office where I spent a goodly number of years, and I value those years. Honorable Anderson, you also have been a magistrate and administrative law judge.

Indeed, I think the President has selected well with the three nominees we have before the Committee this morning. I find it a

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particular privilege to be participating in your advice-and-consent process.

I thank the Chair.

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

Chairman LEAHY. Thank you. I'm going to put in a statement from Senator Cornyn on Judge Haynes. As I said, he talked to me, a respected member of this Committee. As I said, I told him we would work a time. Senator Alexander has a statement that I will put in on Mr. Anderson. Senator Feinstein is another respected member of this Committee and has a statement on Judge Mendez, and I'll put all of those in the record. Of course, we'll leave open the record for any other Senators.

[The prepared statements of Senators Cornyn, Alexander, and Feinstein appear as a submission for the record.]

Chairman LEAHY. Why don't the three of you step forward? I'll administer the oath, then I want you to introduce your family. That's not to suggest you wouldn't be able to introduce them without being under oath.

[Laughter.]

[Whereupon, the witnesses were duly sworn.]

Chairman LEAHY. Thank you. Please sit down.

Judge Haynes, could you introduce your family? The reason I always like to do this at these hearings, someday in the Haynes, Mendez, or Anderson archives they will have their names on this record. We will double-check with you for the spelling of all the names and everything.

But Ms. Haynes, please go ahead.

Ms. HAYNES. Thank you, Mr. Chairman. I appreciate it very much. I'm very honored to have with me some colleagues and friends from my first, as well as three members of my family: my brother-in-law, Roger Haynes, my nephew, Travis Haynes, and last, but certainly not least, my husband, Craig Haynes. My sister, Wydad Doubleday-Ruthberg had very much wanted to come and had her plane ticket from California, and then came down with a horrible case of the flu that I'm sure you're glad she's not here giving to all of us. But she just simply couldn't make the trip. My parents also were unable to make the trip, but they send their great thanks to you for holding this hearing.

Chairman LEAHY. And we will put the names of the members of your firm also in the record so that we'll have that.

Ms. HAYNES. Thank you.

Chairman LEAHY. The staff will work with you, or Mr. Kim will work with you and we'll make sure we get those names.

Judge Mendez?

Senator WARNER. Mr. Chairman, if I might interject, I wonder if the young man would kindly stand and be recognized? It's very important he attend this hearing today, and I want everybody to take a good look at him. Could you introduce him?

Ms. HAYNES. My nephew, Travis Haynes. He's 14, and taking a day or two from school to come and learn something first-hand about government.

Senator WARNER. Well, that's important.

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Chairman LEAHY. And I hope, Travis, you've had an opportunity to get a tour around the Capitol, too, because this is the seat of democracy. You go ahead and sit down. I just want to tell you a story, a brief story.

I have a friend of mine from overseas, older than I am. Shortly after 9/11, he was here visiting and we were walking down the steps of the Capitol and it was just about dusk. This Capitol building is so inspiring, the sky turns this kind of deep bluish purple and the dome was all lit up. I said to him, "Isn't that beautiful?" He said, you know, in World War II when we were being bombed by the Nazis in home area, he said, my father had a picture of the Capitol, the U.S. Capitol. He told us, don't worry, the Americans will come to help out, and they did. It was interesting.

Senator Warner, I told him, I was pointing to the police around and I said how much they do to protect all of us here. He went around and obviously with an accent, not an American, and shook hands with each one of them and thanked them. It was very moving. So I hope you get a chance to go through that because it is a place that has protected our liberties. During the Civil War, President Lincoln wisely kept the building going on of it. It was burned in 1814, but rebuilt. It's an amazing place.

Judge Mendez?

**STATEMENT OF HON. JOHN MENDEZ, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF CALIFORNIA**

Judge MENDEZ. Senator, unfortunately, coming from California, my wife and three daughters were unable to make the trip with me, but I know they're here in spirit: my wife Susan, my daughters, Mary, Caroline and Elizabeth. And as Judge Haynes indicated, my 80-year-old father wanted to make the trip but just wasn't able to, but I know he's here in spirit as well, too. Thank you for allowing me to be here today.

Chairman LEAHY. What are the ages of your daughters?

Judge MENDEZ. My daughter is—the oldest is 20, a junior in college. I have an 18-year-old daughter, and I have a 13-year-old daughter who acts like a 20-year-old daughter.

[Laughter.]

Chairman LEAHY. You're very fortunate. I've reached an age now, we count the grandchildren. In fact, I was helping to baby-sit two of them last night.

Judge Anderson?

**STATEMENT OF STANLEY THOMAS ANDERSON, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TENNESSEE**

Judge ANDERSON. Thank you, Mr. Chairman. I'd like to introduce to you my wife Lori, and also my son, six-year-old Hunter. Hunter, we are very glad could be with us today.

Chairman LEAHY. There we are.

Judge ANDERSON. And I have two daughters. One is 19, who's in college, and one who's 13, as John said, who believes that she's close to 20 also. But I think it's a common situation.

Chairman LEAHY. Well, thank you. Thank you very much.

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Our first witness will be Catharina Haynes. She's been nominated for a Texas seat in the U.S. Court of Appeals for the Fifth Circuit. She's a former State trial court judge for 8 years. Is that correct?

Ms. HAYNES. Yes, Mr. Chairman.

Chairman LEAHY. And I do have this right, that 191st District Court for the State of Texas?

Ms. HAYNES. That's correct.

Chairman LEAHY. Coming from a little, tiny State like mine, we talk about our 14 districts. This is amazing. She's currently a partner in the law firm of Baker & Botts in Dallas, Texas. She graduated valedictorian with highest honors from the Florida Institute of Technology, graduated second in her class at Emory University School of Law. My eldest son is a graduate of Emory School of Law, and I noted that. Prior to her service on the State bench, Ms. Haynes worked in private practice for 12 years at the Texas law firms of Thompson & Knight and Baker & Botts. What year did you graduate from Emory Law School, just out of curiosity?

Ms. HAYNES. 1986. I think I was a little ahead by a few years.

Chairman LEAHY. Would you like to make any kind of opening statement? You're most welcome to.

Ms. HAYNES. Mr. Chairman, if I could, I just want to say a few words of thanks, if that would be acceptable.

Chairman LEAHY. Please.

**STATEMENT OF CATHARINA HAYNES, OF TEXAS, NOMINEE TO BE U.S. CIRCUIT COURT JUDGE FOR THE FIFTH CIRCUIT**

Ms. HAYNES. Mr. Chairman, I want to start by thanking you very much. I realize this is a recess week. It is a time when there are a lot of other things that you could be doing, not the least of which was the skiing you mentioned. But I know you also have a great many commitments to your constituents, to the Senate, and to this Committee that you could be attending to, and I very much appreciate that you took time to hold this hearing here today.

I want to thank Senator Warner very much for being here as well. I realize you had many other obligations and I appreciate your time yesterday, and your graciousness in being here.

I want to thank the staffs as well. I realize they work extremely hard to gather information that's necessary to this important role of advice and consent, and I do thank them very much.

I also thank the President for nominating me, and Senators Hutchison and Cornyn for their support and encouragement. I thank very much all of my colleagues and friends in Dallas, including those at Baker, Botts. I particularly thank my family. They've been a tremendous source of strength and encouragement, not the least of which is my husband Craig, whom I introduced, and has been a tremendous support and help to me and a great role model to me as a lawyer and a person. So, thank you again.

Chairman LEAHY. Well, thank you very much. The Fifth Circuit is an intriguing circuit. It covers one of the most ethnically, racially, and economically diverse regions of the country. But it's also historically been the vanguard of protecting the civil rights of Americans. In the wake of the groundbreaking *Brown* v. *Board of Education decision*, it was Fifth Circuit judges who took a prime

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role in tearing down Jim Crow society in a region that had many areas highly segregated. They extended the Brown's promise of equality for education to other areas, transportation, voting rights, and so on.

So I think that a nominee to this court has a great obligation to demonstrate sensitivity to people of different backgrounds, a commitment to equal justice under the law. You would face many issues that, for example, a judge in my own State of Vermont may not in a lifetime, or many other States similarly situated as mine. Now, you served in a court that normally does not produce written opinions, so it's hard to go into that kind of a paper trail.

Have there ever been times, either as a lawyer, an advocate, or as a judge when you've taken difficult or unpopular positions on comparatively poor or powerless individuals or members of racial minorities, and taken that position when they may be up against a government or a large corporation?

Ms. HAYNES. Mr. Chairman, I am so fortunate to have been born into a multi-cultural family long before I knew what that word meant. My parents are both immigrants from two different parts of the world, and I had a front seat on the world just sitting in my own living room growing up. I have brought that understanding of different backgrounds to my work as a lawyer and as a judge.

As a judge, I was fair to everyone. Everyone that walked in the room, I realized I was the face of justice to them. The people of the least means and the people of the greatest means all had equal justice under the law in my court. I have had the privilege and honor of working in the Vickery Meadow area of Dallas, which is a three square mile area that is full of many wonderful people of many diverse backgrounds, many of whom are low-income and come from all across the world. I had a concern about this area, because when you drive around you see a lot of different stores, but you see no law offices.

So in the last year after I returned to private practice, I went about trying to do something about that. It was a little bit of a difficult issue because the existing structure for pro bono legal services really couldn't serve that community, and I was able to bring together a coalition of several different agencies throughout Dallas County to join together to form the Vickery Meadow Legal Clinic that had its inaugural—

Chairman LEAHY. The Victory?

Ms. HAYNES. Vickery Meadow Legal Clinic, that had its inaugural clinic 3 weeks ago tonight. We had a number of clients appear. We had 25 volunteer attorneys or more. We had non-attorney volunteers. We had folks from the National Council of Jewish Women come and act as leaders. It was a wonderful collaboration of community organizations to help people who not only are low-income, but also many times have language difficulties and cultural barriers to seeking legal help.

Chairman LEAHY. I ask this because, I'm sure you'd agree that as a judge, you have to leave any kind of political bias behind. You have to be—you can't look at somebody as Democrat or Republican, poor, rich, no matter what their racial background. What would you say—and let me back up a little bit. When I voted for judges, and I've voted for thousands of them over the years, I always ask

myself the question: if I had to appear before that judge would it make any difference who I was, plaintiff, defendant, rich, poor, anything else?

Can you sit here this morning and just say you're ready to do that? I'm not asking you to never be political in your thinking or your voting or anything else like that, but when that person, that litigant, that issue is before you, can you sit there and say I'm going to be fair, I'm going to be fair no matter what, and the other judge says on here, I'm going to be my own person?

Ms. HAYNES. Mr. Chairman, I can not only say I will be fair, I can point to 8 years of a court in which there were never any Democrats or Republicans, there were only litigants seeking justice and for whom I was that face of justice. I believe I have a very good reputation for being fair and impartial to all, whatever their background and whatever their political indications.

Chairman LEAHY. Thank you.

[The biographical information follows.]

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

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

   Catharina Jacoba Hendrika Dubbelday Haynes

   Former Names: maiden name of Dubbelday; former last name of Dubbeldam (as a child); former nickname of "Riekje" (as a child)

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

   United States Circuit Judge for the Fifth Circuit

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

   Office: Baker Botts L.L.P.; 2001 Ross Ave., Ste. 600; Dallas, TX 75201

   Residence: Garland, Texas

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

   1963; Melbourne, Florida

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

   I am married to Craig Alan Haynes. He is an attorney and a partner at Thompson & Knight, 1700 Pacific Ave., Ste. 3300, Dallas, TX 75201. I have no children.

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

   Emory University School of Law, August 1983-May 1986; J.D. with distinction, May 1986

   Florida Institute of Technology, January 1980-June 1983 (also audited a course in the summer of 1984), B.S. Psychology with highest honors, June 1983

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

*Compensated Work since College*:

Baker Botts L.L.P, 2001 Ross Ave., Ste. 600, Dallas, TX 75201 (Partner: 1/07-present)

Judge, 191st District Court, 600 Commerce Str., Rm. 740, Dallas, TX 75202 (1/99-12/06)

Baker Botts L.L.P, 2001 Ross Ave., Ste. 600, Dallas, TX 75201 (Partner: 1/95-12/98; Associate: 9/88-12/94)

Thompson & Knight, 1700 Pacific Ave., Ste. 3300, Dallas, TX 75201 (Associate: 5/86-8/88; Summer Clerk: 5/85-6/85)

Bondurant, Stephenson & Smith (now called Bondurant Mixson & Elmore), 1201 W. Peachtree Str., Ste. 3900, Atlanta, GA 30309 (Summer Associate: 7/85-8/85)

Emory University School of Law, 1301 Clifton Road, Atlanta, GA 30322 (Teaching Assistant: 8/85-5/86)

Norrell Services, Inc., 3535 Piedmont Rd. NE, Atlanta, GA 30305 (Temporary Worker, Summer of 1984)

Florida Institute of Technology, Office of the Registrar, 150 W. University Blvd., Melbourne, FL 32901 (Student Assistant: began working there prior to college graduation – 8/83)

*Volunteer Officer/Director Positions since College*:

Charitable: Vickery Meadow Learning Center, 6329 Ridgecrest Dr., Dallas, TX 75231 (Director, 2005-present)

Bar Association: Dallas Women Lawyers Association, c/o Melanie Durst, 700 N. Pearl Str., Dallas, TX 75201 (Advisory Director, 2003-present); At-Large Director, Dallas Bar Association, 2101 Ross Ave., Dallas, TX 75201 (2001)

Governmental: Court Reporters Certification Board, P.O. Box 13131, Austin, TX 78711 (Chair, 2003-06)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00542 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Political/Civic: Southwest Dallas Pachyderm Club, c/o Lucie Weaver, 301 Cindy Way, DeSoto, TX 75115 (Director for about one month early this year; resigned due to work commitments); Greater Dallas Pachyderm Club, c/o Bob Schies, 3523 Brookhaven Club Road, Farmers Branch, TX 75234 (Director, early 2000s); Dallas Republican Career Women, c/o Kathy Zerangue, 10532 Ravenscroft Dr., Dallas, TX 75230 (a vice president in approximately 2002-04); Greater Garland Republican Organization, P.O. Box 460793, Garland, TX 75046 (Treasurer then President in late 1990's/early 2000 period)

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

   None

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

   Awards and Professional Honors:

   2006 State Bar of Texas Presidential Commendation
   2006 Florida Tech Alumni Association Outstanding Achievement Award
   2005 Dallas Association of Young Lawyers (DAYL) Foundation Award of Excellence
   2004 Dallas Women Lawyers Association Louise B. Raggio Award
   2003 Dallas Women Lawyers Association Outstanding Board Member Award
   1996 & 2002 Dallas Bar Association Jo Anna Moreland Outstanding Committee Chair Award

   Texas Board of Legal Specialization: I am Board Certified in Consumer and Commercial Law by the Texas Board of Legal Specialization, a designation shared by fewer than 100 attorneys in Texas. I was originally certified in 1997. Re-certification takes place every five years. I was re-certified in 2002, and my 2007 application for re-certification is pending.

   Committee for a Qualified Judiciary: This organization is a non-partisan committee made up of lawyers and community members, and determines whether each candidate in a contested race is "endorsed as qualified" or not by the committee. In both of my contested races for judge (2002 and 2006), I was endorsed as qualified by the CQJ.

   College of Judicial Studies: As a judge, I received a Certificate of Special Competence in Civil Jurisprudence from the Texas Center for the Judiciary in 2005. To maintain the certificate, one must remain an active judge. Accordingly, the certificate became inactive upon my departure from the bench.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00543 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Scholarships: I attended Emory University School of Law on a 50% academic scholarship; I received an additional scholarship in my final year. I was a National Merit Scholar (college-sponsored) at Florida Institute of Technology.

Academic Honors: I received the Faculty Scholarship Award from Florida Institute of Technology and graduated with highest honors, first in my class. I graduated with distinction from Emory University School of Law, second in my class. I also received a National Association of Women Lawyers Outstanding Woman Law Graduate Award (1986) and an AAUW Excellence for Women Award (1983).

Honorary Society Memberships: Law School: Order of the Coif
College: Blue Key National Honor Fraternity; Psi Chi National Honor Fraternity.

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

State Bar of Texas: Professional Ethics Committee for the State Bar of Texas (2007-present); Insurance Section Council (2002-present); Member (1986-present); College of the State Bar of Texas (1991-present)

Supreme Court of Texas Jury Task Force (1996-97)

Dallas Bar Association: At-Large Director (2001); Co-Chair: Courthouse Committee (2005), Bench/Bar Conference Committee (2002), and Judiciary Committee (1996). Chair, Subcommittee on Vickery Meadow Area of Pro Bono Activities Committee (2007); ADR Section Council (2001-03); Member (1986-present); also a member of various sections and committees of the Dallas Bar over the years.

Honorary member of Garland Bar Association

Member of the National Association of Women Judges

American Bar Association

Dallas Women Lawyers Association Advisory Board

Bar Association of the Fifth Federal Circuit

Eastern District of Texas Bar Association

Dallas Inn of Court

Dallas Bar Foundation

DAYL Foundation



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00544 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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11. **Bar and Court Admission**:

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

I was admitted to the Texas bar in November of 1986.
I have had no lapses in membership.

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

I am admitted to practice before all Texas state courts.

I have been admitted to the bar of the following federal courts; I am not aware of any lapses in membership:

United States District Court for the Northern (1987), Eastern (1988), Western (1997) and Southern (2007) Districts of Texas

United States Court of Appeals for the Fifth (1987) and Tenth (1988) Circuits

Supreme Court of the United States (1991)

12. **Memberships**:

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

Vickery Meadow Learning Center (Director, 2005-present)
Attorneys Serving the Community (2006-present)
Court Reporters Certification Board (Chair, 2003-06)
Team Dallas/Republican Eagles (1998-present)
Greater Garland Republican Organization (1997-2007; former President, Treasurer)
Southwest Dallas Pachyderm Club (2006-07; director for about one month)
Southeast Dallas Pachyderm (approx. 2001-02)
Greater Dallas Pachyderm Club (approx 1999-07; former director)
Park Cities Republican Women's Club (approx. 2003-07)
Dallas Republican Career Women (1997-2007; former vice president)
First Ladies Republican Women's Club (approx. 2005-06)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00545 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Garland Area Republican Women's Club (approx. 1997-2000; now defunct)
Tower Club (a private lunch club) I have been a member since 1995
Eastminster Presbyterian Church (childhood – 1980's)
NorthPark Presbyterian Church (attended in late 80's, joined in 1992-current)

I joined Gamma Phi Beta Sorority in college, and I was the treasurer of the local chapter during college. I am considered an alumna for life, although I have not been active.

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

I have been a member of women's groups and the Presbyterian Church. No group of which I have been a member practices invidious discrimination on the basis of race, sex or religion.

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

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

*Book*:
Chapter Co-Author (with Craig Haynes) Chapter 17, "Posttrial Motions," *Federal Civil Procedure and Evidence During Trial, 5th Circuit* (published by Lawyers Cooperative, but not circulated) (1998)

*Articles*:
"Constructing a Jury Charge: Perspectives from the Bench," *Advocate*, State Bar of Texas, Litigation Section, Winter 2004

"The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved," 34 *Emory Law Journal* 777 (1985)

I also provided information about the procedures in my court which was printed in the Dallas County Bench Books (exemplars from 2004 and 2006 are being submitted).



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00546 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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*Pamphlet:*
I was one of the authors of a published pamphlet entitled: "Representing Yourself: What You Need to Know," originally published under a grant by the Dallas Bar Foundation through the work of the Dallas Association of Young Lawyers.

During the 2006 campaign, I responded to a *Dallas Business Journal* questionnaire, and the responses were printed in that publication. I also responded to the following questionnaires published online or circulated as a handout: *Dallas Morning News*, League of Women Voters, Channel 11, the Dallas *Examiner,* Grand Prairie Chamber of Commerce, Association of Attorney Mediators and Christian Coalition. During the 2002 campaign, I responded to the following questionnaires published online: *Dallas Morning News* (copy could not be located) and League of Women Voters.

*Columns*:
"Prospecting for Jurors," Financial Advisor News (newsletter for the National Association of Insurance and Financial Advisors), 2006

"What I've Learned as a Judge I Wish I'd Known as a Lawyer," *Dicta*, published by the Dallas Association of Young Lawyers, February 2004

"From Russia with Understanding," Dallas Women Lawyers Association Newsletter, November 2003

"Raising the Next Generation of Lawyers," Dallas Women Lawyers Association Newsletter, Summer 2002

"Beyond Billables: Getting from Here to There," *Dicta*, published by the Dallas Association of Young Lawyers, July 2002

I also wrote some judicial profiles for the Dallas Bar Association *Headnotes* in the 1990's as a lawyer. I wrote a letter to the editor of the *Dallas Morning News* in 1996 supporting Bob Dole for president. I do not have a copy of these documents.

Some speeches listed in response to Question 13d were accompanied by papers.

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

None



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00547 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

In my capacity as Presiding Judge of the Civil District Courts in 2005, I was one of the signatories on a letter on behalf of all Dallas district judges concerning proposed changes to the Texas Code of Judicial Conduct. In addition, I orally presented the position of the Dallas County state district judges at a public hearing. I do not know if the hearing was recorded, and I do not have copies of any such recording or transcript.

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

Political Speeches: As a local judicial candidate, I have been to dozens, maybe hundreds, of events where each candidate is asked to introduce himself or herself and given 30 seconds to 2 minutes to speak about his or her qualifications. I have no recordings or notes of these matters and no way to track accurately the dates or locations of these events. Similarly, candidate debates usually involve numerous candidates with no script or recording. I also spoke to the Dallas Republican Career Women and to the Southwest Dallas Pachyderm Club (in the 2000's) about courthouse operations and jury service and to the Richardson Republican Women about evaluating judges (in 1998). I do not have any notes or recordings of those events.

Other Speeches: With respect to the speeches below, other than papers delivered at such a speech, I have no written memorialization of those speeches. With respect to speeches given at continuing education seminars, such as those hosted by the University of Texas or the State Bar of Texas, there may be a recording of those speeches, available through those organizations.

Keynote Speaker, Summer Law Intern Program Recognition Reception, Dallas Bar Association, August 2007

Panelist, "What Works (and What Doesn't Work) in Litigation: Tips for Experts from the Bench and Bar," National Litigation Support Services Association, Las Vegas, June 2007



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00548 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Panelist, "Back From the Bench: Former Trial Judges Reflect on Effective Appellate Lawyering During Trial," Dallas Bar Association, Appellate Law Section, May 2007

"The Rise and Fall of Sweetheart Deals: Agreements and Assignments After *Gandy*," 4th Annual Advanced Insurance Law Course, State Bar of Texas, Dallas, March 2007

"Preview and Review of Key Insurance Cases," Dallas Bar Association, Tort & Insurance Section, Dallas, October 2006

Panelist, Jury Service and Practice in the Courts, Garland Exchange Club, Garland, September 2006

"Separation of Powers," Preston Center Rotary Club, Dallas, 2006

"A View from the CRCB," Texas Court Reporters Association Annual Conference, Houston, June 2006

"Do's and Don'ts for the Advocate in the Courtroom," 19th Annual Advanced Evidence and Discovery Course, State Bar of Texas, Dallas, May 2006

Panelist, "The Ethics of Lawyer-Judge Interactions," Dallas Bar Association Legal Ethics Committee Annual Evening Seminar, Dallas, April 2006

"The Ethics of Lawyer-Judge Interactions," Mesquite Bar Association, Mesquite, February 2006

Panelist, "Judicial Panel on Insurance Cases: What Judges Would Like to See," 10th Annual Insurance Law Institute, The University of Texas, Austin, December 2005

Panelist, "CRCB Potpourri: Hot Topics at the CRCB," Dallas Court Reporters Association "Ethics & Rules Conference, Dallas, October 2005

Panelist, "The Jury Charge," Dallas Bar Association Bench/Bar Conference, Horseshoe Bay, October 2005

Panelist, Guardian Ad Litem Seminar, Dallas Association of Young Lawyers, Dallas, May 2005

"Traps for the Wary: What Every Young Lawyer Should Know," Dallas Association of Young Lawyers, Dallas, April 2005

Panelist, "Mock Mediation on Construction Liability Issues," 2nd Annual Advanced Insurance Law Course, State Bar of Texas, Dallas, April 2005



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00549 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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"CRCB Potpourri: Hot Topics at the CRCB," Texas Court Reporters Association Officials Retreat, Dallas, April 2005

Moderator, "Forum on South Dallas," Dallas Republican Career Women Meeting, Dallas, 2005

Panelist, "What on Earth Are They Thinking? A Panel of Judges Answers and Asks the Eternal Questions About Coverage Litigation," American Bar Association, Insurance Coverage Litigation Committee Seminar, Tucson, March 2005

Panelist, "Women in Politics," Dallas Women Lawyers Association, Dallas, December 2004

Panelist, "The Duty to Defend in Transition: A Mock Summary Judgment Argument," 9th Annual Insurance Law Institute, The University of Texas, Houston, November 2004

"The Do's and Don'ts of Summary Judgment Motions," Ten Minute Mentor Series for Texas Young Lawyers Association (web-based, available at www.tenminutementor.com), November 2004

Panelist, "The Ethics of Lawyer-Judge Interactions," Bench/Bar Conference, Dallas Bar Association, Conroe, Texas, October 2004

"The Three R's of Professionalism for the Newer Lawyer," Dallas Association of Young Lawyers, Dallas, September 2004

"The Top 10 Things Judges Want to Say to Insurance Lawyers," Insurance, Litigation and You: The Impact of Insurance in Litigation, State Bar of Texas, Insurance Law Section Seminar, Dallas, June 2004

"Moving Motions and Riveting Responses: What Every Young Lawyer Needs to Know," Dallas Association of Young Lawyers, Dallas, May 2004

Panelist, Guardian Ad Litem Seminar, Dallas Association of Young Lawyers, Dallas, May 2004

"Texas Insurance Law: The Year in Preview," Dallas Bar Association, Tort & Insurance Section, Dallas, February 2004

Panelist, "Practicing Law in Dallas County," Tarrant County Bar Association, Fort Worth, December 2003

Panelist, Judicial Panel, Dallas Women Lawyers Association, Dallas, November 2003



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00550 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Panelist, Guardian Ad Litem Seminar, Dallas Association of Young Lawyers, Dallas, September 2003

Panelist, "The Ethics of Lawyer-Judge Interactions," Dallas Bar Association, Dallas, May 2003

Panelist, "Judicial Perspectives on Employment Law," Dallas Bar Association Employment Law Section, Dallas, January 2003

"Non-Scientific and Soft Science Experts," Dallas Bar Association, Family Law Section, Dallas, September 2002

Panelist, "Punitive Damages Coverage," Seventh Annual Insurance Law Institute, The University of Texas, San Antonio, September 2002

"Jury Charge from the Trial Court's Perspective," Dallas Bar Association Appellate Law Section, March 2002

Panelist, "View from the Bench regarding ADR," Dallas Bar Association ADR Section, January 2002

"Why You Should Serve on a Jury," Dallas Rotary Club, 2002.

Panelist, "Judicial Panel: Finding and Fighting Remedies for Breach of the Duty to Defend," Sixth Annual Insurance Law Institute, The University of Texas, Austin, September 2001

Panelist, "Trial Court's Perspective: Common Evidentiary Problems," 24th Annual Advanced Civil Trial Course, State Bar of Texas, Dallas, August 2001

"What I Know Now That I Wish I Had Known as a Lawyer," Dallas Bar Association, Dallas, August 2001

"Jury Charge Do's and Don'ts" and "Succeeding in Summary Judgment Motion Practice," An Evening with the Judges, St. Mary's University School of Law, Dallas, June 2001

Panelist, "The Jury Charge," Dallas Bar Association, Dallas, January 2001

"Punitive Damages," KPMG Peat Marwick Seminar, Dallas, July 2000

"2000: Year in Preview," Dallas Bar Association, Tort & Insurance Section, Dallas, February 2000

"Ethics of Lawyer-Judge Interactions," Dallas Bar Association Housing Crisis Training, October 1999 (with Judge Margaret Keliher)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00551 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Panelist, "Masters in Jury Selection," American Board of Trial Advocates, Dallas, August 1999

Panelist, "Succeeding in our Courts," Dallas Bar Association Business Litigation Section, Dallas, July 1999

Panelist, "Judicial Perspectives on Employment Law," Dallas Bar Association Employment Law Section, Dallas, January 1999

Panelist, "Dallas District Judges," Dallas Trial Lawyers Association, Dallas, June 1998

I have also presented in-house continuing legal education speeches on legal topics with accompanying papers to the lawyers at Baker Botts. Because these speeches and papers are prepared and delivered only to lawyers at the firm, they are considered confidential and proprietary to the firm.

Further, I have also participated in speaking occasions as follows:

Bar Associations: I have been asked to speak about procedures in my court on large judicial panels, such as at several of the annual Dallas Bar Association Minority Attorney Business Development Initiative seminars. I have also been a leader of discussion groups at various Dallas Bar Association seminars, such as one in June of 2007 (the Law Student Professionalism Program) and several Bench/Bar Conferences. I have also participated in the DAYL Dinner for the Judiciary as a speaker or table leader. On several occasions between 1999 and 2006, I participated in the Garland Bar Association's Evening with the Civil Judges (always held in October) in which each judge would talk for a few minutes about practices and procedures in his/her court.

Associations of Mediators: I have spoken as a panelist on several "judicial panels" sponsored by either the Association for Conflict Resolution (Dallas Chapter) or the Association of Attorney Mediators (Dallas Chapter).

Mock Trial/Moot Court Competitions: I have also judged various mock trial and moot court competitions such as the National High School Mock Trial Competition (local, state and national level), the SMU Law School competition, the Hispanic National Bar Association competition and the Youth Believing in Change speech competition. I have also participated in mock trial programs intended as training exercises sponsored by various groups.

Presentations at the Courthouse: Various groups have visited the courts, and I have participated in speaking at the courthouse to those groups ranging from a group of Russian women lawyers, adult students from the Vickery Meadow Learning Center and elementary and high school students. I provided a paper entitled "Overview of Texas Courts" to some of those groups. During several of



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00552 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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the years that I was a judge, I participated in organizing the annual Dallas Bar seminar for the clerks and coordinators who work in the district and county courts, held at the Dallas County Courthouse. I spoke at some of those seminars on issues such as speaking to the media, summary judgment motions, severances and pro se litigants. Papers presented to the Clerks/Coordinators Seminars include: "Everything You Ever Wanted to Know about Motions for Summary Judgment and more" (2000), "Thoughts on Severances (2000), "De-stress Through Teamwork (2001, with others), "Do's and Don'ts in Dealing with the Press" (2002).

Orientation: From approximately 2001-2006, I was the speaker on Texas civil procedure and evidence, as well as Texas judicial ethics, at the annual orientation for law students who were preparing to serve as volunteer judicial interns in the courts during the summer. I also wrote two papers in support of that effort, which are still being used for that purpose: "Texas Civil Procedure and Evidence" and "An Overview of Judicial Ethics."

I do not use a prepared speech text or substantive notes. I do not have notes from most of these presentations.

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

I was interviewed by the *Dallas Morning News* editorial board in September of 2002 and August of 2006 in connection with my general election races. There was no recording of those events, to my knowledge. The paper endorsed me both times, with a short discussion in the editorial page, and I have nothing else associated with those interviews.

I was also interviewed in late 1995/early 1996 by the *Dallas Morning News* regarding the subject of the use of visiting judges.

I was interviewed by the *Texas Lawyer* in 2004 or 2005 on the subject of judges' work habits.

I was interviewed by *El Heraldo* newspaper in late October 2006 regarding the court system.

I was interviewed by a freelance reporter for the Dallas Morning News in connection with a voter registration drive in September or October of 2006.

I was interviewed by the *Dallas Business Journal* on December 29, 2006 and by the *Dallas Morning News* in a similar time frame regarding leaving the court and returning to Baker Botts.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00553 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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I do not have any clips or transcripts of those interviews.

Local legal newspapers of the Dallas Bar Association (1999) and Dallas Women Lawyers Association (approximately 2000) interviewed me for judicial profiles as did the newspaper for Florida Institute of Technology Alumni (2006). I do not have any clips or transcripts of those interviews.

I was interviewed in approximately 1996 by KERA radio about the subject of evaluating judges.

I was interviewed in 2002 by a local Pakistani-language radio station about the importance of the jury system and of selecting qualified judges.

I was interviewed on radio, 990 AM, in November of 2005, about the jury system and the courts on the "Peggy Lundy Show." I have a tape of the Lundy show interview; I have no copies of anything associated with any of the other radio interviews.

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 held the position of Judge, 191st Judicial District Court of Dallas County, Texas from January 1, 1999 to December 31, 2006. It is an elective office, elected on a countywide partisan basis. I was first elected in November of 1998 to a four-year term, taking office on January 1, 1999. I was re-elected in November of 2002 for another four-year term that ended on December 31, 2006.

District courts in Texas are courts of general jurisdiction. In Dallas, different district courts hear different types of matters. As judge of the 191st, I heard civil cases. As a volunteer judge, I heard family cases.

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

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

None. (see response to Question 15 e)

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

To my knowledge, the United States Supreme Court has not granted certiorari in any case over which I presided nor is any such request pending.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00554 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

As the judge of the 191st District Court for eight years, I disposed of approximately 7,000-8,000 cases. There is no systematic way to determine affirmances and reversals, so the following list of reversals is based upon the contemporaneous notes I kept, my memory, and my review of the Court of Appeals' website. I may have inadvertently omitted one or two, but I believe this list is complete. Cases from the 191st District Court are appealed to the Court of Appeals for the Fifth District Court at Dallas (known as the "Dallas Court of Appeals"), however, due to docket equalization issues, some cases are transferred from that court to another court of appeals. Appeals to the Texas Supreme Court are by discretionary petition for review. Unless otherwise indicated, these cases were decided by the Dallas Court of Appeals. I have included only cases in which I was the trial judge.

*Reversals:*

*National Multiple Sclerosis v. Rice,* (Case No. 11-99-00212-CV), 29 S.W.3d 174 (Tex. App. – Eastland 2000, no pet.): The associate judge of the trial court heard a default judgment hearing and granted a default judgment, which I then signed. The Eastland Court of Appeals reversed, holding that the record did not adequately establish attempts to serve the defendant at the registered address before substituted service was used.

*Campbell v. Kosarek,* (Case 05-00-00559-CV), 44 S.W.3d 647 (Tex. App. – Dallas 2001, pet. denied): Plaintiff filed a medical malpractice suit which was subject to the expert report requirements of then-Section 4590i of the Texas Revised Civil Statutes Annotated (now Chapter 74 of the Texas Civil Practice and Remedies Code). I signed an order dismissing the case for failure to file a timely report and failure to file adequate reports. The Court of Appeals reversed, holding that there was a period of time in which the case was abated, such that certain reports were timely and remanding for the trial judge to consider the adequacy of those reports.

*Comerica v. Dallas Central Appraisal District,* (Case No. 05-99-00266-CV), 52 S.W.3d 495 (Tex. App. – Dallas 2001, pet. denied): I granted summary judgment in a case presenting the question of whether a lienholder holding property to sell it for foreclosure is an "owner" for purposes of ad valorem taxation. The Court of Appeals held the opposite to my judgment and reversed with a dissenting opinion.

*Bollinger v. Suntrust,* Case No. 05-99-01364-CV (8/17/01, pet dism'd w.o.j.): I certified a class of investors relating to allegations of securities fraud. Between the time of that ruling and the time the appeal was decided, the Texas Supreme Court issued a ruling adding a new requirement that all cases in which a class is



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00555 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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certified must have a trial plan (known as a "*Bernal* trial plan," after the name of that case). Because there was no *Bernal* trial plan, the Court of Appeals reversed and remanded to allow the trial judge to follow the *Bernal* procedures. I did so, and the Court of Appeals affirmed that ruling (Case No. 05-03-00302, 4/29/04, reported at 133 S.W.3d 342). A petition for review was filed and was recently denied by the Texas Supreme Court, leaving in place the class certification ruling.

*Scottsdale v. Travis*, (Case 05-99-01831-CV), 68 S.W.3d 72 (Tex. App – Dallas 2001, pet. denied): By agreement, the parties presented cross-motions for summary judgment on the question of the duty to defend to the associate judge of the court. He granted summary judgment to the insured, and I signed a judgment to that effect. The Court of Appeals reversed, concluding that the incident in question was not a "fortuity" and holding that summary judgment should have been granted to the insurance company.

*McGarry v. Insurance Depot*, Case No. 05-00-01012-CV (8/13/01, no pet.): In the underlying case, the petitioner's attorney, a former appellate justice, was accused of filing a false affidavit to obtain an ex parte writ of garnishment from a judge of a different court. At a prior hearing regarding these issues, I dissolved the writ obtained by that attorney. Thereafter, Insurance Depot moved for sanctions. At the hearing on the motion for sanctions, the parties presented deposition excerpts and pointed to the record in support of their arguments for and against sanctions. I signed an order granting sanctions of $2500 against the attorney for filing a groundless petition for writ of garnishment in bad faith. The Court of Appeals did not address the question of groundlessness, but it found that the deposition excerpts and court record on which I relied were not in evidence such that there was no evidence of bad faith.

*City of Dallas v. Nathan*, Case No. 05-01-00618-CV (9/21/01, no pet.): Plaintiff sued when her five-year old son died at a city pool. The City filed a plea to the jurisdiction based upon sovereign immunity which I granted it in part, but I denied it as to the claim of premises defect. Sovereign immunity is waived for premises defect claims. The Court of Appeals reversed, holding that the allegations did not state a premises defect claim such that sovereign immunity was not waived.

*Great American v. Martin*, Case No. 05-00-01333-CV (8/6/02, no pet.): The case involved a suit by an insurance agent against her insurance company. I granted summary judgment on the case except for the allegations of fraud. The jury found for the plaintiff, and I signed a judgment on the jury verdict. The Court of Appeals reversed finding that as a matter of law, under the facts of this case, fraud was not an available cause of action.

*Mary Kay v. Woolf*, (Case No. 05-03-01099-CV), 146 S.W.3d 813 (Tex. App. – Dallas 2004, no pet.): A sales director for Mary Kay sued for employment discrimination under a California statute, alleging that adverse employment



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00556 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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actions were taken against her after she was diagnosed with cancer and became pregnant. I signed a judgment in favor of the plaintiff on the jury verdict. The Court of Appeals reversed, holding that the plaintiff was not an employee of Mary Kay as a matter of law.

*GC Buildings v. RGS*, (Case No. 05-05-00158-CV), 188 S.W.3d 739 (Tex. App. – Dallas 2006, no pet.): The parties had a dispute over delay payments in a construction contract. I granted summary judgment, but the Court of Appeals reversed, finding fact issues existed.

*DeQuire v. City of Dallas*, (Case No. 05-04-01865-CV) 192 S.W.3d 663 (Tex. App. – Dallas 2006, pet. filed): I granted the City's plea to the jurisdiction based upon sovereign immunity. The Court of Appeals reversed, finding that the City had waived its claim of sovereign immunity by seeking attorneys' fees and costs in response to the plaintiff's request for a declaratory judgment. Under the Texas declaratory judgment statute, the court may award attorney's fees and costs as are equitable and just to either side in a declaratory judgment action. Since this decision was handed down, the Texas Supreme Court has held that a governmental entity's affirmative claim for relief waives sovereign immunity only for those claims responsive to and up to the amount of the relief sought by the governmental entity. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006). A petition for review is pending in the Supreme Court in the *DeQuire* case.

*Counter-Intelligence v. Calypso*, Case No. 05-06-00021-CV (2/13/07, pet. denied). This case involved a special appearance, the procedural way to challenge personal jurisdiction in Texas. I denied the special appearance. The Court of Appeals found insufficient minimum contracts and reversed and rendered.

*Partial Reversals:*

*Hudiburg v. General Motors*, (Case No. 05-02-01166-CV), 114 S.W.3d 680 (Tex. App. – Dallas 2003), *rev'd in part, aff'd in part*, 199 S.W.3d 249 (Tex. 2006). This case presented the question of the duty to indemnify among the dealer, the component part manufacturer and the truck manufacturer for damages claimed when a truck accident injured a plaintiff in the underlying case. Indemnity was sought under Texas common law and statutory law. I granted summary judgment regarding the indemnity obligations of the truck manufacturer and component part manufacturer. The Court of Appeals reversed. The Texas Supreme Court held that summary judgment was properly granted by the trial judge on some of the statutory indemnity claims and affirmed the remainder of the holding of the Court of Appeals.

*Cigna v. Pybas*, Case No. 05-03-00517-CV (2/12/04) (vacated after appellate opinion, pursuant to settlement): This case involved a suit by the family of an HMO patient who alleged that his death was prematurely hastened by the



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00557 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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negligence and malice of the HMO. The case was tried to a jury which found the HMO liable for actual and punitive damages in the decedent's death. I signed a judgment on the jury verdict. The Court of Appeals affirmed the judgment except for the punitive damages. Although the Court of Appeals agreed that the HMO had acted with malice (the legal standard for punitive damages in Texas), it concluded that the malice was insufficiently linked to the harm suffered by the decedent to support an award of punitive damages.

*TIG v. North American*, (Case No. 05-04-00522-CV), 170 S.W.3d 264 (Tex. App. – Dallas 2005, no pet.): This case involved an insurance coverage dispute regarding which policies were primary, which were excess, and in what amounts. The Court of Appeals affirmed much of my rulings but reversed part of the calculation and remanded for recalculation of prejudgment interest.

*City of Dallas v. VSC*, Case No. 05-05-01227-CV (6/21/06, no pet.): The city filed a plea to the jurisdiction which was I overruled. The Court of Appeals affirmed as to all counts except one where the court found that other necessary parties should have been joined; it found a lack of jurisdiction based on the non-joinder of necessary parties.

*Shaw v. Parker*, Case No. 05-05-00201-CV (6/30/06, pet. denied): This case involved a series of contractual disputes between an employee and her former employer as well as a count for slander. I granted summary judgment as to all counts except the one for slander which proceeded to a bench trial at which I found for the plaintiff. The Court of Appeals affirmed the grant of summary judgment, but it reversed the finding of slander, holding that even when used to imply mental instability, as a matter of law, the word "crazy" cannot be slanderous.

*Dallas County v. Alejo*, Case No. 05-06-00214-CV (4/25/07)(petition for rehearing filed 6/12/07): This case involved a mentally ill woman who died in the Dallas County jail after ingesting so many coffee grinds that she experienced acute caffeine toxicity. Dallas County filed a plea to the jurisdiction, asserting that sovereign immunity barred the claim. Such a plea is an early pleading and challenges whether the allegations state a claim within jurisdiction. Sovereign immunity is waived in Texas if the claim involves the use of tangible personal property. I denied the County's plea to the jurisdiction, finding that the claim involved the use of tangible personal property. On appeal, portions of my rulings were affirmed, but, the Court of Appeals also held that the Plaintiff failed to prove that the jailed decedent obtained the coffee grinds from Dallas County personnel, and thus found that the plea to the jurisdiction should have been granted.

*Mandamus:*

I have had only one mandamus petition granted, to my knowledge. *First Texas Homes v. Van Wolfswinkel.* In that case, I granted a motion to compel arbitration



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00558 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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for most of the case. The Court of Appeals denied the petition for writ of mandamus (Case No. 05-02-01209). The Texas Supreme Court ruled that the entire case should be sent to arbitration. (Case No. 02-0876; 11/14/03) Although cases arising under the Texas Arbitration Act can be appealed on an interlocutory basis, cases arising under the Federal Arbitration Act are subject to the mandamus procedure.

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

None

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

None. As a state district judge in Texas, I wrote orders (a few with explanations), jury charges and findings of fact/conclusions of law, but I did not write "unpublished opinions" or "published opinions." I believe that the orders of my court are kept in either paper file format or microfiche/microfilm by the Dallas County District Clerk's office.

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

None.

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

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

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

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



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00559 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

Sua Sponte: During the time I was a judge, I had an "automatic" procedure under which I recused in the following cases (1) all cases in which my husband's law firm represented a party; (2) all cases that were pending at my then-former law firm when I was an attorney there and, during the first two years I was a judge, all cases in which my former law firm represented a party; and (3) all cases in which any of the litigants were corporations in which my husband or I owned stock. Also, by law, some cases, such as election contests, must be heard by another judge, and I recused in those cases.

Recusal Motions: The files of the Dallas County District Clerk for the time period in which I was a judge are almost entirely paper and unsearchable. Therefore, I can only answer as to those cases I remember. I am not aware of other cases in which a hearing on the recusal was held. There may have been other motions to recuse filed that were dismissed by the Presiding Judge of the First Administrative Region (the appropriate official for these matters) without a hearing.

*Ben Drum v. Cynthia Calhoun.* Mr. Drum had filed a lawsuit in early 2006 seeking to remove Cynthia Calhoun as the County Clerk of Dallas County. She lost her bid for re-election, and he filed a motion for nonsuit at the end of December. Under Texas law, a nonsuit order is a ministerial act, and I signed the order. The last business day of the year and my last day in office as a judge, December 29, I learned that Mr. Drum had filed a motion to recuse me. I believed it was moot as a result of the nonsuit order and my impending departure from the court, but I referred the matter to the Presiding Judge of the First Administrative Region.

*Hall v. Pate*, Cause No. 06-1853. Jeff Forrest Smith filed a motion to recuse on behalf of his client a few weeks before I left office in December of 2006, shortly before a scheduled hearing (which was not held as scheduled). The allegations made in the December filing were based upon an incident that occurred in April of 2006. He complained of an incident in which I refused to allow him to visit with me privately, in the absence of opposing counsel, about his conduct at an earlier hearing in this case. I did not think this situation presented a basis to recuse, so I concluded I was obligated to decline to recuse and referred the matter to the Presiding Judge of the First Administrative Region. I am not aware of any action having been taken on the motion.

*Parson v. Mills,* Cause No. 06-3636. Ms. Parson filed a motion to recuse alleging that I could not be fair to her. I did not think this situation presented a basis to recuse, so I concluded I was obligated to decline to recuse and referred the matter



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00560 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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to the Presiding Judge of the First Administrative Region. The motion was denied or dismissed.

*Lewis v. Kartsotic*, Cause No. 01-5653: Ms. Lewis filed a motion to recuse based on unclear allegations. I did not think this situation presented a basis to recuse, so I concluded I was obligated to decline to recuse and referred the matter to the Presiding Judge of the First Administrative Region. The motion was denied or dismissed.

*Patterson v. Brown*, Cause No. 99-2570 (2000): William Reid filed the motion on behalf of his client because Allstate (a non-party to the case) was the insurer for the defendant, and Mr. Reid had been adverse to Allstate in an unrelated case in which I represented Allstate prior to taking the bench. Under *Matlock v. Sanders*, 273 S.W.2d 956 (Tex. Civ. App. – Beaumont 1942, no writ), I did not think this situation presented a basis to recuse, so I concluded I was obligated to decline to recuse and referred the matter to the Presiding Judge of the First Administrative Region. He assigned Judge John Bradshaw who granted the motion.

Cause No. 00-8817 (2000): Delores Trimble and Johnny Montez filed a motion to recuse based on allegations that I could not be fair to them. I did not think this situation presented a basis to recuse, so I concluded I was obligated to decline to recuse and referred the matter to the Presiding Judge of the First Administrative Region. The motion was denied.

*McLendon v. Hunter*, Cause No. 99-5418 (1999): Mr. Hunter was an attorney representing himself and others. He contended that the case in my court was related to a case in another court in which one of my husband's partners might be a witness. However, the judge in the other court had not found the cases related enough to consolidate, so I concluded that I was obligated to decline to recuse and referred the matter to the Presiding Judge of the First Administrative Region. He assigned Judge Harless (now deceased) to hear the motion, and he granted it.

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

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

I was the Chair of the Texas Court Reporters Certification Board, which is an appointed public office. I have not had a circumstance where I was nominated for a public position and not confirmed. I lost the 2006 election for re-election to the 191st Judicial District Court.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00561 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

I have been a member of the Team Dallas/Republican Eagles which is part of the Dallas County Republican Party, of which I have been a participant. I campaigned for myself from 1997 through 2006. Prior to taking the bench, I participated in grass roots political activities, but other than my own campaign, I have never had a title or designated role in another person's campaign. I assisted with yard signs for judicial candidate David Brooks (1990 and 1992), and I helped with phone banking for Dan Branch for Congress in the early 1990's. In the 1990 election, I passed out cards to voters listing the outcome of the Dallas Bar election poll in the Texas Supreme Court races. All of these activities were volunteer and uncompensated.

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

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

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

I did not serve as a clerk to a judge.

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

My entire law practice, other than my service as a judge, has been in a law firm environment.

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

I practiced with the law firm of Thompson & Knight (1986-88), 1700 Pacific Ave., Ste. 3300, Dallas, TX 75201.

I currently practice and have practiced with the law firm of Baker Botts L.L.P., 2001 Ross Ave., Ste. 600, Dallas, TX 75201. I became associated with that firm in September of 1988, became a partner in January of 1995 and then left to take the bench in December of 1998. Upon leaving the bench, I rejoined Baker Botts as a partner in January of 2007.

I was the judge of the 191st District Court, 600 Commerce Street, Rm.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00562 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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740, Dallas, TX 75202, from January of 1999-December of 2006. In that capacity, I was paid by the State of Texas and received a supplement from Dallas County.

b. Describe:

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

I have had a broad civil trial and appellate practice as a lawyer and a broad civil experience as a trial court judge. As a lawyer, I have handled cases in state and federal court throughout Texas and in some other states. I have engaged in substantial motion practice, depositions, mediations and other pre-trial proceedings as well as handled trials and appeals. During the 8 years prior to this one, I presided over a state civil trial court which heard a very wide array of civil matters, as well as forfeitures under the Code of Criminal Procedure.

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

I am Board Certified in Consumer and Commercial Law by the Texas Board of Legal Specialization (a designation shared by fewer than 100 attorneys in Texas). This specialty encompasses transactions involving consumers, sales of goods or services, lending transactions, insurance, deceptive trade practices and associated causes of action and statutes. I have handled primarily commercial/business and insurance cases for corporate and individual clients. In earlier years, I have also handled personal injury cases, and I currently handle products liability cases.

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

My entire practice as a lawyer is and has been litigation-based, either cases already pending or matters which may reach litigation (though some are settled or resolved without litigation).

During the 8 years prior to this year, I appeared in state court nearly every work day as the Judge of the 191st District Court.

In 2007, I returned to the private practice of law, and I am in the process of rebuilding my practice; the bulk of my current practice is in federal court. I have received the training necessary to be a mediator and conducted some pro bono mediations just prior to taking the bench. I have also been asked to serve and/or appointed by courts as a mediator in a few cases on a paying basis this year. This year, I have appeared occasionally in court.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00563 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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During the years before I took the bench, the frequency of my court appearances varied from occasionally in some years to frequently in others:

i. Indicate the percentage of your practice in:
   1. federal courts: approx 40%;
   2. state courts of record: approx 60%;
   3. other courts: I tried one case before an administrative agency through the State Office of Administrative Hearings.

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 100%
   2. criminal proceedings: 0%.

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

As a lawyer, I have tried seven cases to submission of contested issues to the trier of fact (including one before the State Office of Administrative Hearings); three as lead counsel and four as co-lead or associate counsel.

i. What percentage of these trials were:
   1. jury: 57%
   2. non-jury. 43%

As a judge, I presided over almost 300 trials, approximately two-thirds of which were jury trials.

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

I have filed briefs in opposition to petitions for writ of certiorari in two cases as Attorney of Record: *Wanda Sue Brandon v. The Travelers Insurance Company et al.*, Case No. 94-825 (December 1994); Travis *H. Askew et al. v. H.E. Chiles et al.*, Case No. 91-547 (November 1991). Certiorari was not granted in either case.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00564 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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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. *Lewis Walton and Lynda Walton v. Home Owners Warranty Corp. et al.*, In the 215th Judicial District Court of Harris County, Texas; Cause No. 93-02046 (handled from 1994 through end of 1998) (Judge Dwight Jefferson, now in private practice).

This case involved allegations of breach of contract and bad faith in connection with an insurance claim. I was lead counsel for Cigna Insurance Company. This case was tried to a jury for three weeks in the summer of 1998. While the jury was deliberating, my client settled. Other parties continued to verdict.

The plaintiff had several attorneys. At the time of trial, it was David Pace, 707 Omar, Houston, TX 77009, (713) 862-4344 (address from the time of the case; phone number from the State Bar website).

The two co-defendants at trial were represented by Robert Purgatorio, 1200 Smith Street, Ste. 400, Houston, TX 77002-4308, 713.654.1111, and Richard Petronella, 8 East Greenway Plaza, Ste. 606, Houston, TX 77046, 713.965.0606.

My co-counsel at trial, David Bernal, at that time was with the Houston office of Baker Botts L.L.P. He is now Judge of the 281st District Court of Harris County, Texas, located at 201 Caroline, 14th Floor, Houston, TX 77002.

2. *Lincoln National Health and Casualty Ins. Co. v. Clark*, Cause No. 92-2404-C, In the 68th District Court of Dallas Count, Texas (Judge Gary Hall, now retired; Judge David Cave, deceased, presided over the post-answer default trial)(my representation: 1992-96) (also, bill of review under Cause No. 93-11639).

This case involved my client's effort to set aside a disability policy for fraud. I handled the entirety of the case, although another lawyer also was listed on the pleadings. Depositions were taken in Texas and Indiana; after fully litigating the case, Mr. Clark did not appear for trial. Under Texas law, when a party fails to appear after filing an answer, the plaintiff must present evidence at the trial, which I did on behalf of the client and received judgment on behalf of my client. Thereafter, Mr. Clark filed a bill of review and various appellate procedures, but the case was ultimately resolved in my client's favor.

Mr. Clark had various attorneys and was sometimes pro se. The attorney he had for most of the case was Richard Wardroup, P.O. Box 879, Lubbock, TX 79408, 806.744.1911.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00565 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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3. *Lone Star Partners v. NationsBank Corporation et al.*, Cause No. 92-07826-C, In the 68th Judicial District Court of Dallas County, Texas (Judge Gary Hall, now retired), *aff'd in part, rev'd in part*, 893 S.W.2d 593 (Tex. App. – Texarkana 1994, writ denied)(my representation: 1992-1998).

We represented NationsBank Corporation which had obtained the assets of the failed bank, First RepublicBank, in a bid process. Lone Star Partners sued, claiming that NationsBank committed fraud and that Lone Star Partners should have been the successful bidder. We obtained summary judgment on behalf of the client, which was partially reversed on appeal. After remand, summary judgment again was granted in our client's favor. That judgment was appealed, and it was affirmed after I left the firm to take the bench.

Co-counsel: George Lamb, 2001 Ross Ave., Ste. 600, Dallas, TX 75201, 214.953.6500.

Opposing counsel: Carl David Adams, 6060 N. Central Expwy., Ste. 690, Dallas, TX 75206, 214.691.6622.

4. *Wanda Sue Brandon v. Travelers Ins. Co. and Abbott Laboratories, Inc.*; Cause No. CA 1-91-121-C (N.D. Tex., Judge Sam Cummings), *aff'd*, 18 F.3d 1321 (1994) (opinion by Justice Goldberg, deceased), *cert. denied*, 513 U.S. 1081 (1995) (my representation: 1991-95).

This case was a suit for ERISA benefits under a group life policy. I represented Abbott Laboratories. Summary judgment was entered in my client's favor. That judgment was affirmed and certiorari was denied. Although another lawyer from my firm was also listed on the pleadings, I was responsible for 90% of the work on this case.

Counsel for the co-defendant was James Peden, 901 Main Str., Ste. 4300, Dallas, TX 75202, 214.651.4601.

The counsel for the opposing side was Bruce Coane, 1900 West Loop South, Ste. 820, Houston, TX, 77027-3206, 713.850.0066.

5. *Microdynamics, Inc. v. John Phipps and XOR Corp.*, Cause No. 219-1289-92; Judge Curt B. Henderson, In the 219th Judicial District Court of Collin County, Texas (my representation 1992-93).

We represented Microdynamics, Inc. in a suit against its former officer for theft of trade secrets and confidential information. My co-counsel and I successfully tried the temporary injunction hearing to the court. Thereafter, the case settled.

Co-Counsel: Larry Carlson, 2001 Ross Ave., Ste. 600, Dallas, TX 75201, 214.953.6500.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00566 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Opposing counsel: Thomas Barron, 2001 Bryan Str., Ste. 3170, Dallas, TX 75201, 214.855.6631; Kevin Nash, 3521 Oak Lawn #151, Dallas, TX 75219, 214.526.4890; Susan E. Powley, 1717 Main Str., Suite, 3200, Dallas, TX 75201, 214.438.1573.

6. *Unicorn Marketing Corp. v. Peach Tree Bancard Corp.*, Cause No. 236-124236-89; Judge Albert White (now retired); In the 236th Judicial District Court of Tarrant County, Texas (my representation: 1989-1992).

I represented Peach Tree Bancard in a suit filed against it alleging violations of the Texas Deceptive Trade Practices Act arising out of a credit card processing agreement. The plaintiff sought millions of dollars in alleged lost profits. I tried the case on behalf of my client and received a jury verdict in my client's favor on which judgment was entered.

Opposing Counsel: John Osborne, 5065 Westheimer Road, #722, Houston, TX 77056, 713.840.0283.

7. *Travis Askew et al. v. H.E. Chiles, et al.*; Civil Action No. H-90-3003, In the United States District Court for the Southern District of Texas, Houston Division (Judge Sim Lake), *aff'd,* No. 91-2119 (5th Cir. 1991), *cert. denied*, No. 91-647 (1992)(my representation: 1990-1992).

I represented four individuals who were sued in a case in which the Plaintiffs were seeking civil damages for alleged violations of the RICO statutes (18 U.S.C. 1961 *et seq.*). The trial court granted Defendants' motion to dismiss under Federal Rule 12(b)(6), the Fifth Circuit affirmed, and the United States Supreme Court denied the petition for writ of certiorari.

Co-Counsel: Rod Phelan, 2001 Ross Ave., Ste. 600, Dallas, TX 75201, 214.953.6500.

Opposing Counsel: Vernon Reaser, 202 Pecan Dr., Victoria, TX 77905, 361.576.5858.

8. *Elizabeth Walker Williamson et al. v. Coastal Oil & Gas Co. et al.*, Cause No. 88-8232-C. In the 68th District Court of Dallas County, Texas (Judge Gary Hall, now retired).

This case involved a dispute over oil and gas royalty interests. I was part of the team that litigated the case for several years in the early 1990's. It was ultimately settled. We represented Coastal Oil & Gas, and the team from my firm included Ron Palmer (now retired), Larry Carlson and Van Beckwith, 2001 Ross Ave., Ste. 600, Dallas, TX 75201; 214.953.6500.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00567 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Counsel for a co-defendant included John Little, 901 Main Str., Ste. 4110, Dallas, TX 75202, 214.573.2300.

Counsel for the opposing party included Robert Payne (deceased) and Richard Kirwan, 6122 Waggoner, Dallas, TX 75230 (I am unable to confirm current contact information).

9. *United States Aviation Underwriters, Inc. v. Olympia Wings, Inc.*, Civil Action No. H-85-4519, United States Court of Appeals for the Southern District of Texas (Judge James DeAnda, deceased).

I was one of the attorneys representing United States Aviation Underwriters in this case which was a declaratory judgment action regarding insurance coverage over an airplane accident. I began working on the case in late 1986/early 1987. It was tried in October of 1987; the client lost the jury verdict, but the case was reversed on appeal (896 F.2d 949) after I left that firm (I left in August of 1988).

The other members of my client's trial team were Frank Finn and Rachelle Glazer, 1700 Pacific Ave., Ste. 3300, Dallas, TX 75201; 214.969.1700; Ralph Miller, 100 Crescent Court, Ste. 1300, Dallas, TX 75201; 214.746.7700.

Opposing lawyers in the case were Tom Davis (deceased), Luis Vallejo, P.O. Box 786, Houston, TX 77001, 713.664.4045, Mark Hovenkamp, 1001 McKinney, Ste. 1000, Houston, TX, 77002, 713.739.0058 and Craig Lewis, 777 Walker, Ste. 2500, Houston, TX, 77002, 713.222.8080.

10. *In re United States Houston Corporation;* Case No. 87BK-00001-S11; *United States Housing Corporation v. Continental Savings Association*, Adversary No. 87AV-00007; Judge Stephen Callaway; In the United States Bankruptcy Court for the Western District of Louisiana, Shreveport Division.

I was one of three lawyers from my firm who, together with local counsel, represented the debtor-in-possession, U.S. Housing Corporation, in an adversary proceeding alleging fraud in connection with various loans. I participated in trying the case to the court. I began working on the case in 1987, and the trial was that same year; I continued working on this file until I left the firm in August of 1988. An Order of Dismissal was entered in April of 1989.

Co-counsel: Frank Finn (lead), 1700 Pacific Ave., Ste. 3300, Dallas, TX 75201; 214.969.1700.

Opposing counsel: Marigny Lanier, 5910 N. Central Expwy., Suite 1310, Dallas, TX 75206; 214.706.0920; Paul Ledbetter, 3900 N. Dallas Pkwy., Ste. 500, Plano, TX 75093; 972.665.1012



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

My practice as a lawyer has been entirely concentrated in handling litigation or potential litigation. As a partner at the firm, I am involved in mentoring young attorneys and acting as an advisor to summer associates. Other than providing confidential advice protected by the attorney-client privilege on matters that did not result in litigation and handling litigated matters to a conclusion by settlement, summary judgment, trial or other disposition, I have not had any other significant legal activities as a lawyer on behalf of clients. I have recently been appointed by courts to act as a mediator in some cases.

As a judge, I presided over hundreds of trials and thousands of hearings encompassing a wide range of legal theories and factual disputes. I served as the Presiding Judge of the Dallas Civil District Courts in 2005.

I served as one of the primary organizers of the annual Dallas Bar "Clerk/Coordinators Seminar" for 1999-2002. These seminars benefit the legal profession and the public at large by enhancing court personnel's technical and communication skills in a wide variety of areas.

I assisted the Dallas Minority Attorney Program by helping draft a form for Guardians Ad Litem to describe their qualifications (ultimately compiled in a book for use by the judges) and by speaking at their seminars.

I assisted the Dallas Association of Young Lawyers in a number of ways including assisting with numerous continuing legal education and social programs conducted by the DAYL. On the topics of Texas civil procedure and evidence and judicial ethics, I have prepared written materials for and spoken at the annual DAYL orientation for summer law interns in the courts. The summer internship program is a great value to the law students and the courts, as well as the public they serve. Making sure these students understand key aspects of judicial ethics and civil procedure and evidence is important to the success of the program.

I assisted in Alternative Dispute Resolution activities. I served on the Dallas Bar ADR Section Council for the years 2001, 2002 and 2003. In this role, I have helped facilitate better communication between judges, lawyers and mediators which, in turn, helps the public they serve. I have served as a continuing legal education speaker for ADR professionals including non-attorney mediators. As a lawyer, I served as a volunteer mediator at settlement weeks held in Tarrant and Dallas Counties and at the Dispute Mediation Services offices.



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I have served on the State Bar of Texas Insurance Section Council where I assist with planning and implementing continuing legal education seminars and where I have coordinated efforts between the bench and bar.

As part of my work as an advisory director of the Dallas Women Lawyers Association Activities, I participated in DWLA's outreach to the larger community. DWLA hosted a group of Russian Women Lawyers who visited Dallas to learn about our courts and businesses. These women are leaders in their communities and this trip was part of an effort to foster better understanding and relationships between the U.S. and Russia. I served as a "home host," hosting 2 women in my home for 18 days. I also coordinated and prepared materials for a "Day in the Civil Courts" where the delegates spent the day studying our civil court system.

In the Dallas Bar Association, I have served as an At-Large Director of the Dallas Bar, Co-Chair of the Judiciary Committee, Co-Chair of the Bench/Bar Conference Committee and Co-Chair of the Courthouse Committee. As Co-Chair of the Judiciary Committee and as Chair of the Visiting Judges Subcommittee before that, I worked to foster a better relationship with visiting judges and greater accountability for the use of visiting judges. I facilitated the Committee's participation in a project to assist the Dallas Court of Appeals with a record retention/reduction problem they faced. We helped the local judges implement an emergency local rule to deal with filing of discovery that was becoming overwhelming. I also worked to foster more open communications between lawyers and judges. While I was Co-Chair of the Courthouse Committee, an addition to the civil courts' building was being built, and I worked on efforts to make sure that the move from the old section to the new section was handled as smoothly as possible for the benefit of all users of the courthouse.

I was appointed by the Texas Supreme Court to serve on its Task Force on Juries in 1996 and 1997, helping to propose ideas that would facilitate a better environment for jurors and make their service more meaningful and less burdensome.

I was appointed by the Texas Supreme Court as Chair of the Texas Court Reporters Certification Board in 2003. By law, the Chair of the Board must be an active district judge. This Board is charged with certifying, re-certifying and disciplining court reporters. This position is very important in maintaining public trust in the accuracy of transcripts of court proceedings and depositions. In that capacity, I presided over the meetings and disciplinary hearings of the Board. I also presided over a public hearing regarding the issue of the ability of court reporters to enter into long-term financial arrangements with law firms and litigants. Dozens of people spoke at this hearing, and the Board made a recommendation to the Texas Supreme Court as a result of this hearing.

I was recently appointed by the Texas Supreme Court to serve on the Professional Ethics Committee for the State Bar of Texas. This committee issues opinions on the application of the Texas Disciplinary Rules of Professional Conduct in response to questions.



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

I have not taught any law school courses as a lawyer. I have appeared a few times as a guest speaker at courses at SMU Dedman School of Law. I also acted as a volunteer teacher one time in conjunction with the trial techniques program at the Emory University School of Law. I have also spoken at numerous continuing legal education seminars as discussed above. I have been and currently am a volunteer teacher of Pre-GED subjects at the Vickery Meadow Learning Center. I have taught Reading and Writing there. As a third-year law student, I taught Research, Writing and Advocacy to the first-year law students at Emory University School of Law.

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

None.

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

No, I am not employed by anyone other than Baker Botts, from which I would resign, if confirmed. I do not consider it employment, but I am involved in charitable and bar-related volunteer activities which I plan to continue unless required to resign by the Code of Judicial Conduct governing federal judges. I would resign from any political organizations of which I am currently a member.

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

See attached Financial Disclosure Report.

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

See attached Net Worth Statement, dated 7/8/07.



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26. **Potential Conflicts of Interest**:

a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

Parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during my initial service in the position to which I have been nominated, would include cases in which my husband's law firm, Thompson & Knight, represents a party and cases involving my current law firm, Baker Botts, if those cases are currently within the firm as well as for two years after I took office, regardless of when the case came to the firm. With regard to financial arrangements, my husband owns stock in a few companies and we also own mutual funds. I am not aware of any categories of litigation that are likely to present potential conflicts-of-interest during my initial service. If a conflict under the rules is presented, I would recuse as required.

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

I would follow the Code of Conduct for United States Judges.

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

As both a lawyer and a judge, I have been involved in significant volunteer activities within the legal community. I initiated, coordinated and participated in writing a brochure entitled "Representing Yourself: What You Need to Know" in conjunction with the Dallas Association of Young Lawyers and community volunteer, Cobie Russell. This brochure is now widely distributed around the civil courts to assist pro se litigants in accessing the courts and understanding court procedures.

I also volunteered as a judge at the monthly "Pro Bono Clinics" conducted at the Legal Aid of NorthWest Texas offices under the auspices of the Dallas Volunteer Attorney Program.

In 2006, I created and participated in organizing a "Law Fair," presenting legal topics of interest and relevant literature to low-income individuals living in the Vickery Meadow area of Dallas. The Vickery Meadow area of Dallas is a small, densely-populated area that is home to a large number of low-income individuals. As a result of the success of that program, I chaired another Law Fair this year.



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Since my return to private practice, I have volunteered at the South Dallas Legal Clinic. I am also the Chair of the Vickery Meadow Subcommittee of the Dallas Bar Association Pro Bono Activities Committee. As chair of the Subcommittee, I am also working on a long-term project, partnering with other providers of services in the area (such as Human Rights Initiative, Central Dallas Ministries and Catholic Charities) to bring volunteer legal clinics and services to this underserved area.

Over the last several years, I have also served and continue to serve the disadvantaged by teaching Pre-GED at the Vickery Meadow Learning Center, which teaches English as a second language to adults and educates their young children. I am also on the Board of that Center. Through my church, I have also volunteered at Youth Believing in Change, a faith-based organization for at-risk youth.

28. **Selection Process**:

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

My state does not have a selection committee for appointees to the federal circuit court. I was asked to interview for this position, and I met the Counsel and staff from the Office of White House Counsel, as well as the Attorney General and staff from the Department of Justice in April of 2007. Following those interviews, I have communicated with staff from the White House Counsel's office and the Department of Justice to provide additional information on my background and qualifications. I have also communicated with staff from the Department of Justice regarding nomination paperwork. My nomination was submitted to the United States Senate on July 17, 2007.

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

No.



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Rev. 1/2006

# FINANCIAL DISCLOSURE REPORT
## NOMINATION FILING

*Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)*

| 1. Person Reporting (last name, first, middle initial) | 2. Court or Organization | 3. Date of Report |
|---|---|---|
| Haynes, Catharina D | Fifth Circuit | 07/21/2007 |
| **4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)** | **5a. Report Type (check appropriate type)** | **6. Reporting Period** |
| Circuit Judge Nominee | ☒ Nomination, Date 7/17/2007<br>☐ Initial ☐ Annual ☐ Final<br>5b. ☐ Amended Report | 1/1/2006 to 6/30/2007 |
| **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.** | |
| 2001 Ross Ave., Ste 600<br>Dallas, TX 75201 | 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.)*

☐ NONE *(No reportable positions.)*

| POSITION | NAME OF ORGANIZATION/ENTITY |
|---|---|
| 1. Director | Vickery Meadow Learning Center |
| 2. Advisory Director | Dallas Women Lawyers Association |
| 3. Currently, I am partner. I would resign if confirmed. | Baker Botts L.L.P. |
| 4. | |
| 5. | |

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

☐ NONE *(No reportable agreements.)*

| DATE | PARTIES AND TERMS |
|---|---|
| 1. 2007 | Baker & Botts 401k Plan; will rollover if confirmed and required to do so |
| 2. | |
| 3. | |

| FINANCIAL DISCLOSURE REPORT<br>Page 2 of 7 | Name of Person Reporting | Date of Report |
|---|---|---|
| | Haynes, Catharina D | 07/21/2007 |

**III. NON-INVESTMENT INCOME.** *(Reporting individual and spouse; see pp. 17-34 of instructions.)*

**A. Filer's Non-Investment Income**

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

| DATE | SOURCE AND TYPE | INCOME (yours, not spouse's) |
|---|---|---|
| 1. 2006 | State of Texas (Judicial Salary) | $ 125,000 |
| 2. 2006 | Dallas County (County Supplement -- judicial) | $ 8411 |
| 3. 2007 | Baker Botts L.L.P. (law firm partnership income) | $ 193,000 |
| 4. 2005 | State of Texas (Judicial Salary) | $ 101,573 |
| 5. 2005 | Dallas County (County Supplement-judicial) | $ 9182 |
| 6. 1/1/07 | State of Texas (Judicial Salary) (approx.) | $ 10,400 |

**B. Spouse's Non-Investment Income** - *If you were married during any portion of the reporting year, complete this section.*
*(Dollar amount not required except for honoraria.)*

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

| DATE | SOURCE AND TYPE |
|---|---|
| 1. 2006 | Thompson & Knight law firm partnership income |
| 2. 2007 | Thompson & Knight law firm partnership income |
| 3. | |
| 4. | |
| 5. | |

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

☐ NONE *(No reportable reimbursements.)*

| SOURCE | DESCRIPTION |
|---|---|
| 1. exempt | |
| 2. | |
| 3. | |
| 4. | |
| 5. | |

| FINANCIAL DISCLOSURE REPORT<br>Page 3 of 7 | Name of Person Reporting<br>Haynes, Catharina D | Date of Report<br>07/21/2007 |
|---|---|---|

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

☐ NONE *(No reportable gifts.)*

| | SOURCE | DESCRIPTION | VALUE |
|---|---|---|---|
| 1. | exempt | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

**VI. LIABILITIES.** *(Includes those of spouse and dependent children. See pp. 32-34 of instructions.)*

☒ NONE *(No reportable liabilities.)*

| | CREDITOR | DESCRIPTION | VALUE CODE |
|---|---|---|---|
| 1. | | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

| FINANCIAL DISCLOSURE REPORT<br>Page 4 of 7 | Name of Person Reporting<br>Haynes, Catharina D | Date of Report<br>07/21/2007 |
|---|---|---|

**VII. INVESTMENTS and TRUSTS** – *Income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets)<br>Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | (1) Amount Code 1 (A-H) | (2) Type (e.g. div., rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | If not exempt from disclosure<br>(2) Date Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
| 1. Bank of America | B | Interest | O | T | exempt | | | | |
| 2. Chase Bank | B | Interest | K | T | | | | | |
| 3. Janus Money Fund | A | Interest | J | T | | | | | |
| 4. T.Rowe Price Prime (TRP) Reserve Fund | B | Interest | N | T | | | | | |
| 5. TRP New Income | A | Dividend | J | T | | | | | |
| 6. TRP International Stock | C | Dividend | M | T | | | | | |
| 7. TRP New America Growth | D | Dividend | M | T | | | | | |
| 8. TRP Health Sciences Fund | D | Dividend | M | T | | | | | |
| 9. TRP Tax Efficient Multi-cap | | None | M | T | | | | | |
| 10. TRP Tax Free Income Fund | E | Dividend | O | T | | | | | |
| 11. TRP Tax Free Short Interm. | A | Dividend | K | T | | | | | |
| 12. British Petroleum (BP) | A | Dividend | J | T | | | | | |
| 13. IBM | A | Dividend | K | T | | | | | |
| 14. Motorola (MOT) | A | Dividend | J | T | | | | | |
| 15. Pfizer (PFE) | A | Dividend | J | T | | | | | |
| 16. Franklin Mutual Shares Class Z | E | Dividend | N | T | | | | | |
| 17. Janus Fund | A | Dividend | M | T | | | | | |

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

**FINANCIAL DISCLOSURE REPORT**
Page 5 of 7

| Name of Person Reporting | Date of Report |
|---|---|
| Haynes, Catharina D | 07/21/2007 |

## VII. INVESTMENTS and TRUSTS – *Income, value, transactions (includes those of the spouse and dependent children, See pp. 34-37 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period: (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. TRP Equity Income | A | Dividend | K | T | | | | | |
| 19. Vanguard REIT Fund | B | Dividend | M | T | | | | | |
| 20. Vanguard 500 Index Fund | A | Dividend | M | T | | | | | |
| 21. Vanguard TM Small Cap | A | Dividend | M | T | | | | | |
| 22. US EE Savings Bonds | C | Dividend | L | T | | | | | |
| 23. TRP Retirement 2020 (IRA) | A | Dividend | K | T | | | | | |
| 24. TRP Retirement 2030 (IRA) | A | Dividend | J | T | | | | | |
| 25. Baker Botts Partnership Equity | A | Interest | K | U | | | | | |
| 26. Thompson Knight Partnership Equity | | None | L | U | | | | | |
| 27. Baker Botts 401K Plan (AIM Liquid, Fidelity Mag, Fid. Growt | D | Dividend | M | T | | | | | |
| 28. TX Emp. Ret. Plan (Fid US Bond, Vanguard Inst. Van. Growth) | C | Dividend | M | T | | | | | |
| 29. Thompson Knight 401K (Vanguard Well. Van. Inst., Stable Val. | D | Dividend | O | T | | | | | |
| 30. State of TX Judic. Retirement Equity (est.) | C | Interest | L | T | | | | | |
| 31. Baker Botts Drawing Acct. | A | Interest | L | T | | | | | |
| 32. Texas County & District Retirement System | A | Interest | J | T | | | | | |

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

| FINANCIAL DISCLOSURE REPORT<br>Page 6 of 7 | Name of Person Reporting<br>Haynes, Catharina D | Date of Report<br>07/21/2007 |
|---|---|---|

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

| FINANCIAL DISCLOSURE REPORT<br>Page 7 of 7 | Name of Person Reporting<br>Haynes, Catharina D | Date of Report<br>07/21/2007 |
|---|---|---|

**IX. CERTIFICATION.**

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

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

Signature Catharina Haynes Date 7-21-07

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

## FINANCIAL STATEMENT

### NET WORTH

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

| ASSETS | | | | LIABILITIES | | | |
|---|---|---|---|---|---|---|---|
| Cash on hand and in banks | | 985 | 138 | Notes payable to banks-secured | | | |
| U.S. Government securities-add schedule | | 67 | 548 | Notes payable to banks-unsecured | | | |
| Listed securities-add schedule | 2 | 468 | 789 | 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 | | | |
| Real estate owned-add schedule | | 337 | 000 | Chattel mortgages and other liens payable | | | |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 30 | 000 | | | | |
| Cash value-life insurance | | | | | | | |
| Other assets itemize: | | | | | | | |
| 401(k) accounts | | 938 | 000 | | | | |
| IRA accounts | | 37 | 865 | | | | |
| Texas State retirement accounts | | 152 | 000 | Total liabilities | | 0 | |
| Partner Capital/Equity accounts | | 141 | 200 | Net Worth | 5 | 157 | 540 |
| Total Assets | 5 | 157 | 540 | Total liabilities and net worth | 5 | 157 | 540 |
| CONTINGENT LIABILITIES | | | | GENERAL INFORMATION | | | |
| As endorser, comaker or guarantor | | | | Are any assets pledged? (Add schedule) | NO | | |
| On leases or contracts | | | | Are you defendant in any suits or legal actions? | NO | | |
| Legal Claims | | | | Have you ever taken bankruptcy? | NO | | |
| Provision for Federal Income Tax | | | | | | | |
| Other special debt | | | | | | | |

**FINANCIAL STATEMENT**

NET WORTH SCHEDULES

| | |
|---|---|
| U.S. Government Securities | |
| Series EE Bonds | $ 67,548 |
| | |
| Listed Securities | |
| IBM: | $43,612 |
| MOT | $5,352 |
| PFE | $4,303 |
| BP | $12,054 |
| Janus | $241,931 |
| Franklin Mutual Shs Class Z | $404,055 |
| T.Rowe Price New Income | $8,401 |
| TRP New America Growth | $107,553 |
| TRP Tax Free Short Intermed | $16,690 |
| TRP Internat'l Stock | $108,023 |
| TRP Health Sciences | $146,809 |
| TRP Tax Efficient Multicap | $114,980 |
| TRP Tax Free Income | $529,950 |
| TRP Equity Income | $29,066 |
| TRP Prime Reserve Fund | $366,584 |
| Janus Money Market Fund | $2,510 |
| Vanguard REIT Fund | $104,767 |
| Vanguard 500 Index | $116,890 |
| Vanguard Tax Managed Small Cap | $105,259 |
| Total Listed Securities | $ 2,468,789 |
| | |
| Real Estate Owned | |
| Personal residence | $ 337,000 |

AFFIDAVIT

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

8-6-07
(DATE)

(NAME)

JOHANA H. PRIGMORE
Notary Public, State of Texas
My Commission Expires
12/09/2007

(NOTARY)

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

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

   John Anthony Mendez.

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

   United States District Judge for the Eastern District of California

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

   Sacramento County Superior Court
   720 Ninth Street, Department 21
   Sacramento, CA 95814

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

   1955; Oakland, California.

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

   Married.
   Susan Kathryn Mendez (Susan Kathryn Glenn): Teacher (retired)/Homemaker
   Three (3) dependent children

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

   Harvard Law School; 1977-1980; J.D.; June 1980
   Stanford University; 1973-1977; B.A. Political Science; June 1977

7. **Employment Record**: List in reverse chronological order, listing most recent first, all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee



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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.

June 2001 – present
State of California
Sacramento County Superior Court
720 Ninth Street, Department 21
Sacramento, CA 95814
Judge

August 1995 – June 2001
Somach, Simmons & Dunn
813 Sixth Street, Third Floor
Sacramento, CA 95814
Shareholder

August 1993 – July 1995
Brobeck, Phleger & Harrison
(No Current Address)
San Francisco, CA 94111
Of Counsel

August 1992 – July 1993
United States Attorneys Office for the Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102
United States Attorney

August 1986 – July 1992
Downey, Brand, Seymour & Rohwer
555 Capitol Mall, Tenth Floor
Sacramento, CA 95814
Partner/Associate

February 1984 – July 1986
United States Attorneys Office for the Northern District of California
280 S. First St., Room 371
San Jose, CA 95112
Assistant United States Attorney

April 1981 – January 1984
Orrick, Herrington & Sutcliffe
400 Sansome Street
San Francisco, CA 94111
Associate



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00584 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Chickering & Gregory
3 Embarcadero Center
(Not Current Address)
San Francisco, CA 94111
Associate, September 1980 – March 1981; Summer Law Clerk, June – August 1979

June – August 1978
Alameda County District
Attorney's Office
1225 Fallon Street, Room 900
Oakland, CA 94612
Summer Law Clerk

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

I have not served in the military.

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.

Graduated with distinction from Stanford University in June 1977

American Inns of Court (Anthony M. Kennedy Chapter) – team program awarded first place in the nation (2002)

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.

Hispanic National Bar Association
Lifetime member
President, Region V and Member of Board of Governors, September 1993 – 1995

Federal Bar Association, National Organization

Federal Bar Association, Sacramento Chapter
President, January-December, 1991
Vice-President, January-December, 1990
Member of Executive Committee, January, 1990 – 1992

Federal Bar Association, San Francisco Chapter

State Bar of California



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00585 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Member of Litigation Section: 1980 – 2001

American Bar Association
Member of the House of Delegates: 2000 – 2001

Alameda County Bar Association

Sacramento County Bar Association
Member of Bar Council, 1990
Member of Minority Hiring And Retention Committee, 1991 – 1992

San Francisco La Raza Lawyers Association

San Francisco County Bar Association

Ninth Circuit Lawyer Delegates Committee

In addition, I attended the Eastern District Conference (for judges and attorneys who practice regularly in the U.S. District Court, Eastern District of California) in 1988, 1989, 1990, 1991, 1993, and 1995 to 2000. I was on the planning committee for this conference in 1989, 1990, 1991, and 1996, and I served as the moderator for the conference in 1991.

I was also chosen by the judges of the Eastern District of California to serve as a delegate to the Ninth Circuit Judicial Conference but declined this position because of my nomination for the United States Attorney's position.

In my capacity as the United States Attorney for the Northern District of California, I served on the Ninth Circuit Lawyer Delegates Committee for the Northern District of California conference and served as a panelist at this conference in March, 1993.

11. **Bar and Court Admission:**

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

I was admitted to the State Bar of California on December 7, 1980. I did not have any lapses in membership. My membership ended when I assumed my current position as a Judge in June, 2001.

Under the Constitution of California, a person serving as a judge of a court of record is not considered to be a member of the State Bar while in office. See California Constitution Article 6, § 9.

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



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00586 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

Admitted to all state courts in California – December 7, 1980
U.S. District Court for the Northern District of California – December 7, 1980
U.S. District Court for the Southern District of California – 1982
U.S. District Court for the Eastern District of California – August 1986
U.S. District Court for the Central District of California – 1992
U.S. Court of Appeals for the Ninth Circuit – 1981
U.S. District Court for the District of Arizona – September 1995
Supreme Court of the United States – July 2000

There were never any lapses in memberships. I was admitted to and allowed to practice in the courts listed above from the indicated dates until my judicial appointment in 2001.

12. **Memberships**:

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

Rotary Club of Sacramento (May 1996 – 2002)

St. Elizabeth High School (Oakland, CA) – Member and President of School Board (1993 – 1995)

Families for Early Autism Treatment (F.E.A.T.) 1997 – present

Anthony M. Kennedy American Inns of Court (2001-2005) Master of the Bench

Sacramento Children's Receiving Home (2000 – 2005) – Member, Board of Directors

National Association of Former United States Attorneys (1993 – 2002) – Member

California Judges Association (2001 – present) -- Member

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



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00587 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

To the best of my knowledge, none of the organizations listed in response to 12a above currently discriminate or formerly discriminate with one exception. It is my understanding that until the 1980's, women were not allowed membership in Rotary clubs.

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

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

None

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

None

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

None

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



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00588 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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During the period from August 1992 to July 1993, I served as the United States Attorney for the Northern District of California. I delivered numerous speeches and talks to various civic organizations, school groups and law enforcement agencies. I also participated in several panel discussions and conferences generally on the topic of the goals and priorities of the U.S. Attorneys Office and the Department of Justice. I do not have copies of any of my speeches or transcripts or tape recordings of my remarks. I also did not keep any outlines or notes from those speeches that I delivered without a prepared text.

In or around December 1994 I participated as a moderator in a program sponsored by the Alameda County Bar Association which focused on gun violence and recent legislation and case law concerning this issue. The other participants were former San Leandro, California police chief Robert Maginnes and former Alameda County Municipal Court Judge Ron Greenberg. The program was presented to the Oakland Rotary Club and the Alameda County Bar Association (at a membership meeting). I do not have a copy, transcript, or tape recording of my remarks.

During the period from 1994 to August 1995, I served as a legal commentator for the O.J. Simpson trial for the NBC television affiliate in San Francisco (KRON). I usually appeared on the 6:00 p.m. or 11:00 p.m. newscast, three to four times a week and answered questions from the news anchors about the trial. I also made one appearance on NBC's Today show in or about February 2005 in connection with this trial. I do not have a copy, transcript, or tape recording of any of my television appearances.

Finally, since becoming a Judge in 2001, I have given speeches at various elementary, junior high and high schools in the Sacramento area concerning the judicial system. I do not have a copy, transcript, or tape recording of any of these speeches.

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

I gave a number of interviews to newspapers, radio and television stations when I served as the U.S. Attorney for the Northern District of California (1992-1993). Most of these interviews focused on the U.S. Attorney's Office and my priorities as the head of the office. As a judge I have only given one or two interviews back in 2001 with local legal newspapers as part of a judicial profile that these papers publish on every Judge in California. I gave a similar interview to the San Francisco/Sacramento Daily Journal. I do not have a copy of this published interview. I also gave an interview to the Sacramento County Bar Association which appeared in the December 2001 edition of Sacramento Lawyer magazine. I do not have a copy of this article.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00589 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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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.

In April 2001, I was appointed by California Governor Gray Davis to be a judge on the County of Sacramento Superior Court. I successfully stood for election for a six year term in 2002. I am required to stand for election for another six year term in 2008.

The Sacramento County Superior Court is a state trial court. Its jurisdiction includes criminal and civil trials, family law, traffic, probate, juvenile delinquency and dependency matters.

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

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

I have been a state trial judge for over six years. I have written several minute orders and decisions on various motions. In California, state trial court decisions/minute orders/opinions are not published but are merely retained in the court files. It has not been my practice to keep copies of every decision/minute order/opinion that I have written.

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

I am not aware of any instance where a "writ of certiorari" under California law was sought in one of my cases.

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

I am aware of three cases (all are juvenile delinquency matters) in which I have been reversed by the California Court of Appeals for the Third District.

The first is *In re Brent F.*, 130 Cal.App.4th 1124 (2005). The case involved the issue of whether California Welfare & Institutions Code § 777 was the exclusive statutory mechanism for modifying or otherwise changing a previous order by committing a juvenile delinquent ("ward") to the California Youth Authority. The Appellate Court held that I had erred in allowing California Welfare & Institutions Code § 778 to be used for that purpose in a case in which the ward's previous placements had failed.

The second case is *Timothy J. v. Superior Court*, 150 Cal.App.4th 847 (2007). In this case, the Court of Appeals held that I and another Judge on our juvenile court had erred in rejecting the minors' claims of incompetency to stand trial under former Cal. Rules of Court, rule 1498(d) based on their age-related developmental



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00590 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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immaturity because the rule did not require that a minor have a mental disorder or developmental disability before a finding of incompetency could be made. This case is likely to be further appealed to the California Supreme Court.

The third case is *In re Nancy C.*, 132 Cal. App. 4th 608 (2005). In this case, the Court of Appeals granted the minor's request to stay my order requiring her to give DNA samples pursuant to California law pending my determination of whether her offense (unlawfully taking a vehicle) was a misdemeanor or felony. On remand, I declared her case to be a felony as had been originally reflected in the Court's minute order.

There are no appellate opinions where a judgment of mine was affirmed with significant criticism of my ruling.

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

*Timothy J. v. Superior Court*, 150 Cal.App.4th 847 (2007).

I did not issue a written ruling in the *Brent F.* case, but ruled, orally, from the bench.

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

As a trial court judge, all of my decisions/minute orders/rulings are unpublished and are filed and/or stored in the file of the specific case in which they are issued and maintained by the Sacramento County Superior Court clerk's office. In my six years as a trial judge, I have issued several decisions/minute orders/rulings. The majority of my decisions are issued orally from the bench and included in the official trial transcript. These decisions are primarily evidentiary decisions in connection with motions in limine filed pre-trial. I have issued approximately five written decisions/minute orders with respect to the issue of victim restitution. I have also issued two or three written decisions on the issue of mental competency in juvenile delinquency cases.

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

None

16. **Recusal:** If you are or have been a judge, please provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest, or for any other apparent reason, or



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00591 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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in which you recused yourself sua sponte. (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Please identify each such case, and for each provide the following information:

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

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

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

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

California trial courts employ an "automatic" recusal system under Cal. Code of Civil Procedure Section 170.6 by which trial judges may be recused without our knowledge. Each trial attorney may file only one such "peremptory" challenge to an assigned trial judge by way of an affidavit under Section 170.6. Although I am aware that 170.6 challenges have been filed against me, the number of such challenges and the reasons for the filing of these challenges have not been disclosed to me. I am also precluded, by law, from asking the attorney why he or she filed such a challenge.

I have not had to recuse myself sua sponte in any case that has been tried before me.

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

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

August 1992 - July 1993
United States Attorney for the Northern District of California
I was initially appointed by Attorney General Barr. I was reappointed by the United States District Court for the Northern District of California.

On June 26, 1992, I was nominated by President George H. W. Bush to be United States Attorney for the Northern District of California. On October 8, 1992 my nomination was returned to the President upon adjournment of the 102nd Congress.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00592 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Other than my election as a judge, I have not been a candidate for elective office.

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

None

18. Legal Career: Please answer each part separately.

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

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

I did not serve as a clerk to a judge.

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

I have not practiced alone.

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

June 2001 – present
State of California
Sacramento County Superior Court
720 Ninth Street, Department 21
Sacramento, CA 95814
Judge

August 1995 – June 2001
Somach, Simmons & Dunn
813 Sixth Street, Third Floor
Sacramento, CA 95814
Shareholder

August 1993 – July 1995
Brobeck, Phleger & Harrison
(No Current Address)
San Francisco, CA 94111
Of Counsel



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00593 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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August 1992 – July 1993
United States Attorneys Office for the Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102
United States Attorney

August 1986 – July 1992
Downey, Brand, Seymour & Rohwer
555 Capitol Mall, Tenth Floor
Sacramento, CA 95814
Partner/Associate

February 1984 – July 1986
United States Attorneys Office for the Northern District of California
280 S. First St., Room 371
San Jose, CA 95112
Assistant United States Attorney

April 1981 – January 1984
Orrick, Herrington & Sutcliffe
400 Sansome Street
San Francisco, CA 94111
Associate

September 1980 – March 1981
Chickering & Gregory
3 Embarcadero Center
(Not Current Address)
San Francisco, CA 94111
Associate

b. Describe:

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

During the period from 1980-1984, I worked at the law firms of Orrick, Herrington & Sutcliffe and Chickering and Gregory in San Francisco. The general nature of my practice was basic civil and business litigation.

During the period from February 1, 1984 to August, 1986, I was an Assistant United States Attorney in the Northern District of California. I worked in the San Jose, California office, although I tried two cases in San Francisco. I was assigned to the Criminal Division and handled only criminal matters during this period. As a result, I became a "specialist" in federal criminal law and procedure.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00594 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Prior to my appointment as the U.S. Attorney, I was a partner at the Sacramento law firm of Downey, Brand, Seymour & Rohwer (1986-1992). The general nature of my practice during the six years at the firm was a civil litigation and business litigation practice with an emphasis on federal court litigation. I consciously chose not to become specialized in any one particular area of law except to the extent that I am considered to have an "expertise" in federal civil procedure.

During the period I served as the United States Attorney for the Northern District of California (1992-1993), it was my responsibility to supervise the prosecution of all federal crimes and offenses which occurred in the District and to represent and defend the United States in all civil matters filed in the District in which the government is concerned. My office handled all federal cases in the coastal counties of California from Monterey County to the Oregon border. I supervised approximately 90 Assistant United States Attorneys, all of whom reported to me. In addition to the staff of attorneys, I was also responsible for supervising all administrative and support personnel in the office. Thus, my position included administrative as well as legal responsibilities.

The U.S. Attorney's Office in the Northern District consisted of the Criminal Division, Civil Division, Tax Division, Environment and Natural Resources Division, Organized Crime Drug Enforcement Task Force and the Administrative Office. Approximately 75-80% of my time was spent on criminal matters, and the remaining 20-25% of my time was spent on matters involving the other divisions listed above. I was personally involved in one significant civil trial during my tenure as United States Attorney. I also successfully handled one criminal appeal before the Ninth Circuit Court of Appeals. The oral argument on this matter took place on March 8, 1993.

My practice at Somach, Simmons & Dunn (1995-2001) and Brobeck, Phleger & Harrison (1993-1995) involved complex commercial and environmental litigation, white collar criminal defense and regulatory and administrative compliance counseling. I represented individuals, companies, and their officers and directors in civil, criminal and administrative matters. My litigation practice included the counseling of personnel to minimize the exposure of clients to criminal, civil and administrative investigations, the defense of grand jury cases, supervision of internal investigations, trials and the appeal of civil and criminal cases. My substantive practice areas included corporate environmental compliance, contracts, securities, general corporate civil and criminal liability, natural resources, and general federal and state environmental matters.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00595 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

I have handled matters involving a number of different areas of substantive law including securities, contracts, partnerships, real estate, products liability, environmental, administrative, banking, personal injury, government torts, ERISA, employment and labor law.

Because of the nature of my practice, I did not have a "typical" client. During the period I was in private practice, I represented clients ranging from Fortune 500 companies to elderly widows. During the periods I worked in San Francisco at Orrick, Herrington & Sutcliffe and Brobeck, Phleger & Harrison, I represented clients such as Southern California Edison Co., Rockwell International, Merrill Lynch, A.G. Becker, GATX Leasing Company, Fiberboard Corporation, Allied-Sysco Food Services, Inc., as well as numerous individual clients. At Downey, Brand, I represented more individual clients and small businesses than I did when I worked in the San Francisco law firms identified above. I also represented most of the firm's major clients including CCPA (a joint powers agency consisting of the City of Santa Clara, Modesto Irrigation District and the Sacramento Municipal Utility District ("SMUD")), Mid-Valley Dairy Company (a joint venture involving Raley's, Bel Air Mart and Save Mart Supermarkets), Pacific Bell, Hertz and Tahoe Savings and Loan Association.

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

i. Indicate the percentage of your practice in:
   1. federal courts: 75%
   2. state courts of record: 25%
   3. other courts:

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 40%
   2. criminal proceedings: 60%

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

I have tried approximately 19 cases to verdict or judgment. I was lead or sole counsel in approximately 12 of these trials and associate counsel in the remainder.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00596 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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i. What percentage of these trials were:
   1. jury: 68%
   2. non-jury: 32%

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

I have not practiced before the Supreme Court of the United States.

19. Litigation: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

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

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

1. *United States v. Shahab Goushen, Charles Walter Hinck, Alion Andersson, et al.* United States District Court for the Northern District of California; Honorable Spencer A. Williams; Docket No. CR 84-2007 SW; February, 1984 to November, 1984.
813 F.2d 1450 (9th Cir. 1987) appeal from District court conviction. Appeal denied.

I represented the United States in this criminal prosecution against six defendants who were indicted on charges of conspiracy to distribute and distribution of cocaine. At the time this case was prosecuted, it involved the largest cocaine bust in the San Jose, California area. Four of the six defendants entered guilty pleas before trial and only Charles Hinck and Alion Andersson went to trial. After a two-week jury trial, both Hinck and Andersson were found guilty on all counts of the indictment. Both Assistant United States Attorney Altschuler and I served as trial counsel in this case.

Co-Counsel: Assistant United States Attorney
Leland B. Altschuler
(Current Address Unknown)



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Opposing Counsel: Paul Meltzer
(Attorney for Charles Hinck)
340 Soquel Avenue, Ste. 212
Santa Cruz, CA 95062
(408) 426-6000

Michael Stepanian
(Attorney for Alion Andersson)
819 Eddy Street
San Francisco, CA 94109
(415) 771-6174

2. *United States v. Luis Laureano, et al.*; United States District Court for the Northern District of California; Honorable Robert P. Aguilar (guilty pleas and sentencing of four of the defendants) and Honorable William A. Ingram (presided over trial of Jose Martinez); Docket No.: CR 84-2079 RPA; August, 1984 to May, 1985.

I represented the United States in this criminal prosecution of five defendants who were indicted on charges of conspiracy to distribute and distribution of cocaine. Four of the defendants, including a Colombian national and a major narcotics dealer from Miami, entered guilty pleas before trial. The fifth defendant, Jose Martinez, entered a guilty plea after two days of trial. I was the sole counsel involved in this prosecution.

Co-Counsel: None

Opposing Counsel: John Pasco
(Attorney for Jose Martinez)
60 South Market Street
San Jose, California 95113
(408) 998-1952

Robert Breakstone
(Attorney for Carmen Santos)
(Current street address and phone number unknown)

Leonard Robbins
(Attorney for Francisco Rodriguez)
Miami, Florida
(Current street address and phone number unknown)

J. T. Prada
(Attorney for Daciris Villadugo Palomino)



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111 W. St. John, Suite 555
San Jose, California 95113
(415) 275-1290

Harvey Ziff
(Attorney for Lus Laureano)
400 Cambridge Avenue, Suite A
Box 607000
Palo Alto, California 94306
(415) 329-0851

3. *United States v. Gene Albert, Joseph Adamski, Kenneth Duke and Michelina Duke*; United States District Court for the Northern District of California; Honorable Spencer A. Williams; Docket No.: CR 84-2095 SW; April, 1985 to January, 1986.

I represented the United States in this criminal prosecution of four defendants who were indicted on charges of aiding and abetting in the preparation of false tax returns (16 counts) and willfully filing false income tax returns (2 counts). The defendants were involved in a scheme which occurred over a three-year period and involved the sale of cancelled postage stamps to approximately 50 individuals who were instructed by defendants Ken and Michelina Duke to "donate" these stamps to defendant Albert's Universal Life Church and then claim this "donation" on their tax return. All of the false tax returns that were the subject of the indictment were prepared by defendant Adamski who worked at H&R Block and was a friend of the other three defendants. Defendants Albert, Ken Duke and Michelina Duke entered guilty pleas to a reduced number of counts prior to trial. Defendant Adamski went to trial and was found guilty on all 14 counts of the indictment in which he was named. I was the sole counsel involved in this prosecution.

Co-Counsel: None

Opposing-Counsel: David Grunbaum
(Attorney for Gene Albert)
Assistant Federal Public Defender
(Current street address and phone number unknown)

Murray Greiff
(Attorney for Ken and Michelina Duke)
9401 Wilshire Boulevard, Suite 606
Los Angeles, California 90212
(213) 273-1230
(Last known address)



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Stanley Freidman
(Attorney for Joseph Adamski)
20395 Pacific Drive (Last known address)
Cupertino, California 95014
(408) 257-2130

4. *United States v. John E. Warner*; United States District Court for the Northern District of California; Honorable William H. Orrick; Docket No.: CR 85-0092 WHO; August, 1984 to June, 1985.

I represented the United States in this criminal prosecution along with former Assistant United States Attorney Michael Yamaguchi. Defendant John Warner was indicted on ten counts of mail fraud, embezzlement from a savings and loan institution, false statement in bankruptcy proceeding and willful attempt to evade taxes. Defendant Warner was employed by First Nationwide Savings as a Vice President in charge of construction projects. His responsibilities included selecting contractors and supervising the contractors' work for First Nationwide Savings. During the period from January, 1982 to August, 1984, Warner solicited and received approximately $350,000 in kickback payments, gratuities and personal services from several contractors. Warner concealed these kickback payments from his supervisors at First Nationwide and also failed to report them on a bankruptcy petition which he filed in 1983 and on his income tax returns. Warner went to trial and was found guilty by the jury on all counts of the indictment. Assistant U.S. Attorney Yamaguchi and I both served as trial counsel. I was the lead prosecutor from the beginning of the investigation through trial and sentencing.

Co-Counsel: Michael Yamaguchi
(Current address unknown)

Opposing Counsel: Charles Garry (deceased)
San Francisco, California

5. *United States v. Pair Gain Technologies*; United States District Court for the Central District of California; 1997 - 2000.

I served as lead counsel for the corporate defendant in this criminal securities law case. This matter was prosecuted by the U.S. Attorney's office, Central District of California. This case also involved a parallel civil investigation by the SEC.

Co-Counsel: George O'Connell
Brad Benbrook
Stevens & O'Connell
400 Capitol Mall, Suite 1400
Sacramento, California 95814
(916) 329-9111



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David Siegel
Irell & Manella
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067
(310) 277-1010

Opposing Counsel: Barbara Scheper
Superior Court, County of Los Angeles
(Ms. Scheper was the lead federal prosecutor on this case. She was appointed to the Los Angeles Superior Court in 2000. Her current judicial assignment and address are unknown.)

6. *Central Arizona Water Conservation District ("CAWCD") v. United States, et al;* United States District Court for the District of Arizona; Honorable Earl H. Carroll; Docket No.: CIV 95-625 TUC-WDB (EHC); August, 1995 to May, 2000.

This civil action involved various disputes between CAWCD and the United States with respect to the costs of constructing and operating the Central Arizona Project ("CAP"). In dispute were contractual issues governed by a 1988 repayment contract between CAWCD and the United States, other contracts to which CAWCD and the United States or others are parties, contract law, Reclamation Law, and the Administrative Procedures Act, concerning CAWCD's repayment obligation and the U.S.' obligation to pay certain operation and maintenance costs of the CAP and correct CAP construction deficiencies. Along with co-counsel in Phoenix, my firm represented CAWCD in this $500+ million dispute. The case was settled in 2000 after the first two phases of this six phase trial were completed. A verdict in favor of CAWCD in phase one of the trial was issued by the Court in or about October 1998.

Co-Counsel: Stuart L. Somach and Robert B. Hoffman
Somach, Simmons & Dunn
813 Sixth Street, Third Floor
Sacramento, CA 95814
(916) 446-7979

Opposing Counsel: John T. Stemplewicz
Phillip M. Seligman
United States Department of Justice,
Civil Division
Box 875 Ben Franklin Station
Washington, D.C. 20044
(202) 307-1104



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7. *In the Matter of Southern California Edison Company (San Onofre Nuclear Generating Station Units 2 and 3)* Nuclear Regulatory Commission Licensing Board – Dr. Cadet Hand, Elizabeth Johnson and James L. Kelley (chairman); Docket No.: 50-361-OL and 50-361-OL; September, 1980 to September, 1982.

Reported: 15 NRC 61 (January 11, 1982) Nuclear Regulatory Commission Atomic Safety and Licensing Board [decision granting operating license]; 17 NRC 346 (March 4, 1983) Nuclear Regulatory Commission Atomic Safety and Licensing Appeal Board [decision affirming order granting operating license].

This was an administrative proceeding before the Nuclear Regulatory Commission concerning my client, Southern California Edison Company's application for an operating license for Units 2 and 3 of the San Onofre Nuclear Power Plant. Lead counsel for Southern California Edison was David Pigott of Orrick, Herrington & Sutcliffe, San Francisco, California. I was an associate attorney at Orrick, Herrington and assisted Mr. Pigott on this matter. Mr. James Beoletto, one of the in-house counsel at Southern California Edison also assisted us in this proceeding. After a three-month adversarial administrative proceeding held in the summer of 1981, the licensing application was granted by the NRC.

Co-Counsel: David R. Pigott
(Current address unknown)

James E. Beoletto
Southern California Edison Company
2244 Walnut Grove Avenue
Rosemead, California 91770
(818) 302-1332
(Last known address)

Opposing Counsel: Richard Wharton
University of San Diego Law School
Legal Clinic
Alcala Park
San Diego, California 92110
(619) 260-4532
(Last known address)

Lawrence Chandler
(Current address unknown)

8. *United States (Environmental Protection Agency) v. Midway Heights County Water District*; 695 F. Supp. 1072 (E.D. Cal. 1988) United States District Court for the Eastern District of California; Honorable Samuel King (visiting judge from Hawaii), Honorable Raul A. Ramirez; CIV-S-87-1112 RAR; February, 1988 to April, 1989.



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This was a civil environmental action brought by the EPA against my client, Midway Heights County Water District ("Midway Heights"), under the Safe Drinking Water Act ("SDWA"). Midway Heights was cited by the EPA for delivering unsafe drinking water to approximately 250 of its customers. Midway Heights denied that it was in violation of the SDWA and the EPA filed this action to obtain injunctive relief preventing Midway Heights from delivering this drinking water. This action settled shortly before trial. Midway Heights agreed to enter into a consent decree with the EPA pursuant to which a drinking water system that satisfied EPA standards was installed by the water district. I served as litigation counsel, along with Kevin O'Brien of my law firm, for Midway Heights. We substituted in as counsel for Midway Heights after a preliminary injunction against our client had already been issued by the court.

Co-Counsel: Kevin M. O'Brien
Downey, Brand, Seymour & Rohwer
555 Capitol Mall, 11th Floor
Sacramento, California 95814
(916) 441-0131

Opposing Counsel: Robert Foster
United States Department of Justice
Environmental Enforcement Division
(Current address unknown)

Barbara Ettlinger
Environmental Protection Agency
Region IX
(Current address unknown)

9. *Mid Valley Bank v. North Valley Bank, et al.*; 764 F. Supp. 1377 (E.D. Cal. 1991) United States District Court for the Eastern District of California; Honorable Lawrence K. Karlton; Docket No.: CIV-S-88-1691 LKK; June, 1990 to September, 1991.

This was a cost recovery action brought under CERCLA by my client, Mid Valley Bank, against the previous owners and operators of contaminated property purchased by Mid Valley Bank. The three defendants were North Valley Bank, Shell Oil Company and Della Mae Montgomery. The property was originally owned by defendant Montgomery. She leased the property to Shell Oil Company which operated a gas station at the site for several years. In the 1970's, Shell abandoned the property and left all of the gas tanks in the ground. North Valley Bank bought the property and removed some tanks but left eight tanks in the ground. Mid Valley Bank bought the property in 1983 and in February, 1988, it discovered that the tanks were leaking and the soil and ground water had become contaminated. Mid Valley filed this action against defendants to recover the past



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and future costs of cleaning up the contamination which had been and would be incurred. The case settled prior to trial in September, 1991. The terms of the settlement are confidential. I was co-counsel in this litigation along with Bill Hvidsten and Steven Goldberg of my firm.
Date of Representation:

Co-Counsel: William Hvidsten and Steven Goldberg
Downey, Brand, Seymour & Rohwer
555 Capitol Mall, 10th Floor
Sacramento, CA 95814
(916) 441-0131
(Mr. Hvidsten's current address is unknown)

Opposing Counsel: Dale Campbell and Mike Vergara
Weintraub, Genshlea & Sproul
400 Capitol Mall, Suite 1200
Sacramento, California 95814
(916) 558-6000
(Attorneys for North Valley Bank)
(Mr. Vergara is now employed at my prior law firm – Somach, Simmons & Dunn,
(916) 446-7979)

Eric Haas
Kathleen Clark
Larson, Burnham & Trutner
300 Lakeside Drive
P. O. Box 119
Oakland, California 94604
(510) 444-6800
(Attorneys for Shell Oil Company)
(Last known address)

Lisa Wible Wright
Law Office of Lisa Wright
555 Capitol Mall, #140
Sacramento, California 95814
(916) 498-6262
(Attorneys for Della Mae Montgomery)
(Last known address)

10. *George Benarroch and Euro Canadian Securities, Ltd., v. Brush Creek Mining and Development Co., Inc. and Simone Anderson; Brush Creek Mining and Development Co. v. Georges Benarroch, et al.*; United States District Court for the Eastern District of California; Honorable William B. Shubb; Docket No.: CIV-S-91-250 WBS, CIV-S-91-251 WBS; December, 1990 to July, 1991.



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This matter involved two civil actions which were consolidated into one case. The first lawsuit was filed by Brush Creek Mining and Development Co. against my clients, Georges Benarroch and his company, Euro Canadian Securities, Ltd., alleging that Mr. Benarroch and Euro Canadian violated certain provisions of the Securities Exchange Act of 1934 and breached certain agreements with Brush Creek. The second lawsuit was filed by Mr. Benarroch and Euro Canadian against Brush Creek and one of its directors, Mrs. Anderson, alleging that Brush Creek and Mrs. Anderson reached certain agreements with them, including an agreement to compensate Mr. Benarroch for services he performed in raising capital for Brush Creek and an agreement to allow Mr. Benarroch to nominate a majority of the members on the Board of Directors of Brush Creek. After six months of litigation, including motions for injunctive relief, the parties agreed to settle the case. The terms of the settlement included a distribution of 1.5 million shares of Brush Creek to Mr. Benarroch worth approximately $2.5 million. In return, Mr. Benarroch agreed to resign as a director of Brush Creek in the future. I was the lead litigation counsel for Mr. Benarroch and Euro Canadian and was assisted by two associates in my firm, Sharon Sandeen and William Warne.

Co-Counsel: Sharon Sandeen and William Warne
Downey, Brand, Seymour & Rohwer
555 Capitol Mall, 10th Floor
Sacramento, CA 95814
(916) 441-0131
(Ms. Sandeen's current address is unknown)

Opposing Counsel: Andrea Miller and Vince DiCarlo
Bartel, Eng, Torngren & Miller
300 Capitol Mall, Suite 1100
Sacramento, California 95814
(916) 442-0400
(Attorneys for Brush Creek Mining & Development Co., Inc.)
(Ms. Miller's current address is unknown)

Brian Englund
Grossfeld, Dougherty & Grossfeld
(Attorneys for Simone Anderson)
(Current address unknown)

20. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00605 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I practiced law for over 20 years before my appointment as a state trial court judge. My clients included individuals, small businesses, partnerships and Fortune 500 corporations. I consider all of the work I did on behalf of these clients to be significant. I had a diverse and interesting practice. I was a litigator and a trial attorney that handled complex civil and criminal matters. The majority of my cases were in federal court. I worked in some of the best law firms in San Francisco and Sacramento as well as the United States Attorneys Office in the Northern District of California. I was responsible for a wide variety of civil cases and am well prepared to handle any type of matter which might arise in the District Court. As a former United States Attorney and Assistant United States Attorney I was responsible for the prosecution of hundreds of felony cases. As an attorney in private practice, I handled a number of white collar criminal matters as a defense attorney.

As an attorney I also participated in national, state and local bar activities and assumed leadership positions in such bar associations as the American Bar Association (member of the House of Delegates) and the Hispanic National Bar Association (President of the California region and member of the executive board). I was nominated by the federal judges of the Eastern District of California to serve as a lawyer delegate to the Ninth Circuit Conference and I served on the executive committee of the local Federal Bar Associations in Sacramento and San Francisco. I was one of the few minority partners in the two laws firms at which I worked in Sacramento and participated in local bar association programs designed to encourage the hiring, retention and promotion of minority attorneys. I was the first Hispanic to be appointed as the United States Attorney in the Northern District of California and one of the youngest to be appointed. ( I was 36 years old when I assumed office).

I have never performed any lobbying activities.

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

Harvard Law School
Visiting Instructor, Introduction to Advocacy Course, January 1994. This is a three week trial practice course and I was one of approximately 25 instructors who taught different trial skills to the students during one week of the course. I have also served as one of the Moot Court Judges for the semi-final round of the Moot Court competition in March 2004.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00606 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Stanford Law School
Teaching Team Member, Advocacy Skills Workshop, January 1997, 1998, 1999, 2000, 2002, 2003 and 2004. This course and the nature of my services were identical to my experience at Harvard (except I taught for one or two days rather than an entire week).

USF Law School
Visiting Instructor, Advocacy Program, May 1999. This course and the nature of my services were identical to my experience at Stanford Law School.

McGeorge Law School
I taught a one day course on voir dire in the Trial Advocacy Program in Fall 2000 and Spring 2001. I have also served as a trial judge in the law school's trial practice course. The students participate in a mock jury trial at the end of the course. I have done this every year, twice a year, since 2001.

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

As a state trial court judge I am vested in the California Judges Retirement System II. Upon resignation I am entitled to receive the full amount of funds that I have contributed to this retirement fund along with the contribution from the State of California. At the present time, the amount in this account is approximately $200,000.
These funds would be rolled over into my personal individual retirement account.

I have no other anticipated receipts or future compensation for any financial or business interest.

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

No.

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

See attached Financial Disclosure Report.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00607 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC
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25. Statement of Net Worth: Please complete the attached financial net worth statement in detail (add schedules as called for).

    See attached Net Worth Statement.

26. Potential Conflicts of Interest:

    a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

       The parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during my initial service in the position to which I have been nominated might include parties or attorneys to whom I am related or have a close personal relationship and parties or matters which concern my financial interests. At present, I do not have any financial arrangements that may present potential conflicts of interest.

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

       Any potential conflicts of interest will be resolved in the same manner that I currently utilize as a Superior Court Judge as required under applicable statutes and judicial canons. In all cases I will follow the Code of Conduct for United States Judges and applicable statutes, policies and procedures.

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

    I devoted hundreds of hours in my career to pro bono matters in both San Francisco and Sacramento. I participated as a panel attorney in the Voluntary Legal Services Program in both communities. The majority of pro bono cases I handled involved landlord tenant disputes where I represented the tenant who was about to be evicted. During the period I worked at Orrick, Herrington & Sutcliffe, I also volunteered my time and services representing individuals who had felony convictions but had "gone straight" and were attempting to obtain occupational licenses from the state, e.g., a teaching credential. In one particular case that I handled, my client had been convicted of murder in Boston at the age of 18 or 19 and served approximately 12 years in prison. After he was paroled, he moved to California. He enrolled in school and obtained his high school and college degrees, including a master's degree in education. He then applied to the state for a license to teach at the junior college level and he came to me to assist him in obtaining his license. California had a general rule at this time prohibiting ex-felons from obtaining a license to



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00608 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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teach. However, because my client had exhibited such exemplary behavior since his release from prison, his criminal record in Massachusetts was purged and I successfully argued to the State of California that its general rule should not apply in this case. The last I heard from this client (in 1983), he had obtained a job teaching in a junior college in the San Francisco Bay Area.

During the period from 1981 to 1983, I averaged approximately 50 hours a year working on pro bono cases through the Voluntary Legal Services Program in San Francisco. After moving to Sacramento, I worked approximately 10-20 hours a year on pro bono cases for the Sacramento County Bar Association/Legal Services of Northern California Voluntary Legal Services Program.

During the period from 1996 to 2001, I was involved in providing free consulting, advocacy and legal services to parents of special needs children. I attended meetings with School Districts, wrote letters on behalf of my clients and assisted them at Individualized Education Program ("IEP") hearings. I also advocated for these parents in connection with obtaining services from the various Regional Centers in their geographical area. My wife and I are members of the Sacramento Chapter of F.E.A.T. (Families for Early Autism Treatment). We are the proud parents of a 18 year old daughter with autism.

Throughout my career I have also been involved in community affairs other than those associated with the legal profession. For example, in 1992 I participated in a program called Leadership Sacramento which teamed up with the Sisters of Mercy in a project to provide transitional housing to low income or homeless families. In 1993 I served as a member and President of the school board at St. Elizabeth's High School in Oakland. During the period I served as the United States Attorney I spoke at a number of high school and junior high schools about my career and the importance of education. In addition, I made it a priority of the U.S. Attorney's Office to get involved in a community service program outside of the legal arena. During the 1992-1993 school year, approximately 60 members of the office and I participated in the Bay Area Federal Executive Board's "Adopt-A-School" program. These volunteers from my office established an ongoing relationship with Roosevelt Middle School in San Francisco and participated in a wide range of activities including shadow days, tutoring, mentoring and on site school assemblies and programs. Finally, I served on the Board of Directors of the Children's Receiving Home of Sacramento from 2000 to 2005. This organization provides emergency and transitional housing for abused and neglected children ages 2 to 17 in Sacramento County

28. Selection Process:

    a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00609 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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communications you had with the White House staff or the Justice Department regarding this nomination. Please do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

After submitting my written Application for United States District Court, I was interviewed by the Bipartisan Judicial Nomination Panel for the Eastern District of California on May 11, 2007. This Judicial Advisory Committee was comprised of six members, including one member selected by Senator Barbara Boxer, one selected by Senator Dianne Feinstein and one selected jointly by both Senators along with three members named by Mr. Gerald Parksy, President Bush's State Chair for Judicial appointments. The Committee selected me as one of three candidates to move on to the next stage of the process.

I was interviewed by Mr. Parsky and Mr. Eric Haas on May 29, 2007. After this interview, Mr. Parsky forwarded my name to the White House and on June 11, 2007 I was interviewed by staff from the White House Counsel's Office and from the Department of Justice.

On June 22, 2007, I was notified by the White House Counsel's Office and the Department of Justice that I was being considered by the President for nomination to the federal judiciary and that an investigation of my background and qualifications would be conducted by the Department of Justice. I have had subsequent conversations with staff from the Department of Justice regarding the nomination paperwork. My nomination was submitted to the United States Senate on September 6, 2007.

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

No.



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# FINANCIAL DISCLOSURE REPORT
## NOMINATION FILING

*Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)*

| 1. Person Reporting (last name, first, middle initial) | 2. Court or Organization | 3. Date of Report |
|---|---|---|
| Mendez, John A | Dist. Court E.D. California | 09/07/2007 |
| **4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)** | **5a. Report Type (check appropriate type)** | **6. Reporting Period** |
| District Court Judge Nominee | [X] Nomination, Date 09/06/2007<br>[ ] Initial [ ] Annual [ ] Final<br>5b. [ ] Amended Report | 01/01/2006 to 08/31/2007 |
| **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.** | |
| 500 I Street<br>Sacramento, CA 95814 | 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.)*

[X] NONE *(No reportable positions.)*

| | POSITION | NAME OF ORGANIZATION/ENTITY |
|---|---|---|
| 1. | | |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |

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

[ ] NONE *(No reportable agreements.)*

| | DATE | PARTIES AND TERMS |
|---|---|---|
| 1. | 2001 | California Judges Retirement System II administered by State of California; pension upon retirement or option to rollover or cash out upon resignation |
| 2. | | |
| 3. | | |

| FINANCIAL DISCLOSURE REPORT<br>Page 2 of 6 | Name of Person Reporting<br>Mendez, John A | Date of Report<br>09/07/2007 |
|---|---|---|

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

**A. Filer's Non-Investment Income**

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

| | DATE | SOURCE AND TYPE | INCOME (yours, not spouse's) |
|---|---|---|---|
| 1. | 2006 | Sacramento County Superior Court Judge | $ 133,000 |
| 2. | 2007 | Sacramento County Superior Court Judge | $ 84,000 |
| 3. | 2005 | Sacramento County Superior Court Judge | $ 105,000 |
| 4. | | | |
| 5. | | | |

**B. Spouse's Non-Investment Income** - *If you were married during any portion of the reporting year, complete this section.*
*(Dollar amount not required except for honoraria.)*

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

| | DATE | SOURCE AND TYPE |
|---|---|---|
| 1. | 2006 | Sacramento County Dept. of Health and Human Services—in home care provider for disabled daughter |
| 2. | 2007 | Sacramento County Dept. of Health and Human Services—in home care provider for disabled daughter |
| 3. | | |
| 4. | | |
| 5. | | |

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

☐ NONE *(No reportable reimbursements.)*

| | SOURCE | DESCRIPTION |
|---|---|---|
| 1. | | EXEMPT |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |

| FINANCIAL DISCLOSURE REPORT<br>Page 3 of 6 | Name of Person Reporting<br>Mendez, John A | Date of Report<br>09/07/2007 |
|---|---|---|

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

☐ NONE *(No reportable gifts.)*

| | SOURCE | DESCRIPTION | VALUE |
|---|---|---|---|
| 1. | | EXEMPT | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

**VI. LIABILITIES.** *(Includes those of spouse and dependent children. See pp. 32-34 of instructions.)*

☒ NONE *(No reportable liabilities.)*

| | CREDITOR | DESCRIPTION | VALUE CODE |
|---|---|---|---|
| 1. | | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

| FINANCIAL DISCLOSURE REPORT<br>Page 4 of 6 | Name of Person Reporting<br>Mendez, John A | Date of Report<br>09/07/2007 |
|---|---|---|

**VII. INVESTMENTS and TRUSTS** -- *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets)<br>Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | If not exempt from disclosure | | | |
| | (1) Amount Code 1 (A-H) | (2) Type (e.g. div., rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | (2) Date Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
| 1. BROKERAGE ACCOUNT | | | | | EXEMPT | | | | |
| 2. --Cash | A | Interest | K | T | | | | | |
| 3. --Alcoa Common Stock | A | Dividend | J | T | | | | | |
| 4. --Countrywide mortgage and asset backed securities | B | Interest | K | T | | | | | |
| 5. --Legg Mason Partners Mutual Funds | C | Interest | L | T | | | | | |
| 6. --General Motors Acceptance Corp corporate bonds | B | Interest | L | T | | | | | |
| 7. --Federal Home Loan Mtg Corp gov't bond | B | Interest | K | T | | | | | |
| 8. --Federal Home Loan Mtg. Medium Term Notes gov't bond | B | Interest | K | T | | | | | |
| 9. --TRAC Smith Barney Mutual Funds | A | Interest | K | T | | | | | |
| 10. | | | | | | | | | |
| 11. IRA #1 | E | Interest | N | T | EXEMPT | | | | |
| 12. | | Dividend | | | | | | | |
| 13. --Alcoa common stock | | | | | | | | | |
| 14. --Abbott Laboratories common stock | | | | | | | | | |
| 15. --Anheuser-Busch Companies common stock | | | | | | | | | |
| 16. --Bank of America common stock | | | | | | | | | |
| 17. --Baxter Intl Inc. common stock | | | | | | | | | |

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

| FINANCIAL DISCLOSURE REPORT<br>Page 5 of 6 | Name of Person Reporting<br>Mendez, John A | Date of Report<br>09/07/2007 |
|---|---|---|

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

PART VII--INVESTMENTS AND TRUSTS(con't)

IRA #1 (con't)

--Chevron Corp. common stock
--Chubb Corp. common stock
--Dover Corp. common stock
--Dow Chemical Co. common stock
--E I Dupont de Nemours & Co. common stock
--Emerson Electric Co. common stock
--Exxon Mobil Corp common stock
--GAP Inc. common stock
--General Electric Co. common stock
--Glaxosmith Kline PLC common stock
--Honeywell Intl Inc. common stock
--Hubbell Inc. Class B common stock
--JP Morgan Chase & Co. common stock
--Johnson & Johnson common stock
--Kimberly Clark Corp. common stock
--Kraft Foods Inc. Class A common stock
--Leggett & Platt Inc. common stock
--Linear Technology Corp. common stock
--Microsoft Corp. common stock
--Motorola Inc. DE common stock
--News Corp Class B New common stock
--Novartis AG ADR common stock
--Nuveen Investments Inc. common stock
--Pearson PLC Sponsored ADR common stock
--Pfizer Inc. common stock
--Taiwan Semiconductor Mfg. Co. common stock
--Unilever PLC common stock
--Verizon Communications common stock
--Vodafone Group PLC common stock
--Wachovia Corp common stock
--Wells Fargo & Co. New common stock
--Weyerhaeuser Co. common stock
--Wyeth common stock

--Dreyfus Money Market and Liqued Assets Money Fund (cash equivalents)
--U.S. Treasury Notes Series D government bonds
--U.S. Treasury Notes Series L government bonds
--Federal National Mortgage Association Global Debs government bonds
--Federal National Mortgage Association BK/Entry government bonds
--Federal Home Loan Mortgage Corp. Ref Note government bonds
--Federal Home Loan Mortgage Corp Global Deb BK/Entry government bonds
--U.S. Treasury Notes Series K-2012 government bonds

| FINANCIAL DISCLOSURE REPORT<br>Page 6 of 6 | Name of Person Reporting<br>Mendez, John A | Date of Report<br>09/07/2007 |
|---|---|---|

## IX. CERTIFICATION.

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

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

Signature J A Mendez Date 9-7-07

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

## FINANCIAL STATEMENT

NET WORTH

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

| ASSETS | | | | LIABILITIES | | | |
|---|---|---|---|---|---|---|---|
| Cash on hand and in banks | | 134 | 100 | Notes payable to banks-secured | | | |
| U.S. Government securities-add schedule | | 129 | 558 | Notes payable to banks-unsecured | | 2 | 000 |
| Listed securities-add schedule | | 187 | 815 | Notes payable to relatives | | | |
| Unlisted securities--add schedule | | 104 | 898 | Notes payable to others | | | |
| Accounts and notes receivable: | | | | Accounts and bills due | | 5 | 500 |
| Due from relatives and friends | | | | Unpaid income tax | | | |
| Due from others | | | | Other unpaid income and interest | | | |
| Doubtful | | | | Real estate mortgages payable-add schedule | | 562 | 000 |
| Real estate owned-add schedule | 1 | 100 | 000 | Chattel mortgages and other liens payable | | | |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 50 | 000 | | | | |
| Cash value-life insurance | | | | | | | |
| Other assets itemize: | | | | | | | |
| Accrued interest on bonds/CDs | | 1 | 916 | | | | |
| GMAC Corporate Bonds | | 44 | 426 | | | | |
| California Judicial Retirement Account | | 190 | 000 | Total liabilities | | 569 | 500 |
| Inheritance | | 67 | 000 | Net Worth | 1 | 440 | 213 |
| Total Assets | 2 | 009 | 713 | Total liabilities and net worth | 2 | 009 | 713 |
| CONTINGENT LIABILITIES | | | | GENERAL INFORMATION | | | |
| As endorser, comaker or guarantor | | | | Are any assets pledged? (Add schedule) | NO | | |
| On leases or contracts | | | | Are you defendant in any suits or legal actions? | NO | | |
| Legal Claims | | | | Have you ever taken bankruptcy? | NO | | |
| Provision for Federal Income Tax | | | | | | | |
| Other special debt | | | | | | | |

**FINANCIAL STATEMENT**

NET WORTH SCHEDULES

| | |
|---|---|
| U.S. Government Securities | |
| U.S. Treasury Notes Series D-2009 | $ 19,473 |
| U.S. Treasury Notes Series L-2009 | 15,531 |
| Federal National Mortgage Assn Global Debs | 9,688 |
| Federal National Mortgage Assn Bk/Entry DTD | 4,936 |
| Federal Home Loan Mtg Corp. Ref Note DTD | 11,134 |
| Federal Home Loan Mtg Corp. Global DEB | 7,160 |
| U.S. Treasury Notes Series K-2012 | 7,876 |
| Federal Home Loan Mtg Corp. Step Up Notes | 19,760 |
| Federal Home Loan Mtg Corp. Medium Term Notes | 34,000 |
| Total Unlisted Securities | $129,558 |

| | |
|---|---|
| Unlisted Securities | |
| Countrywide Alternative Loan Series 2006 | $ 24,411 |
| Mutual Funds | 80,487 |
| Total Unlisted Securities | $ 104,898 |

| | |
|---|---|
| Real Estate Owned | |
| Personal residence | $ 1,100,000 |

| | |
|---|---|
| Real Estate Mortgages Payable | |
| Personal residence | $ 562,000 |

| Listed Securities | |
|---|---|
| Alcoa Inc. | $ 9,082 |
| Abbot Laboratories | 5,635 |
| Anheuser-Busch Companies, Inc. | 4,000 |
| Bank of America | 5,578 |
| Baxter International Inc. | 2,274 |
| Chevron Corp. | 6,519 |
| Chubb Corp. | 6,584 |
| Dover Corp. | 1,001 |
| Dow Chemical Co. | 5,446 |
| E.I. Dupont de Nemours & Co. | 7,325 |
| Emerson Electric Co. | 4,845 |
| Exxon Mobil Corp. | 6,654 |
| GAP, Inc. | 4,445 |
| General Electric Co. | 6,013 |
| Glaxosmith Kline PLC | 3,653 |
| Honeywell International | 5,212 |
| Hubbell, Inc. | 2,817 |
| J.P. Morgan Chase & Co. | 5,701 |
| Johnson & Johnson | 5,062 |
| Kimberly Clark Corp. | 6,032 |
| Kraft Foods Inc. | 3,046 |
| Leggett & Platt Inc. | 1,958 |
| Linear Technology Corp. | 5,025 |
| Microsoft Corp. | 7,672 |
| News Corp. Class B New | 4,490 |
| Novartis AG ADR | 2,809 |
| Nuveen Investments, Inc. | 3,840 |
| Pearson PLC Sponsored ADR | 5,512 |
| Pfizer, Inc. | 6,323 |
| Taiwan Semiconductor Mfg. Co. Ltd. ADR | 4,255 |
| Unilever PLC Spons. ADR New | 6,096 |
| Verizon Communications | 7,618 |
| Vodafone Group PLC Spons. ADR New | 6,035 |
| Wachovia Corp. 2nd New | 2,710 |
| Wells Fargo & Co. New | 5,774 |
| Weyerhaeuser Co. | 6,147 |
| Wyeth | 4,627 |
| Total Listed Securities | $187,815 |



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AFFIDAVIT

I, John Anthony Mendez, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

October 10, 2007
(DATE)

John Anthony Mendez
(NAME)

(See Attached)
(NOTARY)

## CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Saeramento

On 10/10/2007 (Date) before me, Leslie Shergill, Notary Public (Name and Title of Officer (e.g., "Jane Doe, Notary Public"))

personally appeared Judge Anthony Mendez (Name(s) of Signer(s))

☒ personally known to me

☐ (or proved to me on the basis of satisfactory evidence)

to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

LESLIE SHERGILL
Commission # 1645791
Notary Public - California
Sacramento County
My Comm. Expires Feb 17, 2010

Place Notary Seal Above

Leslie Shergill
Signature of Notary Public

### OPTIONAL

*Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.*

**Description of Attached Document**

Title or Type of Document: Questionnaire for Judicial Nominees

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: _____
☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____
Signer Is Representing: _____

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

Signer's Name: _____
☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____
Signer Is Representing: _____

RIGHT THUMBPRINT OF SIGNER
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**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

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

   Stanley Thomas (Tom) Anderson

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

   United States District Judge for the Western District of Tennessee

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

   Office: United States Courthouse
   111 South Highland Ave.
   Suite 417
   Jackson, TN 38301

   Residence: Lexington, Tennessee

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

   Lexington, Henderson County, Tennessee in 1953

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

   Lori Paige (Rich) Anderson; formerly Lori Hardin; Paralegal employed at Nancy Choate Law Office, 365 North Parkway Suite 5, Jackson, TN. 38305; three (3) dependent children

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

   University of Memphis School of Law; 8/76 to 1/80; J. D. degree received in 1980.

   University of Tennessee at Martin; 8/71 to 5/76; Bachelor of Science degree in 1976.



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

   11/03 to Present – United States Magistrate Judge for the Western District of Tennessee.

   7/87 to 11/03 – Engaged in private law practice as owner of Anderson Law Firm, PLLC, 130-C Stonebridge Blvd., Jackson, Tennessee

   6/85 to 7/87 – Administrative Law Judge for Tennessee Claims Commission. Commission adjudicated claims against the State of Tennessee.

   9/83 to 6/85 – Assistant Commissioner for Tennessee Department of Transportation. Responsible for projects assigned by Commissioner of Transportation.

   6/80 to 9/83 – Engaged in private law practice at Davis, Smith and Anderson in Lexington, Tennessee.

   8/78 to 1/80 – Law Clerk for Shelby County Attorney's Office in Memphis, Tennessee

   3/77 to 1/78 – Teacher at Draughon's Business College in Memphis, Tennessee

   1/68 to 8/76 – Sales person for family owned business; Anderson Sporting Goods, Highway 412 West, Lexington, Tennessee 38351

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

   None

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

   Fellow of Tennessee Bar Foundation

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

    American Bar Association



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Federal Bar Association

Madison County, Tennessee Bar Association

Shelby County, Tennessee Bar Association;

11. **Bar and Court Admission**:

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

Admitted to Tennessee Bar in July, 1980 with no lapses in membership.

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

Tennessee Courts of Record since 1980

Admitted to practice in Western, Middle and Eastern Districts of Tennessee. (est. 1991)

Admitted to practice in Sixth Circuit Court of Appeals. (est. 1993)

Admitted to practice before Supreme Court of the United States. (est. 1996)

No lapses in any Court.

12. **Memberships**:

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

First Chairman of Board of Beech River YMCA –2000;

Former Member of Madison County, Tennessee YMCA and Madison County YMCA Endowment Fund;

Board Member of Methodist Hospital of Lexington, Tennessee from 2002 to 2004;



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00624 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Rotary International from 1999 to 2005;

Pine Tree Country Club, Lexington, Tennessee from 1990 to 1998

Jackson Country Club, Jackson, Tennessee from 1999 to 2006;

Board Member of Carl Perkins Child Abuse Center in Jackson, Tennessee in approx. 1988.

Sigma Alpha Epsilon Fraternity, University of Tennessee at Martin, 1971 to 1976

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

While attending college between 1971 and 1976, I was a member of Sigma Alpha Epsilon Fraternity. Membership was practically limited to males. I remain an alumnus of the fraternity, but have not been active since graduating from college in 1976.

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

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

In 1978 I was employed in the Shelby County, Tennessee Attorney's Office and was assigned to assist in the codification of all private acts which pertained to Memphis, Shelby County, Tennessee. Thereafter, the *Laws of Shelby County, Tennessee* was published.

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

None



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

None

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

Since becoming a United States Magistrate Judge, I have been invited to speak to various groups regarding practice in federal courts, issuance of search and related warrants involving cell site information and issues involving labor law. None were recorded or televised to the best of my knowledge and I did not maintain outlines or notes.

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

In 1985, I gave an interview to the Commercial Appeal, a Memphis, Tennessee based newspaper, regarding the newly created Tennessee Claims Commission and my appointment as the first Commissioner for the Commission for West Tennessee.

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 Magistrate Judge for the Western District of Tennessee appointed by the 5 District Judges from the Western District of Tennessee.

Tennessee Claims Commission. Created by Tennessee Legislature in 1984 to adjudicate claims filed against the state of Tennessee. As the first West Tennessee Commissioner (Administrative Law Judge), I was responsible for all cases and claims filed in the 22 counties which comprised the Western District of Tennessee. I was appointed by then Governor Lamar Alexander.



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

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

United States v Mason
2006 WL 1278986 (W.D. Tenn.)

Arrington v United States of America
2005 WL 3533441 (W.D. Tenn.)
Deming v Jackson-Madison County General Hospital
2005 WL 21144069 (W.D. Tenn.)

Smith v Franks
2005 WL 2008506 (W.D. Tenn.)

Long v The Procter & Gamble Manufacturing Co.
2005 WL 1631033 (W.D. Tenn.)

Cranfill v Brew Brothers, Inc., et al
2005 WL 1420876 (W.D. Tenn.)

Long v The Procter and Gamble Manufacturing Co.
2005 WL 1181888 (W.D. Tenn.)

Lewis v United States
2004 WL 3254734 (W.D. Tenn.)

Hill v McNairy County Board of Education
229 F.R.D. 563

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

None.

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

None

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

As a United States Magistrate Judge, matters will frequently be referred to me for the preparation of a report and recommendation. The District Judge will then



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review the report and recommendation and issue an opinion either adopting or rejecting the report and recommendation, in whole or in part.

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

None

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

None

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

Larry Melton, et al v Bank of Lexington, et al
U.S. District Court, Western District of Tennessee No. 02-1152

Bryan Samuel Mooney v Susan Wallace, et al
U.S. District Court, Western District of Tennessee No. 04-1190

Jacob Rhodes v Susan Wallace, et al
U.S. District Court, Western District of Tennessee No. 04-1191

Nerissa DeBerry v Henderson County Board of Education, et al
U.S. District Court, Western District of Tennessee No. 04-1241

Zachary Robbins v Susan Wallace, et al
U.S. District Court, Western District of Tennessee No. 04-1294

Dalton Dyer v Susan Wallace, et al
U.S. District Court, Western District of Tennessee No. 05-1004

Haley Nicole Rhodes v Susan Wallace, et al
U.S. District Court, Western District of Tennessee No. 05-1020

Alice Adams Jackson v Michael B. Craig, et al
U.S. District Court, Western District of Tennessee No. 07-1001



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00628 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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USA v William Justin Holmes
U.S. District Court, Western District of Tennessee No. 06-10078

Ronnell Jason Dupree LeBerry v Corrections Corporation of America, et al
U.S. District Court, Western District of Tennessee No. 03-1185

Eric Nash v Corrections Corporation of America
U.S. District Court, Western District of Tennessee No. 03-1225

Billie D. McKinnie v Corrections Corporation of America, et al
U.S. District Court, Western District of Tennessee No. 03-1226

Daythan Houser v Corrections Corporation of America, et al
U.S. District Court, Western District of Tennessee No. 03-1227

Paul Price v Corrections Corporation of America, et al
U.S. District Court, Western District of Tennessee No. 03-1228

Cornelius Maddox v Corrections Corporation of America, et al
U.S. District Court, Western District of Tennessee No. 03-1229

Lorenzo Webb v Corrections Corporation of America, et al
U.S. District Court, Western District of Tennessee No. 03-1230

Booker Horges v Corrections Corporation of America, et al
U.S. District Court, Western District of Tennessee No. 03-1231

Larry Johnson v Corrections Corporation of America, et al
U.S. District Court, Western District of Tennessee No. 03-1232

Milton Smith v Corrections Corporation of America, et al
U.S. District Court, Western District of Tennessee No. 03-1233

James Kittinger v Corrections Corporation of America, et al
U.S. District Court, Western District of Tennessee No. 03-1234

Patrick Flayter v Prison Realty Trust, et al
U.S. District Court, Western District of Tennessee No. 03-1235

Rumont Kirkpatrick v Corrections Corporation of America, et al
U.S. District Court, Western District of Tennessee No. 03-1236

Jerred Washington v Corrections Corporation of America, et al
U.S. District Court, Western District of Tennessee No. 03-1237



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00629 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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John L. Williams v Corrections Corporation of America, et al
U.S. District Court, Western District of Tennessee No. 03-1238

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

Sua sponte on all cases;

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

I recused myself because I previously represented a party or entity when in private practice and before my appointment as a United States Magistrate Judge. In some instances, I would recuse myself if the incident alleged in the complaint occurred during a time frame while I was representing a particular party or entity even if I had no personal knowledge about the matter.

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

The court has implemented an Automated Judicial Conflict Screening program. The possibility that continued involvement could be constructed as a potential conflict of interest;

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

I recused myself in each of the listed cases because I had either represented a party or entity when in private practice shortly before my appointment as a United States Magistrate Judge, or the complaint alleged that the incident occurred while I was representing a particular party or entity even if I had no personal knowledge about the matter.

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

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

I was appointed by the county legislative body to serve as county attorney for Henderson County, Tennessee on two occasions. The first time was in 1981 and the second was in the mid-1990's. I served approximately 10 years as county attorney.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00630 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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In 1981 I was appointed by then Governor Lamar Alexander to the Tennessee Civil Service Commission for a two year term.

In 1985 I was appointed by then Governor Lamar Alexander as the first West Tennessee Commissioner of the newly created Tennessee Claims Commission. My appointment was approved by the Tennessee Legislature.

In 1998 I was elected to the Tennessee Republican Executive Committee for the Sixth Congressional District.

I have never been unsuccessfully nominated for any appointed office.

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

In 1972, I was employed by the Robin Beard for Congress Committee as the candidate's driver in the Sixth Congressional District of Tennessee.

In 1974, I was employed by the Lamar Alexander for Governor (Tennessee) Committee as the candidate's driver and personal assistant.

In 1978, I was employed as the campaign manager for the Cook for Congress Committee in the Seventh Congressional District of Tennessee.

In 1980, I was involved in the Ronald Reagan for President campaign as a volunteer working in western Tennessee.

In 1984, I was involved in the Ronald Reagan for President campaign as a volunteer working in western Tennessee.

In 1988, I was involved in the George Bush for President campaign as a volunteer working in western Tennessee.

In 1998, I was elected to the Tennessee Republican Executive Committee from the Sixth Congressional District.

In 2000, I was an alternate delegate to the Republican National Convention in Philadelphia, Pa.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00631 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

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

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

I did not serve as a clerk to a judge.

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

I was the only attorney employed by Anderson Law Firm, PLLC for the first two or three years after the firm was established. Thereafter, additional attorneys were employed.

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

| | |
|---|---|
| 11/03 to Present | United States District Court for the Western District of Tennessee<br>111 South Highland Ave.<br>Suite 417<br>Jackson, TN 38301<br>United States Magistrate Judge |
| 4/98 to 11/03 | Anderson Law Firm, PLLC (firm dissolved)<br>130-C Stonebridge Blvd.<br>Jackson, TN 38301 |
| 7/87 to 1/00 | Anderson Law Firm, PLLC<br>10855 Highway 412 West<br>Lexington, TN 38351 |
| 6/85 to 7/87 | Tennessee Claims Commission<br>500 Dedrick Street, Suite 1330<br>Nashville, TN 37243<br>Administrative Law Judge |
| 9/83 to 6/85 | Tennessee Department of Transportation<br>James K. Polk Building<br>Nashville, TN 37243<br>Assistant Commissioner for of Transportation |



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00632 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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| | |
|---|---|
| 6/80 to 9/83 | Davis, Smith and Anderson (firm dissolved)<br>Lexington, TN. |

b. Describe:

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

Upon graduation from law school in 1980, I joined Davis, Smith and Anderson in Lexington, Tennessee. Davis, Smith and Anderson was a general practice firm in west Tennessee. I represented a variety of clients and performed a variety of legal services. I regularly appeared in state courts and assisted the senior partner, Mr. Joe C. Davis, a well known and respected trial attorney in west Tennessee.

In 1985, I was appointed to the newly created Tennessee Claims Commission as the first Commissioner from the Western District of Tennessee. The Tennessee Claims Commission adjudicated claims against the state of Tennessee.

In 1987, I began Anderson Law Firm, PLLC in Lexington, Tennessee. Anderson Law Firm was a general practice firm that employed from 1 to 5 associate attorneys at any given time. The firm emphasized federal practice, and in 1998 opened a second office in Jackson, Tennessee. In 2000, the firm moved all operations to 130-C Stonebridge Blvd. in Jackson, Tennessee.

In 2003, I was selected as a United States Magistrate Judge for the Western District of Tennessee, and continue to serve in that position.

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

When I began Anderson Law Firm, PLLC in 1987, it was a general practice firm. The firm represented both plaintiffs and defendants in state and federal courts. In 1992, the firm began to focus on federal practice and represented individuals, corporations and municipalities involved primarily in section 1983 litigation.

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

My practice has always been heavily concentrated in litigation, and I appeared in court routinely. Between 1994 and 2003, I tried an average of 10-12 cases per year in federal district courts, and handled a vast majority of the appellate matters associated with those cases.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00633 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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i. Indicate the percentage of your practice in:
   1. federal courts; 75%
   2. state courts of record; 20%
   3. other courts. 5%

ii. Indicate the percentage of your practice in:
   1. civil proceedings; 85%
   2. criminal proceedings. 15%

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

Between 75 and 85 cases as sole or chief counsel, primarily in federal courts

i. What percentage of these trials were:
   1. jury; 90%
   2. non-jury. 10%

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

None

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

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

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

1. *Patricia Bowman, personal representative of Anthony David Bowman, deceased v. Corrections Corporation of America, for profit foreign corporation, et al.*; U.S. District Court, Middle District; U.S. District Court No. 96-1142; December 16, 1996;



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00634 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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United States District Court, Middle District of Tennessee (Nashville);
U.S. District Court Judge William J. Haynes, Jr.
U.S. District Court Docket Number: 96-cv-1142

U.S. Court of Appeals for the Sixth Circuit; Court of Appeals Docket Number: 00-6720
Honorable Danny J. Boggs, Authoring Judge; Honorable Richard F. Suhrheinrich, Circuit Judge; Honorable Eugene E. Siler, Circuit Judge

I was lead Counsel, representing the Warden and Corrections Corporation of America, Kevin Myers, Prison Realty Corporation in this Civil rights lawsuit filed by estate of inmate who died of sickle cell anemia. The Jury returned a verdict in favor of defendants after three week trial.

On Appeal the U. S. Court of Appeals affirmed the District Court's denial of Bowman's motion for judgment as a matter of law or a new trial. It reversed the District Court's holding with respect to the unconstitutionality of CCA's medical policy, along with the injunction awarded on that basis, since this issue is moot for Bowman and she has no standing upon which to bring such a claim for prospective relief. Finally, it reversed the District Court's award of attorney's fees to Bowman, as Bowman is no longer the prevailing party; decision for publication pursuant to Local Rule 206 [00-6719, 00-6720].

Co-Counsel:

Andree Kahn Blumstein, Atty, for Defendants on Appeal
Sherrod & Roe
Sun Trust Financial Center
424 Church Street
Suite 2000
Nashville, Tennessee 37219-2375

Patrick Ruth, Attorney for Defendant, Dr. Robert Coble
Ruth, Howard, Tate & Sowell
144 Second Avenue, N.
Suite 200
Nashville, Tennessee 37201
615-620-5859

George Dean, Atty. for Defendant, Dr. Robert Coble
Parker, Lawrence, Cantrell & Dean
200 Fourth Avenue, N.
Suite 500
Nashville, Tennessee 37219
615-255-7500



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00635 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC
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Opposing Counsel:

Joseph Howell Johnston, Atty. for Plaintiff
P.O. Box 120874
Acklen Station
Nashville, Tennessee 37212
615-383-2119

John W. Chandler, Jr., Atty. for Plaintiff
532 S. McLean Boulevard
Memphis, Tennessee 38104
901-523-1966

2. *Jewell Maness v. Estate of Acie Lee Maness, Deceased; James Lee Maness, Willie Maness & Edward Maness*; Chancery Court, Henderson County, Tennessee; Chancery Court Docket Number 8960; March 3, 1994

Henderson County Chancery Court (Lexington);
Honorable Joe C. Morris, Chancellor (deceased)
Henderson County Chancery Court Docket Number: 8960

Tennessee Court of Appeals; Court of Appeals Docket Number: 02A01-961-cv-00270
Honorable Hewitt Tomlin, Authoring Judge; Honorable W. Frank Crawford; Honorable Alan E. Highers

I represented a widow/plaintiff who dissented from her deceased husband's Last Will and Testament after it was revealed that her husband had transferred a majority of estate assets to his children from a previous marriage without the wife's knowledge or consent. The Chancellor upheld the provisions of the Last Will and Testament. On appeal the Tennessee Court of Appeals reversed the Chancellor's holding and awarded the majority of the estate to Plaintiff.

Opposing Counsel:

Stephen Milam, Attorney for Defendants
Milam and Carter
113 Main Street
Lexington, Tennessee 38351
731-968-0288

3. *State of Tennessee v. David Wayne Britt*; Circuit Court, Hardeman County, Tennessee; Circuit Court Number: 5242; November 1, 1989

Circuit Court, Hardeman County, Tennessee
Honorable Jon Blackwood, Circuit Judge (retired)
Hardeman County Circuit Court Number: 5242



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00636 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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I served as Co-Counsel, representing a 15 year old Defendant charged with the murder of his teacher's husband. On the date trial was set to begin, and against the advice of Counsel, the Defendant and his mother advised Counsel that the Defendant desired to accept the plea agreement offered by the District Attorney General and enter a plea of guilty. The Court questioned the Defendant and his mother regarding the change of plea and accepted the Defendant's guilty plea. Subsequently, the Defendant filed a Petition for Post Conviction Relief alleging ineffective assistance of Counsel. The trial judge conducted a hearing and issued an opinion finding that the Defendant had entered his plea knowingly and voluntarily, and that he had received effective assistance of Counsel.

Co-Counsel:

Jack Hinson Attorney for Plaintiff
52 Natchez Trace Drive
Lexington, Tennessee 38351
731-968-0864

Opposing Counsel:

Paul Summers, District Attorney General (retired)
Waller, Lansden, Dortch and Davis, LLC
Nashville City Center
511 Union Street, Suite 2700
Nashville, Tennessee 37219
615-850-8790

Elizabeth Rice, Assistant District Attorney (retired)
25th Judicial District
District Attorney's Office
Somerville, Tennessee
901-465-7351

4. *Henderson County through its County Commission v. Ronald Derryberry, et al*; Chancery Court of Henderson County, Tennessee; Henderson County Chancery Number: 7904; January 4, 1992

Chancery Court of Henderson County, Tennessee
Honorable Joe C. Morris, Chancellor (deceased)
Henderson County Chancery Court No. 7904

Tennessee Court of Appeals; Court of Appeals Docket Number: 02A01-9203CH00063; Honorable Hewitt Tomlin, Authoring Judge; Honorable W. Frank Crawford; Honorable Alan E. Highers.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00637 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Supreme Court of Tennessee; Supreme Court Docket Number: 02S01-9303-CH-00017; Honorable Martha Craig Daughtrey, Authoring Judge; Honorable Lyle Reid; Honorable Frank F. Drowota, Chief Justice; Honorable Charles O'Brien; Honorable E. Riley Anderson

I was lead counsel representing the newly elected county Board of Education in Henderson County, Tennessee. The county filed suit against the former Board Members after the county adopted new board selection procedures. The Chancellor ruled in favor of the plaintiffs and defendants appealed to the Tennessee Court of Appeals. The Court of Appeals reversed the trial court's judgment. The Tennessee Supreme Court granted plaintiffs permission to appeal from the decision of the Court of Appeals. Subsequently, the Tennessee Supreme Court reversed the judgment of the Court of Appeals and reinstated the findings of the trial court.

Opposing Counsel:

D.D. Maddox, Attorney for Defendants (deceased)
Maddox, Maddox & Maddox
19695 E. Main Street
Huntingdon, Tennessee 38344
731-986-4896

Edwin C. Townsend, Sr., Attorney for Defendants
Townsend & Townsend
58 Tennessee Avenue South
Parsons, Tennessee
731-847-3111

5. *Bobby Cogdell, et al v. City of Lexington, Tennessee*; U.S. District Court, Western District; U.S. District Court No 1:00-cv-01083

United States District Court, Western District of Tennessee (Jackson);
U.S. District Court Judge James D. Todd
U.S. District Court Docket Number: 1:00-cv-01083

I was Co-Counsel, representing a municipality and individual Board Members in a suit filed by one Board Member against other board members over alleged defamatory statements made during a board meeting. The plaintiff alleged that his First Amendment Rights under the United States Constitution had been violated. The case settled prior to trial.

Co-Counsel:

Fred Collins, Co-Counsel for Defendants
P.O. Box 679
Milan, Tennessee 38358
731-686-9094



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00638 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Pamela L. Reeves, Co-Counsel for Defendants
800 South Gay Street
Suite 1700
Knoxville, Tennessee 37901
865-540-1977

Opposing Counsel:

Michael L. Weinman, Attorney for Plaintiff
114 S. Liberty Street
Jackson, Tennessee 38302
731-686-9094

6. *State of Tennessee v. Jack Fowler*; U.S. District Court, Western District, Memphis; U.S. District Court No: 2:87-10017; 1987

United States District Court, Western District of Tennessee (Memphis);
U.S. District Judge Julia Gibbons
U.S. District Court Docket Number: 2:87-10017

I was Co-Counsel, representing a county Sheriff who was charged with violating the civil rights of inmates in his jail. The indictment alleged that the Sheriff had forced inmates under his custody and control to engage in sexual acts against their will. After the third or fourth day of trial, the defendant decided to accept the plea offered by the Assistant United States Attorney and pleaded guilty to misdemeanor offenses.

Co-Counsel:

D.D. Maddox, Attorney for Defendant (deceased)
Maddox, Maddox and Maddox
19695 E. Main Street
Huntingdon, Tennessee 38344
731-986-4896

Opposing Counsel:

Dan Newsom
Assistant U.S. Attorney
167 N. Main
Suite 800
Memphis, Tennessee 38103
901-544-4231

7. *Whiteville SORT cases: Ottoway Murphy v. Prison Realty Trust, et al;* U.S. District Court, Western District; U.S. District Court Nos.: 99-1260 through 99-1289; 00-1050 and 00-1096; October 26, 1999



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00639 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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United States District Court, Western District of Tennessee (Jackson)
U.S. District Court Judge J. Daniel Breen
U.S. District Court Docket Numbers: 99-1260 through 99-1289; 00-1050 and 00-1096

I was lead Counsel, representing a private correctional management company and others when approximately 30 cases were filed by inmates alleging violation of civil rights after a correctional officer was assaulted inside a correctional facility. The inmates alleged that they were subjected to cruel and unusual punishment by other guards and that the company had a defacto policy which allowed the abuse to occur. Much of the discovery had been completed and the first case was ready for trial when I was appointed to my current position as a United States Magistrate Judge. As such, I was required to withdraw from any further involvement with these cases. It is my understanding that all of the cases ultimately settled out of Court.

Co-Counsel:

Joseph F. Welborn, III, Co-Counsel for Defendants
J. Mark Tipps, Co-Counsel for Defendants
Robert J. Walker, Co-Counsel for Defendants
Walker, Tipps & Malone
2300 One Nashville Place
150 Fourth Avenue North
Nashville, Tennessee 37219
615-313-6000

Opposing Counsel:

Wayne A. Ritchie, Attorney for Plaintiffs
Robert Ritchie, Attorney for Plaintiffs (deceased)
Ritchie, Fels & Dillard, P.C.
606 W. Main Street, Suite 300
Knoxville, Tennessee 37901
865-637-0661

W. Gaston Fairey, Attorney for Plaintiffs
Fairey, Parise & Mills, P.A.
1722 Main Street
Columbia, South Carolina 28201
803-252-7606

Mark Thomsen, Attorney for Plaintiffs
Sarah Frink Kaas, Attorney for Plaintiffs
Cannon & Dunphy, S.C.
595 North Barker Road
Brookfield, Wisconsin 53008
414-782-2700



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00640 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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C. Michael Robbins, Attorney for Plaintiffs
Robbins Law Office
202 South Maple Street, Suite B
Covington, Tennessee 38019
901-475-2422

William D. Massey, Attorney for Plaintiffs
Massey & McClusky
3074 East Street
Memphis, Tennessee 38128
901-384-4004

Ellen L. Wiesner, Attorney for Plaintiffs
Cannon & Dunphy, S.C.
595 North Barker Road
Brookfield, Wisconsin 53008
414-782-2700

James M. Shellow, Attorney for Plaintiffs
Robin Shellow, Attorney for Plaintiffs
Shellow & Shellow
324 West Vine Street
Milwaukee, Wisconsin 53212

8. *Robert Germaine and wife, Colleen Germain v. James H. King, O.D.*; Circuit Court of Perry County, Tennessee; Circuit Court No. 3233; September 20, 1999

Circuit Court of Perry County, Tennessee
Honorable Donald Paul Harris
Circuit Court No. 3233

I was lead Counsel, representing the plaintiffs in this civil lawsuit in which a diabetic patient filed suit against an optometrist who failed to diagnose and treat his diabetic condition. The optometrist denied that the Plaintiff had made him aware of his diabetes, but the records indicated otherwise. The Plaintiff suffered significant loss of vision. Case settled prior to trial.

Opposing Counsel:

Floyd Flippin, Attorney for Defendant
Flippin & Atkins
1302 Main Street
Humboldt, Tennessee 38343
731-784-2818



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00641 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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9. *Wesley Taylor v Corrections Corporation of America, et al*; U.S. District Court, Middle District; U.S. District Court No. 1:00-0089; 2000

United States District Court, Middle District of Tennessee (Nashville);
U.S. District Court Judge Todd J. Campbell
U.S. District Court Docket Number: 1:00-0089

Tennessee Court of Appeals; Court of Appeals Docket Number: 03-6125

I was lead counsel, representing a private correctional management company against a claim by an inmate plaintiff that the company was deliberately indifferent when a ladder he was standing on fell and he was injured. Plaintiff also claimed that the company was deliberately indifferent to his serious medical needs. The Jury returned a verdict for plaintiff against the company. An appeal was initiated based upon a number of questions of law involved in the case, but I was appointed to my current position as United States Magistrate Judge before the appeal could be heard. It is my understanding that the parties settled the case.

Co-Counsel:
George Dean
Parker, Lawrence, Cantrell & Dean
Noel Place, 5th Floor
200 Fourth Avenue, North
Nashville, Tennessee 37219
615-255-7500

Opposing Counsel:
Jason Whitworth, Attorney for Plaintiff
202 South Cooper
Suite 4
Memphis, Tennessee 38104
901-729-9999

10. *Patrick R. Dalka, Jason Szydlek v. Maurice C. Sublett, TransCor America, Inc., Corrections Corporation of America*; U.S. District Court, Western District; U.S. District Court No. 2:01-2485; June 21, 2001

United States District Court, Western District of Tennessee (Memphis)
U.S. Magistrate Judge Diane Vescovo
U.S. District Court Docket Number: 2:01-2485

I was lead Counsel, representing an inmate transportation company and a driver of a transportation vehicle against claims by inmate plaintiffs alleging they were injured while being transported. The plaintiffs alleged that the defendants were deliberately indifferent to a serious risk of harm due to the manner in which they were being transported. The defendant settled the case with the plaintiff who sustained the most serious injuries, and I



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00642 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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was required to withdraw from further representation after being appointed as United States Magistrate Judge.

Co-Counsel:

K. Michelle Booth - Associate Defense Counsel
K. Michelle Booth Law Firm
39 North Broad Street
Lexington, Tennessee 38351
731-967-1979

Opposing Counsel:

Andrew Clarke, Attorney for Plaintiff
Borod & Kramer, P.C.
80 Monroe Avenue
Suite G1
Memphis, Tennessee 38103
901-524-0200

Jeffrey A. Land, Attorney for Plaintiff
Jeffrey A. Land and Associates
540 S. Mendenhall Road
Suite 12
Memphis, Tennessee 38117
901-682-7205

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

I consider my service as county attorney and counsel to a board of education as constituting some of my most significant legal activity. Decisions made by the county and the board of education often had broad implications and affected large numbers of people, and therefore the legal advise that I gave these entities was critical in the decision making process. Also, one of my clients was involved in private correctional management and I developed great appreciation for those charged with the responsibility of incarcerating individuals convicted of crimes. Maintaining safe and humane correctional facilities is essential to a free society and there is constant pressure to protect and preserve the rights of those incarcerated while operating a safe, cost efficient correctional facility.

I have never performed lobbying activities for any client or organization.



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

    While I was attending law school in 1977, I taught part-time at Draughon's Business College in Memphis, Tennessee. I taught courses in political science, current events, and psychology. Many of the students were veterans seeking degrees after returning from military service.

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

    None

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

    I have no such plans, commitments or agreements.

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

    See attached Financial Disclosure Report

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

    See attached Net Worth Statement

26. **Potential Conflicts of Interest**:

    a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00644 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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I am not aware of any likely conflicts-of-interest that would arise in this position. Should I become aware that a conflict, either real or apparent, exists I would recuse myself from the matter sua sponte.

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

I will follow the Code of Conduct for United States Judges and applicable policies and procedures. Additionally, my district has an automated conflict screening program in place and I regularly review the list of conflict of interest listings and update as necessary. If a potential conflict should arise, I will first see if it is possible to remove the conflict, if appropriate, and advise counsel or the parties of the potential conflict. There are certain circumstances where it would not be appropriate or acceptable to attempt to remove the potential conflict, and in those cases I will remove myself, sua sponte.

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

I participated in the pro bono project sponsored by my local bar association. The last several years I was in private practice, I participated in the civil rights section of the pro bono project and routinely spoke with and counseled individuals referred by the bar association. The frequency of referrals varied, but I averaged speaking to or counseling individuals seeking assistance regarding civil rights related matters several hours each month.

28. **Selection Process**:

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

In 2003, I applied for the position of Magistrate Judge from the Western District of Tennessee and was interviewed by the Selection Committee appointed by the District Court. The Selection Committee nominated 5 persons who were then interviewed by the district judges. I was selected by the district judges.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00645 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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In February, 2007 District Judge James Todd advised the other judges that he had notified the White House and the Senators from Tennessee that it was his intention to take senior status in May, 2008. I was contacted by the office of Tennessee's senior senator regarding any interest I might have in the vacancy when it became effective. After expressing my interest in the position, I was advised that my name had been submitted to the White House for consideration. On February 23, 2007 I met with members from the White House Deputy General Counsel's office and a representative from the Justice Department. Subsequently, I have had communications with staff from the Department of Justice regarding the completion of nomination paperwork. My nomination was submitted to the Senate on September 6, 2007.

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

No



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Rev. 3/2007

# FINANCIAL DISCLOSURE REPORT
## NOMINATION FILING

*Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)*

| 1. Person Reporting (last name, first, middle initial) | 2. Court or Organization | 3. Date of Report |
|---|---|---|
| Anderson, Stanley T | Western District of Tennessee | 09/07/2007 |
| **4. Title** (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) | **5a.** Report Type (check appropriate type) | **6. Reporting Period** |
| District Judge - Nominee | ☒ Nomination, Date 09/06/2007<br>☐ Initial ☐ Annual ☐ Final<br>5b. ☐ Amended Report | 01/01/2006 to 08/31/2007 |
| **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. | |
| 417 U.S. Courthouse<br>111 South Highland Ave.<br>Jackson, Tennessee 38301 | 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.)*

☒ NONE *(No reportable positions.)*

| | POSITION | NAME OF ORGANIZATION/ENTITY |
|---|---|---|
| 1. | | |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |

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

☒ NONE *(No reportable agreements.)*

| | DATE | PARTIES AND TERMS |
|---|---|---|
| 1. | | |
| 2. | | |
| 3. | | |

**FINANCIAL DISCLOSURE REPORT**
Page 2 of 6

| Name of Person Reporting | Date of Report |
|---|---|
| Anderson, Stanley T. | 09/07/2007 |

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

**A. Filer's Non-Investment Income**

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

| | DATE | SOURCE AND TYPE | INCOME (yours, not spouse's) |
|---|---|---|---|
| 1. | 2006 | One time fee of $30,000 for case that settled after becoming Magistrate Judge | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

**B. Spouse's Non-Investment Income** - *If you were married during any portion of the reporting year, complete this section.*
*(Dollar amount not required except for honoraria.)*

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

| | DATE | SOURCE AND TYPE |
|---|---|---|
| 1. | 2006-2007 | Law Office of Nancy Choate |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |

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

☐ NONE *(No reportable reimbursements.)*

| | SOURCE | DESCRIPTION |
|---|---|---|
| 1. | Exempt | |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |

| FINANCIAL DISCLOSURE REPORT<br>Page 3 of 6 | Name of Person Reporting<br>Anderson, Stanley T | Date of Report<br>09/07/2007 |
|---|---|---|

**V. GIFTS.** *(Includes those to spouse and dependent children. See pp. 26-31 of instructions.)*

☐ NONE *(No reportable gifts.)*

| | SOURCE | DESCRIPTION | VALUE |
|---|---|---|---|
| 1. | Exempt | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

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

☐ NONE *(No reportable liabilities.)*

| | CREDITOR | DESCRIPTION | VALUE CODE |
|---|---|---|---|
| 1. | First Bank | personal loan | K |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

**FINANCIAL DISCLOSURE REPORT**
Page 4 of 6

| Name of Person Reporting | Date of Report |
|---|---|
| Andersen, Stanley T | 09/07/2007 |

**VII. INVESTMENTS and TRUSTS** -- *Income, value, transactions (Include those of the spouse and dependent children. See pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

| | A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure* | B. Income during reporting period (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, redemption) | D. (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) |
|---|---|---|---|---|---|---|---|---|---|---|
| 1. | CSCO | | None | | | Exempt | | | | |
| 2. | NOK | | None | | | | | | | |
| 3. | Rental Property, Lexington, Tenn. | | None | M | S | | | | | |
| 4. | ING Direct Acct. | B | Interest | K | T | | | | | |
| 5. | First Bank Acct. | A | Interest | J | T | | | | | |
| 6. | Brokerage Account #1 | | | | | | | | | |
| 7. | VOXW | | None | J | T | | | | | |
| 8. | IGRU | | None | J | T | | | | | |
| 9. | | | | | | | | | | |
| 10. | | | | | | | | | | |
| 11. | | | | | | | | | | |
| 12. | | | | | | | | | | |
| 13. | | | | | | | | | | |
| 14. | | | | | | | | | | |
| 15. | | | | | | | | | | |
| 16. | | | | | | | | | | |
| 17. | | | | | | | | | | |

1. Income Gain Codes (See Columns B1 and D4)
2. Value Codes (See Columns C1 and D3)
3. Value Method Codes (See Column C2)

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
I =$15,000 or less
J =$15,001 - $50,000
K =$50,001 - $100,000
L =$100,001 - $250,000
M =$250,001 - $500,000
N =$500,001 - $1,000,000
O =$1,000,001 - $5,000,000
P1 =$5,000,001 - $25,000,000
P2 =$25,000,001 - $50,000,000
P3 =$25,000,001 - $50,000,000
P4 =More than $50,000,000
R =Over (Real Estate Only)
S =Assessment
T =Cash Market
Q =Appraisal
U =Book Value
V =Other
W =Estimated

| FINANCIAL DISCLOSURE REPORT<br>Page 5 of 6 | Name of Person Reporting<br>Anderson, Stanley T | Date of Report<br>09/07/2007 |
|---|---|---|

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

Part III.A. - Additional non-investment income was received for services as a United States Magistrate Judge, WD-TN.

| FINANCIAL DISCLOSURE REPORT<br>Page 6 of 6 | Name of Person Reporting<br>Anderson, Stanley T | Date of Report<br>09/07/2007 |
|---|---|---|

**IX. CERTIFICATION.**

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

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

Signature: S. Thomas Anderson Date: 09-10-07

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

## FINANCIAL STATEMENT

### NET WORTH

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

| ASSETS | | | | LIABILITIES | | | |
|---|---|---|---|---|---|---|---|
| Cash on hand and in banks | | 10 | 000 | Notes payable to banks-secured | | 45 | 000 |
| U.S. Government securities-add schedule | | | | Notes payable to banks-unsecured | | | |
| Listed securities-add schedule | | 25 | 000 | Notes payable to relatives | | 70 | 000 |
| 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 | | 125 | 000 |
| Real estate owned-add schedule | | 485 | 000 | Chattel mortgages and other liens payable | | | |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 45 | 000 | | | | |
| Cash value-life insurance | | | | | | | |
| Other assets itemize: | | | | | | | |
| Retirement Accounts | | 185 | 000 | | | | |
| | | | | | | | |
| | | | | Total liabilities | | 240 | 000 |
| | | | | Net Worth | | 505 | 000 |
| Total Assets | | 745 | 000 | Total liabilities and net worth | | 745 | 000 |
| 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 | | | | | | | |



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## FINANCIAL STATEMENT

### NET WORTH SCHEDULES

| | |
|---|---|
| **Listed Securities** | |
| VOXW | $ 20,000 |
| IGRI | 5,000 |
| Total Listed Securities | 25,000 |
| | |
| **Real Estate Owned** | |
| Personal residence | $300,000 |
| Rental Property | 185,000 |
| Total Real Estate Owned | 485,000 |
| | |
| **Real Estate Mortgages Payable** | |
| Personal residence | $ 125,000 |

AFFIDAVIT

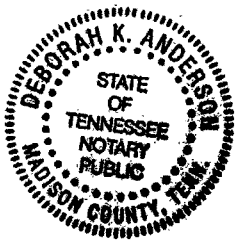
I, S. Thomas Anderson, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

September 24, 2007
(DATE)

S. Thomas Anderson
(NAME)

Deborah K. Anderson
(NOTARY)

My Commission Expires 8-22-11



Senator Warner.

Senator WARNER. Thank you very much, Mr. Chairman. I was particularly interested when you talked yesterday about your pro bono work, and I'm glad that you covered that this morning. I think it's a dimension of growing importance for the Bar Associations and members of the Bar Associations to step up and help because of the cost to engage attorneys today, and so many people simply can't do it. So, you have a very credible record in that context.

There were some questions raised apparently in your work with the staff and others about written opinions. The question is, apparently on your court it's not a practice to write opinions. Is that correct?

Ms. HAYNES. That is correct, Senator. We are not blessed with law clerks. We do all our own research, our own preparation of orders. Sometimes they're prepared by lawyers, but if it's going to be prepared by the court, it's myself who would have done it, including typing it.

Senator WARNER. What about other documents such as speeches and so forth? In other words, is there some material out there by which it would reflect some of your views in your capacity as a member of the bench, and indeed when you practice law?

Ms. HAYNES. Senator, I, of course, have a long record of 8 years of service as a judge which is well-known to the community, and thousands of litigants and jurors and lawyers came through my court over those 8 years. In addition, I sent copies of my speeches and writings and so forth, and my memory is, if I'm remembering correctly, I sent five sets and it was a 30-pound box. So that is, by my calculation, six pounds. So there's a great many speeches that I've given that are in written form. I have had some very short speeches that don't have notes because they were so short there was no need of notes.

Senator WARNER. Well, I've been sitting here 30 years and I don't know where I'd go to look for any of my old speeches either.

[Laughter.]

So I haven't got any recollection.

It's interesting. Your record reflects the following: as a State court judge you presided over hundreds of trials, including more than 190 jury trials, 100 bench trials, and decided more than 7,000 cases. That, I think, is an extraordinary record, coupled with your academic achievements. I think you were second in your class. Is that correct?

Ms. HAYNES. I was, Senator. Thank you.

Senator WARNER. In law school. And your husband was first in his class.

Ms. HAYNES. He was, indeed. In fact, he courted me by pointing that out.

[Laughter.]

Chairman LEAHY. And you still went out with him.

[Laughter.]

Senator WARNER. Well, as I said, Mr. Chairman, we're fortunate that this lovely jurist is stepping forward for further public service and a most important responsibility on the Circuit Court of Appeals.

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Ms. HAYNES. Thank you.

Senator WARNER. That court is—those following this hearing understand that it's just below the Supreme Court of the United States, and those decisions combined—let's see. Texas, Louisiana, and Mississippi. Is that the three States that this circuit covers?

Ms. HAYNES. Yes, Senator, it is.

Senator WARNER. Right. Well, I thank you again.

I'll put one or two additional questions into the record, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Warner.

Chairman LEAHY. You know, let me go back to this issue of race. Last year, the U.S. Supreme Court heard two cases involving the use of race as a factor in student assignments to public schools. I realize that any member of any Court of Appeals is of course bound by stare decisis, bound by decisions of the Supreme Court.

In *Parents Involved in Community Schools* v. *Seattle School District*, the combined case, in a 5:4 decision the court struck down school assignment plans from school districts in Seattle, Washington, and Louisville, Kentucky, that they were used to achieve diversity in public education.

Now, Justice Kennedy provided the crucial fifth vote to strike down the school plan issue, but he wrote a concurring opinion accepting that achieving diversity and overcoming racial isolation in public schools have compelling interests. Have you had a chance to read that decision and do you agree with what Justice Kennedy said?

Ms. HAYNES. I have a great passion for education as the way out of a lot of difficulties. In my particular case, my parents came here as immigrants with little or no money, but blessed with a Ph.D. in the case of my father in physics and a master's in chemistry in the case of my mother, and this was a tremendous help to them in making their way in this new world. So, I respect education a great deal.

If a case were presented to me in this area, we'd have to very carefully review the precedents you mentioned that I'm familiar with, but if the case were presented to me I would want to review them very carefully against that backdrop of passion for education and address the particular circumstance presented.

Chairman LEAHY. There are some who have felt that the Supreme Court almost nonchalantly overturned *Brown* v. *Board of Education*, others have looked at the concurring opinion and say they did not. Do you feel that Brown has been overturned?

Ms. HAYNES. It would take a majority of the Supreme Court to state that they're overruling *Brown* v. *Board of Education*, to take away a precedent such as that. As a judge on the Fifth Circuit, if I were confirmed, I would have to look at all of the opinions and follow that of the majority, which under the *Marks* case is the narrowest ground that would support the decision.

Chairman LEAHY. Chief Justice Roberts had said in that case, the way to stop discrimination on the basis of race is to stop discriminating on the basis of race. That statement by itself is one I would assume you would agree.

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Ms. HAYNES. That statement was in the plurality. If I were confirmed on the Fifth Circuit, I would have to look at the majority holding to address on a case that might be presented.

Chairman LEAHY. When people go to the courts, oftentimes as a last resort to protect their constitutional rights, especially less powerful who may not have the kind of political clout and legislative bodies that others might have. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself.

They did this in *U.S.* v. *Carolene Products* back in 1938. They held the legislation which restricts those political process which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibits of the 14th Amendment than are most other types of legislation. Now, that's actually a footnote. But do you read that as saying that litigants can expect the courts to look very, very carefully at what has been done, including in the legislative process?

Ms. HAYNES. We're very fortunate, in my view, to be in a country that has the checks and balances of three branches of government. The judiciary has to give respect to the other two branches, and particular respect to the laws passed by the legislature.

At the same time, it is necessary for the judiciary to hold government accountable where those rules are not followed. In my particular case, I had numerous situations where someone was suing the government, or the State was suing, and I had to address the question of whether or not government had followed the rules. I had a specific case involving plaintiffs suing the Dallas Independent School District, alleging that they had not followed the Open Meetings Act in connection with redistricting, which is a very sensitive and difficult issue in Dallas, and probably beyond.

I made a very careful scrutiny of hundreds of pages of transcripts myself—again, no law clerk—of these closed sessions that were alleged to have been improperly held in closed session, and found that some had been improperly held in closed session and required that they be made public and open, and therefore held government accountable.

Chairman LEAHY. I appreciate that. So often, as indicated—and I'll have a couple other questions for the record—we find that the courts really are the last resorts. I mean, we have seen it in the past when legislatures or Congress has failed to act, and sometimes is a right that needs to be under the Constitution, needs to be enforced, and we have to go there. At the same time, we have to show judicial restraint and temperament.

I feel like in saying that that I'm channeling Senator Thurmond, who used to state very clearly here, don't forget, it's a lifetime position. You go there, you're the most powerful person in the courtroom. You have to treat everybody the same. I mean, in your law practice you've seen people that did not have what you call judicial temperament, I'm sure. We all did when we were practicing law. There's no way of putting a definition of that, but it's more, you know it when you see it.

If you've ever had the temptation, if you're confirmed, to abuse your position, think of judges in your own practice or our own ca-

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00657 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

reer, especially when you were a young, beginning lawyer, when you looked at them and thought, who do they think they are? That's probably the best way of doing it. Look at them and just think, a lawyer would be sitting there saying, who the heck do they think they are? It's not a bad test.

Senator Warner, did you have any other questions?

Senator WARNER. No, that's all. Thank you. I will put in, for the record, a few questions.

Chairman LEAHY. Well, then let me lead into, for both of the District Court nominees, just starting with that same question. Judge Mendez, let me ask you, have you, in your practice of law, seen a judge act where you were thinking, who the heck does he or she think they are?

Judge MENDEZ. I have.

Chairman LEAHY. I'm not going to ask you to say who it was.

[Laughter.]

Judge MENDEZ. I will not.

Chairman LEAHY. But if you're confirmed, this is a lifetime position. I mean, you can tell me or anybody else what you think of us, and that's fine. But do you feel that you can go on a bench and remember that lawyers are there to advocate for clients and that the issues have to be treated fairly?

Judge MENDEZ. I'm reminded of that every day as a State court trial judge. Having been a State court trial judge for 7 years, that's been excellent training, great experience for a move to the Federal District Court, if I am confirmed. I am constantly reminded of that. In California, we are constantly reminded of that when we attend judicial education programs over and over again.

I do remember being a lawyer in Federal District court and, just as you said, thinking if I am ever fortunate enough to become a judge, I'm going to remember what it's like to be a lawyer. I've taken that to heart every day as a State court trial judge.

Chairman LEAHY. Over a period of about 10 years, I had the privilege of actually trying more cases than anybody else in our State of Vermont. I saw some very, very good judges. I saw some others I wondered, how in heavens name did they ever get where they are. In the Federal system, it is so important. I mean, our whole—this is the third branch of our government and this is where it works only if people have faith in the courts. You don't have armies. You don't have anything else like that. People have to have faith and respect for the courts. If you lose that, we've lost the ability to have checks and balances in our government.

I'd tell, if I might, Senator Warner, a short story. Shortly after the break-up of the Soviet Union, a group of jurists and lawyers were here visiting and going around the Capitol, talking to different people. As part of their business, they came in the conference room in my office and they were asking me questions. One said, is it true that in your country people have actually gone in and sued the government? I said, yes, it happens all the time. And is it true that there are time that the government loses? I said, it happens all the time. And do you then replace the judge?

[Laughter.]

It was like, you know in the cartoons where a light bulb goes on? It was like that as we explained.

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We've had lawyers, and even members of our Supreme Court, who have taken part in exchanges with, now Russia, formerly the Soviet Union, in talking about courts. That is the one thing they keep emphasizing, the independence of it. We see it every time we read about other countries, where suddenly the President or Prime Minister is arbitrarily firing judges because he didn't like their decisions. We can't have that.

Let me ask Judge Anderson, what about you? Is there anything here that you disagree with? I mean, here's your chance to tell me.

Judge ANDERSON. No, sir, there is not. I think it comes down basically to a matter of respect, respect not only that the litigants have for the court, but respect that the court has for the litigants, and the attorneys, and everyone who appears. I have tried as best I could to conduct myself as a magistrate judge in that fashion, and as an administrative law judge it was the first time in Tennessee's history that citizens had the right to sue the State, so I was the first judge—one of the first three judges to serve in that capacity, so I got to deal frequently with issues involving State liability.

Chairman LEAHY. And would it be safe to say you realize the State can lose?

Judge ANDERSON. Yes, sir. I do realize the State can lose.

Chairman LEAHY. And do you agree—I mentioned Carolene Products. The footnote said all citizens have to have fair and effective representation. Do you agree with that?

Judge ANDERSON. I do agree with that, Senator.

Chairman LEAHY. When I was a prosecutor, I always used to think one of the most difficult things was when we had basically incompetent counselors show up on the other side, because I thought I had a duty in the court to basically try their case as well as my own case. It's a lot better, I think you'd both agree, as trial judges, if you've got two basically equal—or basically equal representation on both sides.

Judge ANDERSON. Yes, sir.

Chairman LEAHY. I think the checks and balances is important. It can come at all levels. In 2002, the Office of Legal Counsel at the Justice Department issued a secret legal opinion that concluded that the President of the United States had the power to override domestic and international laws outlawing torture and said he has complete authority to do that. It seemed to assert the President could immunize people from prosecution for a violation of U.S. criminal laws that may prohibit torture.

I'm not talking about the President's obvious and complete constitutional power to issue pardons, but just to immunize and say, OK, you can break the law, but you can't. Now, after it became public—after the secret memo became public, it was withdrawn. Do you believe that—not just this President, but any President, can immunize illegal conduct?

Judge ANDERSON. Senator, I believe that in a situation like what you're talking about, it comes back for someone—if I'm fortunate enough to be confirmed as a District judge, it comes back to Supreme Court authority, the statutes that have been passed by this Congress, and any other body of law that might apply to the situation. That's the way I would try to administer the law, if I'm fortunate enough to be confirmed.

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00659 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

Chairman LEAHY. Would you take the basic proposition to at least begin with that nobody in the United States is above the law?

Judge ANDERSON. Yes, sir. I would.

Chairman LEAHY. Judge Mendez.

Judge MENDEZ. I agree with Judge Anderson. In thinking about this, too, as a trial judge, one of the benefits I think you have as a trial judge is the ability to create a record. You can call for witnesses. You have the ability to ask for briefs. You need to follow precedent. You can make—again, that's why I like being a State trial court judge. You can take your time on decisions that are incredibly important and get all the information you need to do your job as a judge, and that's what you need to do as a judge. Make a record, explain your decisions, and get as much information as you can and apply specific facts of the case to precedent.

Chairman LEAHY. Judge Haynes, would you agree that the life of an appellate judge is at least easier if you've got a complete record coming up?

Ms. HAYNES. Each level—

Chairman LEAHY. I mean, you're still going to have—you may have a hard decision on the issue.

Ms. HAYNES. Yeah.

Chairman LEAHY. But it's a little bit easier if you don't have to try to create the record yourself. Is that correct?

Ms. HAYNES. Each level has its own challenges. I certainly know the challenges that are faced in a District court, at least a State District court, and they are substantial.

Chairman LEAHY. Senator Warner.

Senator WARNER. To Judge Mendez, you have always found a lot of time to speak to young people. You've taken an interest in that. Would you share with us some of the principles that you lay down when you explain the importance of the third branch of government, namely the judicial system?

Judge MENDEZ. Thank you for pointing that out. I actually spent, as I indicated in my questionnaire, 5 years on our juvenile delinquency court. I found that to be the best assignment I've had as a judge. In terms of laying down principles, one of the reasons I really enjoyed juvenile court is you not only get to be a judge, quite frankly, you can bring your parenting skills to that court as well. It's very unique in terms of what you do for young people who obviously are there because their life is in crisis.

The most important principle I lay down is education, quite frankly. The way out of juvenile delinquency, the way out of the life that most of them aren't responsible for, their parents are responsible for creating this situation, is education. I emphasize that over and over again, including learning about government, participating in the process.

I always tell them, anyone that complains about the branches of government, and particularly elected officials, the first question you ask is, did you vote, have you registered to vote? People that complain about—we get a lot of questions about jury duty. It's important to participate in the process, but the way out, and the main message I give is what my parents gave me, and that is the way to succeed in life is through education.

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Senator WARNER. The Chairman was recounting the demise of the Soviet Union and the excitement of former Soviet citizens, now Russian citizens, and others in learning about our judicial system. You have no reluctance to hold the President of the United States, if he's adjudged to have misconstrued his constitutional powers, to hold him accountable. Is that correct?

Judge MENDEZ. I think the Chairman pointed out well, as a judge it doesn't matter who comes into your court: everyone is equal, everyone has to be treated fairly. As a judge, that's the way you have to approach every case, and that's the way I would approach this.

Senator WARNER. One of the landmark cases certainly in our lifetime, was the time of Truman, who was held accountable in, what, 1944?

Chairman LEAHY. On the *Youngstown Steel* case. Yes.

Senator WARNER. The *Youngstown Steel* case.

Chairman LEAHY. Yes.

Senator WARNER. But you know, it's interesting. People don't realize, if you look at the Constitution and the protection of liberty and rights, the U.S. District judge has, I think, the most powerful position. It certainly in many ways is equated to that of the President in finding fact and holding people accountable under the law, and I hope each of you are fully aware of the awesomeness of your power and how, as the Chairman pointed out, it has to be administered with a sense of fairness to all and equal justice to all.

Judge Anderson, again, you've done a lot of work in the pro bono field. I think it's important that you lay before us this morning some of the things that you did in that field.

Judge ANDERSON. I was fortunate to serve on the Pro Bono Panel for my local Bar Association. My area of focus was civil rights. I was amazed at times at the number of cases that we were called and consulted about regarding various civil rights violations, or perceived violations. It, in many ways, was one of the most rewarding aspects of my private practice.

Also, in serving as a judge you see a lot of litigants who, it may be their very first time to be in the court and the first time to see how the process works, and I've tried to use that as much as I could to help educate young people and those that come into court for the first time.

Senator WARNER. Thank you.

Mr. Chairman, I think that concludes my question in open hearing here this morning with our distinguished panel of nominees.

Chairman LEAHY. I was chuckling a little bit, thinking of judicial demeanor. I'm a member of the Vermont Bar, I'm a member of the District of Columbia Bar, the U.S. Supreme Court Bar. These are all bars I've appeared before in the Second Circuit. But I've only appeared once in court since I—when the Senate has to appear before a judge, the District judge in Vermont, whom I had recommended to President Clinton, he was now our chief district judge. It was a young law graduate who had clerked for him from Emory Law School, my son Kevin. Now it is his time to be—he's already admitted to the Vermont Bar. There, the admission is moved by the head of the Board of Bar Examiners for anybody who has passed the bar.

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00661 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

In the District court, you had to have a member of the bar move, so I appeared in court. He was clerking for that judge. I made the usual motion, put into the record all—admitted to the Vermont bar, and here is who it was. So I said, Your Honor, may it please the court, I'd move his admission. He looks at me and goes, hmmm. I'm like, what do you mean, hmmm? He said, motion granted.

[Laughter.]

He told me, how creative. He said, you know, Patrick, I just wanted to remind you who's boss here in this court. But thank you.

We'll stand in recess. We'll leave the record open for an appropriate period of time if anybody has questions.

Senator Warner, I can't thank you enough for this.

Senator WARNER. I thank you, Mr. Chairman. It's been a great privilege for me, and to have the opportunity to meet Mrs. Haynes. I have to say, the Chairman talked about my modest career in the Senate. I recommended to a President the first woman Federal jurist in the history of Virginia. Just think: it was 200 years of history by the time I got around to that nomination. She later became the chief judge of our District court in her region.

So I congratulate you, and I congratulate each of you for your past public service, and hopefully with the confirmation of the Senate, your future public service.

Chairman LEAHY. Thank you.

Senator WARNER. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. I really appreciate it.

[Whereupon, at 11:05 a.m. the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

# QUESTIONS AND ANSWERS

**Catharina Haynes**
**2001 Ross Avenue, Suite 600**
**Dallas, Texas 75201**

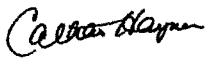
March 4, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Attached are my responses to written questions from Chairman Leahy, Senator Kennedy, Senator Feinstein, and Senator Cardin.

Sincerely,



Catharina Haynes

cc:
The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

**Responses of Catharina Haynes**
**Nominee to the U.S. Court of Appeals for the Fifth Circuit**
**to the Written Questions of Chairman Patrick Leahy**

**1. Republican Presidents have appointed 12 of the 16 active judges to the Fifth Circuit, the court to which you have been nominated. This imbalance is partly due to Republican efforts to stall President Clinton's outstanding nominees to this court such as Judge Jorge Rangel of Texas, Enrique Moreno of Texas and Alston Johnson of Louisiana. Under my Chairmanship, this Committee has been much fairer to President Bush's nominees to the Fifth Circuit, giving all 6 hearings and all of the previous 5 votes, confirming 2 last year. Given that the Fifth Circuit is now stacked overwhelmingly with Republican-appointed judges, and that the seat to which you are nominated is the last vacancy, what balance will you bring to this court?**

I am the child of immigrants who are from two different parts of the world, having met as foreign exchange students one summer in America. From the very beginning of my life, I have had the opportunity to witness the interaction of two cultures in the midst of a third culture, as well as the challenges and opportunities presented by that union. As a teenager, my father lived through the Nazi occupation of The Netherlands. He shared many stories of that experience with me, which gave me a great appreciation for the freedoms we have in the United States. Through the course of my life, I have traveled widely and met many people from many different parts of the world. These experiences have given me a diverse perspective on the world, different peoples and different cultures. I have brought that insight, understanding and perspective to my practice as a lawyer and my work as a judge.

In addition to my personal background, as a judge I have presided over cases involving people from all backgrounds and walks of life. I have had thousands of lawyers, witnesses and jurors in my court from diverse backgrounds. I believe that I have a strong reputation as a fair judge to all. Dallas County is very diverse. In my capacity as either a candidate for office or a public official, I have had the opportunity to attend many events throughout Dallas County involving people with a wide variety of backgrounds and interests. I also hosted visitors from other countries, including a delegation of Russian women lawyers, in my courtroom to learn about the American legal system.

Mediation is a very common dispute resolution mechanism in Dallas. In creating a list of mediators to appoint as a judge, I reached out to the entire legal community. I contacted several diverse bar associations, such as the Hispanic Bar Association, to seek applications from qualified mediators. I participated in several Minority Attorney Business Development Initiative seminars in an effort to encourage a diverse pool of mediators to apply for appointments from my court.

I also became concerned about the lack of information for pro se litigants. I worked with the Dallas Association of Young Lawyers to create a brochure entitled "Representing Yourself -- What You Need to Know." In contested cases in my court in



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which there was a pro se litigant, I included a copy of this brochure with every scheduling order (both to the pro se litigant and to counsel for any represented parties). I believe that this brochure was widely used and available at the courts during the time I was there.

Over the last five years, I have taught Pre-GED at the Vickery Meadow Learning Center (VMLC), and over the last three years, I also have served on its Board. VMLC is dedicated to English literacy and empowerment for adults for whom English is not their first language. It also educates their young children. The Vickery Meadow area is a three-mile area of approximately 36,000 people, many of whom are low income and many of whom are immigrants or refugees from around the world. In my class alone, I have taught students from Latin America, Nigeria, Sudan, Ethiopia, and Iraq, to name a few. This enriching experience has further broadened my perspective on the world. Through our church, my husband and I have volunteered at Youth Believing in Change, a faith-based organization for at-risk youth.

Through my work at VMLC, I learned of the need for legal services in the Vickery Meadow area. When I returned to private practice last year, I set out to try to address this problem. I learned that the existing structure for pro bono services, a collaboration between Legal Aid of NorthWest Texas (LANWT) and the Dallas Bar Association through the Dallas Volunteer Attorney Program (DVAP), was insufficient to meet the needs of the potential clients in this area. Over this past year, therefore, I worked with members of the Dallas Bar Pro Bono Activities Committee, DVAP, LANWT, Catholic Charities of Dallas, Inc. Immigration and Legal Services, Human Rights Initiative of North Texas, and Central Dallas Ministries - Legal Action Works to collaborate on the Vickery Meadow Legal Clinic. Additionally, members of the National Council of Jewish Women volunteered as greeters. The clinic serves as an intake clinic that then directs cases to the appropriate collaborating agency; the Committee then finds volunteer attorneys to take the cases as appropriate. We held the first clinic on January 31, and it was a success. We are planning three more clinics for later this year. It is hoped that this program will grow to allow for more clinics, serving more clients.

For these efforts, I have been advised that I will receive the Distinguished Advocate for Catholic Charities of Dallas, Inc. Immigration and Legal Services award. I am honored to have received several other awards over the last 12 years recognizing my volunteer efforts as a lawyer and a judge, including the Dallas Bar Association's Outstanding Committee Chair Award, the DAYL Foundation's Award of Excellence, the Dallas Women Lawyers' Louise B. Raggio Award and Florida Tech Alumni Association's Outstanding Achievement Award.

As stated in the Code of Judicial Conduct, partisan concerns cannot play any role in a judge's decisions. I followed that rule diligently as a state district judge, and I would do so again as a Judge of the Court of Appeals, if confirmed.



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I believe that my diverse background and experiences, coupled with my many years of experience in dealing with people from all walks of life, has prepared me well to serve on the Fifth Circuit, if confirmed.

**2. Two weeks ago, on February 7, President Bush held a highly political and partisan event to make the claim Democrats were holding up judicial and executive nominees. In fact, the Senate confirmed 40 nominees to lifetime judicial appointments last year, more than the Republican-led Senate had for this President the previous three and more than were confirmed in 1996, 1997, 1999, and 2000, when a Republican-led Senate was considering President Clinton's nominations. The Judiciary Committee also reported 25 nominees to important executive positions last year in an effort to restock the leadership of the Department of Justice after so many resignations following the U.S. Attorney firing scandal. Progress on executive and judicial nominations has continued this year. Nonetheless, you participated in this political exercise even though your hearing had already been announced.**

**A. Do you still believe that the Senate has unfairly held up your nomination?**

**B. Do you feel it is appropriate for nominees to participate in partisan events designed to use the nominations process for political gain?**

I was invited to the White House at the request of the President for breakfast and remarks regarding nominations. I have great respect for the office of President, and I attended. I very much appreciate the scheduling of my hearing last month, particularly during a recess week.

**3. Given your lack of criminal law experience, what experiences will you draw upon and what steps will you take to prepare yourself to handle the complex criminal appeals that will come before you as a federal appellate court judge?**

As a state district judge presiding over civil cases, I have had to learn and apply criminal law concepts. For example, I presided over cases under Chapter 59 of the Texas Code of Criminal Procedure involving the forfeiture of contraband. These cases required analyzing whether the charged offense met the standards of this chapter, as well as other criminal law concepts, such as a showing of probable cause for seizing the alleged contraband. I also had cases that presented Fifth Amendment issues as a result of parallel criminal and civil actions. I presided over cases filed by prisoners which touched upon criminal law issues, such as the Eighth Amendment. I also attended continuing judicial education seminars in which criminal law updates and issues were discussed. My court also occasionally heard criminal contempt cases.

Some statutes have both civil and criminal aspects, such as the Racketeer Influenced and Corrupt Organizations Act (RICO) and federal securities statutes. In



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00666 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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handling the civil side of such cases, I became familiar with the elements and analyses of these statutes on the criminal side.

In addition to a strong academic record, I believe that I have a strong record of handling complex cases as a lawyer and a judge that prepares me to address issues that may arise that I have not previously handled. I believe that I also have a strong and demonstrated commitment to continuing education -- I am a Fellow of the College of the State Bar of Texas, which recognizes outstanding achievement in continuing legal education. I have continually met the continuing education requirements for membership in that organization since joining in 1990. I also attended extra courses, not required by any law or rule, to obtain a Certificate of Special Competence in Civil Jurisprudence from the Texas Center for the Judiciary in 2005. If confirmed, I would continue to attend continuing education courses in a variety of topics, including criminal law. I would also continue the extensive reading I already do of advance sheets and relevant legal articles.

Whether or not I have had previous experience with an issue, if confirmed, I would carefully review the record, the briefing and all applicable authorities in reaching my decision. That is the approach I took as a state district judge.

**4. As discussed at your hearing, last term, the U.S. Supreme Court heard two cases involving the use of race as a factor in student assignments to public schools. In the consolidated opinion of *Parents Involved in Community Schools v. Seattle School District No 1, et al.*, a 5-4 decision, the Court struck down school assignment plans from school districts in Seattle, Washington and Louisville, Kentucky that used race to achieve diversity in public education.**

**A. Although Justice Kennedy provided the crucial fifth vote to strike down the school plans at issue, he wrote a concurring opinion accepting that achieving diversity and overcoming racial isolation in public schools are compelling interests. Do you agree with Justice Kennedy that achieving diversity and overcoming racial isolation are compelling interests?**

If I were confirmed and a case were presented to me regarding school plans involving race, I would apply all relevant precedents. Under *Marks v. United States*, 430 U.S. 188 (1977), where five justices do not join in one complete opinion, the opinion of the Court is that which provides the narrowest ground for the holding.

**B. Do you agree that the landmark decision in *Brown v. Board of Education* remains good law? What do you believe are its role and importance are today?**

Just a few years ago, the Dallas Bar Association held a year long series of celebrations and commemorations of the 50th Anniversary of this landmark opinion. I was excited to attend some of these events and to remember the rich history of that opinion. I have a deep passion for education, which began in my childhood. My



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immigrant parents came to this country with very little in monetary terms, but a great deal in the form of education (a Ph.D. in Physics and a Masters in Chemistry for my father and mother, respectively). They taught me from a very young age that education provides a framework for personal satisfaction and professional success. I share my passion for education with people of limited means by teaching Pre-GED courses at the Vickery Meadow Learning Center. Education for all is crucial to the strength of our country.

A majority of the U.S. Supreme Court has not stated that *Brown* has been overruled. I would follow the precedent of the U.S. Supreme Court, if confirmed.

**5. The Mississippi Supreme Court recently upheld Republican Governor Haley Barbour's decision not to hold a special election to replace Senator Lott until the November 4 General Election, thereby allowing his interim appointment of Republican Roger Wicker to remain in effect until then. This decision overturned a lower court decision that the special election had to be held within 90 days, as called for by the Mississippi law governing the filling of Senate vacancies.**

**The Supreme Court's decision appeared to twist the plain meaning of words in the statute such as "year" to reach its result and find ambiguity where the law was clear on its face, ignoring the formula set forth by the legislature in the statute requiring a special election within 90 days because Senator Lott retired last year, after Mississippi's state elections. In fact, in Judge Early's concurrence, he explicitly substituted his own policy judgment for that of the legislature, basing his decision on a determination that it would be too expensive to have a special election when they already have a general election planned, stating "reason and economy must prevail."**

**When Strom Thurmond was on this Committee, he liked to ask judicial nominees about the value of judicial restraint. Judicial restraint does not seem to support the result of the Mississippi Supreme Court. Do you believe that judges should rule based on the plain meaning of laws and the language of statutes? Do you agree regardless of the political interests at stake in a particular outcome?**

As stated in the Code of Conduct for United States Judges and the Code of Judicial Conduct applicable to Texas judges, a judge is required to apply the law faithfully without regard to "partisan interests, public clamor or the fear of criticism." In the eight years I served on the state district bench, I always conducted myself in accordance with these precepts, and I would do so again, if confirmed.

As a state district judge, I had many opportunities to construe statutes. In doing so, I always started with the language of the statute itself. I looked at whether any binding precedents construing that statute or the same language in another statute existed and, if so, I followed those precedents. If not, I looked for persuasive reasoning in precedents from courts that were not directly binding. In the absence of precedential



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authority, I applied the plain language of the statute in light of the principles for code construction announced in cases and statutes.

**6. The U.S. Court of Appeals for the Fifth Circuit rules frequently on death penalty cases and has often been reversed on such cases by the United States Supreme Court, even in its recent very conservative composition. For instance, in 2005, in *Miller-El v. Dretke*, a case in which prosecutors used peremptory challenges to strike 10 of 11 African-American jurors in a capital case, the Court stated in a 6-3 reversal that the Fifth Circuit's decision to uphold the death sentence "blinks reality." One year earlier, in *Tennard v. Dretke*, which involved the potential execution of a man with an I.Q. of 67, the Court stated that "[t]he Fifth Circuit's test has no foundation in the decisions of this Court." This past term, the Fifth Circuit was overruled by the Supreme Court in four capital punishment cases.**

**In light of so many instances of the Supreme Court overruling the Fifth Circuit's narrow death penalty jurisprudence, what assurances can you give this Committee that as a Fifth Circuit judge you would not seek to narrow the rights of capital defendants?**

My record demonstrates that, as a judge, I took every case very seriously, and I would do so on the Fifth Circuit, if confirmed. Given what is at stake, I would take a capital case involving the death penalty extremely seriously. For the government to take a life is a very serious matter, necessitating careful review and deliberation. I do not have any preconceived notions about this subject – if confirmed, I would review each case anew without presuming the correctness of the decision below. I would study each case carefully, review the record and relevant precedents, then make a decision based solely upon the Constitution, applicable law and relevant precedents as applied to the facts.

**7. We are at a pivotal moment in American history for the preservation of the careful balance of powers between the branches of our government, faced with a President making sweeping claims to nearly unchecked executive powers. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or the recent warrantless spying on American citizens. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into lobbyist Jack Abramoff's influence on members of Congress, we make sure that we exercise our own power properly. Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?**

Our system of checks and balances has stood the test of time because it effectively ensures that no one person or branch holds all governmental power. The legislature is an important branch in our government, and it is an important check and balance on the other branches. All branches of government should be diligent in their tasks and respectful of the other branches.



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**Responses of Catharina Haynes**
**Nominee to the U.S. Court of Appeals for the Fifth Circuit**
**the the Written Questions of Senator Edward M. Kennedy**

1. **You've said that you do not write opinions, but that you sign orders, "a few with explanations." How do you decide which orders will include explanations?**

As a state district judge in Dallas, it was not the practice in my court to prepare written opinions on each decision, given the limited resources and volume of work we had. I did sometimes prepare writings explaining my rulings which were orders with explanations; infrequently, letter explanations were sent. Additionally, sometimes I signed findings of fact and conclusions of law proffered by the attorneys, but most of the time I wrote my own findings of fact and conclusions of law, which involved a discussion of law and facts. Out of more than ten thousand orders and judgments, I have located three orders signed by me I did not previously recall that had used the title "opinion," but they are in the nature of orders with explanation. Two were for administrative appeals and the other was from 1999, upon a special request for additional rulings. They are being provided in response to Question 2.

Most of the time, I ruled from the bench, and I gave oral explanations and reasoning, as appropriate, for those rulings at the time. Orders with explanations or letters with legal reasoning occurred most often in cases where it was necessary to take the matter under advisement, and I issued a ruling after the hearing.

2. **Please provide an estimate of the percentage of cases you've decided as a judge that involve the following issues, and please provide the Committee with copies of any orders that you signed "with explanations" in such cases:**

   a. **federal constitutional issues;**
   b. **civil rights;**
   c. **the rights of consumers;**
   d. **workers' rights.**

When I was a judge, the Dallas County District Clerk did not keep statistics regarding the categories of cases described. Based upon my memory and experience, the largest number of cases in the 191st District Court during my time there were personal injury and malpractice cases. The second largest number of cases were consumer and business cases. Given the overall volume of cases, this translates into a very significant number of cases of these types. I am also Board Certified in Consumer and Commercial Law by the Texas Board of Legal Specialization, a designation held by fewer than 100 attorneys. With respect to workers' rights, my court heard workers' compensation cases, wrongful discharge cases and employment cases, as well as administrative appeals that sometimes implicated these issues. These cases were a smaller percentage of my docket than the personal injury and consumer/business cases. Cases in state court sometimes



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present federal constitutional issues; in addition, concepts such as due process inhere in every case. Cases brought alleging a question for decision under other provisions of the federal constitution or civil rights legislation were a smaller percentage of cases than the other categories described. I am submitting orders with explanation and letters in the categories requested. Letters generally are not maintained in the minute books assembled by the deputy clerks for the court, so I am providing the best copies available to me.

**3. Please identify any cases in which you issued an order for judgment n.o.v. and describe in detail the issues in the cases and the reasons for your decision.**

I have great respect for the jury system. A judge must carefully analyze the law and the evidence with respect to a jury verdict, but she must be careful not to overturn it lightly. I cannot think of a single case in which I entered an opposed judgment n.o.v. on the entire case. There may have been cases where evidence did not support one cause of action or element of damages but did support another, and I entered judgment accordingly.

**4. Other than in cases involving default judgments, have you ordered monetary awards for plaintiffs in civil rights cases? How many?**

As a judge, I have tried approximately three hundred cases, of which about one-third were bench trials. One of those bench trials involved a case touching upon civil rights. In the case of *Garza v. Dallas Independent School District*, Cause No. 01-8448-J, Latino plaintiffs sued the Dallas Independent School District (DISD) in connection with alleged violations of the Texas Open Meetings Act during its deliberations over the redistricting of voting boundaries for the voting districts within the DISD. I awarded attorneys fees to the prevailing plaintiffs; no other monetary damages were sought at the time of trial. I do not recall a case of this type in my court in which the jury awarded monetary damages.

**5. The Fifth Circuit often has the last word in cases involving issues of constitutional law.**

**a. During your practice as an attorney, how many cases have you litigated involving constitutional issues? Please identify these cases and describe in detail the constitutional issues involved in each case.**

**b. How many cases have you decided as a state trial judge involving constitutional issues? Please identify these cases and describe in detail the constitutional issues involved in each case.**

As a lawyer and a judge, I have handled cases where constitutional law questions of varying types were presented. I do not have any statistics that would provide an accurate count or method of locating such cases. As a judge, due process concerns under the Fourteenth Amendment inhered in every case I handled, particularly in cases



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involving default judgments (of which there were hundreds). In each case, I carefully scrutinized the record to determine whether proper notice was given to the defendant as required by the United States and Texas constitutions. As a result of this careful scrutiny, only one default judgment I entered was reversed. In some instances, such as whether the Federal Arbitration Act applies to an arbitration clause at issue, I had to review precedent under the Commerce Clause.

I presided over hundreds of forfeiture cases under the Code of Criminal Procedure. In each case, the State was required to show that there was probable cause for the seizure of the item in question, implicating Fourth Amendment concerns. An example of such a case that I tried is *State of Texas v. $3617*, Cause No. 98-6258-L (tried for the 193rd District Court of Dallas County).

Other examples of cases involving constitutional law issues presented to my court are as follows:

*Haywood-Jordan-McCowan v. Fair*, Cause No. 98-2102 (Due Process).

*Watson v. Fleck*, Cause No. 03-11643 (Due Process)

*Home and Hearth, Inc. v. Assoc. Design Professionals*, Cause No. 00-2208 (Due Process)

*Trinity Industries Leasing v. American Energy, Inc.*, Cause No. 97-6498 (Due Process)

*JRW Aviation, Inc. v. The Jones Co.*, Cause No. 03-11272 (Due Process)

*Northwest Investments v. City of Dallas*, Cause No. 01-1357 (First Amendment)

*City of Dallas v. MDII*, Cause No. 01-4540 (First Amendment)

*Reedy v. Crayton Webb*, Cause No. 00-2968 (First Amendment)

*Reagan v. Blair*, Cause No. 99-9157 (First Amendment)

*Apostolic Assembly of the Faith in Christ Jesus, Inc. v. Salvador Rodarte*, Cause No. 05-6264 (First Amendment and constitutional limitations on court's ability to hear cases regarding church governance)

*Prime Lending v. Goodrich*, Cause No. 03-12450 (Fifth Amendment)

*Wallace v. Dallas County*, Cause No. 98-7602 (Eighth Amendment)

As an attorney, constitutional issues have arisen in various cases I have handled. The most recent example is a case in which I am one of the attorneys representing a



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defendant (Verizon Communications, Inc.) after judgment was entered. *Thomas v. Curtis and Verizon Communications, Inc.*, Cause No. 06-16428, County Court at Law No. 2 of Dallas County. We filed a special appearance challenging the constitutionality under the Due Process Clause of the United States Constitution of the judgment entered against this entity (which is not the Verizon entity doing business in Texas). The challenge was based upon this entity's lack of minimum contacts with the State of Texas.

**6. Your work in private practice has primarily involved the defense of insurance companies and other corporate entities. Please identify anything in your professional record that demonstrates that you would apply the law fairly in cases in which individuals bring claims against such defendants.**

I believe that I have a strong record of fairness as a judge of a state trial court for eight years, during which I tried hundreds of cases and heard thousands of motions. In making rulings, I did not consider whether it would benefit one side or the other. I looked only to the applicable law in light of the facts. The result of this approach is that I ruled both for and against individuals in lawsuits against corporations, governmental entities and insurance companies. A few examples of rulings in favor of an individual against a corporation, governmental entity or insurance company which were appealed are as follows (the case number provided is for the appeal to the Fifth District Court of Appeals at Dallas):

*Great American v. Martin*, Case No. 05-00-01333-CV (8/6/02, no pet.): The case involved a suit by an insurance agent against her insurance company. I granted summary judgment on the case except for the allegations of fraud. The jury found for the plaintiff, and I signed a judgment on the jury verdict for over $11 million. The Court of Appeals reversed finding that as a matter of law, under the facts of this case, fraud was not an available cause of action.

*Mary Kay v. Woolf*, (Case No. 05-03-01099-CV), 146 S.W.3d 813 (Tex. App. – Dallas 2004, no pet.): A sales director for Mary Kay sued for employment discrimination under a California statute, alleging that adverse employment actions were taken against her after she was diagnosed with cancer and became pregnant. I signed a judgment in favor of the plaintiff on the jury verdict for over $1.2 million. (The jury found liability for punitive damages, but they also answered affirmatively to a defense to punitive damages under California law, so I did not award punitive damages.) The Court of Appeals reversed, holding that the plaintiff was not an employee of Mary Kay as a matter of law.

*Cigna v. Pybas*, Case No. 05-03-00517-CV (2/12/04) (vacated after appellate opinion, pursuant to settlement): This case involved a suit by the family of an HMO patient who alleged that his death was prematurely hastened by the negligence and malice of the HMO. The case was tried to a jury which found the HMO liable for actual and punitive damages in the decedent's death. I signed a judgment on the jury verdict for over $3 million in actual damages and $10 million in punitive damages. The Court of Appeals affirmed the judgment, except for the punitive damages. Although the Court of



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Appeals agreed that the HMO had acted with malice (the legal standard for punitive damages in Texas), it concluded that the malice was insufficiently linked to the harm suffered by the decedent to support an award of punitive damages.

*State Farm v. Hamilton*, No. 05-06-01032-CV (judgment entered 7/5/06; appeal pending). The Hamiltons sued State Farm for damages allegedly resulting from the improper handling of their insurance claim on their homeowner's policy. The case was tried to a jury, and I signed a judgment on the jury verdict for repair damages, mental anguish, attorneys' fees, costs and interest. State Farm has appealed, and a decision is pending.

*Dallas County v. Alejo*, Case No. 05-06-00214-CV (4/25/07): This case involved a mentally ill woman who was incarcerated in the Dallas County jail and died after ingesting so many coffee grinds that she experienced acute caffeine toxicity. Dallas County filed a plea to the jurisdiction, asserting that sovereign immunity barred the claim. Such a plea is an early pleading and challenges whether the allegations state a claim within jurisdiction. Sovereign immunity is waived in Texas if the claim involves the use of tangible personal property. I denied the County's plea to the jurisdiction, finding that the claim involved the use of tangible personal property. On appeal, portions of my rulings were affirmed, but, the Court of Appeals also held that the Plaintiff failed to prove that the jailed decedent obtained the coffee grinds from Dallas County personnel, and thus found that the plea to the jurisdiction should have been granted. The Court of Appeals recently denied the motion for rehearing in that case.

*Tewelde and Irving Holdings, Inc. v. Brown*, Case No. 05-06-01654-CV (judgment entered 9/8/06; appeal pending): Brown was injured in an accident with Irving Holdings' taxi, driven by Tewelde. The jury found that both parties to the accident contributed to the accident, but they did not find the plaintiff more than 50% responsible. I entered judgment on the jury verdict for plaintiff, reducing it for the plaintiffs' comparative negligence. Defendants took the position that further reductions should be taken under a new Texas statute limiting recovery of medical expenses to the amount actually paid or incurred by or on behalf of the plaintiff. The question was whether this cap should be applied before or after the reduction for contributory negligence. I ruled in favor of the plaintiff on this issue, and the defendants have appealed. The appeal is pending.

*City of Dallas v. Nathan*, Case No. 05-01-00618-CV (9/21/01, no pet.): Plaintiff sued when her five-year old son died at a city pool. The City filed a plea to the jurisdiction based upon sovereign immunity, which I granted in part, but I denied it as to the claim of premises defect. Sovereign immunity is waived for premises defect claims. The Court of Appeals reversed, holding that the allegations did not state a premises defect claim such that sovereign immunity was not waived.

The American Bar Association provides ratings of federal judicial nominees. They base their ratings on three criteria: integrity, professional competence and judicial temperament. I am honored that I received the ABA's highest rating of "Well Qualified."



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**7. Have you ever represented a worker, consumer or other individual against a corporate defendant? If so, please identify such cases and describe in detail your role in the case and the claims involved.**

As a lawyer, I have represented individuals sued by corporations, and I have represented individuals suing other individuals. With respect to a case where I represented an individual plaintiff against a corporate defendant, I can recall the case of *Gary Granzow v. Trinity Gas Corp.*, In the United States District Court for the Northern District of Texas, San Angelo Division; Civil Action No. 6:95-CV-012-C. I was lead counsel for my client, Mr. Granzow, who sued Trinity Gas Corporation for breach of contract, fraud and deceptive trade practices.

**8. In connection with your nomination, have you been asked about your views on constitutional issues, workers' rights, or reproductive rights? If so, please explain in detail.**

Only in the Senate hearing and questions for the record process.

**9. Did you publicly express any position on the nomination of former White House Counsel Harriet Miers to the Supreme Court?**

No.

**10. Did you have any communication or other contact with any religious leader or any public figure regarding Ms. Miers' Supreme Court nomination? If so, please describe in detail the nature and subject of those contacts, including with whom you had contact and when.**

I have never contacted or been contacted by any religious leader or public figure regarding Ms. Miers' nomination. While her nomination was pending, I was contacted by a member of the American Bar Association Committee that evaluates federal judicial nominees. I advised the member that I was not sufficiently familiar with Ms. Miers' qualifications and background to provide any information to the Committee.



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# Questions of Senator Edward M. Kennedy to Catharina Haynes Nominee to the U.S. Court of Appeals for the Fifth Circuit

## Documents accompanying Response to Question 2

In addition to orders with explanations, a few additional orders in *Garza v. DISD* were supplied for context.

PDF 1 of 2

CAUSE NO. 01-3448-J

| | | |
|---|---|---|
| TRINIDAD GARZA et al. Plaintiffs, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| DALLAS INDEP. SCHOOL DIST. et al. Defendants. | ) | 191st JUDICIAL DISTRICT |

ORDER ON REMEDIES

Before the Court on this day is this case in which the Court has previously found that Defendants violated portions of the Texas Open Meetings Act (the "Act"). On December 14, 2001, the Court heard evidence and argument regarding the remedy question and allowed additional letter briefing to be filed December 17, 2001. Having considered same, all briefing filed and all applicable statutory and case authority, the Court finds that the remedies should be as set forth below.

*Previous Orders.* By Order dated November 30, 2001, the Court found that certain portions of ten closed meeting sessions regarding redistricting should have been held in open session and ordered production of the transcripts of those portions.[1] The parties agreed that this ruling essentially disposed of Plaintiffs' Count 1 claims, and summary judgment was granted to Plaintiffs on Count 1. The Court found no violations of the content requirements of the Act and granted summary judgment to Defendants on Count 2. The Court found one violation of the Act's notice timing requirements, granting summary

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[1] In that order, the Court expressly stated: "The Court notes that any finding herein that certain portions of the transcripts are not subject to DISD's claim of privilege is in no way a finding of any intentional impropriety or knowing violation of the Open Meetings Act on the part of any person present during such meeting or portion of meeting at issue. Indeed, this case illustrates the difficulty of conducting a redistricting process in the face of both pending and threatened litigation." Nov. 30, 2001 Order Regarding In Camera Inspection of Transcripts.



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judgment to Plaintiffs on Count 3 as to the October 1 meeting, at which the vote in question was taken. The Court granted summary judgment to Defendants as to Count 3 in all other respects. Count 4 was nonsuited.

The record (at Plaintiffs' Exhibit 3) contains the transcripts ordered produced. They reflect a series of deliberations and debates about various redistricting maps and proposals held in closed meetings. These deliberations and debates should have occurred in open session.

Defendant DISD also violated the Act by its undisputed failure to post notice of the meeting at which the vote was taken at least 72 hours before the meeting. As a result of this untimely posting, Defendants conceded that the October 1 redistricting vote should be voided, and the Court so ordered from the bench on December 14, 2001. Defendant DISD also conceded liability for attorneys' fees under Government Code Section 551.142(b). Still in dispute is what, if any, injunctive remedies should issue, as well as the amount of reasonable attorneys' fees to be awarded to the Plaintiffs.[2]

*Standards for Relief.* Government Code Section 551.141 states: "An action taken by a governmental body in violation of this chapter is voidable." Government Code Section 551.142(a) states: "An interested person . . . may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body."

Sections 551.141 and 551.142(a) provide no explicit standards for the

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[2] Defendant Parrott's cross-claim for indemnity is also still pending on the question of the amount of reasonable attorneys' fees for her defense. Both attorneys' fees issues will be tried at a later date if agreement cannot be reached.



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remedies provided. A plain reading of these statutes, however, indicates clearly that they are remedial rather than punitive in nature. Courts have held the "Open Meetings Act to be a remedial statute which should be liberally construed to effect its purpose." *Toyah Indep. Sch. Dist. v. Pecos-Barstow Indep. Sch. Dist.*, 466 S.W.2d 377, 380 (Tex. Civ. App.--San Antonio 1971, no writ). Thus, remediation, not punishment, is the goal of any relief awarded under these sections.

The Court has already granted the Section 551.141 remedy by voiding the October 1 redistricting vote. The Court allowed the parties to file briefs analyzing the factors for granting injunctive relief under Section 551.142(a). In addition to Texas cases construing the Act, the parties agree that this proceeding is equitable in nature such that general principles of equity, as well as principles specific to injunctive relief, guide the Court in its decision. Other states' analyses of their open meetings laws also may be persuasive.[3]

To obtain injunctive relief, a party must establish (1) the existence of a wrongful act; (2) the existence of imminent harm; (3) the existence of irreparable injury; and (4) the absence of an adequate remedy at law. *Swate v. Medina Comm. Hosp.*, 966 S.W.2d 693, 700 (Tex. App. - San Antonio 1998, pet. denied). Additionally, the Court appropriately should balance the equities between the parties and the public. *Hooks Telephone Co. v. Town of Leary*, 352 S.W.2d 755 (Tex. App. -- Texarkana 1961, no writ). Addressing the likely effect on the public of equitable remedies is particularly appropriate because redistricting addresses a fundamental right of citizens to vote in such a way that every vote

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[3] The Court's and counsel's research does not reveal any other state with the "stop, prevent or reverse" language contained in Section 551.142(a).



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counts equally,[4] such that deliberations about this issue are of "special public interest." Avoidance of harm to the public in such a process is the purpose behind granting broad standing rights to "an interested person" to seek redress for violations of the Act. *See Hays County Water Planning Partnership v. Hays County*, 41 S.W.3d 174, 177-78 (Tex. App. – Austin 2001, pet. denied) (holding that the interest protected by the Act is the interest of the general public).

*Applying the Standards.* The Court applies the above standards to this case:

*Existence of a Wrongful Act.* The Court has already found violations of two sections of the Act, specifically that deliberations and debate were held in closed sessions that should have been held in open sessions and that notice of the October 1 meeting was untimely.

*Existence of Imminent Harm.* The Court heard evidence that at least some members of the public generally, and one of the Plaintiffs specifically, were harmed by the violations in that they were unable to hear the deliberations of the Board on a matter of special public interest. Although Defendants have respected and followed the Court's rulings, Defendant DISD stated as recently as last Friday that the Board continues to disagree

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[4] The purpose of redistricting is to take into account population shifts as they affect voting districts. In a community of 100,000 people with 10 districts, each district should have approximately 10,000 people. Because people move and population growth is seldom even across a community, the process of equalizing a district takes place every 10 years based upon United States Census figures. Because Texas is subject to the remedial provisions of the Voting Rights Act, redistricting also must avoid retrogression of a minority group. *See* 42 U.S.C. § 1973c. At the same time, race cannot be the predominant factor in redistricting. *Shaw v. Reno*, 509 U.S. 630 (1993). These considerations, as well as others, make redistricting a highly complicated and often emotional process.



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with the Court's ruling regarding the Open Meetings violations. As a result, the Court finds that there is a risk of imminent harm if injunctive relief is not granted in that deliberations and debate regarding redistricting may continue to occur in closed sessions. Additionally, DISD's counsel has indicated that the Board intends to revote this week. Such a vote would necessarily be tainted by the violations already found. If injunctive relief is not entered, the Plaintiffs' and public's right to meaningfully participate in the redistricting process would be impinged. Thus, the Court finds that an injunction is necessary to avoid imminent harm.

*No Adequate Remedy at Law.* By expressly allowing for injunctive relief to "stop, prevent or reverse" violations of the Act, the legislature found that monetary damages would be insufficient to compensate for violations that affect the public at large. Payment of money would not "right the wrong." The Court finds no adequate remedy at law.

*Existence of Irreparable Injury and Balancing of the Equities.* The American form of government is founded upon the fundamental belief that government derives its power from the consent of the governed.[5] Without public involvement in and confidence in the workings of government, the system is weakened. This concept is never more true than in the area of apportioning voting districts. If segments of the population feel disenfranchised by a secret process, they become "hurt, angry and frustrated," something Adolfo Callejo testified has already occurred here.

Because public confidence in the government and the right of the public to

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[5] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness--that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed . . . ." *Declaration of Independence*, 1776.



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be heard on matters of public importance are central to the continued strength of any democracy, states have enacted open government laws like the Texas Open Meetings Act. The Act requires all meetings to be open, subject to narrow exceptions. "The Open Meetings Act was promulgated to encourage good government by ending, to the extent possible, closed-door sessions in which deals are cut without public scrutiny." *Save Our Springs Alliance v. Lowry*, 934 S.W.2d 161, 162 (Tex. App. – Austin 1996, mandamus overruled). Plaintiffs argue that allowing violations of these important requirements to go unremedied inexorably injures Plaintiffs and the public by undercutting public trust in the government and denying the public the right to be heard.

Defendants argue "no harm, no foul." *See Hays County Water Planning Partnership v. Hays County*, 41 S.W.3d 174, 183 (Tex. App. – Austin 2001, pet. denied)(discussing "no harm, no foul" concept in the context of the Act). They contend that no one was deprived of the right to be heard at a series of meetings over the past several months and that the actual vote on the actual map selected will be taken in an open meeting (as was, the Defendants allege, the original vote). Since the Court cannot appropriately enter an injunction ordering the Trustees to speak and the transcripts, Defendants say, are now "public," they allege any harm either has been or cannot be cured. Courts have rejected the "no harm, no foul" argument. *Id.*("It is not enough to say that because the commissioners court took no action . . . there has been no harm to the public, and the district court cannot . . . order a remedial remedy. Such a holding would ignore the public's interest.") "Equity will not suffer a right without a remedy." *Chandler v. Welborn*, 156 Tex. 312, 294 S.W.2d 801, 807 (1956). The Court has found there indeed was a harm from the series of open



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meetings violations which prevented the public from observing the redistricting debate. Such injury to the very core of the democratic process is irreparable and is exactly the sort of injury foreseen by the legislature in providing injunctive relief as a remedy for Act violations. Ordering the transcripts to be made public is part of the remedy, but the wrong done has not been fully righted at this time. The Court finds that Plaintiffs and members of the community will be irreparably injured if injunctive relief is not granted.

In balancing the equities, the Court must weigh the harm to the public of allowing a vote tainted by violations of the Act to stand or be quickly retaken against the harm to the public and Defendants caused by any disruption or delay of the redistricting process by further deliberations. Of course, the Court cannot and does not decide the relative merits of the map previously adopted or any other map considered or proposed. However, whatever map is adopted, the effects of the redistricting vote will be felt for at least ten years. Any delay in the upcoming elections or redistricting process will be considerably shorter. The Court finds that allowing a process tainted by these violations to govern the next ten years of redistricting far outweighs any harm to the public or Defendants caused by a disruption in or delay of the redistricting process. In fashioning a remedy, the Court will endeavor to limit any disruption or delay as much as possible. However, the injunctive relief must, as well as possible, "reverse" the effects of months of improperly closed deliberations.

*The Remedy.*[6] Cases involving injunctive relief under the Act demonstrate

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[6] No factual issues relevant to the issuance of an injunction remain for determination. Thus, the case is ripe for permanent injunctive relief. Until the attorneys' fees issues are finalized or severed, however, no final judgment can be entered. To avoid any question about the underpinning of the injunctive relief herein, the Court will order the posting of a nominal bond until a final judgment is entered.



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an intent by the Courts to fashion a remedy broad enough to right the wrong and no broader. *See Matagorda County Hosp. Dist. v. City of Palacios*, 47 S.W.3d 96 (Tex. App. -- Corpus Christi 2001, no pet. hist.); *Hays County Water Planning Partnership v. Hays County*, 41 S.W.3d 174, 183 (Tex. App. -- Austin 2001, pet. denied); *Harris County Emergency Service Dist. v. Harris County Emergency Corps*, 999 S.W.2d 163, 168 (Tex. App. -- Houston [14th Dist.] 1999, no pet.)(narrowing injunction entered by trial court); *Hitt v. Mabry*, 687 S.W.2d 791, 795 (Tex. App. -- San Antonio 1985, no writ)("[A]n injunction should be broad enough to prevent a repetition of the evil sought to be avoided."). Cases analyzing injunctive relief generally are similarly careful to strike a balance between righting wrongs and unnecessarily impinging on the rights of the defendant. *See, e.g., Ex parte Jackman*, 663 S.W.2d 520, 523 (Tex. App. -- Dallas 1983, no writ)("An injunction, although it must be broad enough to cover the prohibited conduct, must not be drafted so broadly as to prohibit the enjoyment of lawful rights, or to operate perpetually against acts that in the future may become lawful.").

Section 551.142(a) allows the Court to enter injunctive relief to "stop, prevent or *reverse*" a violation of the Act. The "reverse a *violation*" language is broader than Section 551.141's reference to voiding "an *action*." The "reverse" language was added to the Act in 1987 specifically to address arguments that the Court did not have the power to address past wrongs by injunctive relief. *Ferris v. Texas Board of Chiropractic Examiners*, 808 S.W.2d 514 (Tex. App. -- Austin 1991, writ denied). "Section [551.142(a)] now adequately responds to earlier criticism that a governmental agency could violate the Act and later rectify its violation by conducting a 'sham' proceeding in compliance with the Act...." *Id.* at 517. Here, the violations included hours of deliberations over policy, political and



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personal issues underlying redistricting in closed sessions. As other states have found, simply revoting does not cure the taint of the improper deliberations. *See, e.g., Blackford v. School Board of Orange County*, 375 So. 2d 578, 580-81 (Fla. Dist. Ct. App. 1979). Since the Court cannot erase from the Trustees' minds the information they learned during the improperly closed sessions, "reversing" the violations requires undoing the harm caused by the inability of the public to witness its government in action. With these principles in mind, the Court analyzes the relief requested:

*Monitoring Closed Sessions.* Last week, Plaintiffs requested the Court to appoint a monitor for all future closed sessions that may relate to redistricting. The monitor, in turn, would report any violations of the Act to the Court. In their December 17 briefing, they requested a court reporter to transcribe such meetings. The Court finds that Defendants have repeatedly engaged in violations of the Act by deliberating policy and debating maps in closed sessions. Defendants' continued assertion through counsel that they did not violate the Act supports a finding that such violations will continue to occur in the future if not enjoined. However, the Court is constrained to find the least intrusive means to prevent such violations and police its injunction.

The Court finds that a specific injunction proscribing deliberations about policy, political or personal concerns relevant to redistricting and debating various maps in closed sessions should be entered. Compliance with this order can be insured by requiring all closed sessions in which redistricting under the 2000 Census is mentioned to be audiotaped and requiring that each speaker on such tape be specifically identified either by recognition by the chair or by his/her own identification. This process allows for a Court to



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review the closed sessions if necessary in the future, but avoids the expense and intrusion of a human monitor or court reporter at every session.

*Publication of the Closed Session Transcripts.* Defendants argue that any harm caused by the improper meetings has been cured by the Court "ordering that they be made public." The Court's previous order of November 30, 2001 specifically overruled the claim of privilege as to certain portions of the transcripts in question and ordered them produced to the other parties in the case. Defendants complied, and Plaintiffs have now filed those excerpts as Plaintiffs' Exhibit 3 to the December 14, 2001 hearing.[7] While those portions are now "public" in the sense that they are in an open court record, they have not been made public in the same way a board meeting would be. Furthermore, the tapes themselves have not been produced in any form or made public.

Accordingly, the Court will enter an injunction requiring DISD to publish a copy of this Order on Remedies and the closed meeting transcripts ordered produced by the November 30, 2001 order of this Court on a publicly accessible website, make copies available to the public at all subsequent Board meetings regarding redistricting and have copies available for review at the Board's offices during regular office hours to members of the public who request it. Further, the Court will order Defendant DISD to edit the tapes in the same way previously ordered for the transcripts and produce same to opposing counsel and the public. Any member of the public who desires his/her own copy of the transcripts or edited tapes should be required to pay no more than the actual copy costs associated with

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[7] Portions were also filed with the court by the Plaintiffs in support of their motion for summary judgment.



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copying same.

*Requirements for Further Deliberative Process.* Because the vote was voided, Defendants will necessarily revote on a redistricting plan in the future. The Court finds that Defendants should be required to hold all deliberations in public and allow public comment regarding same. Plaintiffs have requested specific time parameters and directives to be issued. Defendants have argued that no evidence suggests that any member of the public was prohibited from speaking at any of the previous open meetings about redistricting.

The Court agrees that it does not have the power to order any of the Trustees to speak; in fashioning a remedy, the Court must be mindful that it is not appropriate for one branch of government to micromanage the details of the deliberative process of another branch. Thus, ordering specific votes to be taken on specific maps is beyond the scope of relief permissible under the facts herein. However, even though no member of the public was previously prevented from speaking, the public has not had an opportunity to comment in light of the closed meeting portions ordered produced and which are to be publicly disseminated as discussed above. This lack of informed commenting requires additional time for public comment and deliberations thereupon.

Before revoting,[1] the Board must allow for public comment; any deliberations following or preceding such comment by the Board must be in open session. All previously discarded maps (see Attachment B) should be placed before the Board and public for discussion. The Court will enter an injunction to prevent a revote not in accordance with

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[1] The Court uses the term "revoting" to encompass a vote on any proposed map, not only the one previously adopted and since voided.



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these procedures.

*Withdrawal of Plan Based upon Voided Vote.* In light of the Court's voiding of the October 1 vote, Plaintiffs request that Defendants be ordered to withdraw their submission of the October 1 plan to the Department of Justice. The Court finds that as part of voiding the October 1 vote, Defendant DISD should be ordered to advise the Department of Justice that the plan submitted was based upon a vote now voided and pull down the plan from consideration pending a lawful vote on whatever plan is ultimately adopted.

Based upon the foregoing,

IT IS ORDERED that the October 1, 2001, vote on redistricting is hereby VOIDED and Defendant DISD is ordered to advise the Department of Justice that the plan submitted was based upon a vote now voided and pull down the plan from consideration pending a lawful vote on whatever plan is ultimately adopted.

IT IS FURTHER ORDERED that the clerk shall issue a writ of injunction directed to Defendants, all future Trustees of the Dallas Independent School District, and all those acting in concert with Defendants or future Trustees as follows:

1. Prohibiting any closed sessions in which the following occurs: policy, political or personal concerns regarding redistricting under the 2000 Census is deliberated; or the merits or lack of merits of any proposed redistricting map concerning redistricting under the 2000 Census are deliberated. Further, any closed session in which redistricting under the 2000 Census is in any way discussed under any exception to the Act[9] is prohibited

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[9] The Court recognizes that this case itself, as well as litigation that may be filed in the future regarding redistricting, may legitimately require closed sessions.



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unless an audiotape of the entire session is made with each speaker clearly identified by the chair or the speaker.

2. Requiring that a copy of this Order on Remedies and the portions of the Closed Meetings ordered produced by the November 30, 2001 order, which portions are specifically described in Attachment A hereto, be made available to the public as follows: (1) on a publicly accessible website, (2) by making copies available for inspection and review at future Board meetings in which redistricting under the 2000 Census is discussed, and (3) by making copies available for inspection and review at Defendant DISD's offices during regular business hours with copies to be made at the request of a member of the public at no more than the actual cost to Defendant DISD of such copying. Defendants are prohibited from voting on any redistricting plan until seven days after compliance with this provision. The website posting shall take place as soon as possible; making copies available at DISD's offices shall occur immediately. The duration of this section of the injunction is ten years from the date of this order except that the website posting need be maintained only until 30 days after a final redistricting plan under the 2000 Census is approved by the Department of Justice and/or a court of competent jurisdiction.

3. Requiring that the audiotapes corresponding to the transcript pages listed on Attachment A be produced to opposing counsel with copies made available to the public for review and inspection at the District's offices during regular business hours for a period of 10 years; in editing the tapes to conform to the Court's order, the District may use the services of professionals who are ordered to maintain the unedited tapes and any portions of the tapes not ordered produced as confidential, and who each shall sign a statement to the



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effect that he/she agrees to maintain as confidential all portions of the tapes not ordered produced. The editing required by this section shall be accomplished no more than 20 days from the date of this order at Defendant DISD's expense. If a member of the public desires to have a copy of the edited tapes, such person may not be charged more than the actual cost to Defendant DISD of making the copy. The duration of this section of the injunction is ten years from the date of this order, except for the obligation of confidentiality regarding the transcripts/tapes not produced which is perpetual.

4. Prohibiting a vote on any redistricting plan until after the public has had the opportunity to comment at a properly noticed, scheduled Board meeting following the publications described above; all previously discarded maps shall be made available to the public and placed before the Board and public for discussion during an open session; all debate by the Board regarding any redistricting plan under the 2000 Census shall be made at a properly noticed open session of the Board.

IT IS FURTHER ORDERED that, until final judgment is entered in this case, the injunctive relief ordered herein is conditioned on the posting of a $100.00 bond or cash deposit in lieu of bond in the amount of $100.00.

The clerk of the court is directed to send a copy of this order to all counsel of record by facsimile.

SIGNED this 18th day of December, 2001.

JUDGE PRESIDING

cc: Daniel Perez, VIA FAX 214-653-1014
Eric Moyé, VIA FAX 214-712-4402
Norton Rosenthal, VIA FAX 214-752-4671



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**Attachment A**

**The claim of privilege as to the following transcript pages was overruled and ordered produced by order dated November 30, 2001:**

| Transcript Date | Page/Line | Claim of Privilege Overruled |
|---|---|---|
| April 10, 2001 | p10 L16-p12 L10 | Overruled |
| | p13 L4-p15 L15 | Overruled |
| April 18, 2001 | p36 L.13-p46 L6 | Overruled |
| | p57 L14-p63 L20 | Overruled |
| | p65 L17-p73 L8 | Overruled |
| | p85 L17-p87 | Overruled |
| April 26, 2001 | p6 L24-p15 L9 | Overruled |
| | p31 L22-p39 | Overruled |
| May 31, 2001 | p34 L11-p41 L9 | Overruled |
| June 13, 2001 | p67 L7-p91 | Overruled |
| July 8, 2001 (part I) | p50 L10-p54 L14 | Overruled |
| | p55-p60 L13 | Overruled |
| | p62 L21-p67 L11 | Overruled |
| | p81 L4-p85 L11 | Overruled |
| | p97 L11-p108 L7 | Overruled |
| | p111 L25-p114 L3 | Overruled |
| July 8, 2001 Part II | p2-p6 L12 | Overruled |
| | p14 L14-p18 L22 | Overruled |
| | p22 L19 - p31 L25 | Overruled |
| | p32 L6-p34 L 9 | Overruled |
| July 24, 2001 | p11 L19-p35 L15 | Overruled |
| | p40 L16-p42 L23 | Overruled |
| | p48 L23-p57 L13 | Overruled |
| | p61 L23-p65 L2 | Overruled |
| | p65 L7-p65 L22 | Overruled |
| | p66 L6-p89 L23 | Overruled |
| August 7, 2001 | p7 L24-p13 L5 | Overruled |
| | p13 L19-p16 L3 | Overruled |



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| | | |
|---|---|---|
| | p21 l.13-p26 l.14 | Overruled |
| | p26 l.21-p30 l.22 | Overruled |
| | p32 l.25-p41 l.19 | Overruled |
| | p42 l.13-p44 l.10 | Overruled |
| | p45 l.13-p49 l.15 | Overruled |
| | p49 l.19-p53 | Overruled |
| August 15, 2001 | p15 l.18-p30 l.9 | Overruled |
| | p31 l.2-p33 l.24 | Overruled |
| | p36 l.13-p39 l.11 | Overruled |
| | p41 l.22-p51 l.16 | Overruled |
| | p96 l.19-p97 l.11 | Overruled |
| September 19, 2001 | p58 l.24-p67 l.11 | Overruled |
| | p68 l.10-p77 l.11 | Overruled |
| | p77 l.21("R . . . ")-p97 l.8 | Overruled |
| | p100 l.17-p102 l.19 | Overruled |
| | p103 l.10-p108 l.15 | Overruled |
| | p110 l.17-p115 | Overruled |

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**Attachment B**

As used herein, the term "previously discarded maps" means and includes: Citizen Plan W; Citizen Plan T; Citizen Plan U; Citizen Plan X (revised); Draft Plan 3H; Draft Plan 3B; Draft Plan 3B-1(revised); Draft Plan 3H, revised; Draft Plan 3H, Revision 2; Draft Plan G; Illustrative Plan 1, Revision 2; Illustrative Plan 1, Revision 2A; Illustrative Plan 1, Revision 2B; Illustrative Plan 1, Revision 2C; Illustrative Plan 1, Revision 3; Illustrative Plan 1, Revision 4A; Illustrative Plan 1, Revision 5A; Illustrative Plan 1, Revision 5B; Illustrative Plan 1, Revision 1; Illustrative Plan 1, Revision 2; Plan 3H; Plan X and Plan B1.



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CAUSE NO. 01-9468-J

| | | |
|---|---|---|
| TRINIDAD "TRINI" GARZA et al., Plaintiffs | ) | IN THE DISTRICT COURT OF |
| vs. | ) | DALLAS COUNTY, TEXAS |
| DALLAS INDEPENDENT SCHOOL DISTRICT, et al. Defendants. | ) | 191st JUDICIAL DISTRICT |

ORDER ON MOTION FOR ADDITIONAL REMEDY

On January 28, 2002, this Court signed a Final Judgment in this case. On February 19, 2002, Defendants filed a "Motion for Additional Remedy" seeking to substantively modify this final judgment such that the Court has construed that motion as a Rule 329b motion to modify. The Motion was heard on February 22, 2002. The Court, having considered the evidence presented, having heard the arguments of counsel and having read the associated briefing is of the opinion that an order should issue as follows and that the final judgment should be amended in conformity therewith.

*Background*

As a result of the passage of time during Defendant DISD's efforts to comply with the Court's previous orders, DISD has advised the Court that it is not possible to hold DISD's regularly scheduled general election in May 2002 and still comply with other federal and state statutory provisions. The parties agree that a May 2002 election is not legally possible. Under Section 41.001 of the Texas Election Code, DISD may hold an election on a date other than a "uniform election date" if the election is held under "an order of a court." No party disputes the Court's authority in this regard.

The parties agree that waiting until the next regularly scheduled DISD election, May 2003, is too long to wait for an election under the soon-to-be newly redistricted lines.



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However, the parties disagree as to the date such an election should be held. DISD wants as early a date as possible.[1] Plaintiffs urge a later date, arguing for more time for Justice Department consideration of the map ultimately chosen and for any intervening litigation.

*The Evidence*

The Court heard extensive evidence from Dallas County Elections Supervisor Bruce Sherbet who is charged with administering all elections in Dallas County but one.[2] He has spent over 20 years in this department and has supervised numerous elections at all times of year. Additionally, Trustee Room Staff testified regarding the budgetary issues involved. Their testimony will be discussed in more detail below.

*The Factors*

Very little Texas authority exists addressing what factors a Court should use under Election Code 41.001(b)(4). "[W]here, as here, it [is] impossible to hold the election at the time prescribed by the provisions of the laws regulating elections in this State, it should be held within a reasonable time thereafter." *Castillo v. State*, 404 S.W.2d 97, 99 (Tex. Civ. App. – San Antonio 1966, no writ).

Certain factors emerge as appropriate for consideration of this issue: (1) the harm to the public from delaying an election under new district lines; (2) the cost to the public of a specially set election; and (3) the practicalities underlying the timing of such a specially set election.

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[1] All parties agree that, by state law, at least 90 days must elapse between the Board vote selecting a new map and the election held under that map. Tex. Elec. Code § 276.006 (Vernon Supp. 2001); Tex. Educ. Code § 11.052(i)(Vernon Supp. 2001).

[2] Sunnyvale does not utilize Mr. Sherbet's department.



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The parties agree that the public interest is not served by waiting until May of 2003 to hold an election under the newly redistricted lines. The public's right to vote such that each person's vote counts equally, the principle underlying the requirement of redistricting under the Decennial Census, is a fundamental right that should be protected.

Mr. Sherbet testified that the likely cost of a May 2002 election would have been $500,000 while a specially set election might be as high as $750,000. Ms. Staff testified, however, that the amount for the May 2002 election has already been budgeted in the District's nearly $1 billion budget at a figure much closer to the $750,000 figure because DISD anticipated that there would not be a sharing of costs in a May 2002 election.[3] Thus, the cost of the specially set election has already been accounted for almost entirely. While any additional public expenditure is significant, the resulting difference, if any, is not insurmountably large. Mr. Sherbet also testified that the Elections Department has seen and will see an election in nearly every month this year which presents burdens upon his department. He clearly stated, however, that his department is up to the task of whatever is determined appropriate by the Court.[4]

While the Court respects the burdens placed upon the system by having an additional election, the need for citizens to exercise their right to vote timely and under newly drawn lines far outweighs such burdens. Thus, the Court finds that DISD's election should be held earlier than May 2003.

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[3] Election costs for a particular jurisdiction vary by several factors including how many jurisdictions share in the cost of the election.

[4] The Court appreciates the hard work of Mr. Sherbet and the Elections Department.



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*Timing*

Thus, the Court turns to the third element for consideration: the practicalities of the timing of a specially set election. Before considering a "non-uniform" date, the Court will address the reasons an election cannot be held on the remaining two "uniform election" dates in 2002.

The September Date. The second Saturday of September is a "uniform election date" on which a bond election for the City of Dallas is already scheduled. Election Code §41.001(a)(3)(Vernon Supp. 2001). However, Section 41.001(d) of the Election Code provides: "A general election of officers of a . . . school district . . . may not be held on the . . . September uniform election date." Similarly, Section 41.001(e) provides: "An election for an office in which a majority vote is required may not be held on the September . . . uniform election date." Neither section provides for an exception for court-ordered elections. Thus, the Court concludes that the DISD election may not lawfully take place on the September uniform date.

The November Date. Plaintiffs proposed inclusion of the DISD elections on the November general election ballot. Mr. Sherbet termed such a proposal "disastrous." He very strongly urged the Court not to order the DISD election to take place in November.[5] He indicated that inclusion of the DISD election would turn an already confusing "two page ballot" into an even more confusing "three page ballot." He testified that each additional page adds to voter confusion and the likelihood that a voter fails to vote in an election

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[5] Mr. Sherbet testified that the cost to DISD of a November 2002 election would be approximately $500,000-$600,000. While Dallas County would share the costs, the costs are much higher due to the longer ballot.



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because he/she does not know it is there.

Mr. Sherbet explained that this problem is exacerbated in a November election by the availability of "straight ticket" voting for partisan elections. At the current time, all elections scheduled for the November 2002 ballot are partisan elections. Thus, a person voting straight ticket may simply "shade"[6] the party of choice and leave. Because DISD elections are not partisan, such a voter will not have voted in the DISD election. Instead, a straight ticket voter would have to know that he/she must go all the way to the third page of the ballot to cast a vote in the DISD election. While voter instruction can be given, Mr. Sherbet indicated that voter confusion in this situation is still quite high.

Even for those voters who do not vote "straight ticket," there is still a high likelihood of substantial voter drop off and confusion because the DISD elections, by law, would have to be placed at the very end, even after uncontested races for county positions. Mr. Sherbet explained that there is a substantial drop off between those who vote in the first race – U.S. Senate for this November – and those who vote in the last race – constable for this November. The drop off is even greater when the voter gets to the uncontested races. In Sherbet's experience, few voters who do not vote "straight ticket" vote in uncontested races. Thus, any benefit to the public of voting in one election rather than two (and the concomitant higher turnout for a gubernatorial election than a school board election) is lost by the high likelihood of voter confusion, the problems presented by straight ticket voting for a

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[6] For election day voting, Dallas County uses the optical scanner ballot where a voter shades their candidate of choice in each election. The voter has the option of voting "straight ticket" by shading his/her party of choice at the beginning and need vote no further is he/she so chooses.



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nonpartisan election and drop off in voting.

Weighing these considerations and giving deference to Mr. Sherbet's very strong caution against including the DISD election in the November 2002 election, the Court finds that the November election date is not a viable date.

A Summer Date. Plaintiffs argued that if November is not chosen, then January 2003 should be chosen in order to make sure the Department of Justice has had time to precleur whatever map is chosen. DISD argues for a summer date in order to allow the new trustees to take office as soon as possible and to participate in the budget discussions in August. The Court finds that January 2003 is too long to wait for an election under the newly drawn lines. It is always possible that problems can arise at any time that make a summer date impossible. However, the Court cannot assume, in the absence of evidence, that such a delay is likely or probable.[7]

The summer date must be no earlier than 90 days after the vote on the new lines (to comply with state law) and no later than August 28, 2002, which is the first day for early voting in the September 14, 2002 bond election.[8] Setting this date is further complicated by the need to insure time for a runoff, because DISD requires a majority for election as a

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[7] In the event that court challenges are filed to the newly adopted map, that court can take jurisdiction of the election date issue. If unforeseen delays take the process into 2003, the May 2003 election may become the only viable date. These possibilities should not govern the setting of a date under the normal time frame for Justice Department pre-clearance which is 60 days.

[8] Mr. Sherbet testified that having two different elections going at once would be a very difficult process for his department, would strain already strained resources and would further confuse voters. He also explained that an election cannot occur in October.



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trustee. Since a runoff is usually 4 weeks after the original election, that places the timing in late July. Plaintiffs have argued for as late a date as feasible. DISD has indicated a July date would be acceptable.

Weighing all of these considerations, the Court sets July 27 as the date for the election, with August 24 for the runoff. Early voting would then begin after the July 4th holidays. Given the very generous provisions for early voting (such that those on brief summer vacations will have an opportunity to vote in person) and the allowance of absentee voting for those out of the county for an extended period, the Court finds that this date presents the least burdens and the greatest benefits. Accordingly,

The Court ORDERS that the general election of DISD trustees that would have been held in May of 2002 shall instead take place on July 27, 2002, with any necessary runoff on August 24, 2002.

The clerk of the court is directed to send a copy of this order to all counsel of record as indicated below. The clerk shall also mail a copy of this order to Bruce Sherbet, Elections Supervisor.

It is so ORDERED.

SIGNED this 12th day of February, 2002.

JUDGE PRESIDING

cc: Daniel Press, VIA FAX 214-653-1014
Eric Moyé, VIA FAX 214-712-4402
Nestor Rosenthal, VIA FAX 214-752-4671
Bruce Sherbet, Elections Supervisor, via Dallas County mail



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CAUSE NO. 01-9442-J

| | | |
|---|---|---|
| TRINIDAD "TRINI" GARZA, PEDRO "PETE" VACA, MARIA ADAMES, and WILLIAM ACOSTA, | § | IN THE DISTRICT COURT |
| Plaintiffs, | § | |
| v. | § | DALLAS COUNTY, TEXAS |
| DALLAS INDEPENDENT SCHOOL DISTRICT, the BOARD OF EDUCATION OF THE DALLAS INDEPENDENT SCHOOL DISTRICT, and KEN ZORNES, ROXAN STAFF, RAFAEL ANCHIA, LEW BLACKBURN, HOLLIS BRASHEAR, KATHLEEN LEOS, LOIS PARROTT, RON PRICE, and GEORGE WILLIAMS in their official capacities as Trustees of the Board of Education of the Dallas Independent School District, | § | Judge Catherine Haynes |
| Defendants. | § | 191st JUDICIAL DISTRICT |

AMENDED FINAL JUDGMENT

On January 25, 2002, came on to be tried the remaining issues in this case. The Court previously entered orders dated November 30, 2001(Order Regarding In Camera Inspection of Transcripts), December 11, 2001(Order Regarding Motions for Summary Judgment) and December 18, 2001(Order on Remedies), which are incorporated by reference herein. On January 28, 2002, the Court issued findings of fact and conclusions of law regarding the attorneys' fees issues tried on January 25, which findings and conclusions are incorporated by reference herein. As a result of the summary judgment rulings, Plaintiffs'



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nonsuit of certain matters and the findings and conclusions on attorneys' fees, all matters in dispute were resolved and a final judgment was entered on January 28, 2002. Thereafter, on February 19, 2002, Defendants filed a "Motion for Additional Remedy" which the Court has treated as a motion to modify the final judgment under TRCP 329b. The Court held a hearing on this Motion on February 22, 2002, and, having considered the evidence presented at the hearing, the arguments of counsel and the parties' briefing, is of the opinion that its final judgment of January 28, 2002 should be modified and this amended judgment substituted in its place. The Court incorporates by reference its "Order on Motion for Additional Remedy" herein.

*Plaintiffs' Claims*

*Count One*: By Order dated November 30, 2001, the Court found that certain portions of ten closed meeting sessions regarding redistricting should have been held in open session and ordered production of the transcripts of those portions. The record contains the transcripts ordered produced. They reflect a series of deliberations and debates about various redistricting maps and proposals held in closed meetings, which should have occurred in open session. The parties conceded that this ruling essentially disposed of Plaintiffs' Count 1 claims, and summary judgment was granted to Plaintiffs on Count 1.

*Count Two*: The Court found no violations of the content requirements of the Texas Open Meetings Act ("the Act") and granted summary judgment to Defendants on Count 2.

*Count Three*: Defendant DISD also violated the Act by its undisputed failure to post notice of the meeting at which the redistricting vote was taken at least 72 hours before the



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meeting. As a result of this untimely posting, the Court ordered that the October 1 redistricting vote should be voided. The Court granted summary judgment to Plaintiffs on Count 3 solely as to the October 1, 2001 meeting, at which the vote in question was taken. The Court granted summary judgment to Defendants as to Count 3 in all other respects.

*Count Four*: Count 4 was nonsuited by Plaintiffs.

*Attorneys' fees*: The Plaintiffs having substantially prevailed in light of the Court's rulings, the Court also found the DISD liable for Plaintiffs' attorneys' fees pursuant to Government Code Section 551.142(b). The Court finds that Plaintiffs are entitled to $157,380.00 in reasonable attorneys' fees for the prosecution of this matter through trial, and $33,314.22 for costs of litigation reasonably incurred, together with conditional appellate attorneys' fees.

*Injunctive relief*: By its Order on Remedies of December 18, 2001, the Court found the existence of a wrongful act, existence of imminent harm, existence of irreparable injury, and no existence of an adequate remedy at law, as more fully set forth in that order which is incorporated by reference herein.

*Cross-Plaintiffs' Claims*

The Court ruled that Dallas Independent School District policy required the District to provide a defense for Dr. Lois Parrott and that DISD refused and failed to do so necessitating her hiring of separate counsel in this matter. The Court granted summary judgment to Cross-Plaintiff on her claim for defense, limited to only the defense of the matters in issue in this case that was non-duplicative of the DISD's counsel's defense of the trustees as a whole. Cross-Plaintiff's claim for indemnity is moot as no monetary judgment



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was or will be entered against her in this case. The Court finds that Dr. Parrott is entitled to $28,125.00 in reasonable and necessary attorneys' fees in her defense of this matter and for prosecution of her cross-claim through the trial of this case, and $233.25 for reasonable expenses incurred, together will conditional appellate attorneys' fees.

***Motion for Additional Remedy***

As a result of its Order on Motion for Additional Remedy, the Court has found that the election of DISD trustees that would have been held in May of 2002 shall instead take place on July 27, 2002, with a runoff date, if necessary, on August 24, 2002.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the October 1, 2001, vote on redistricting is VOIDED and Defendant DISD is ordered to advise the Department of Justice that the plan submitted was based upon a vote now voided and pull down the plan from consideration pending a lawful vote on whatever plan is ultimately adopted.

IT IS FURTHER ORDERED that the clerk shall issue a writ of permanent injunction directed to Defendants, all future Trustees of the Dallas Independent School District, and all those acting in concert with Defendants or future Trustees as follows:

1. Prohibiting any closed sessions in which the following occurs: policy, political or personal concerns regarding redistricting under the 2000 Census is deliberated; or the merits or lack of merits of any proposed redistricting map concerning redistricting under the 2000 Census are deliberated. Further, any closed session in which redistricting



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under the 2000 Census is in any way discussed under any exception to the Act[1] is prohibited unless an audiotape of the entire session is made with each speaker clearly identified by the chair or the speaker.

2. Requiring that a copy of the December 18 Order on Remedies and the portions of the Closed Meetings ordered produced by the November 30, 2001 orde., which portions are specifically described in Attachment A hereto, be made available to the public as follows: (1) on a publicly accessible website, (2) by making copies available for inspection and review at future Board meetings in which redistricting under the 2000 Census is discussed, and (3) by making copies available for inspection and review at Defendant DISD's offices during regular business hours with copies to be made at the request of a member of the public at no more than the actual cost to Defendant DISD of such copying. Defendants are prohibited from voting on any redistricting plan until seven days after compliance with this provision. The website posting shall take place as soon as possible;[2] making copies available at DISD's offices shall occur immediately. The duration of this section of the injunction is ten years from the date of the December 18 Order except that the website posting need be maintained only until 30 days after a final redistricting plan under the 2000 Census is approved by the Department of Justice and/or a court of competent jurisdiction.

3. Requiring that the audiotapes corresponding to the transcript pages listed on Attachment A be produced to opposing counsel with copies made available to the public

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[1] The Court recognizes that this case itself, as well as litigation that may be filed in the future regarding redistricting, may legitimately require closed sessions.

[2] DISD has indicated to the Court that this posting has already occurred.



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for review and inspection at the District's offices during regular business hours for a period of 10 years; in editing the tapes to conform to the Court's order, the District may use the services of professionals who are ordered to maintain the unedited tapes and any portions of the tapes not ordered produced as confidential, and who each shall sign a statement to the effect that he/she agrees to maintain as confidential all portions of the tapes not ordered produced. The editing required by this section shall be accomplished in no more than 20 days from the date of the December 18, 2001 Order[3] at Defendant DISD's expense. If a member of the public desires to have a copy of the edited tapes, such person may not be charged more than the actual cost to Defendant DISD of making the copy. The duration of this section of the injunction is ten years from the date of the December 18 Order, except for the obligation of confidentiality regarding the transcripts/tapes not produced which is perpetual.

4. Prohibiting a vote on any redistricting plan until after the public has had the opportunity to comment at a properly noticed, scheduled Board meeting following the publications described above; all previously discarded maps (see Attachment B) shall be made available to the public and placed before the Board and public for discussion during an open session; all debate by the Board regarding any redistricting plan under the 2000 Census shall be made at a properly noticed open session of the Board.

It is further ORDERED that Plaintiffs have and recover from Defendant Dallas Independent School District their reasonable attorneys' fees and costs of litigation in this matter in the total amount of $190,694.22, together with an additional $50,000 if DISD appeals this matter as to Plaintiffs to the Court of Appeals and DISD is ultimately

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[3] No one has contended that this has not occurred.



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unsuccessful, together with an additional $50,000 if review is sought from the Texas Supreme Court with respect to the Plaintiffs' claims, but DISD is ultimately unsuccessful.

It is further ORDERED that Dr. Lois Parrott have and recover from Defendant Dallas Independent School District her reasonable and necessary attorneys' fees and expenses in the total amount of $28,358.25, together with an additional $15,000 if DISD appeals this matter as to Dr. Parrott to the Court of Appeals and DISD is ultimately unsuccessful, together with an additional $15,000 if review is sought from the Texas Supreme Court with respect to Dr. Parrott's claims, but DISD is ultimately unsuccessful.

IT IS FURTHER ORDERED that the election for DISD trustees that would have taken place in May of 2002 shall instead take place on July 27, 2002, with any necessary runoff election related thereto to be held on August 24, 2002.[4]

All taxable court costs associated herewith not included in the amounts awarded above are hereby taxed against Defendant Dallas Independent School District, for which let execution issue. All sums awarded herein shall bear interest at the rate of ten percent per annum from the date of this judgment until paid.

The injunction bond posted by Plaintiffs on or about December 19, 2001, is hereby released, less all lawful administrative expenses of the District Clerk.

All relief not expressly granted herein is DENIED. This judgment is in substitution of the Judgment signed January 28, 2002, finally disposes of all claims and matters in issue in this case and is appealable.

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[4] Compliance with these dates is excused if an election on these dates is not possible due to delays in obtaining federal pre-clearance under the Voting Rights Act.



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The clerk of the court is directed to send a copy of this order to all counsel of record as indicated below. The clerk shall also mail a copy of this judgment to Bruce Sherbet, Elections Supervisor.

It is so ORDERED.

SIGNED this 22nd day of February, 2002.

JUDGE PRESIDING

cc: Daniel Perez, VIA FAX 214-653-1014
Eric Moyé, VIA FAX 214-712-4402
Neston Rosenthal, VIA FAX 214-752-4671
Bruce Sherbet, Elections Supervisor, VIA Dallas County mail



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Attachment A

The claim of privilege as to the following transcript pages was overruled and ordered produced by order dated November 30, 2001:

| Transcript Date: | Page/Line: | Claim of Privilege Overruled |
|---|---|---|
| April 10, 2001 | p10 L16-p12 L10 | Overruled |
| | p13 L4-p15 L15 | Overruled |
| April 18, 2001 | p36 L13-p46 L6 | Overruled |
| | p57 L14-p63 L20 | Overruled |
| | p65 L17-p73 L8 | Overruled |
| | p85 L17-p87 | Overruled |
| April 26, 2001 | p6 L24-p15 L9 | Overruled |
| | p31 L22-p39 | Overruled |
| May 31, 2001 | p34 L11-p41 L9 | Overruled |
| June 13, 2001 | p67 L7-p91 | Overruled |
| July 6, 2001 (part I) | p50 L10-p54 L14 | Overruled |
| | p55-p60 L13 | Overruled |
| | p62 L21-p67 L11 | Overruled |
| | p81 L4-p85 L11 | Overruled |
| | p97 L11-p108 L7 | Overruled |
| | p111 L25-p114 L3 | Overruled |
| July 8, 2001 Part II | p2-p6 L12 | Overruled |
| | p14 L14-p18 L22 | Overruled |
| | p22 L19 - p31 L25 | Overruled |
| | p32 L6-p34 L 9 | Overruled |
| July 24, 2001 | p11 L19-p35 L15 | Overruled |
| | p40 L16-p42 L23 | Overruled |
| | p48 L23-p57 L13 | Overruled |
| | p61 L23-p65 L2 | Overruled |
| | p65 L7-p65 L22 | Overruled |
| | p66 L6-p89 L23 | Overruled |
| August 7, 2001 | p7 L24-p13 L5 | Overruled |
| | p13 L19-p16 L3 | Overruled |



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| | | |
|---|---|---|
| | p21 L13-p26 L14 | Overruled |
| | p26 L21-p30 1.22 | Overruled |
| | p32 L25-p41 L19 | Overruled |
| | p42 L13-p44 L10 | Overruled |
| | p45 L13-p49 L15 | Overruled |
| | p49 L19-p53 | Overruled |
| August 15, 2001 | p15 L18-p30 L9 | Overruled |
| | p31 L2-p33 L24 | Overruled |
| | p36 L13-p39 L11 | Overruled |
| | p41 L22-p51 L16 | Overruled |
| | p96 L19-p97 L11 | Overruled |
| September 19, 2001 | p58 L24-p67 L11 | Overruled |
| | p68 L10-p77 L11 | Overruled |
| | p77 L21("It . . . ")-p97 L8 | Overruled |
| | p100 L17-p102 L19 | Overruled |
| | p103 L10-p108 L15 | Overruled |
| | p110 L17-p115 | Overruled |

Attachment B

As used herein, the term "previously discarded maps" means and includes: Citizen Plan W; Citizen Plan T; Citizen Plan U; Citizen Plan X (revised); Draft Plan 3H; Draft Plan 3B; Draft Plan 3B-1(revised); Draft Plan 3H, revised; Draft Plan 3H, Revision 2; Draft Plan G; Illustrative Plan 1, Revision 2; Illustrative Plan 1, Revision 2A; Illustrative Plan 1, Revision 2B; Illustrative Plan 1, Revision 2C; Illustrative Plan 1, Revision 3; Illustrative Plan 1, Revision 4A; Illustrative Plan 1, Revision 5A; Illustrative Plan 1, Revision 5B; Illustrative Plan 1, Revision 1; Illustrative Plan 1, Revision 2; Plan 3H; Plan X and Plan B1.

2-26-02 Ordered that Court stand adjourned until morning at nine (9) o'clock.
Court met pursuant to adjournment and there were
these present as of yesterday.



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CAUSE NO. 01-8448-J

| | | |
|---|---|---|
| TRINIDAD GARZA et al.<br>Plaintiffs, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| DALLAS INDEP. SCHOOL DIST. et al.<br>Defendants. | ) | 191st JUDICIAL DISTRICT |

ORDER REGARDING MOTIONS TO COMPEL

Before the Court on this day is Plaintiff's motion to compel certain transcript of closed meetings[1] held by Defendant DISD as well as documents claimed as privileged or otherwise exempt from discovery. Defendant DISD has filed a response to the motion and has tendered the closed meetings transcripts in camera (except for Sept. 19, 2001, which Defendant stated will be tendered shortly) ; Defendant DISD has also indicated it will tender the disputed documents in camera shortly. The Court convened a telephone hearing on November 27, 2001 with all counsel of record present at which a discussion was held regarding the procedures to use in obtaining any further evidence necessary to decide the motions to compel and complete the in camera review in light of the press of time necessitated by the December 17, 2001 trial setting which, in turn, was necessitated by the timeliness of the issues raised. The Court ordered that all affidavits and any other matters to be considered in connection with the motions to compel the transcripts and documents be submitted by Thursday, November 29, 2001 at 5:00 p.m. and copies provided to opposing counsel contemporaneously therewith. For good cause

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[1] With the agreement of the parties, by order of November 12, 2001, the Court ordered that the tapes of the closed meetings be transcribed by a certified court reporter to facilitate this court's review as well as any appellate review that may occur.

shown, that being the press of time, the Court grants leave to file those affidavits on fewer than seven days' notice. The Court finds that it is prepared to consider the motions to compel and related in camera submissions as of Thursday, November 29, 2001 at 5:00 p.m. and to hear them by submission. However, if any party desires an oral hearing or contends that an oral hearing is required, they should so advise the court in writing, with a copy to opposing counsel, no later than Thursday, November 29, 2001 at 5:00 p.m. If such a hearing is requested, it will be held on Friday, November 30, 2001 at 10:00 a.m. and the Court grants leave to hold the hearing on fewer than three days' notice. Accordingly,

IT IS ORDERED that any affidavits supporting or opposing claims of privilege or other exemption from discovery relevant to the motions to compel the closed meeting transcripts or documents listed on Defendant DISD's privilege/exemption log, as well as any other materials pertinent thereto shall be filed no later than Thursday, November 29, 2001 at 5:00 p.m. and copies provided to opposing counsel contemporaneously therewith. The Court will not consider in camera anything not copied to opposing counsel other than the transcripts and the documents themselves.

IT IS FURTHER ORDERED that, unless a party states in writing to the court and opposing counsel by Thursday, November 29, 2001 at 5:00 p.m. that it desires an oral hearing on the motions or that it contends an oral hearing is required, the matter will be considered by written submission as of Thursday, November 29, 2001 at 5:00 p.m. If a hearing is requested, it will be held on Friday, November 30, 2001 at 10:00 a.m.

IT IS FURTHER ORDERED that leave to file affidavits on fewer than seven days' notice and to have the hearing on the motion to compel on fewer than three

days' notice is granted.

The clerk of the court is directed to send a copy of this order to all counsel of record by facsimile.

SIGNED this 29th day of May, 2001.

JUDGE PRESIDING

cc: Daniel Perez VIA FAX 214-252-9400
Eric Moye VIA FAX 214-712-4402
Norton Rosenthal VIA FAX 214-752-4671

CAUSE NO. 01-3448-J

| | | |
|---|---|---|
| TRINIDAD GARZA et al.<br>Plaintiffs, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| DALLAS INDEP. SCHOOL DIST. et al.<br>Defendants. | ) | 191st JUDICIAL DISTRICT |

ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS

On December 7, 2001, came on to be heard Defendants' Motion for Summary Judgment regarding Plaintiffs' claims and Plaintiffs' Motion for Summary Judgment, as well as responses and supplements thereto. In accordance with the parties' agreements which were made in view of the exigencies of this case, including, but not limited to, the short time between filing and trial and the short time between the Court's ruling on in camera submissions and the agreed date for the summary judgment hearing, summary judgment filings have been made in a shorter time frame than ordinarily required by Rule 166a. The Court has considered all summary judgment filings made before December 7, 2001 as timely in light of the parties' agreements and the absence of objections to same and, to the extent necessary, grants leave for such filings. Having considered the motions, the responses, the competent summary judgment evidence and the arguments of counsel, the Court is of the opinion that an order should be entered as follows.

IT IS ORDERED THAT Plaintiffs' Motion for Summary Judgment on Count 1 of their Petition (regarding Texas Open Meeting Act Closed Meeting Requirements) is GRANTED as to closed meetings held on April 10, April 18, April 26, May 31, June 13, July



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8, July 24, August 7, August 15 and September 19, 2001, except that the Court reserves judgment on the remedy for same. Defendants' Motion for Summary Judgment on Count 1 is DENIED.

Plaintiffs' Motion for Summary Judgment on Count 2 of their Petition (regarding notice of subject requirements) is DENIED and Defendants' Motion for Summary Judgment on Count 2 is GRANTED; Plaintiffs take nothing on Count 2.

Plaintiffs' Motion for Summary Judgment on Count 3 (regarding Section 551.043 notice requirements) of their Petition except that the Court reserves judgment on the remedy for same is GRANTED as to the timing of the notice for the October 1, 2001 meeting (except that the Court reserves judgment on the remedy for same) and DENIED in all other respects. Defendants' Motion for Summary Judgment on Count 3 is GRANTED as to all meeting notices in question except for the timing of the October 1, 2001 notice as to which Defendants' Motion is DENIED.

Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Summary Judgment as to Count 4 of the Petition (regarding alleged staggered meetings) are DENIED.

The clerk of the court is directed to send a copy of this order to all counsel of record by facsimile.

SIGNED this 11th day of Dec., 2001.

JUDGE PRESIDING

cc: Daniel Perez VIA FAX 214-653-1014
Eric Moyo VIA FAX 214-712-4402
Norton Rosenthal VIA FAX 214-752-4671



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CAUSE NO. 01-8448-J

| | | |
|---|---|---|
| TRINIDAD GARZA et al.<br>Plaintiffs, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| DALLAS INDEP. SCHOOL DIST. et al.<br>Defendants. | ) | 191st JUDICIAL DISTRICT |

ORDER REGARDING IN CAMERA INSPECTION OF TRANSCRIPTS

Before the Court on this day is Plaintiff's motion to compel[1] certain transcripts of closed meetings[2] held by Defendant DISD claimed as privileged or otherwise exempt from discovery. The Court, having considered the evidence discussed below, the briefing of the parties and the arguments of counsel, is of the opinion that an order should be entered as follows. To facilitate the parties' understanding of the Court's ruling, the Court will address certain legal issues raised generally by the parties as well as announce the standard it used in addressing the in camera review before ruling upon the specific

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[1] On November 14, 2001, Plaintiffs moved to compel production of all documents responsive to their discovery requests, including matters listed on Defendant DISD's privilege log. Item 101 on the privilege log references the audiotapes of closed meetings that were transcribed pursuant to the Court's order of November 12, 2001, which transcripts were delivered to the Court for in camera inspection on November 26, 2001. In responding to Plaintiff's motion to compel, Defendant's separated issues regarding the tape transcripts from the other documents. The Court similarly is addressing the tape transcripts by separate order from the other documents claimed as privileged or otherwise exempt from discovery.

[2] With the agreement of the parties, by order of November 12, 2001, the Court ordered that the tapes of the closed meetings be transcribed by a certified court reporter to facilitate this court's review as well as any appellate review that may occur. Additionally, a transcript is necessary so that the Court can make specific rulings as to specific portions of the meetings. The Court notes that the transcripts indicate a number of inaudible or unintelligible portions of the tapes.



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transcripts. The Court notes that any finding herein that certain portions of the transcripts are not subject to DISD's claim of privilege is in no way a finding of any intentional impropriety or knowing violation of the Open Meetings Act on the part of any person present during such meeting or portion of meeting at issue. Indeed, this case illustrates the difficulty of conducting a redistricting process in the face of both pending and threatened litigation.

*The Evidence.* The Court takes judicial notice of the contents of the file in this case, specifically, the pleadings of the parties in this case, the pleadings from *Trinidad Garza et al. v. Dallas Independent School District et al.*, in the United States District Court for the Northern District of Texas, Dallas Division, Civil Action No. 3-01CV0502-H (the "Federal Suit") filed in this case, the deposition of Kathleen Leos on file with the Court, the Affidavit of Lois Parrott on file with the court, the Affidavit of Eric Moyé and its attachments filed November 29, 2001, and the attachments to Plaintiff's Reply filed November 29, 2001. The Court also considered the transcripts themselves as evidence.

*The Standards.* Defendant DISD contends that it was entitled to and did engage in closed sessions related to redistricting to discuss pending or contemplated litigation. DISD thus contends that the closed meetings should remain closed under Tex. Govt. Code 551.071.[3] During much of the time in question, the Federal Suit, filed by these same plaintiffs, was pending. Other litigation regarding the redistricting was expected and contemplated. Other litigation regarding issues unrelated to redistricting also were pending

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[3] A few pages of a few of the transcripts deal with personnel matters unrelated to the redistricting issue and others deal with lawsuits not relating to redistricting. The Court finds that matters unrelated to the redistricting issue are irrelevant and need not be produced.



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or contemplated during this time period. Thus, the Court finds that discussion of matters relating to the Federal Suit and any pending or anticipated suit were properly made in closed session. Additionally, discussions with counsel regarding pending or contemplated litigation are privileged under the attorney-client privilege. While the two may be different, no ruling herein turns upon the distinction, thus the Court will refer collectively to the claim under Tex. Govt. Code 551.071 and Texas Rule of Evidence 503 as the "claim of privilege."

In addressing the claim of privilege, the Court was mindful that a single stray remark off the topic of pending or contemplated litigation in the context of a long discussion does not defeat the claim of privilege. At the same time, a discussion that begins with pending or contemplated litigation but veers off into a discussion of personal or political considerations relevant to redistricting is not cloaked in privilege simply because the intentions were good.

The Court carefully examined the transcripts. Where discussions strayed from the topics allowed to be closed by Tex. Govt. Code 551.071, the Court has overruled the claim of privilege until the discussion returned to appropriate topics. In so doing, the Court has endeavored to give deference to the need for a governmental entity to fully defend itself in pending litigation and minimize or avoid exposure to the entity for anticipated litigation balanced against the right of the public to participate in and witness the debate and deliberations over such an important topic. A full and frank confidential discussion of pending/contemplated litigation is both allowed by Tex. Govt. Code 551.071 and necessary for the governmental entity to protect itself. Nevertheless, the fact that the District was or might be sued about redistricting does not allow the District to discuss all aspects of



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redistricting in a closed session. General policy-making discussions and deliberations over which map to choose should be held in open session; the presence of an attorney does not exempt such discussions from the "openness" requirements of the Act.

*Bickerstaff Personnel.* Plaintiffs' counsel stipulated that he is not contending that the presence of attorneys from the Bickerstaff firm itself breached the requisite confidentiality needed to maintain the privilege. In light of Mr. Moyé's affidavit establishing that a Vial, Hamilton lawyer attended each closed session, Plaintiff's counsel stipulated at the November 30, 2001 hearing regarding production of documents that he was not contending that privilege was breached by virtue of Bickerstaff's attendance at those meetings.

*The Crime-Fraud Exception.* No evidence was presented that supports a finding that counsel was consulted in order to allow any of the Defendants to commit a crime or perpetrate a fraud.

*Waiver.* The Court finds that the fact that an attorney and his client discuss something that later is part of publicly filed documents does not waive the privilege. It is common for an attorney to discuss litigation strategy with his client and then employ the strategy agreed upon. If that constituted a waiver, little would be privileged. The Court rejects Plaintiffs' broad claim of waiver.

With the foregoing in mind, the Court finds that the claim of privilege should be sustained as to certain parts of the transcript and overruled as to others as indicated below.



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| Transcript Date | Page/Line | Claim of Privilege Sustained*/Overruled |
|---|---|---|
| Apr. 4, 2001 | p2-p20 | Sustained (personnel/relevance) |
| | p21-p49 | Sustained |
| April 10, 2001 | p2-p10 l.15 | Sustained |
| | p10 l.16-p12 l.10 | Overruled |
| | p12 l.11-p13 l.3 | Sustained |
| | p13 l.4-p15 l.15 | Overruled |
| | p15 l.16-p23 | Sustained |
| April 18, 2001 | p2-p36 l.12 | Sustained |
| | p36 l.13-p46 l.6 | Overruled |
| | p46 l.7-p57 l.13 | Sustained |
| | p57 l.14-p63 l.20 | Overruled |
| | p63 l.21- p65 l.16 | Sustained |
| | p65 l.17-p73 l.8 | Overruled |
| | p73 l.9-p85 l.16 | Sustained |
| | p85 l.17-p87 | Overruled |
| | p88-p102 | Sustained (personnel/irrelevant) |
| April 26, 2001 | p2-p6 l.23 | Sustained |
| | p6 l.24-p15 l.9 | Overruled |
| | p15 l.10-p31 l.21 | Sustained |
| | p31 l.22-p39 | Overruled |
| May 31, 2001 | p2-p34 l.10 | Sustained |
| | p34 l.11-p41 l.9 | Overruled |
| | p41 l.10-p48 | Sustained |
| June 13, 2001 | p2-p52 | Sustained (attorney/client privilege and irrelevant) |
| | p53-p67 l.6 | Sustained |
| | p67 l.7-p91 | Overruled |
| July 8, 2001 (part I) | p2-p50 l.9 | Sustained |
| | p50 l.10-p54 l.14 | Overruled |
| | p54 l.15-25 | Sustained |
| | p55-p60 l.13 | Overruled |
| | p60 l.14-p62 l.20 | Sustained |

* Unless otherwise indicated, "sustained" means sustained on Tex. Govt. Code 551.071 (litigation) and attorney-client privilege grounds.



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|---|---|---|
| | p62 l.21-p67 l.11 | Overruled |
| | p67 l.12-p81 l.3 | Sustained |
| | p81 l.4-p85 l.11 | Overruled |
| | p85 l.12-p97 l. 10 | Sustained |
| | p97 l.11-p108 l.7 | Overruled |
| | p108 l.8-p111 l.24 | Sustained |
| | p111 l.25-p114 l.3 | Overruled |
| | p114 l.4-p116 | Sustained |
| July 8, 2001 Part II | p2-p6 l.12 | Overruled |
| | p6 l.13 - p14 l.13 | Sustained |
| | p14 l.14-p18 l.22 | Overruled |
| | p18 l.23-p22 l.18 | Sustained |
| | p22 l.19 - p31 l.25 | Overruled |
| | p32 l.1-5 | Sustained |
| | p32 l.6-p34 l. 9 | Overruled |
| | p34 l.10-p35 | Sustained |
| July 24, 2001 | p2-p11 l.18 | Sustained |
| | p11 l.19-p35 l.15 | Overruled |
| | p35 l.16-p40 l.15 | Sustained |
| | p40 l.16-p42 l.23 | Overruled |
| | p42 l.24-p48 l.22 | Sustained |
| | p48 l.23-p57 l.13 | Overruled |
| | p57 l.14-p61 l.22 | Sustained |
| | p61 l.23-p65 l.2 | Overruled |
| | p65 l.3-6 | Sustained |
| | p65 l.7-p65 l.22 | Overruled |
| | p65 l.23-p66 l.5 | Sustained |
| | p66 l.6-p89 l.23 | Overruled |
| | p89 l.24-p93 | Sustained |
| | p94-p117 | Sustained (a/c privilege and irrelevant) |
| August 7, 2001 | p2-p7 l.23 | Sustained |
| | p7 l.24-p13 l.5 | Overruled |
| | p13 l.6-l.18 | Sustained |
| | p13 l.19-p16 l.3 | Overruled |
| | p16 l.4-p21 l.12 | Sustained |
| | p21 l.13-p26 l.14 | Overruled |
| | p26 l.15-l.20 | Sustained |
| | p26 l.21-p30 l.22 | Overruled |
| | p30 l.23-p32 l.24 | Sustained |
| | p32 l.25-p41 l.19 | Overruled |



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| | | |
|---|---|---|
| | p41 L20-p42 L12 | Sustained |
| | p42 L13-p44 L10 | Overruled |
| | p44 L11-p45 L12 | Sustained |
| | p45 L13-p49 L15 | Overruled |
| | p49 L16-L18 | Sustained |
| | p49 L19-p53 | Overruled |
| August 15, 2001 | p2-p15 L17 | Sustained |
| | p15 L18-p30 L9 | Overruled |
| | p30 L10-p31 L1 | Sustained |
| | p31 L2-p33 L24 | Overruled |
| | p33 L25-p36 L12 | Sustained |
| | p36 L13-p39 L11 | Overruled |
| | p39 L12-p41 L21 | Sustained |
| | p41 L22-p51 L16 | Overruled |
| | p51 L18-96 L18 | Sustained (a/c privilege/irrelevant) |
| | p96 L19-p97 L11 | Overruled |
| | p97 L12-p120 | Sustained (a/c privilege/irrelevant) |
| September 19, 2001 | p2-p25 | Sustained (a/c privilege & irrelevant) |
| | p26-p36 L6 | Sustained (Tex. Govt. Code 551.072 & irrelevant) |
| | p36 L7-p58 L23 | Sustained |
| | p58 L24-p67 L11 | Overruled |
| | p67 L12-p68 L9 | Sustained |
| | p68 L10-p77 L11 | Overruled |
| | p77 L12-21 (before "it") Sustained | |
| | p77 L21("It . . . ")-p97 L8 Overruled | |
| | p97 L9-p100 L16 | Sustained |
| | p100 L17-p102 L19 | Overruled |
| | p102 L20-p103 L9 | Sustained |
| | p103 L10-p108 L15 | Overruled |
| | p108 L16-p110 L16 | Sustained |
| | p110 L17-p115 | Overruled |
| September 25, 2001 | p2-p11 L24 | Sustained (a/c privilege & irrelevant) |
| | p11 L25-p94 | Sustained |
| October 1, 2001 | p2-p10 | Sustained (Tex. Govt. Code 551.076) |

Accordingly,

IT IS ORDERED that all transcript portions as to which the objections made 029
were overruled shall be produced by Defendant DISD to all parties no later than Tuesday, December 4, 2001 at 5:00 p.m.

The clerk of the court is directed to send a copy of this order to all counsel of record by facsimile.

SIGNED this 30th day of November, 2001.

JUDGE PRESIDING

cc: Daniel Perez VIA FAX 214-653-1014
Eric Moye VIA FAX 214-712-4402
Norton Rosenthal VIA FAX 214-752-4671

12-4-01 [illegible]

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CAUSE NO. 01-9448-J

| | | |
|---|---|---|
| TRINIDAD "TRINI" GARZA, PEDRO "PETE" VACA, MARIA ADAMES, and WILLIAM ACOSTA, | § | IN THE DISTRICT COURT |
| Plaintiffs, | § | |
| v. | § | DALLAS COUNTY, TEXAS |
| DALLAS INDEPENDENT SCHOOL DISTRICT, the BOARD OF EDUCATION OF THE DALLAS INDEPENDENT SCHOOL DISTRICT, and KEN ZORNES, ROXAN STAFF, RAFAEL ANCHIA, LEW BLACKBURN, HOLLIS BRASHEAR, KATHLEEN LEOS, LOIS PARROTT, RON PRICE, and GEORGE WILLIAMS in their official capacities as Trustees of the Board of Education of the Dallas Independent School District, | § | Judge Catharina Haynes |
| Defendants. | § | 191st JUDICIAL DISTRICT |

FINAL JUDGMENT

On January 25, 2002, came on to be tried the remaining issues in this case. The Court previously entered orders dated November 30, 2001(Order Regarding In Camera Inspection of Transcripts), December 11, 2001(Order Regarding Motions for Summary Judgment) and December 18, 2001(Order on Remedies), which are incorporated by reference herein. The Court this day has issued findings of fact and conclusions of law regarding the attorneys' fees issues tried on January 25, which findings and conclusions are incorporated by reference herein. As a result of the summary judgment rulings, Plaintiffs' nonsuit of



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certain matters and the findings and conclusions on attorneys' fees, all matters in dispute have been resolved and a final judgment should be entered.

*Plaintiffs' Claims*

*Count One*: By Order dated November 30, 2001, the Court found that certain portions of ten closed meeting sessions regarding redistricting should have been held in open session and ordered production of the transcripts of those portions. The record contains the transcripts ordered produced. They reflect a series of deliberations and debates about various redistricting maps and proposals held in closed meetings, which should have occurred in open session. The parties conceded that this ruling essentially disposed of Plaintiffs' Count 1 claims, and summary judgment was granted to Plaintiffs on Count 1.

*Count Two*: The Court found no violations of the content requirements of the Texas Open Meetings Act ("the Act") and granted summary judgment to Defendants on Count 2.

*Count Three*: Defendant DISD also violated the Act by its undisputed failure to post notice of the meeting at which the redistricting vote was taken at least 72 hours before the meeting. As a result of this untimely posting, the Court ordered that the October 1 redistricting vote should be voided. The Court granted summary judgment to Plaintiffs on Count 3 solely as to the October 1, 2001 meeting, at which the vote in question was taken. The Court granted summary judgment to Defendants as to Count 3 in all other respects.

*Count Four*: Count 4 was nonsuited by Plaintiffs.

*Attorneys' fees*: The Plaintiffs having substantially prevailed in light of the Court's rulings, the Court also found the DISD liable for Plaintiffs' attorneys' fees pursuant to



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Government Code Section 551.142(b). The Court finds that Plaintiffs are entitled to $157,380.00 in reasonable attorneys' fees for the prosecution of this matter through trial, and $33,314.22 for costs of litigation reasonably incurred, together with conditional appellate attorneys' fees.

*Injunctive relief*: By its Order on Remedies of December 18, 2001, the Court found the existence of a wrongful act, existence of imminent harm, existence of irreparable injury, and no existence of an adequate remedy at law, as more fully set forth in that order which is incorporated by reference herein.

*Cross-Plaintiffs' Claims*

The Court ruled that Dallas Independent School District policy required the District to provide a defense for Dr. Lois Parrott and that DISD refused and failed to do so necessitating her hiring of separate counsel in this matter. The Court granted summary judgment to Cross-Plaintiff on her claim for defense, limited to only the defense of the matters in issue in this case that was non-duplicative of the DISD's counsel's defense of the trustees as a whole. Cross-Plaintiff's claim for indemnity is moot as no monetary judgment was or will be entered against her in this case. The Court finds that Dr. Parrott is entitled to $28,125.00 in reasonable and necessary attorneys' fees in her defense of this matter and for prosecution of her cross-claim through the trial of this case, and $233.25 for reasonable expenses incurred, together with conditional appellate attorneys' fees. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the October 1, 2001, vote on redistricting is VOIDED and Defendant DISD is ordered to advise the Department of Justice that the plan submitted was based upon a vote now voided and pull



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down the plan from consideration pending a lawful vote on whatever plan is ultimately adopted.

IT IS FURTHER ORDERED that the clerk shall issue a writ of permanent injunction directed to Defendants, all future Trustees of the Dallas Independent School District, and all those acting in concert with Defendants or future Trustees as follows:

1. Prohibiting any closed sessions in which the following occurs: policy, political or personal concerns regarding redistricting under the 2000 Census is deliberated; or the merits or lack of merits of any proposed redistricting map concerning redistricting under the 2000 Census are deliberated. Further, any closed session in which redistricting under the 2000 Census is in any way discussed under any exception to the Act[1] is prohibited unless an audiotape of the entire session is made with each speaker clearly identified by the chair or the speaker.

2. Requiring that a copy of the December 18 Order on Remedies and the portions of the Closed Meetings ordered produced by the November 30, 2001 order, which portions are specifically described in Attachment A hereto, be made available to the public as follows: (1) on a publicly accessible website, (2) by making copies available for inspection and review at future Board meetings in which redistricting under the 2000 Census is discussed, and (3) by making copies available for inspection and review at Defendant DISD's offices during regular business hours with copies to be made at the request of a member of the public at no more than the actual cost to Defendant DISD of such copying. Defendants

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[1] The Court recognizes that this case itself, as well as litigation that may be filed in the future regarding redistricting, may legitimately require closed sessions.



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are prohibited from voting on any redistricting plan until seven days after compliance with this provision. The website posting shall take place as soon as possible;[2] making copies available at DISD's offices shall occur immediately. The duration of this section of the injunction is ten years from the date of the December 18 Order except that the website posting need be maintained only until 30 days after a final redistricting plan under the 2000 Census is approved by the Department of Justice and/or a court of competent jurisdiction.

3. Requiring that the audiotapes corresponding to the transcript pages listed on Attachment A be produced to opposing counsel with copies made available to the public for review and inspection at the District's offices during regular business hours for a period of 10 years; in editing the tapes to conform to the Court's order, the District may use the services of professionals who are ordered to maintain the unedited tapes and any portions of the tapes not ordered produced as confidential, and who each shall sign a statement to the effect that he/she agrees to maintain as confidential all portions of the tapes not ordered produced. The editing required by this section shall be accomplished in no more than 20 days from the date of the December 18, 2001 Order[3] at Defendant DISD's expense. If a member of the public desires to have a copy of the edited tapes, such person may not be charged more than the actual cost to Defendant DISD of making the copy. The duration of this section of the injunction is ten years from the date of the December 18 Order, except for the obligation of confidentiality regarding the transcripts/tapes not produced which is perpetual.

4. Prohibiting a vote on any redistricting plan until after the public has had

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[2] DISD has indicated to the Court that this posting has already occurred.

[3] No one has contended that this has not occurred.



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the opportunity to comment at a properly noticed, scheduled Board meeting following the publications described above; all previously discarded maps (see Attachment B) shall be made available to the public and placed before the Board and public for discussion during an open session; all debate by the Board regarding any redistricting plan under the 2000 Census shall be made at a properly noticed open session of the Board.

It is further ORDERED that Plaintiffs have and recover from Defendant Dallas Independent School District their reasonable attorneys' fees and costs of litigation in this matter in the total amount of $190,694.22, together with an additional $50,000 if DISD appeals this matter as to Plaintiffs to the Court of Appeals and DISD is ultimately unsuccessful, together with an additional $50,000 if review is sought from the Texas Supreme Court with respect to the Plaintiffs' claims, but DISD is ultimately unsuccessful.

It is further ORDERED that Dr. Lois Parrott have and recover from Defendant Dallas Independent School District her reasonable and necessary attorneys' fees and expenses in the total amount of $28,358.25, together with an additional $15,000 if DISD appeals this matter as to Dr. Parrott to the Court of Appeals and DISD is ultimately unsuccessful, together with an additional $15,000 if review is sought from the Texas Supreme Court with respect to Dr. Parrott's claims, but DISD is ultimately unsuccessful.

All taxable court costs associated herewith not included in the amounts awarded above are hereby taxed against Defendant Dallas Independent School District, for which let execution issue. All sums awarded herein shall bear interest at the rate of ten percent per annum from the date of this judgment until paid.

The injunction bond posted by Plaintiffs on or about December 19, 2001, is hereby



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released, less all lawful administrative expenses of the District Clerk.

All relief not expressly granted herein is DENIED. This judgment finally disposes of all claims and matters in issue in this case and is appealable.

The clerk of the court is directed to send a copy of this order to all counsel of record as indicated below.

It is so ORDERED.

SIGNED this 28th day of January, 2002.

JUDGE PRESIDING

cc: Daniel Pasos, VIA FAX 214-653-1014
Eric Moyé, VIA FAX 214-712-4402
Newton Rosenthal, VIA FAX 214-752-4671



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306

**Attachment A**

**The claim of privilege as to the following transcript pages was overruled and ordered produced by order dated November 30, 2001:**

| Transcript Date | Page/Line | Claim of Privilege Overruled |
|---|---|---|
| April 10, 2001 | p10 l.16-p12 l.10 | Overruled |
| | p13 l.4-p15 l.15 | Overruled |
| April 18, 2001 | p36 l.13-p46 l.6 | Overruled |
| | p57 l.14-p63 l.20 | Overruled |
| | p65 l.17-p73 l.8 | Overruled |
| | p85 l.17-p87 | Overruled |
| April 26, 2001 | p6 l.24-p15 l.9 | Overruled |
| | p31 l.22-p39 | Overruled |
| May 31, 2001 | p34 l.11-p41 l.9 | Overruled |
| June 13, 2001 | p67 l.7-p91 | Overruled |
| July 8, 2001 (part I) | p50 l.10-p54 l.14 | Overruled |
| | p55-p60 l.13 | Overruled |
| | p62 l.21-p67 l.11 | Overruled |
| | p81 l.4-p85 l.11 | Overruled |
| | p97 l.11-p108 l.7 | Overruled |
| | p111 l.25-p114 l.3 | Overruled |
| July 8, 2001 Part II | p2-p6 l.12 | Overruled |
| | p14 l.14-p18 l.22 | Overruled |
| | p22 l.19 - p31 l.25 | Overruled |
| | p32 l.6-p34 l. 9 | Overruled |
| July 24, 2001 | p11 l.19-p35 l.15 | Overruled |
| | p40 l.16-p42 l.23 | Overruled |
| | p48 l.23-p57 l.13 | Overruled |
| | p61 l.23-p65 l.2 | Overruled |
| | p65 l.7-p65 l.22 | Overruled |
| | p66 l.6-p89 l.23 | Overruled |
| August 7, 2001 | p7 l.24-p13 l.5 | Overruled |
| | p13 l.19-p16 l.3 | Overruled |



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| | | |
|---|---|---|
| | p21 L13-p26 L14 | Overruled |
| | p26 L21-p30 L22 | Overruled |
| | p32 L25-p41 L19 | Overruled |
| | p42 L13-p44 L10 | Overruled |
| | p45 L13-p49 L15 | Overruled |
| | p49 L19-p53 | Overruled |
| August 15, 2001 | p15 L18-p30 L9 | Overruled |
| | p31 L2-p33 L24 | Overruled |
| | p36 L13-p39 L11 | Overruled |
| | p41 L22-p51 L16 | Overruled |
| | p96 L19-p97 L11 | Overruled |
| September 19, 2001 | p58 L24-p67 L11 | Overruled |
| | p68 L10-p77 L11 | Overruled |
| | p77 L21("R. . . .")-p97 L8 | Overruled |
| | p100 L17-p102 L19 | Overruled |
| | p103 L10-p108 L15 | Overruled |
| | p110 L17-p115 | Overruled |

Attachment B

As used herein, the term "previously discarded maps" means and includes: Citizen Plan W; Citizen Plan T; Citizen Plan U; Citizen Plan X (revised); Draft Plan 3H; Draft Plan 3B; Draft Plan 3B-1(revised); Draft Plan 3H, revised; Draft Plan 3H, Revision 2; Draft Plan G; Illustrative Plan 1, Revision 2; Illustrative Plan 1, Revision 2A; Illustrative Plan 1, Revision 2B; Illustrative Plan 1, Revision 2C; Illustrative Plan 1, Revision 3; Illustrative Plan 1, Revision 4A; Illustrative Plan 1, Revision 5A; Illustrative Plan 1, Revision 5B; Illustrative Plan 1, Revision 1; Illustrative Plan 1, Revision 2; Plan 3H; Plan X and Plan B1.



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# Questions of Senator Edward M. Kennedy to Catharina Haynes Nominee to the U.S. Court of Appeals for the Fifth Circuit

## Documents accompanying Response to Question 2

In addition to orders with explanations, a few additional orders in *Garza v. DISD* were supplied for context.

PDF 2 of 2

CAUSE NO. 03-676-J

| | | |
|---|---|---|
| INKJET INTERNATIONAL, LTD. | ) | IN THE DISTRICT COURT OF |
| Plaintiff, | ) | |
| v. | ) | DALLAS COUNTY, TEXAS |
| JASON SWEET et al. | ) | |
| Defendants. | ) | 191st JUDICIAL DISTRICT |

ORDER ON MOTION FOR SANCTIONS

Before the Court on this day is Plaintiff's Motion for Sanctions filed June 3, supplemented June 27 and supplemented again on July 8, 2003, as well as the responses thereto, all of which were heard on July 10, 2003. Plaintiff alleges that Defendants Sweet, Persad and XL[1] ("Defendants") should be sanctioned for alleged repeated discovery violations. Defendants contend they have fully complied with their discovery obligations. The Court provides its findings and conclusions below.

*Background.* In the Summer of 2002, Frontier Partners, through its partner Jason Sweet, began the process of negotiating a potential purchase of Plaintiff Inkjet through an intermediary, Geneva. At that time, Defendant Persad was a significant employee of Inkjet. As a condition to reviewing Inkjet's books and records, Geneva required Sweet and Frontier to sign a Confidentiality Agreement (Plaintiff's Exh. 4[2]). The negotiations between Frontier and Inkjet eventually collapsed, and the purchase was never consummated.

Instead, Inkjet contends, Sweet and Persad formed XL to compete directly

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[1] At the July 10 hearing, Inkjet's counsel agreed that Inkjet was not pursuing the motion as against Melissa Forrest at that hearing. Accordingly, matters relating only to her conduct will not be considered in this order except as they bear upon XL's discovery conduct in light of Forrest's position at XL.

[2] Unless otherwise indicated, all references to exhibits are to the exhibits admitted at the July 10 hearing.



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with Inkjet using Persad's extensive knowledge of Inkjet's customers, pricing, business structure and operations. Inkjet filed this lawsuit on January 23, 2003 and immediately sought temporary relief to stop alleged violations of the Confidentiality Agreement. A Temporary Restraining Order was entered. Later, after an evidentiary hearing, a Temporary Injunction and Amended Temporary Injunction were entered.

*Contempt Motions.* Inkjet has brought three separate motions for contempt regarding alleged violations of the TRO and Temporary Injunction. The first motion resulted in a finding of contempt and punishment assessed. A hearing on the second motion had to be suspended when it was determined that the hard drive that was the subject of the hearing had not been properly copied (or proffered for copying). The third motion was filed in the Court of Appeals and has been referred to this court for an evidentiary hearing to commence on July 21.

Throughout the motions for sanctions at issue, Inkjet refers to the contempt motions and order of contempt. The Court finds that the matters made the basis of the motions for contempt should be addressed directly in the respective contempt hearings and orders. The June 3 motion essentially seeks additional sanctions for the contumacious conduct addressed in the first contempt motion and order regarding same. The Court finds that punishment for the conduct addressed in the first contempt motion should have been assessed in the order of contempt issued after the first contempt hearing. The Court declines to award additional sanctions for any violations of the TRO addressed in the first contempt hearing. The matters alleged in the second and third contempt motions will be addressed in the hearings and orders on those motions.



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However, the Court recognizes that "[i]n determining discovery sanctions, a trial court may consider the entire record and all the offending parties' conduct during the litigation." *Electronic Data Systems Corp. v. Tyson*, 862 S.W.2d 728, 733-34 (Tex. App. -- Dallas 1993, orig. proceeding). The contempt finding and the other conduct alleged are relevant to determining Defendants' state of mind and wrongful intent, if any, in connection with any discovery violations. That evidence is also relevant to the question of what, if any, punishment is appropriate for any discovery violations found. Because the second motion for contempt deals only with Forrest's conduct, it will not be considered at all in this order. *See* footnote 1, *supra*.

The Court's consideration of the evidence presented regarding the contempt matters leads to the conclusion that Defendants have engaged in a pattern of aggressively and creatively interpreting court orders to serve their purposes and allow them to "work around" adverse rulings.

*Deposition Instructions.* In the June 27 sanctions motion, Inkjet refers to questions asked in depositions as to which the witness was instructed not to answer. Rule 199.5(f) states: "An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one from which any answer would be misleading, or secure a ruling pursuant to paragraph (g)." TRCP 199.5(f). The matters regarding Melissa Forrest's own thoughts, understandings and beliefs will not be addressed here. *See* footnote 1, *supra*, and pages 8-12 of the June 27 Supplement to Motion for Sanctions. However, to the extent that she was asked about events at and conduct of XL, XL



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can be held responsible for the answers or lack of answers due to her position at XL and the fact that the objecting attorney also represented XL. Specifically, the Court will consider the following questions and the instructions regarding them as part of this order: Forrest Depo., Plaintiff's Exh. 10, pg. 86, l. 21 and p. 86, l. 25-p. 87, l.2. The Court finds that the two questions, with the modification at page 87, lines 4-5, were proper questions and a blanket instruction not to answer was not proper.

Inkjet also challenges the instructions not to answer at the second Persad Deposition. Plaintiff's Exh. 11, pgs. 259-263.[3] Mr. Persad was asked whether he thought certain conduct was a violation of the injunction. His attorney instructed him not to answer the question. When asked the basis for the instruction, she said: "I'm going to instruct him not to answer that. I'm not going to have him made a record of this when we don't know what the underlying facts are." Persad Depo., Plaintiff's Exh. 11, pg. 260. Neither this explanation nor the remaining colloquy of counsel provides a basis for an instruction not to answer. The Court finds that this instruction was improper. No other specific instances of deposition instructions were given in the motion for sanctions.

*Withholding Documents.* Plaintiff contends that Defendants have deliberately and tactically withheld documents, then produced them at inconvenient times such as right before or right after a deposition (*see, e.g.*, discussion at June 27 motion, p. 25). It contends that Defendants have sometimes taken months to produce relevant evidence. No previous motion to compel has been filed by Plaintiff and granted; however, the parties have exchanged e-mails and correspondence over the last few months regarding document

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[3] Inkjet's accusations about deposition untruths will be addressed below.



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production issues.

The Court agrees that all parties should produce documents timely, rather than tactically. In the June 27 motion, Plaintiff gives specifics as follows:

1. P. 12: E-mails of communications with Inkjet customers were not gathered by Forrest because she didn't think they were relevant. Defendants' counsel has stated they have been produced except for whatever was either lost or destroyed in the January computer updating that is the subject of the second motion for contempt and will not be addressed here. *See* footnote 1, *supra.*

2. Defendants failed to produce shipping documents for "non-Exhibit A"[4] customers until very recently. They state that same were not requested until the Second Request for Production (Plaintiff's Exh. 30) served in May to which answers were made on June 5. The Court finds that the First Request for Production did not ask for these documents (Defendant's Exh. 23). Defendants contend they have now produced all responsive documents, albeit not on June 5.

3. Financial statements were not produced, even though they existed. Plaintiff's Exh. 36.

4. Other examples were given where Plaintiff accuses Defendants of lying about documents. Those situations are discussed below.

Parties are required to attempt to work out discovery issues before presenting them to the Court. TRCP 191.2. The Court finds that Defendants have failed to produce documents timely, instead doing so in a tactical way. However, the Court also finds that Defendants have produced the requested documents (to the extent they haven't been destroyed) after efforts by the parties to work out their differences.

*Destroying Documents.* Although no direct evidence was presented about this, Plaintiff's counsel represented to the Court that his client hired an investigator to search

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[4] "Exhibit A" refers to the attachment to the Temporary Injunction listing the customers which Defendants were forbidden from contacting.



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XL's trash for documents. This process has yielded documents that, when confronted with them, Defendants admit not producing. The most prominent example of this is Deposition Exhibit 29 to Plaintiff's Exhibit 11 (Persad Deposition). This document was not previously produced. It supports an argument that Defendants are attempting an "end run" around the Temporary Injunction by doing business with a nominally different company which is really an affiliate or d/b/a of an Exhibit A company.

Additionally, Defendant Persad admitted to destroying documents such as e-mails from a friend who is employed by an Exhibit A company which Persad claims were just "jokes." Of course, having destroyed these e-mails, it then becomes impossible for anyone else to determine whether they were "just jokes" or something more. This destruction of a communication with an Exhibit A company becomes more significant in light of the fact that the "friend" who is sending the "jokes" is Doyle Meredith. Persad Deposition, Plantiff's Exh. 11, p. 247, l.22. Doyle Meredith is the person to whom Persad allegedly paid kickbacks; those alleged kickbacks, in turn, are part of the basis for Defendants' counterclaim for fraud. Persad Deposition, Plaintiff's Exh. 11, p. 238-39; Defendants' Second Amended Original Answer, Counterclaim and Third Party Petition (filed 6/20/03), p. 6. Destruction of e-mails from such a person cannot be considered "innocent" under the facts and circumstances of this case.

Plaintiff Exhibits 41 and 46[5] present a situation where Plaintiff accuses Defendants of destroying documents, while Defendants contend the document was lost through an innocent mistake. The Court is reluctant to conclude that a member of the Bar

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[5] The Court grants Plaintiff's Motion to Supplement with Exhibit 46.



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has intentionally destroyed documents without some evidence of such intentional conduct. This situation, however, where relevant documents are not produced and are "lost" in the hands of counsel, is unacceptable.

*Testimony about Documents.* Plaintiff accuses Defendants of lying, focusing on Persad's testimony regarding contacts with customers and his representation that document production was "complete." The Court finds that Persad has been dishonest in his statements about customer contacts. However, the Court finds that Persad was only one person involved in the document production. Without evidence that Persad knew the document production was incomplete or that he was the one responsible for insuring its completeness, the Court will not personally sanction Persad for the problems with the document production.

*Jason Sweet.* While Mr. Sweet is clearly responsible for overseeing activities at XL, including activities relating to the production/withholding of documents, there is virtually no evidence of his involvement in an individual capacity in the matters sought to be sanctioned. The only specific example regarding Mr. Sweet is the testimony about whether or not an employment agreement was prepared for Mr. Persad during the Inkjet/Frontier negotiations. Sweet Depo., Plaintiff's Exh. 8, pgs. 96-97. Mr. Sweet indicated that they "never got that far" (regarding a covenant not to compete) in the drafting of the agreement, but, many months later, Defendants produced a draft employment agreement that did get "that far." Plaintiff's Exh. 12.

No evidence was presented regarding the degree of Sweet's involvement in preparation of or discussions regarding Plaintiff's Exhibit 12. The Court does not condone



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the tactical production of this document or any mischaracterization of it by Sweet; however, the evidence of Sweet's individual conduct is not sufficient to impose sanctions upon Sweet personally.

*Raj Persad and XL.* The evidence demonstrates that Persad has personally been involved in deceitful conduct, failure to answer deposition questions and destruction of documents. XL has been involved in deceitful conduct, destruction of documents, failing to answer deposition questions and production of documents in an untimely, tactical manner. The Court concludes that Sweet should not be personally sanctioned for the discovery conduct alleged in the three motions for sanctions, but that XL and Persad should be sanctioned.

*Sanctions.* Plaintiff seeks "death penalty" sanctions. The Court considers that any sanction under Texas Rule of Civil Procedure 215.2(b) is a "lesser-included" sanction under such a request. The Court concludes that it can and, in fact, must consider whether lesser sanctions are appropriate or whether "death penalty" sanctions are necessary. At the July 10 hearing, the Court also heard argument and discussion about whether a spoliation presumption and instruction would be appropriate. While arguing that the evidence does not support a spoliation presumption/instruction, Defendants' counsel conceded that such a presumption/instruction was a sanction the Court could consider under the motions presented. *See also* TRCP 215.2(b)(3) & (4). The Court will consider all appropriate sanctions.

It is well-settled that "death penalty" sanctions are a last resort used to punish egregious conduct. *See, e.g., TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913



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(Tex. 1991); *Braden v. Downey*, 811 S.W.2d 922 (Tex. 1991). The trial court is required to make sure the punishment fits the crime, no more and no less. *Powell*, 811 S.W.2d at 917.[6] "The legitimate purposes of discovery sanctions are threefold: (1) to secure compliance with discovery rules; (2) to deter other litigants from similar misconduct; and (3) to punish violators." *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992).

The Court finds that Defendants XL and Persad have engaged in gamesmanship and discovery abuse designed to increase the cost of litigation and make presentation of the merits more difficult. The Court agrees with Plaintiff that the destruction of evidence and continued pattern of aggressively and creatively construing court orders suggest something more egregious than mere negligent mistakes.

The Court disagrees with Defendants' "no harm, no foul" analysis in their July 15 Response. Deceitful conduct and destruction of documents go to the very core of the litigation process. Defendants' argument misses the very problem inherent in document destruction: Plaintiff has to take Defendants' word for what is lost.

On the other hand, Defendants correctly point out that this case does not involve a complete failure to participate in discovery. Nor does it present a situation where the Plaintiff is simply unable to prove its case due to Defendants' conduct. Defendants have produced a number of documents and given many pages of actual answers to deposition

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[6] *Powell* also requires that the Court inquire whether the party, counsel or both is at fault. 811 S.W.2d at 917. Plaintiff has not sought sanctions against counsel in this motion. The Court finds that the conduct being sanctioned was known to and committed in participation with the parties being sanctioned. Accordingly, this is not a situation where sanctions are being visited upon an innocent client due to unknown wrongful acts of his attorney.



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questions. Plaintiff has not previously sought discovery orders from the Court.

Considering all relevant evidence and the relevant case law, the Court finds that Defendants' conduct was wrongful, but it does not rise to the level that allows "death penalty" sanctions without first utilizing lesser sanctions. The Court will now examine those sanctions.

Plaintiff has been put to unnecessary expense in bringing and prosecuting this motion and the underlying discovery. The Court will grant Plaintiff those expenses, including attorneys' fees. TRCP 215.1(d); TRCP 215.2(b)(2). If the parties cannot agree on the amount of same, they should set a hearing to determine the amount.

With respect to the deposition testimony as to which there was an instruction not to answer, the Court finds that the witnesses should be compelled to answer the questions described above together with reasonable follow up not to exceed one hour per witness. This hour per witness is in addition to the time allowed under the Texas Rules of Civil Procedure for each witness deposition and the total time for depositions.

With respect to the document production and destruction issues, TRCP 215.2(b)(3) & (4) state: "[Upon proof of sanctionable conduct,] the court in which the action is pending may . . . make such orders in regard to the failure as are just, and among others the following: (3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence . . . ." Where evidence has been destroyed, "[a]



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trial judge should have discretion to fashion an appropriate remedy to restore the parties to a rough approximation of their positions if all evidence were available." *Wal-Mart Stores, Inc. v. Johnson*, 2003 Tex. LEXIS 62 at p. 4 (Tex. May 22, 2003).

Defendants are ordered to produce all responsive documents to Plaintiff's First and Second Requests for Production, save only those documents protected by the attorney-client privilege. All documents withheld for privilege must be described on a privilege log except for documents created on or after January 23, 2003 and which are (1) communications between counsel[7] for Defendants and Defendants; (2) communications among counsel for Defendants; or (3) notes of, trial/pretrial preparation materials prepared by or research memos of counsel. Any documents responsive to any of Plaintiff's discovery requests which have been destroyed for any reason must be specifically listed on a log by date, sender/recipient(s) of the document and subject matter. If same cannot be done with precision, the destroying person must state in writing under oath the best description he/she can give of the destroyed documents. If e-mails have been discarded but can be retrieved by means of expert analysis of the hard drive or similar technique, same must be done. Compliance with this portion of the order must be completed within two weeks of the date of this order, and Defendant XL shall bear the expense of the production and any hard drive restoration. Except as required by this section of the order, Plaintiff's request for a forensic analysis is denied without prejudice.

Case law has suggested that a spoliation presumption/instruction is

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[7] "Counsel" includes employees of the attorney's law firm acting at his/her request or direction.



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appropriate only where there is a duty to preserve evidence which is breached to the detriment of the non-destroying party. *Trevino v. Ortega*, 969 S.W.2d 950, 957-58 (Tex. 1998)(Baker, concurring). Unlike the situation in *Wal-Mart v. Johnson* which held that there is no duty to preserve evidence where litigation was not reasonably anticipated, the Court finds that after this lawsuit was filed, the parties had a duty to preserve evidence. *Cf. Wal-Mart Stores, Inc. v. Johnson*, 2003 Tex. LEXIS 62 at p. 4 (Tex. May 22, 2003). The document destruction in this case has taken place while "bet the company" litigation was *ongoing*.

XL and Persad failed to take reasonable steps to ensure that any documents deleted from the system under the Temporary Injunction were preserved by giving copies to their counsel as contemplated by the Temporary Injunction order. Persad has engaged in e-mail conversations with a material witness without preserving same. Defendants admit that some documents (*see* Deposition Exh. 29 to Plaintiff's Exh. 11) have been thrown away which directly bear upon inappropriate customer contacts. Accordingly, Defendants have breached the duty to preserve evidence.

Finally, the damage to Plaintiff is great because Defendants contend that the documents "don't matter," and Plaintiff has no independent basis on which to contradict the "no harm, no foul" defense. *See Trevino v. Ortega*, 969 S.W.2d 950, 957-58 (Tex. 1998)(Baker, concurring); *see also Wal-Mart Stores, Inc. v. Johnson*, 2003 Tex. LEXIS 62 at p. 4 (Tex. May 22, 2003)(spoliation instruction used for deliberate destruction of relevant evidence).

The Court is required to fashion a sanction that best remedies the harm. In



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addition to the sanctions described above, a spoliation instruction best remedies the harm caused by the continuing destruction of evidence and deceitful conduct without destroying Defendants' ability to defend the case on the merits. Because Defendants' conduct has not completely eliminated Plaintiff's ability to present its case and defend against the counterclaims, the Court concludes that an adverse presumption instruction is appropriate. *Trevino*, 969 S.W.2d at 960 (Baker, concurring). Accordingly, at the civil trial[8] on the merits, the Court will give the jury an instruction in substantially the following form: "With respect to any destruction of documents by XL or Persad, you are instructed that the deliberate destruction of evidence gives rise to the presumption that the matter destroyed is not favorable to the defendant destroying same." *See H.E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 344 (Tex. Civ. App. – Waco 1975, writ dism'd by agr.).

All other requested sanctions are denied without prejudice to their reurgence if further discovery abuse occurs. The motion for continuance will be addressed at a later date. The clerk of the court is directed to send a copy of this order to all counsel of record.

SIGNED this 17th day of July, 2003.

JUDGE PRESIDING

cc: Patrick Strauss, via fax 214.922.4142
John Eichman, via fax 214.855.4300
Andrew Chatham, via fax 214.468.0994

[8] Due to the different standards of proof and due process concerns in a criminal case, the Court declines to indulge a spoliation presumption at the criminal contempt hearing scheduled for July 21 or any similar criminal hearing. The evidence regarding document destruction can be presented as part of the evidence in that case.



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CAUSE NO. 99-3622

| | | |
|---|---|---|
| NAVEEN KASHYAP<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| MIKE MOSES et al.<br>Defendants. | ) | 191st JUDICIAL DISTRICT |

OPINION ON ADMINISTRATIVE APPEAL

Before the Court on this day is Plaintiff's appeal of the Commissioner of Education's affirmance of the Dallas Independent School District Board's adoption of the hearing examiner's findings of fact regarding Plaintiff's conduct as a teacher and the School Board's subsequent discipline of Plaintiff. Specifically, Plaintiff was found to have changed student test answers and was suspended as a result. The Court will address Plaintiff's grounds for review in the order they are set forth in the Plaintiff's Verified First Amended Petition and Application for Temporary Restraining Order, pages 3-4.

*Substantial Evidence.* Plaintiff challenges the factual finding that she changed test scores. She alleges that the witnesses who testified that she changed test scores are not credible and that other, credible witnesses testified that she did not change test scores. She argues the motivations of the accusing students and the principal who originally brought forth the disciplinary action.

All parties agree that this appeal from the administrative agency is governed by the "substantial evidence" review standard. Under this standard, this Court, as the reviewing court, is not permitted to substitute its judgment for that of the hearing officer.



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*Montgomery Independent School District v. Davis*, 34 S.W.3d 559, 565 (Tex. 2000). This Court is not permitted to re-weigh witnesses' credibility to arrive at a different conclusion on the facts than that of the hearing officer. *Id.*

The evidence in this case was contradictory and conflicting. Towanna W. and Tiffany W. testified clearly and positively that Plaintiff changed test answers. Plaintiff and other students contradicted this testimony. The resolution of this conflicting testimony and the determination of each witness's credibility was for the hearing officer, not this court. The Court finds that the hearing examiner's findings and their adoption by the Commissioner are supported by substantial evidence as that standard has been defined by the case law.

*Punishment.* Plaintiff also challenges the punishment she received: suspension without pay for the remainder of the 1998-99 school year. Having accepted the hearing examiner's finding of fact that test answers were changed, the punishment is within the School Board's discretion. Changing test answers is a very serious offense. The Court finds that suspension without pay for less than a year is not an arbitrary or unreasonable punishment for such an offense.

*Spoliation.* Plaintiff asserts that the destruction of the test sheets in question mandates a presumption against the School Board that, as a matter of law, Plaintiff did not change the answers. The hearing examiner found that the test sheets were destroyed, but he found that this was done in the ordinary course of business and was not "specifically intended to thwart the aims of justice." Plaintiff has cited no authority for the proposition that the non-spoliating party is entitled to win as a matter of law because of the destruction of relevant documents in the ordinary course of business. To the extent that this conduct



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should have been sanctioned, it was within the hearing examiner's discretion to determine the sanction. He did so by granting Plaintiff's (then Respondent's) motion to strike evidence proffered by the DISD. The Court finds nothing arbitrary or unreasonable in this conduct and nothing mandates an irrebuttable presumption against DISD.

*Due Process.* The Court has specifically reserved the question as to whether causes of action based upon alleged constitutional violations survive this appeal and whether they may be asserted as independent causes of action. As such, the Court will address constitutional concerns only as they relate to the appeal of the administrative action and not as they may exist independently of the administrative review process.

The Court finds that Plaintiff was allowed to present a number of witnesses and evidence. She was represented by counsel. The hearing examiner considered evidence that now comprises several volumes of the record. With respect to the alleged irregularities concerning the hearing examiner himself, the Court finds that the Commissioner's decision in this regard was supported by substantial evidence and that any known irregularities not brought to the Commissioner's attention were waived.

*Discrimination.* Points 5 and 6 of the "scope of review" issues set forth in the First Amended Petition both concern charges of discrimination by DISD against Plaintiff. The Commissioner found as follows: "there is no requirement that findings concerning an issue not relied upon by the board must be included in the board's decision. In fact, the Decision finds that Petitioner [Plaintiff] did change students' answer sheets. The board did not take action against Petitioner's contract because of her race or national origin but because she tried to raise her students' scores through cheating." The Court finds that this conclusion



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418

was supported by substantial evidence, without prejudice to addressing any remaining independent causes of action in this case that may be based upon unlawful discrimination.

As a result of the foregoing, the Court has determined to affirm the May 6, 1999 decision of the Commissioner of Education affirming Plaintiff's suspension without pay. A hearing to determine whether any independent causes of action remain in this case and, if so, how those causes should be proceed is set for August 24, 2001 at 10:30 a.m. Any party desiring to file a brief in the independent cause of action issue should file such brief such that it reaches the deputy district clerk of the 191st District Court no later than August 10, 2001. Replies to such briefs, if any, shall be filed such that they reach such deputy district clerk no later than August 14, 2001.

The clerk of the court is directed to send a copy of this order to all counsel of record.

SIGNED this 25th day of July, 2001.

JUDGE PRESIDING

cc: Counsel of Record



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CAUSE NO. 99-03622

| | | |
|---|---|---|
| NAVEEN KASHYAP, | § | IN THE DISTRICT COURT |
| Plaintiff, | § | |
| vs. | § | |
| MIKE MOSES, Commissioner of Education for the State of Texas, | § | |
| and | § | |
| DALLAS INDEPENDENT SCHOOL DISTRICT, | § | DALLAS COUNTY, TEXAS |
| and | § | |
| BOARD OF TRUSTEES OF DALLAS INDEPENDENT SCHOOL DISTRICT, | § | |
| and | § | |
| ROBERT PAYTON, | § | |
| Defendants. | § | 191ST JUDICIAL DISTRICT |

Final ORDER OF DISMISSAL

CAME ON for hearing the above-entitled and numbered cause, and the parties stated to the Court that all matters in controversy have been settled and agreed upon, and that this lawsuit should be dismissed with prejudice.

IT IS, ACCORDINGLY, ORDERED that this cause be, and the same hereby is, dismissed with prejudice. Costs taxed against the party incurring same.

SIGNED this 22nd day of February 2002.

JUDGE PRESIDING

ORDER OF DISMISSAL Sole Page

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CAUSE NO. 96-7329

| | | |
|---|---|---|
| PATRICIA PETERSON<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| CONLEY-LOTT-NICHOLS<br>Defendant. | ) | 191st JUDICIAL DISTRICT |

OPINION

Before the Court on this day are the parties' various posttrial motions, including Plaintiff's motion for judgment. The Court has signed the judgment in the form found by the Court to be a proper rendition based upon rulings previously made either orally on the record or in writing and the jury's verdict. A few matters have been argued by the parties which require further discussion by the Court and which are addressed herein.

*Election of Remedies.* The Court has found that Plaintiff is required to elect among the overlapping theories of recovery espoused in this case under longstanding authority, including *Town East Ford Sales, Inc. v. Gray*, 730 S.W.2d 796, 811 (Tex. App. -- Dallas 1987, no writ); *Star Houston, Inc. v. Shewack*, 886 S.W.2d 414, 422 (Tex. App. -- Houston [1st Dist.] 1994). *See also Hargrove v. Trinity Universal Ins. Co.*, 256 S.W.2d 73, 75 (Tex. 1953). Where a party seeks redress under two or more theories of recovery for a single wrong, the party must select which remedy she wishes before entry of judgment. *Id.* Plaintiff has argued that different "wrongs" underlaid each of the theories asserted. However, the Court finds that the evidence with respect to each theory was overlapping and cumulative, thus, the Court finds that Plaintiff must choose her theory of recovery.

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271

Plaintiff also argued that Defendant was required to plead the doctrine of election of remedies. The Court does not agree; nevertheless, if it is required to be pleaded, the Court finds no surprise to Plaintiff. Defendant moved for summary judgment, claiming the THRCA was the exclusive remedy for the wrongs claimed. At the hearing, the Court found that the THRCA did not pre-empt common law remedies, but the Court clearly stated that Plaintiff would be required to elect a theory of recovery. Thus, the Court finds that Plaintiff is not surprised by the assertion of this point such that a trial amendment is appropriate even if proper pleading is required.

In order to allow for an efficient appellate process regarding the Court's decision herein, the Court agreed to make "alternative findings" regarding damages in the event that a higher court finds the precedents upon which this Court relies inapposite or overrules same. In making these alternative findings (attached as Exhibit A), the Court in no way suggests that it believes its ruling above to be incorrect.

*THRCA Cap.* Defendant asserts that damages under the THRCA should be capped at $50,000, because it employs 51-100 people.[1] The Court finds that this is an affirmative defense which must be pleaded and proved. No jury issue was submitted on this point, so the Court must determine whether this fact was "conclusively proven" under TRCP 279. Defendant points to the testimony of Dana Meador and the EEOC form filed by Plaintiff (Plaintiff's Exhibit 55). The Court finds that this evidence is *some* evidence of the applicability of the cap but not *conclusive* evidence. Accordingly, the Court declines to

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[1] The Court notes Plaintiff's alternative request for judgment -- if the Court finds that the THRCA cap applies, then Plaintiff would elect recovery under the intentional infliction of emotional distress count.



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impose the cap.

*Prejudgment Interest.* The parties disagree as to whether prejudgment interest is allowed on the causes of action asserted herein. The Court requested briefing on the recent case of *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507 (Tex. 1998) and its applicability here. Under that case, the Court finds that equitable prejudgment interest is awarded in a similar fashion to statutory prejudgment interest. Thus, whether or not the statute is met, equitable prejudgment interest may be awarded at the rate of 10% per annum, simple interest, from the date suit was filed (no earlier date having been proved herein). No case has been cited denying recovery of prejudgment interest in this context, and the Court can find no reason to decline to award equitable prejudgment interest under *Johnson & Higgins*.

*Punitive Damages.* Defendant suggests that too low a standard was applied to the award of punitive damages. However, the Court has reviewed the questions submitted to the jury and finds that the jury was properly charged on the question of punitive damages and that no proper objections to that portion of the charge were overruled. The question then becomes whether the award of punitive damages was supported by the evidence and whether the award was excessive.

The evidence, viewed in a light most favorably to the verdict, was that Plaintiff was subjected to repeated and unwelcome touchings, comments and conduct on the part of senior managers of the company. Additionally, Plaintiff was subjected to an actual attack by the Defendant's general manager on company premises. Defendant has raised the issue of whether such conduct by the Defendant's managerial employees could subject the Defendant



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to liability as the Defendant claims it was outside the scope of the employees' job duties. However, the jury could reasonably infer from the evidence that Robert Nichols, president of the company, closed his eyes to the conduct because he did not want to "rock the boat" with respect to these valued employees who were profitable for the company. Thus, the jury could conclude that the company benefitted by keeping these employees happy to the severe detriment of other employees.

Allowing employees to be subjected to repeated touchings and unwelcome remarks, as well as physical assaults, in order to maintain company profitability is the sort of conduct that constitutes conscious indifference and/or reckless indifference as defined by the law. While the jury could have rejected the evidence supporting punitive damages, it did not do so. The trial judge cannot substitute its own view of the facts in place of that of the jury.

With respect to whether the award was excessive, the Court finds it was not. It was less than the amount of actual damages awarded and certainly bore a reasonable relationship both to the alleged misconduct and the net worth of the defendant. Accordingly, the Court declines to set aside the punitive damages verdict.

The clerk of this court is directed to send this opinion to counsel for Plaintiff who shall, in turn, immediately forward a copy of this order to all other counsel of record and pro se parties by facsimile or hand delivery.

SIGNED this 13th day of July, 1999.

Carlton Kaye

JUDGE PRESIDING

cc: Plaintiff's Counsel of Record



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274

**EXHIBIT A**
**(Adopted by reference)**



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NO. 96-07329-J

| | | |
|---|---|---|
| PATRICIA PETERSON | ) | IN THE DISTRICT COURT OF |
| | ) | |
| Plaintiff, | ) | |
| | ) | DALLAS COUNTY, TEXAS |
| VS. | ) | |
| | FILED | |
| CONLEY, LOTT, NICHOLS MACHINERY CO., AND W. ROBERT NICHOLS, III | JUL. [illegible] | 191ST JUDICIAL DISTRICT |
| Defendants. | | |

THE COURT'S ALTERNATIVE FINDINGS AND CONCLUSIONS

Upon Motion by Plaintiff the Court hereby makes the following findings of fact and conclusions of law in the alternative to the Court's Final Judgment entered herein:

I.

In the event the Court's ruling herein that Plaintiff is entitled to judgment upon only one of the three claims which the jury found in Plaintiff's favor shall be reversed, and Plaintiff shall be found to be entitled to judgment on the highest nonduplicative damage findings by the jury for each of the three claims found in Plaintiff's favor by the jury, then the judgment shall include the following amounts, which the Court finds to be nonduplicative:

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| CLAIM | INTENTIONAL INFLICTION | SEXUAL HARASSMENT-HOSTILE ENVIRONMENT | NEGLIGENCE |
|---|---|---|---|
| Past Mental Anguish | | | |
| Past Physical Pain and Mental Anguish | | | $ 90,000 |
| Future Mental Anguish | -0- | | |
| Future Physical Pain and Mental Anguish | | | -0- |
| Past Damage to Earnings Capacity | | | -0- |
| Future Damage to Earnings Capacity | 110,500 | | |
| Back Pay | | 28,000 | |
| Compensatory Damages | | | |
| Past Psychological Care | | | -0- |
| Future Psychological Care | | | 2,340 |
| TOTAL ACTUAL DAMAGES | $110,500 | $ 28,000 | $ 92,340 |

plus attorneys' fees of $85,000, expert fees of $5,860, punitive damages of $50,000 and prejudgment interest on past physical pain and mental anguish.

II.

In the event that the Court's Final Judgment entered herein shall be reversed with respect to Plaintiff's TCHRA claim, then the Court finds in the alternative that



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277

Plaintiff shall be entitled to judgment on the higher of the Intentional Infliction of Emotional Distress or Negligent Retention claim in the following amounts:

| CLAIM | INTENTIONAL INFLICTION | NEGLIGENCE |
|---|---|---|
| Past Mental Anguish | $ 13,000 | |
| Past Physical Pain and Mental Anguish | | $ 90,000 |
| Future Mental Anguish | -0- | |
| Future Physical Pain and Mental Anguish | | -0- |
| Past Damage to Earnings Capacity | 28,000 | -0- |
| Future Damage to Earnings Capacity | 110,500 | 37,500 |
| Back Pay | | |
| Compensatory Damages | | |
| Past Psychological Care | | -0- |
| Future Psychological Care | | 2,340 |
| TOTAL ACTUAL DAMAGES | $151,500 | $129,840 |

plus, in either case, punitive damages of $50,000, and prejudgment interest on $13,000 of past mental anguish on the Intentional Infliction claim and on $90,000 of past physical pain and mental anguish as to the Negligent Retention claim.



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SIGNED as of the _____ day of _____, 1999.

_____
DISTRICT JUDGE

[illegible]

7-14-99 morning at nine (9) o'clock.
Court met pursuant to adjournment

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CAUSE NO. 98-06478

| | | |
|---|---|---|
| STACY SOILEAU, Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| TEXAS WORKFORCE COMM. and SOUTHWEST AIRLINES, Defendants. | ) | 191st JUDICIAL DISTRICT |

FINAL ORDER DISMISSING APPEAL FOR WANT OF JURISDICTION

Before the Court are Defendants' Pleas to the Jurisdiction raising the question of whether Plaintiff timely filed her appeal to this court of the Findings and Decisions of the Texas Workforce Commission in her claim for unemployment benefits. The pleas were heard on February 24, 1999 before this Court and the parties were ordered to file any further briefing addressing the pleas by March 8, 1999

The Court has carefully reviewed the briefing and evidence submitted by the parties as well as the oral argument of counsel. The Court has reviewed the authorities cited. It appears to the Court that the statutory construction authorities cited by Plaintiff are inapposite as they deal with statutes where the dates begin to run from the date a party is "notified." No such provision appears in the two statutes at issue here -- Texas Labor Code §§ 212.153 and 212.201. The former statute makes the commission decision final fourteen days "after the date the decision is mailed." No evidence has been proffered to show that the decision was mailed on any date other than the one stamped on the decision -- July 21, 1998. The affidavit of Plaintiff's counsel states that *he* obtained the decision on July 27, 1998, but does not state the date his client received it. In any event, Section 212.153 says nothing about the date someone is notified, only the date of

mailing. Section 212.201 then requires an appeal to the district court by 14 days after the date the decision became final -- August 18, 1998 in this case. The Court's file shows this appeal was filed on August 19, 1998. Once again, Section 212.201 states nothing about when a party was notified.

The *Albertson's* case attached to Plaintiff's brief is similarly inapposite. That case addressed mandatory notice to TWCC of a timely filed appeal to the district court. The Court held that this mandatory notice provision was not jurisdictional. The Court did not address the effect of the failure to file in the district court within 40 days -- which would be the analogous situation to ours. Indeed, the Court's opinion reflects that the appeal to the district court was timely filed. Filing deadlines for appeals are generally jurisdictional, while notice provisions often are not.

Plaintiff also attacks the appellate scheme as unconstitutional. There may be circumstances where such an attack would be well-taken. However, in this case, by Plaintiff's own admission, her counsel had the decision of the commission in hand for 22 days before an appeal would be due and for the entire 14 day period for appealing contemplated by Section 212.201. Under this circumstance, it cannot be said that Plaintiff's remedy was rendered illusory by a lack of notice or that the alleged delay in receipt of the notice from the commission made it impossible or impracticable to file a timely appeal.

For the foregoing reasons, as well as those stated in the briefs of Defendants, the Court finds that it lacks jurisdiction to hear this appeal. Accordingly,

IT IS ORDERED that this case is dismissed for want of jurisdiction.

All costs are taxed against the party incurring same.

The clerk of this court is directed to send this order to a counsel of record for each party.

This is a FINAL order.

SIGNED this 15th day of March, 1999.

JUDGE PRESIDING

cc: All Counsel of Record

CAUSE NO. 97-10408 365 129

| | | |
|---|---|---|
| CITY OF DALLAS,<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| STEVEN O'BRIEN,<br>Defendant. | ) | 191st JUDICIAL DISTRICT |

OPINION

*Procedural Background*

On June 20, 1996, Officer Steven O'Brien ("O'Brien") was among several officers assigned to pursue one Roy Trujillo, Jr., who was a suspect in the kidnapping of two children. Mr. Trujillo was reported to be armed and dangerous. O'Brien ultimately apprehended Mr. Trujillo after an extended chase in which numerous law enforcement personnel participated. Much of the chase was apparently captured on videotape by a news station. During the course of Mr. Trujillo's apprehension, O'Brien was alleged to have told a private citizen (Gerald Rouse), whom he enlisted in aid of the apprehension, to run over Mr. Trujillo. O'Brien ultimately caught up with Mr. Trujillo in the woods, shot him in the leg and thereafter handcuffed him and struck him These latter events took place when O'Brien and Mr. Trujillo were alone.

As a result of these actions, O'Brien was charged by the department with violating the following sections of the Dallas Police Department Code of Conduct: Chapter IV. Section 4.3(relating to conduct which has a tendency to adversely affect public respect and confidence in the department); Chapter IV. Section 4.10 (prohibiting unnecessary force);



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00763 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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and Chapter IV. Section 6.6 (requiring that only necessary force be used in effecting an arrest and maintaining custody of a suspect). Based upon an investigation and finding that O'Brien violated these sections, the department terminated O'Brien as a Dallas police officer. The termination was upheld by the City Manager.

O'Brien appealed the termination to the Civil Service Department which referred the matter to Administrative Law Judge (ALJ) Gerald Grissom. No party challenges ALJ Grissom's authority to review both O'Brien's guilt as to the violations and the punishment assessed. During the course of the administrative hearing, the City repeatedly asserted that the Section 4.3 violation was based upon the alleged remarks to Mr. Rouse and that the Sections 4.10 and 6.6 violations were based solely upon O'Brien's conduct after shooting Mr. Trujillo and handcuffing him; i.e., the actual shooting was not the subject of the disciplinary action.

On January 27, 1997, ALJ Grissom answered the tendered questions regarding the violations. ALJ Grissom found that O'Brien did not violate Section 4.3 but did violate Sections 4.10 and 6.6. However, on March 12, 1997, after conducting a hearing on punishment, he found that the punishment of termination was excessive and, instead, found that a six month suspension, coupled with a period of probation and psychological counseling was an appropriate sanction.

On November 20, 1997, the City appealed ALJ Grissom's decision to this Court. No party has contested the Court's jurisdiction to consider this matter.[1] The City filed

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[1] Section 34-40(o) of the Dallas City Code provides that an ALJ's decision becomes final if not appealed to the district court "within one year." The Court finds that this case was filed "within one year" of the ALJ decision.



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the transcript of the administrative hearing with this Court. No meaningful action took place in this case thereafter until O'Brien's attorney moved for summary judgment. On February 5, 1999, the parties appeared through their counsel for the hearing on the summary judgment motion. Counsel for the City objected to using the summary judgment procedure in this case where the district court is functioning, in effect, as an appellate court. The parties agreed to file motions to affirm or reverse and appropriate briefing pursuant to a briefing schedule established by the Court and agreed upon by the parties. The parties further agreed that no further oral hearing would be necessary, unless requested by the Court.

After reviewing the parties' briefs filed in accordance with the briefing schedule, the Court determined that a full review of the administrative hearing transcript was necessary to a determination of this case. The Court has, in fact, read the entire transcript. The Court also finds that the parties agree, and the law provides, that this case is governed by the "substantial evidence" review process outlined in the Administrative Procedure Act (found at Govt. Code Sect. 2001.174).[2]

*Facts*

O'Brien seeks affirmance of the entire ruling of the ALJ and does not, apparently, contest the discipline imposed by the ALJ. The City contests both the lack of affirmance on the Section 4.3 charge and the imposition of a sanction less than termination on the Sections 4.10 and 6.6 charges upheld by the ALJ.

Section 4.3: Although the City now appears to be arguing that any

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[2] Additionally, Dallas City Code Section 34-40(o) provides that the district court's review is limited to the "record of the hearing."



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inappropriate force necessarily has a tendency to discredit the department in the eyes of the public, at the administrative hearing, the City focused its Section 4.3 arguments on the statements made by O'Brien to Mr. Rouse. The only witnesses to O'Brien's comments were Mr. Rouse and O'Brien himself. The testimony of these two witnesses disagreed as to the exact words used by O'Brien, but both agreed that O'Brien did not intend for Mr. Rouse to actually run over Mr. Trujillo. Mr. Rouse also testified that nothing O'Brien said or did lowered his respect for the police department.

Sections 4.10 and 6.6: Both the question of whether O'Brien's actions after handcuffing Mr. Trujillo constituted inappropriate force and the question of whether such conduct warranted termination in this case were the subject of a great deal of testimony, much of it conflicting.

For example, on the question of whether or not the force was inappropriate, Detective Lumbley, who was involved with the search effort for Mr. Trujillo indicated that this search was a "serious manhunt" involving over 100 officers and the FBI. The officers involved in the manhunt were aware that Mr. Trujillo was a "hardened criminal" said to be armed, dangerous and in possession of two innocent children. Detective Lumbley also indicated that handcuffing a suspect does not end the threat to the officer. Sergeant Melba Martinez, O'Brien's direct supervisor, indicated that she recommended termination only at the behest of her chain of command. She did not think O'Brien's conduct was inappropriate, but, if it was, she believed a 30 day suspension was more appropriate. O'Brien indicated that all of his actions were taken in an effort to apprehend the suspect, secure the safety of the two children, and provide for his own safety.



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On the other hand, Detective Cadena concluded that O'Brien's actions in, for example, straddling the suspect, did not demonstrate a fear of a continuing threat after the suspect was shot and handcuffed. He agreed, however, that a suspect can continue to be dangerous even after being handcuffed. O'Brien's expert witness, Tim Powers, explained that straddling a suspect doesn't show that the officer doesn't think he's in danger. He believed it was more a "reflexive action."

The administrative hearing was conducted in two phases. The first phase determined whether O'Brien violated the sections in question. The second phase determined punishment. During the second phase, a number of witnesses testified, again with conflicting viewpoints. Lieutenant Grayson and Chief Price, who were in the "chain of command" which recommended termination testified that they believed termination was appropriate primarily because they believed it was a serious incident and because O'Brien attempted to justify his actions rather than "admit he lost it." Both witnesses agreed that they did not consider O'Brien's previous service record (prior to this incident, he performed "exceptionally well") nor did they compare his conduct on this occasion with that of other officers who had received lesser punishments for inappropriate force violations. Chief Price indicated he was not familiar with what was taught at the academy, but that striking a handcuffed individual who had been shot was inappropriate. He was only aware of one previous termination for excessive force. He denied that the publicity and community pressure surrounding this incident influenced his opinion.

Mr. Trujillo, his father and a member of the community who testified at Mr. Trujillo's father's request all agreed that termination was appropriate. Mr. Trujillo's father



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00767 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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opined that O'Brien crossed the line when he became "judge and executioner."

On the other hand, O'Brien testified that he had received no more than a written reprimand for previous minor infractions. He had received over 20 commendations, including one from a sergeant for this incident (though that commendation "did not go up the chain of command"). He indicated that he had "learned a lot" from this incident and would, in future occasions if reinstated, "step back" and wait for a physical resistance rather than his "perception" of resisting before exerting any force. He now understands that you must do what is right and also what is perceived as right.

Sergeants Martinez and Derr who had supervised O'Brien in the past believed that if he were reinstated, he would be a good officer. As stated above, Sgt. Martinez indicated that a thirty day suspension would be appropriate, not termination. Sr. Corporals Cato and Moore concurred that O'Brien was a good officer. Sr. Corporal Cato indicated that he did not think termination was appropriate. Sergeant DeCorte, who handled the grand jury proceedings arising from this event (in which O'Brien was no-billed), believed that this was a situation where things "looked worse than they were." Roy Honeycutt, a police review board member, indicated that his initial reaction to the videotape was much worse than his reaction after studying it in slow motion. He has seen many excessive force cases and feels this is not a situation warranting termination. A Department of Defense investigator, Jesse Gonzales, who is also a personal friend of O'Brien, investigated whether any federal civil rights violations occurred. He found they did not. He also termed the punishment imposed as "way excessive."



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00768 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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The ALJ in this case was faced with the difficult task of addressing the delicate balance involved when police seek to apprehend suspects thought to be dangerous in order to protect public safety while insuring that police officers respect the rights of suspects and do not become "judge and executioner" in the heat of the moment. Under Section 2001 174, the district court, in reviewing the ALJ's determination, is not permitted to substitute its own view of the facts and its own judgment of what should be done for that of the ALJ. *Railroad Commission of Texas v. Torch Operating Co.*, 912 S.W.2d 790 (Tex. 1995). "The issue for the reviewing court is not whether the agency reached the correct conclusion, but rather whether there is some basis in the record for the action taken by the agency. . . . Substantial evidence requires only more than a mere scintilla." *Id.* at 792-93. Thus, even if more evidence supports a view other than the one taken by the ALJ, his determination may still be supported by "substantial evidence." *Id.*

This case presents one in which members of the police department in question do not themselves agree on the appropriateness of O'Brien's conduct and the severity of his punishment. The ALJ heard numerous witnesses and considered evidence in a transcript which consumed over five hundred pages. He had the opportunity to observe the demeanor of the witnesses and assess their credibility. Whether or not this Court would come to a different conclusion than that reached by ALJ Grissom is irrelevant. The Court finds that ALJ Grissom's findings were supported by substantial evidence, as that phrase has been defined and clarified by the decision cited above and those cited by counsel for the parties.



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*Conclusion* **136**

Accordingly, the decision of the ALJ should be affirmed.

The clerk of this court is directed to send this opinion to counsel for Defendant who shall, in turn, immediately forward a copy of this opinion to all other counsel of record by a method prescribed in Texas Rule of Civil Procedure 21a.

SIGNED this 23rd day of February, 1999.

JUDGE PRESIDING

cc: Michael Cronig



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December 3, 2002

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Re: *Pybas et al. v. Cigna Healthcare etc.*; Cause No. 01-2980

Counselors:

Before the Court is Defendant's Motion for JNOV, Plaintiff's Motion for Judgment and various other post-trial motions heard on October 16, 2002, and further briefed thereafter with permission of the Court. Limitations on the Court do not allow copying this letter on the many counsel who have appeared on behalf of the same party. This letter is being sent to two attorneys per side and each is directed to forward to all other interested counsel on their side. Constraints upon the Court also do not allow for a lengthy "opinion" on each point presented. The Court will address each jnov ground in turn; however, the fact that a ground for relief is not addressed does not mean it was not considered. Nor should absence of discussion of any ground supporting the Court's decision be taken as rejection of that ground. Any requested relief not discussed in this letter should be considered denied. The Court contemplates that this letter will give rise to an order in conformity therewith; this letter itself is not intended as an order or judgment.

**Defendant's Sept. 26, 2002 Motion for JNOV and Plaintiff's Oct. 11 Conditional Motion to Reopen**

JNOV Points 1-2 and Conditional Motion to Reopen (Standing Issues)

Both sides concede that any attack on any plaintiff's capacity to sue has been waived by the failure to raise this point by verified pleading prior to trial (or any other method pre-trial). Standing,

of course, goes to the Court's jurisdiction to hear matters and cannot be waived.

Plaintiff pleaded that Mrs. Pybas was suing individually and in a representative capacity, and no exceptions were filed thereto. The evidence presented at trial constitutes some evidence that Mrs. Pybas and Mrs. Denton have standing to bring this action. However, in an abundance of caution, the Court grants the conditional motion to reopen evidence and considers the evidence presented at the Oct. 16 hearing. That evidence demonstrates without question that Plaintiffs have standing.

Rule 270 prohibits reopening evidence on a "controversial" matter after the jury is discharged. However, the issues underlying standing do not become "controversial" just because Defendant seeks to make them controversial. The jury would not have been entitled to consider who(plaintiffs or the grandchildren) benefits from the Estate's recovery in determining the liability and damages questions in this case. The standing evidence presented during the trial and during the Rule 270 hearing does not present any relevant jury questions. Thus, the Court finds that the conditional motion should be granted and that Plaintiffs have standing to sue on their own behalf and on behalf of the Estate of Herschel Pybas.

The petition on file at the time of trial was adequate, so there is no need to amend or supplement same on the issue of standing and Plaintiffs' motion regarding same is denied as unnecessary. Defendant's post-trial request to amend its answer is denied.

JNOV Points 3-4 (alleged jury charge defects)

Defendant failed to object to the jury charge's purported omission of causation of death and use of the term "death" in Question 8. Defendant was given a full opportunity to object at the appropriate time – before the charge was read to the jury – and these objections are too late.

JNOV Points 7-8 (sufficiency of evidence of causation)

The evidence of causation is detailed at length in Plaintiff's briefings (*see, e.g.*, pp. 39-70 of Plaintiff's Oct. 11 Response). Some evidence of both cause in fact and proximate cause was presented. Resolution of any conflicts in the evidence was for the jury not this Court.

JNOV Points 9, 10, 12 & 13 (sufficiency of the evidence on liability issues)

The Court and the jury heard hours of testimony demonstrating Defendant's violations of the standard of care and inappropriate behavior in connection with the handling of Mr. Pybas's claim. More than a scintilla of evidence supports the answers to Questions 1 and 2.

JNOV Points 11, 14, 15 & 16[1] (sufficiency of the evidence on damages issues)

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[1] Defendant challenges the sufficiency of the evidence to support the jury's answer to Question 5, regarding damages to Shari Denton, even though this question was answered "0," which favors Defendant.



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Mr. Pybas was hospitalized for approximately a week following his January 22 release from the IHS facility. During that time, there is ample evidence he suffered both physical and mental pain, to the point of being afraid to go to sleep for fear he would never wake up. The Court has already found sufficient evidence that Defendant was a proximate cause of the harm to Mr. Pybas.

JNOV Points 5-6 & 17-19 (sufficiency of punitive damages evidence)

Question No. 6 asked the jury whether it found, by clear and convincing evidence, that the injury to Herschel Pybas resulted from a willful act or omission or gross neglect. The Court finds the pre-emption and Medicare Act arguments do not support the relief Defendant requests under the facts of this case.

The jury could believe from the evidence presented that Defendant's approach to Mr. Pybas's care, from start to finish, evinced a total lack of concern for his condition and well-being and a virtual obsession with "the bottom line."[2] For example, the evidence supported a conclusion that Defendant rushed and pushed to discharge Mr. Pybas at the worst possible time – Friday afternoon. The evidence shows that Nurse Shelton was rewarded for her cost-consciousness within a short time of Mr. Pybas's death. By contrast, she received no discipline her failure to follow the doctor's orders for oxygen. The evidence shows that Defendant's vice principals were well aware of Mr. Pybas's fragile condition. The evidence demonstrates that Nurse Shelton knew, as did Dr. Seely and Jan Milligan, that absence of oxygen for a fragile patient such as Mr. Pybas was highly likely to cause serious harm. Indeed, no witness suggested that oxygen was not needed. The evidence also showed that people in this industry, including those involved in Mr. Pybas's situation, are aware that Friday afternoon discharges have a much higher likelihood of mistakes than those discharged on other dates, yet Defendant's personnel insisted on discharging this fragile patient at the worst possible time. Further evidence supporting the jury's finding is detailed in Plaintiff's October 11 response. The Court finds the evidence is sufficient to support the jury's answer to Question 6.

With respect to Question 7, the jury was asked whether it found, by clear and convincing evidence, that CIGNA, by act or omission, knowingly or intentionally caused serious bodily injury to Herschel Pybas. Defendant did not object to the joining of "act or omission" in one question. Thus, Defendant must establish there is no evidence of either one.[3] The Court finds, as discussed above, that there is evidence of "acts" within the meaning of the statute.

With respect to Defendant's other arguments about Question 7, the Court disagrees that Chapter 41 requires engrafting the entire penal code and criminal jurisprudence onto Chapter 41 just

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[2] The standard is not whether the Court agrees with the jury or whether a reasonable person could believe differently from what the jury found.

[3] *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000): "When a single broad-form liability question erroneously commingles valid and invalid liability theories *and the appellant's objection is timely and specific*, the error is harmful . . . ." (emphasis added). No objection whatsoever was made to this part of the question although objection was made to another part of Question 7.



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because Chapter 41 refers to the Penal Code. No authority is cited for the proposition that the correct standard for corporate liability under Chapter 41 for the felony acts in question is "high managerial agent." In any event, Defendant waived this point by failing to object to it. With respect to the definition of "knowingly" and "intentionally," the Court used the precise statutory definition. The Court declines to set aside the jury's verdict in answer to Question 7.

Finally, Question 8 inquired as to the amount of punitive damages. Defendant failed to object to the alleged impropriety in failing to segregate between the two plaintiffs. The question of excessiveness of the punitive damage amount is a factual sufficiency question best left for post-judgment motions. *See Alamo Nat. Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981)(excessiveness of punitive damages award is a factual inquiry).

Plaintiffs and Defendant should jointly submit an order regarding the jnov and other motions and an "approved as to form" judgment in conformity with this letter.

The Court appreciates the professionalism and diligence of the attorneys in presenting these matters to the Court.

Sincerely,

Catharina Haynes

March 4, 2000

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Re: *Ballantyne v. USAA Life Ins. Co.*, Cause No. 98-7698

Counselors:

Before the Court is Defendant USAA Life Insurance Company's Motion for Partial Summary Judgment seeking summary judgment on Plaintiff Flent Ballantyne's extracontractual claims for damages based upon the theory that "liability became reasonably clear," such that USAA Life's failure to pay the claim constituted bad faith, a violation of the DTPA and a violation of Article 21.21 of the Texas Insurance Code.[1] Ballantyne's response also addresses reasons why summary judgment on the contract claim should not be granted; USAA Life conceded at the hearing that it is not seeking a summary judgment on the contract claims. During the hearing on the motion, Ballantyne's counsel conceded and Ballantyne's response[2] demonstrates, that Ballantyne's basis for opposing the summary judgment on the extracontractual claims is based upon Ballantyne's

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[1] In his response, Ballantyne raised the issue of inadequate notice of the hearing, but indicated he would waive such argument if his response were accepted as timely filed. No argument was made at the hearing regarding notice. The Court finds that Ballantyne's response should be considered timely filed and any objection to the timeliness of the notice of hearing is therefore waived.

[2] Ballantyne's response also makes some reference to the issue of whether or not the application was attached to the policy as required by statute and the terms of the policy itself. However, Ballantyne never brought forward any evidence to create a fact issue regarding USAA Life's knowledge of any failure to attach the application such as would be necessary to create a fact issue on the extracontractual claim.



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interpretation of Article 21.17 of the Texas Insurance Code.[3]

Article 21.17 states, in pertinent part:

> [N]o defense based upon misrepresentations made in the applications for [insurance] shall be valid, unless the defendant shall show on the trial that, within a reasonable time after discovering the falsity of the representations so made, it gave notice to . . . the beneficiaries of said contract, that it refused to be bound by the contract or policy; provided, that ninety days shall be a reasonable time . . . .

The parties dispute whether the ninety day period set forth in the statute is a "floor" or a "ceiling." In other words, if the insurer gives notice, say, 91 days after discovering the falsity,[4] can the jury consider whether that is reasonable or does the insurer lose as a matter of law? Ballantyne concedes that on the merits of the claim – that is, whether Mrs. Ballantyne misrepresented her medical condition and whether the misrepresentations were material to the risk assumed – liability did not become reasonably clear. However, Ballantyne contends that the statute unequivocally makes the 90 day period a ceiling such that, once ninety days passed from the alleged "trigger date" of September 13, 1996, USAA Life could no longer rely on its misrepresentation defense such that "liability became reasonably clear."

On the other hand, USAA Life alleges that the statute can reasonably be interpreted to create a floor: 90 days is, as a matter of law, reasonable; however, longer than 90 days, depending on the facts, also could be reasonable. If this interpretation is correct (or even, USAA Life asserts, if it is reasonable), then 90 days after the Egan memo date (if that is, in fact, the "trigger date") USAA Life did not lose its ability to rely on the misrepresentation defense and thereby become in bad faith.

No case cited by either party has squarely addressed the floor/ceiling dispute or purported to construe the statute. The Court finds that Ballantyne's construction of the statute unreasonably writes out of the statute the phrase: "within a reasonable time after discovering the falsity of the representations so made," and substitutes: "within 90 days after discovering the falsity of the representations so made." The legislature would be free to make this revision, but the courts are not. Indeed, as demonstrated by Insurance Code Article 21.55, the legislature knows well how to impose strict time limits on insurance companies; *e.g.*, "an insurer shall, not later than the 15th day after receipt of notice of a claim . . . acknowledge receipt of the claim." Tex. Ins. Code art. 21.55. By choosing instead to specify a "reasonable time," the legislature declined to impose a strict time limit. The court finds as a matter of law, that 90 days is a "floor."

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[3] Neither party wished the court to consider the effect of Article 21.35, making Article 21.17 inapplicable to certain life policies.

[4] The parties dispute the "trigger date" for the ninety days or "reasonable time." Ballantyne contends that the September 13, 1996 Egan memo was the "trigger date." USAA Life contends it was some time in December of 1996. Notice was given December 26, 1996, 104 days after Ballantyne's "trigger date."

At a minimum, given the dearth of case law guidance interpreting the statute squarely, USAA Life's construction is not unreasonable. Therefore, Ballantyne's argument that any reasonable insurer would have known 91 days after the Egan September 13 memo that liability became reasonably clear, or that a fact issue is created in this regard, fails. Where disputed facts exist, the question of bad faith is for the jury. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997). However, where no evidence suggests that liability became reasonably clear or where the evidence conclusively demonstrates a reasonable (even if wrong) basis for failure to pay, bad faith liability cannot attach as a matter of law. *Oram v. State Farm Lloyds*, 977 S.W.2d 163 (Tex. App. – Austin 1998, no pet.). It has long been the law that mere reasonable disputes over coverage between an insurance company and its insured do not give rise to the level of bad faith. *National Union Fire Ins. Co. v. Dominguez*, 873 S.W.2d 373 (Tex. 1994); *Lyons v. Millers Casualty Ins. Co. of Texas*, 866 S.W.2d 597 (Tex. 1993). Nothing in *Giles*' restating of the tort of bad faith purported to change or overrule this well-established principle.

Accordingly, the court finds that USAA Life's motion with respect to those extracontractual theories that rely upon "liability becoming reasonably clear"[5] should be granted. In all other respects, it should be denied. USAA Life's counsel is ordered to prepare an order conforming with this letter, circulate to Ballantyne's counsel for review as to form and proffer to the court within seven days of receipt of this letter.

The Court appreciates the parties briefing and arguments on this matter.

Sincerely,

Catharina Haynes

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[5] *I.e.*, Article 21.21 §10(ii), the tort of bad faith and DTPA violations based upon same.

December 31, 2002

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Re: *Devine v. Dallas County*; Cause No. 02-5426

Counselors:

Before the Court is this administrative appeal which was tried by the Court on December 17, 2002. As discussed below, the Court finds that the decision of the Commissioners should be affirmed. The following discussion is not intended as an exhaustive and detailed description of the Court's reasoning, but rather an overview of the primary points raised by the parties.

*Standard of Review and Analysis of the Facts.* The Court finds that the factual determinations made by the Commissioners must be reviewed under the substantial evidence standard. Under this standard, the Commissioners clearly had sufficient evidence on which to sustain the charges in question. Even ignoring the polygraph results discussed below, the complainant's affidavit, Detective Williams' investigation, Ola Allen's affidavit and, to some extent, even Petitioner's own affidavit, provide sufficient evidence under the substantial evidence standard to affirm the factual determinations made. Mr. Devine admitted that he had made various comments of a personal nature to the complainant and even admitted that he was wrong in doing so.

The complainant's own affidavit testimony is also some evidence in support of the Commissioners' ruling. At the hearing, Mr. Kirby stated that this was a case of "he said/she said." Sexual harassment often is such a situation. In that situation, resolution of conflicting evidence–

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[1] Mr. Kirby appeared in place of Ms. Sorrels at the trial. However, the Court has no indication of having granted leave to withdraw.

Mr. Devine's denials and Sergeant Favors' testimony vs. the complainant's evidence, Detective Williams' investigation, Ola Allen's evidence and some of Devine's own statements– was for the Commissioners, not this court.

*Constitutional Violations and the Polygraph Exams.* Petitioner argues that his substantial rights were violated when he was forced to take a polygraph exam[2]. The evidence presented by the County provides some evidence that the polygraph was in compliance with Government Code 614. The second polygraph was voluntarily taken.

Additionally, at the hearing before the Commissioners, Petitioner made no effort to object to the admission of either polygraph. This Court cannot find error on the part of the Commissioners in considering evidence to which no objection was made at the time it was offered. Indeed, Petitioner's attorney referenced the polygraphs on many occasions. Having failed to raise this below, the Court finds that any complaint about the admission of the polygraph results was waived.

*Punishment.* The degree of punishment is also a question of substantial evidence. If one believes the complainant's evidence, as the Commissioners did, Petitioner's conduct was completely inappropriate for one in his position. The Commissioners could have concluded from the evidence that leaving someone who has conducted himself in that fashion in such a high position could subject the department to liability if he repeated the conduct. They could have, from the evidence, concluded that the fact that he had treated other women politely does not excuse his conduct around a woman he admits finding attractive. While this Court might apply a different punishment, the demotion in question was supported by substantial evidence. The evidence regarding the treatment of other people accused of misconduct is not such as to show that the Commissioners' decision was arbitrary or unreasonable.

The Court appreciates the attorneys' hard work in presenting the arguments to the Court.

Sincerely,

Catharina Haynes

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[2] In his affidavit, Devine offered to take a polygraph but then recanted this offer. He was then ordered to do so by direct order.

June 29, 2001

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Re: *Legacy Homes v. Great American Ins.*; Cause No. 00-7985

Counselors:

Before the Court are the parties' cross-motions for summary judgment, argued on June 1, 2001. The Court requested additional briefing on the limited question of whether the insurance policy provisions regarding "no action" and "voluntary payments" relied upon by Defendant constitute conditions precedent with which compliance is a prerequisite to a suit for indemnity payments. The Court established a briefing schedule which closed on June 19. The Court did not grant either side leave to file additional motions or responses or address any other issues. Thus, additional alleged grounds to grant or deny either party's summary judgment motion contained in the supplemental briefing will not be considered.

The basic facts underlying the summary judgment motions are not disputed: Two homeowners, the Proctors, sued Legacy Homes, the builder of their house, for foundation and related damage to their home. Great American tendered a defense under a reservation of rights and did defend Legacy Homes until shortly before trial, when Legacy Homes rejected the reservation of rights and settled *Proctor v. Legacy Homes* on its own, without Great American's consent. Legacy Homes now sues to recover the amount paid in settlement plus attorneys' fees and costs.

*Is Great American precluded from relying upon the "no action" and "voluntary payments" clauses by its alleged failure to timely plead those provisions?* The Court's pretrial order set a deadline for amended pleadings of 30 days before the discovery cutoff. Based upon the parties' Rule 11 agreement extending the cutoff to a date in August, 2001 (and the absence of any proof regarding a prior discovery deadline), the Court finds that the answer filed in May is timely. Alternatively, the Court grants leave to file the amended answer. Thus, Great American is not precluded from relying upon these provisions.

*Are the "no action" and "voluntary payments" clauses conditions precedent to Legacy Homes recovery on the policy?* Yes. Section IV of the Commercial General Liability Policy is entitled "Commercial General Liability Conditions" and contains the following provisions: "No insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense . . . without our consent." IV.2(d); and "No person or organization has a right under this Coverage Part . . . to sue us on this Coverage Part unless all of its terms have been fully complied with. A person or organization may sue us to recover on an agreed settlement [defined as one signed by the carrier] or on a final judgment against an Insured obtained after an actual trial." IV.3. These clauses are conditions precedent to recovery on the policy. *State Farm Lloyds Ins. Co. v. Maldonado*, 963 S.W.2d 38 (Tex. 1998)(interpreting a similar clause).

Cases have held that conditions precedent in insurance policies must be met before an insured can recover on the policy. *Maldonado*, 963 S.W.2d at 40 ("Because State Farm agreed to defend Robert under a reservation of rights and Robert failed to satisfy a condition precedent of the insurance policy, Robert cannot sue or recover on the policy."); *Members Mutual Ins. Co. v. Cutaia*, 476 S.W.2d 278 (Tex. 1972)(enforcing notice of suit provision);[1] *Charter Roofing Co., Inc. v. Tri-State Ins. Co.*, 841 S.W.2d 903, 907 (Tex. App. – Houston [14th Dist.] 1992, writ denied)(enforcing "no action" and "voluntary payments" provision); *Trevino v. Allstate Ins. Co.*, 651 S.W.2d 8 (Tex. App. – Dallas 1983, writ ref'd n.r.e.); *Hanover Ins. Co. of New York v. Hagler*, 532 S.W.2d 136. 137 (Tex. Civ. App. – Dallas 1975, writ ref'd n.r.e.).

The foregoing cases enforced conditions precedent in a policy without a requirement that the insured show prejudice. *Hernandez* does not require a contrary result. *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691 (Tex. 1994). That case rests on the premise that a material breach by one party excuses performance by the other, while an immaterial breach does not. *Id.* at 692-93. Accordingly, if the breach is technical, no one is hurt, and it should not operate to bar coverage. *Id.* at 693. On the other hand, if the breach is material, the breaching party may not seek the benefits of the contract. *Id.* at 692. The Court's discussion centers on language *excluding* coverage for voluntary settlements, expressly talking about the "settlement-without-consent exclusion." *Id.* at 692.[2] It does not address the interplay between the "no action" clause and the "no voluntary payments" clause, which operate to make the "no voluntary payments" a condition precedent to suit on the policy. Unlike the exclusion focused on in *Hernandez*, where material breach would be pertinent, failure to comply with a condition precedent, under general contract principles, is a bar to recovery under the contract. *See, e.g., Maldonado*, 963 S.W.2d at 41. Legacy Homes cites a case decided by the United States Court of Appeals for the Fifth Circuit in 1983, purporting to apply

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[1] Subsequently, the Texas Department of Insurance's adopted Board Order 23080 requiring general liability policies to contain a provision that "notice of suit" provisions will not be enforced to deny coverage unless the insurer was prejudiced. As a result, the specific holding of *Cutaia,* relating to "notice of suit" provisions is no longer applicable. *See Trevino v. Allstate Ins. Co.*, 651 S.W.2d 8, 11 n.1 (Tex. App. – Dallas 1983, writ ref'd n.r.e.).

[2] The language in the *Hernandez* policy was found in the exclusion section: "this insurance does not apply . . . ." 875 S.W.2d at 692 n.1. This preface is the typical preface to policy exclusions.

Texas law, for the opposite proposition. *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 121 (5th Cir. 1983). Texas insurance law has evolved considerably since that time, and almost all of the cases cited in this letter were decided after *Rhodes*. The one sentence in *Rhodes* suggesting that, even where the carrier has acted properly, it may not insist upon conditions precedent restricting an insured's ability to settle covered claims does not cite any Texas cases or provide any reasoning for its holding.[3] *Rhodes* is not binding on this Court and the Court declines to follow the one sentence in question.

The Court finds that the clauses in question are conditions precedent to recovery under the policy and that failure to comply with those conditions bars recovery without regard to whether or not prejudice to the carrier is shown. [4]

*Was Legacy Homes excused from complying with the conditions precedent?* Legacy Homes concedes that it is not contending that Great American breached the policy by tendering a defense under a reservation of rights. Instead, in its supplemental briefing, it contends for the first time that Great American breached a purported duty to file a declaratory judgment action, thus excusing compliance with the conditions precedent in question.

Great American moved for summary judgment on the conditions precedent in question. An excuse to compliance is an affirmative defense which Legacy Homes must raise in its response and as to which Legacy Homes must raise a fact issue. *American Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994); *Jones v. Texas Pacific Indemnity Co.*, 853 S.W.2d 791, 795 (Tex. App. – Dallas 1993, no writ). It did neither: it neither raised this in its response nor put on any proof that such a declaratory judgment action was not filed. Thus, the alleged failure to file a declaratory judgment action does not excuse compliance with the conditions precedent.

In any event, the Court finds there is no general duty to file a declaratory judgment action when a carrier is defending under a reservation of rights. No case has held that where the insurer and insured have no present dispute, because the insured is satisfied with the current defense

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[3] "In either case [whether or not insurer properly reserved its rights], the insured is not constrained by a condition in the policy which limit the insured's ability to settle the claim . . . ." 719 F.2d at 121.

[4] A recent decision from the San Antonio Court of Appeals addressing sharing among co-insurers does not require a different result. *General Agents Ins. Co. v. Home Ins. Co.* 21 S.W.3d 419(Tex. App. – San Antonio 2000, pet. dism'd by agr.). In a co-insurer situation, this case allows contribution action against the other carrier purportedly under equitable subrogation theory. However, the analysis does not turn on a review of the obligations of an insured to an insurer, but rather on the co-existing rights and duties of two primary carriers to defend and to control defense and settlement. "GAINSCO's willingness to proceed with the defense of the lawsuit and its right to enforce the no-action clause in it policy must be balanced against Home's desire to settle for policy limits and its co-equal right to control the defense and settlement of the lawsuit." *Id.* at 424. By contrast, an insured and its carrier to do not have co-existing (concurrently) rights and duties to defend and control.



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and liability in the underlying lawsuit has not yet been established, a declaratory judgment *has* to be filed. To impose such a requirement would greatly multiply litigation, create an unnecessary additional conflict between the insured and insurer, require the insured and insurer to publicly dispute facts about the insured's liability while the underlying lawsuit is pending and unnecessarily take a court's time resolving issues not the current subject of a real controversy. Thus, until Legacy Homes rejected the qualified defense, there was no duty to file a declaratory judgment action.

Similarly, there was no duty to file a declaratory judgment action after the rejection of the defense[5] because Plaintiff has failed to establish (or raise a fact issue) that this is the type of case where there is NO duty to defend and the same facts that establish this lack of duty to defend also defeat coverage as in *Farmers Texas County Mutual Ins. Co. v. Griffin*, 955 S.W.2d 81, 83 (Tex. 1997). Where there is no set of facts that would provide a duty to defend, it makes sense to litigate defense and coverage issues promptly and together. However, this case, by all parties' admission, involves at least some covered claims. Thus, coverage could not have been determined prior to a final determination of the underlying lawsuit. [6]

Legacy Homes also suggests that Great American should have offered more to settle the claims in the underlying lawsuit. "Failure to settle" claims in third party cases are subject only to the *Stowers* remedy. *Maryland Ins. Co. v. Head Industrial Coating & Serv., Inc.*, 938 S.W.2d 27, 28 (Tex. 1996) (only tort duty in handling third party claims is that of *Stowers*). Legacy Homes has neither pled, nor raised a fact issue regarding failure to comply with the *Stowers* duty, probably because the remedy under *Stowers* is that the carrier pays the excess judgment (i.e., the judgment in excess of the policy limits). No judgment of any kind, much less an excess judgment, was entered in this case.

Where, as here, the insurer properly tendered a defense under a reservation of rights, it is not precluded from insisting upon conditions precedent. *See American Eagle Ins. Co. v. Nettleton*, 932 S.W.2d 169, 174 (Tex. App. -- El Paso 1996, writ denied).

*Does public policy require a different result?* The language of *Maldonado* and the other cases discussed above are clear and require the result reached above. Nevertheless, Legacy Homes suggests that the result is different when the insured rejects the qualified defense. It argues that the law allows an insured to reject a qualified defense and control the defense of the case. Therefore, it argues, the insured must have the right to settle the case consistent with Texas law favoring settlements.

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[5] The timing in this case would not have allowed for resolution of such a declaratory judgment action in time for the underlying lawsuit in any event, as Plaintiff concedes the rejection of the qualified defense took place on the eve of trial after a continuance was denied. Thus, the filing of the declaratory judgment action would have been an exercise in futility in any event.

[6] *Gandy* does not impose a duty on carriers always to file declaratory judgment actions. *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996). Indeed, *Gandy* notes that the insured can file a declaratory judgment as well.

It is true that an insured in Texas has the right to reject a qualified defense and control its own defense. It is also true that Texas law favors settlements. However, Texas law does not favor settlements that multiply and distort litigation, nor does it favor those who would settle with another's money. *Texas Association of Counties County Government Risk Management Pool v. Matagorda County*, 44 Tex. Sup. Ct. J. 215 (Dec. 21, 2000); *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 715 (Tex. 1996). The Court agrees that the situation presented in this case is not the same situation as in *Gandy*. The insured in this case actually paid money to the claimants in the underlying case, and no assignment took place. Nevertheless, the *Gandy* Court's broad pronouncement reaches farther by clearly proclaiming that judgments entered into without a fully adversarial trial are not binding on the non-defending carrier. 925 S.W.2d at 714. *Matagorda* addressed the flip side of the present case, but clearly demonstrates that the Court frowns upon one party settling with another's money.

Further, the effect of this settlement is not to end the litigation, but rather to switch parties from homeowner and builder to insured and insurer. Legacy Homes simply traded one lawsuit for another. Legacy Homes has also created a situation where the natural alignment of parties is skewed. Instead of the insurer and insured working together to defend against the underlying claimant's contentions, the insured will now work on the same side as the underlying claimant against the insurance company. Whereas in the underlying litigation, Legacy Homes would have been in the position of defending its work, now Legacy Homes must concede that substantial questions about its work exist in order to support the large settlement. The settlement then, far from resolving the dispute, multiplies the lawsuit and distorts it.

Additionally, this is not a case where the claimant is unwilling to settle within policy limits and the insured seeks to protect itself from excess exposure by limiting such exposure in settlement. Legacy Homes has sought the entire amount paid in settlement from Great American, and it contends the entire amount is covered under the policy.

Legacy Homes argues that the discretion of the insured is limited by the requirement that the settlement be reasonable, and that this requirement adequately protects the insurer. It has never been the law, however, that one person can spend another's money without his consent, subject only to the requirement that the spending be "reasonable." That argument might be weightier if Legacy Homes was contending that Great American owed only a portion of the settlement. Legacy Homes has not cited any valid Texas authority giving the insured the right to sign checks for the insurance company so long as the insured settles "reasonably."

The policy placed in evidence demonstrates limits in excess of the settlement. Thus, in settling, Legacy Homes, by its own contentions, was entirely "playing with" Great American's money. Legacy Homes has advanced no policy reasons why the result in *Matagorda* – that the insurer cannot "play with" the insured's money – should be different if the situation were reversed. Thus, the facts of this case do not require an analysis of whether the policy considerations are different when the insured seeks to "play with" both its money and the insurer's.

Finally, it is not this Court's role to rewrite an insurance policy. The language in question is standard and common. If the legislature or the Texas Department of Insurance believes

that the clauses in question are unfair to insureds, they can pass appropriate laws or regulations. Indeed, the Department of Insurance did pass a board order requiring certain policies to contain a prejudice requirement relating to the "notice of suit" condition. *See* note 1 above. If the changes advocated by Legacy Homes-- requiring prejudice for all conditions precedent or allowing insureds to settle with the insurance company's money without regard to such conditions precedent in the insurance policy-- should be made, those changes are not for this Court to make.

In view of *Gandy* and the policy analysis above, the Court finds that the public policy of this state does not require a voiding of the policy conditions precedent in favor of the insured's right to control its defense.

Plaintiff sought a declaratory judgment of coverage and sued for breach of contract. The Court grants summary judgment that Plaintiff is not entitled to indemnity under the policy for the *Proctor v. Legacy Homes* settlement and that the failure to pay that settlement was not a breach of contract. With respect to attorneys' fees for the declaratory judgment action and attorneys' fees for unreimbursed defense costs from the underlying lawsuit, the Court finds the summary judgment record is inadequate to decide or fails to address these issues. Accordingly, summary judgment is denied without prejudice on the question of attorneys' fees.

Sincerely,

Catharina Haynes

November 26, 2002

Catherine Kays
16475 Dallas Pkwy., Ste. 500
Addison, TX 75001

Steven Dunn
6116 N. Central Expwy., Ste. 1090
Dallas, TX 75206

Re: *Sabre Realty Mgmt. v. Shevlin*; Cause No. 02-5894

Counselors:

Before the Court is Plaintiff's Amended Motion for Summary Judgment heard today. Having considered the motion, the response thereto and all competent summary judgment evidence, the Court concludes:

1. The evidence proves, and Defendant does not deny, that Defendant has failed to pay rent when due for the months of April 2002-November 2002 and that Defendant failed to pay his year-end reconciliation for 2001. Thus, to date, $16,630.08 is owed before consideration of any defenses. Rent continues to accrue at the amount of $2255/month.

2. Plaintiff pleaded presentment of the claim; thus, Defendant had the burden to specifically deny under oath such presentment for purposes of Chapter 38 fees. This was not done. Thus, under both the lease and Chapter 38, Plaintiff is entitled to fees if it ultimately prevails. The amounts set forth in the Kays affidavit are uncontroverted and are reasonable and necessary.

3. Defendant relies upon the defense of mitigation to preclude summary judgment. Because this is an affirmative defense, Defendant must raise a fact issue as to this defense to defeat summary judgment. *Lunsford Consulting Group, Inc. v. Crescent Real Estate Funding VIII*, 77 S.W.3d 473(Tex. App. – Hous[1st Dist.] 2002, no pet.) The landlord's duty to mitigate "requires the landlord to use reasonable efforts to fill the premises when the tenant vacates in breach of the lease." *Austin Hill v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 299 (Tex. 1997). Defendant has suggested that Plaintiff's leasing agent is not particularly competent and shown a

lack of advertising in trade journals. However, Plaintiff has demonstrated some efforts to mitigate, and Defendant has failed to put forth any evidence of what an "objectively reasonable" effort would be. Thus, Defendant failed to raise a fact issue on the defense of failure to mitigate.

As a result of the foregoing analysis, summary judgment should be granted to Plaintiff. Ms. Kays may prepare the order.

Sincerely,

Catharina Haynes

March 25, 2002

Emil Lippe
2001 Bryan Tower, Suite 1850
Dallas, TX 75201

Mary Ann Beaty
10246 Midway Rd., Suite 203
Dallas, TX 75229

Re: *Medical-Billing v. Linda Walker*; Cause No. 01-10578

Counselors:

Before the Court is Defendant's Special Appearance heard on March 14, 2002, with additional briefing allowed to be filed by March 19, 2002. Defendant opposed Plaintiff's motion for continuance of the hearing. Defendant declined to appear in person; instead standing on her affidavit. The Court allowed Defendant's counsel additional time for briefing, but the Court did not grant leave to file any additional evidence nor was such leave requested. Having opposed Plaintiff's request for a continuance of the hearing, Defendant will not now be heard to complain that she needed additional time to present evidence. The Court declines to consider the "evidence" attached to Defendant's "Additional Authorities in Support of Defendant's Special Appearance." Instead, the Court will rely upon the affidavits on file at the time of the hearing and the testimony presented at the hearing. Even if the additional evidence were considered, however, it would not change the outcome set forth below.

Where a defendant purposefully directs libelous conduct towards a resident of a state, that conduct can support exercise of specific jurisdiction in that state over that defendant. *See Calder v. Jones,* 465 U.S. 783 (1984); *see also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). In her Additional Authorities, Defendant contends that she did not libel Plaintiff. It is not the office of a special appearance to determine the merits of the claim. Instead, the Court looks to the allegations and the link between the defendant, the forum and the activities in question. Here, it was Defendant's burden to negate jurisdiction. She failed to prove that she was unaware that Plaintiff lived in Texas or that she was not the author of the comments attributed to "Linda Walker." The Linda Walker comments attached to the petition, and not denied by Defendant, support a claim of intentional conduct directed at the forum state. Indeed, Texas laws and a Texas attorney are specifically discussed. Walker knew that Plaintiff lives and does business in Texas (or she has failed to negate such knowledge). As such, maintenance of this libel suit in Texas does not offend traditional notions of fair play and substantial justice. The special appearance should be overruled.

**Responses of Catharina Haynes**
**Nominee to the U. S. Court of Appeals for the Fifth Circuit**
**to the Written Questions of Senator Dianne Feinstein**

**1. In your response to the Committee questionnaire you wrote that 100 percent of your practice has been in civil proceedings. And while seeking re-election as a state court judge in 2006 you stated in a questionnaire, "I have never handled a criminal case." You are nominated to the court of last resort for almost all criminal defendants throughout Texas, Louisiana, and Mississippi.**

- ***Please explain in detail the extent to which you have handled cases during your legal career involving the interpretation of each of the following:***
  - ***The Equal Protection Clause of the Fourteenth Amendment;***
  - ***The Due Process Clauses of the Fifth and Fourteenth Amendments;***
  - ***The Fourth Amendment protection against unreasonable searches and seizures;***
  - ***The Eighth Amendment prohibition of cruel and unusual punishment; and***
  - ***Federal criminal statutes.***
- ***If confirmed, what would you do to prepare yourself for handling criminal appeals?***

As a judge, every case that came before me involved consideration of due process, although it was not a contested issue in every case. This issue arose particularly in default judgment cases and in cases where a nonresident defendant challenged personal jurisdiction through the Texas procedure of a "special appearance" (which is the equivalent of a Federal Rule of Civil Procedure 12b(2) motion).

The precedent of *Batson v. Kentucky*, 476 U.S. 79 (1986) and progeny, which involves equal protection issues, applies in state courts as well as in federal courts, and I have applied that precedent in my court. Indeed, the first week I was a judge, a *Batson* challenge was raised in jury selection in the case of *Tasby v. Robinson*, Cause No. 97-7221.

As a state district judge presiding over civil cases, I have had to learn and apply criminal law concepts. For example, I presided over cases under Chapter 59 of the Texas Code of Criminal Procedure involving the forfeiture of contraband. These cases required analyzing whether the charged offense met the standards of this chapter, as well as other



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criminal law concepts, such as a showing of probable cause for seizing the alleged contraband, which implicates Fourth Amendment concerns.

Occasionally, I had prisoner lawsuits that alleged cruel and unusual treatment in the jail or prison. One such case that I presided over as a judge was *Wallace v. Dallas County*, Cause No. 98-07602-J. In that case, the prisoner fell in the jail and alleged that he was mistreated in violation of the Eighth Amendment after the fall. The jury found against him.

Some federal statutes have both civil and criminal aspects, such as the Racketeer Influenced Corrupt Organizations Act (RICO) and securities statutes. In handling the civil side of such cases as a lawyer, I became familiar with the elements and analyses of these statutes on the criminal side. Examples of such cases handled as a lawyer include:

*Enterprise Drilling and Manufacturing Co., Inc. v. Western Petroleum Services, Inc.*; In the United States District Court for the Southern District of Texas, Victoria Division; Civil Action No. V-88-025 (alleged civil RICO)

*B.J. Gierhart v. H.E. Chiles*; In the United States District Court for the Southern District of Texas, Corpus Christi Division; Civil Action No. C-90-245 (alleged civil RICO)

*G. M. Rowe v. Western Petroleum Services, Inc.;* In the United States District Court of Texas for the Southern District of Texas; Victoria Division; Civil Action No. V-88-51 (alleged civil RICO)

*Travis Askew et al. v. H.E. Chiles;* In the United States District Court for the Southern District of Texas, Houston Division; Civil Action No. H-90-3003, *aff'd*, No. 91-2219 (5th Cir. 1991), *cert. denied*, No. 91-647 (1992) (alleged civil RICO)

*Merrimac v. Buckwalter*, In the United States District Court for the Northern District of Texas, Dallas Division; Civil Action No. CA3-89-976-F (alleged securities fraud)

Additionally, I worked on some cases where parallel civil/criminal proceedings arose. As a result, I became familiar with the pertinent criminal statutes in those cases. Examples of such cases handled as a lawyer include:

*In re Fort Worth Gold & Diamond Exchange, Inc. dba Fort Worth Gold & Silver Exchange*; In the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division; Case No. 491-45261-MT-7 (I represented a creditor in this bankruptcy; principals of the debtor were indicted for and pled guilty to bankruptcy fraud.)

*Lincoln National Health and Casualty Ins. Co. v. Clark*, Cause No. 92-2404-C, In the 68th District Court of Dallas County, Texas (I represented an insurance company that alleged fraud in the application by Mr. Clark as part of a scheme to obtain excess disability and health policies; Mr. Clark was indicted and pled guilty to mail fraud in connection with the scheme.)



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Last year, I was specially requested by the Judge of the 95th District Court of Dallas County, with the concurrence of the parties' counsel, to act as a mediator in a case alleging claims under 42 U.S.C. 1983 for deprivation of due process in connection with the firing of deputy constables by the newly-elected constable. *Estate of Stanley Gaines et al. v. County of Dallas*, Cause No. 01-4784-D; In the 95th District Court of Dallas County, Texas.

In addition to a strong academic record, I believe that I have a strong record of handling complex cases as a lawyer and a judge that prepares me to address issues that may arise that I have not previously handled. I believe that I also have a strong and demonstrated commitment to continuing education -- I am a Fellow of the College of the State Bar of Texas, which recognizes outstanding achievement in continuing legal education. I have continually met the continuing education requirements for membership in that organization since joining in 1990. I also attended extra courses, not required by any law or rule, to obtain a Certificate of Special Competence in Civil Jurisprudence from the Texas Center for the Judiciary in 2005. If confirmed, I would continue to attend continuing education courses in a variety of topics, including criminal law. I would also continue the extensive reading I already do of advance sheets (containing summaries of recent court decisions) and relevant legal articles.

Whether or not I have had previous experience with an issue, if confirmed, I would carefully review the record, the briefing and all applicable authorities in reaching my decision. That is the approach I took as a state district judge.

**2. Please name the current Supreme Court Justice whose approach to judging you believe is most similar to your own, and explain in detail the reasons for your answer.**

I admire all current Supreme Court Justices, and there is no one specific Justice whose approach is most similar to my own. I am sure that each Supreme Court Justice takes his or her oath seriously and applies the law in accordance with his or her understanding of the applicable statutes and precedents, in view of the Constitution. My approach has always been one of judicial restraint, careful preparation and careful review of the law in light of the facts I find or as found by a jury. As a lawyer and a judge, I have had the privilege or appearing before, working alongside and having my decisions reviewed by many different judges and justices. I tried to take the best from each of these judges and justices and apply that learning to my conduct as a judge when I was on the state bench. I would do so again on the federal bench, if confirmed.



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**Responses of Catharina Haynes**
**Nominee to the U.S. Court of Appeals for the Fifth Circuit**
**to the Written Questions of Senator Benjamin L. Cardin**

**(1) In response to Question 15 (e) of the Committee Questionnaire, you stated that "as a state district judge in Texas, I wrote orders (a few with explanations), jury charges and findings of fact / conclusions of law, but I did not write 'unpublished opinions' or 'published opinions.'**

**As a U.S. Circuit Judge on the Court of Appeals, a major responsibility you will have is writing substantive judicial opinions. What experience do you have in writing substantive judicial opinions?**

As a state district judge in Dallas, it was not the practice in my court to prepare opinions on each decision, given the limited resources and volume of work we had. I did sometimes prepare writings explaining my rulings. Additionally, sometimes I signed findings of fact and conclusions of law proffered by the attorneys, but most of the time I wrote my own findings of fact and conclusions of law, which involved a discussion of law and facts.

In addition to my eight years of experience as a judge, I have more than thirteen years as a practicing attorney writing motions, briefs and legal memoranda, as well as continuing education papers and articles. I have extensive experience preparing written analyses of the law and facts of a case for clients, courts and educational purposes. I believe these experiences prepare me well for the task of writing appellate opinions, if the Senate confirms me.

**(2) In response to Question 18 (c), you stated that "my entire practice as a lawyer is and has been litigation-based." You indicated that the percentage of your practice in civil proceedings was 100%, and your percentage of your practice in criminal proceedings was 0%. In response to Question 14, you stated that "as judge of the 191st [Judicial District Court of Dallas County, Texas] I heard civil cases."**

**As a U.S. Circuit Judge on the Court of Appeals, you will be called upon to decide a large number of criminal law cases. What experience do you have in handling criminal cases?**

As a state district judge presiding over civil cases, I have had to learn and apply criminal law concepts. For example, I presided over cases under Chapter 59 of the Texas Code of Criminal Procedure involving the forfeiture of contraband. These cases required analyzing whether the charged offense met the standards of this chapter, as well as other criminal law concepts, such as a showing of probable cause for seizing the alleged contraband. I also had cases that presented Fifth Amendment issues as a result of parallel criminal and civil actions. I presided over cases filed by prisoners which touched upon criminal law issues, such as the Eighth Amendment. I also attended



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continuing judicial education seminars in which criminal law updates and issues were discussed. My court also occasionally heard criminal contempt cases.

Some statutes have both civil and criminal aspects, such as the Racketeer Influenced and Corrupt Organizations Act (RICO) and federal securities statutes. In handling the civil side of such cases, I became familiar with the elements and analyses of these statutes on the criminal side.

Whether or not I have had previous experience with an issue, if confirmed, I would carefully review the record, the briefing and all applicable authorities in reaching my decision. That is the approach I took as a state district judge.

**(3) Do you have any experience in working on constitutional law cases? If so, please provide a brief summary of your work on these issues.**

As a judge, I presided over cases where issues were raised under the First Amendment, Fourth Amendment, Fifth Amendment, Eighth Amendment and Fourteenth Amendment of the United States Constitution. In response to Question 2, I addressed the Fourth, Fifth and Eighth Amendment issues. The Fourteenth Amendment is implicated in all questions involving due process, such as whether proper notice was given in a default judgment case and whether jurisdiction could be exercised over a defendant who is a resident of another jurisdiction; these kinds of issues arose regularly. With respect to the First Amendment, I handled a number of issues such as church governance, free speech in libel cases and free speech in cases involving erotic dancing businesses.

As a lawyer, I have also addressed constitutional issues as they arose in cases I have handled.

**(4) What significant pieces of legal or scholarly writing have you composed that may assist you in your role as a federal judge, if you are confirmed?**

I have provided the Committee with copies of my continuing education legal writings and articles through the date of my Senate Questionnaire. I have co-authored a chapter on Federal Civil Procedure (Chapter 17, "Posttrial Motions," *Federal Civil Procedure and Evidence During Trial, 5th Circuit* (Published by Lawyers Cooperative, but not circulated)), and I have written several papers on insurance law, legal ethics and professionalism, judicial ethics and procedure. I wrote an article on the jury charge and a law review comment on the psychotherapist-client testimonial privilege. If confirmed, I would draw upon these works as well as my extensive experience in writing legal analyses as a lawyer and a judge.



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**Response of Catharina Haynes**
**Nominee to the U.S. Court of Appeals for the Fifth Circuit**
**To March 8, 2008 Questions of Senator Edward M. Kennedy**

1. **In your Senate questionnaire, you stated that you do not write opinions, but that you wrote orders, jury charges, and findings of fact/conclusions of law. Your responses to written questions from the Committee suggest, however, that your findings of fact and conclusions of law include substantive legal discussions, and are not substantively different from opinions. If these have not already been provided to the Committee, please provide copies of any findings of fact and conclusions of law that involved:**

   a. **federal constitutional issues (including the cases identified in your response to question 5 of my written questions submitted to you on February 28 and the cases interpreting Batson v. Kentucky identified in your response to question 1 of Senator Feinstein's written questions of that date);**
   b. **civil rights;**
   c. **the rights of consumers;**
   d. **workers' rights;**
   e. **reproductive rights or other First Amendment issues.**

   **Please also provide any letters or other documents you authored, explaining your reasoning on these issues.**

   Findings of fact and conclusions of law are not issued in every case. They reflect the court's determination of disputed questions of fact and contested issues of law; however, it was not my intent to suggest they are the same thing as judicial opinions. Texas Rule of Civil Procedure 296 provides in part: "In any case tried in the district court or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law."

   Responsive documents are being provided. Please note that the findings of fact and conclusions of law in the following cases were substantially authored by the attorneys, rather than by me:

   *Wardlow v. Spectrasite*, Cause No. 04-2665
   *Watson v. Fleck*, Cause No. 03-11643
   *Calypso Waterjet v. Flow International*, Cause No. 05-1410 (Additional findings were substantially authored by the attorneys; original findings were authored by me.)
   *Pybas v. Cigna Healthcare*, Cause No. 01-02980
   *Plumlee v. Electrocom Automation*, Cause No. 97-5235



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**2. You failed to provide a complete response to question two of my written questions submitted on February 28. You did not identify or describe any case in which you issued an order for judgment n.o.v., but instead stated that you had not "entered an opposed judgment n.o.v. on the entire case." Please identify any case or cases in which you issued an order for judgment n.o.v. – regardless of whether that judgment was opposed and regardless of whether your order applied to the entire case or only to a particular claim or claims. In addition, please describe in detail the issues in each case and the reasons for your decision.**

To the best of my knowledge, based upon my memory and a diligent search of court records, I have not issued an order for judgment n.o.v. on the entire case. With respect to partial judgments n.o.v.:

*With respect to a cause of action:*

*Dean v. Swicegood*, Cause No. 94-6195 (11/12/99): Ms. Dean filed a medical malpractice suit against Dr. Swicegood and his clinic, Hull-Swicegood Clinic. The jury found direct negligence as to Dr. Swicegood and Hull-Swicegood Clinic and also found that Dr. Swicegood was acting in the course and scope of his employment for the Clinic at the time of the occurrences in question. I concluded that there was no evidence to support the finding that Hull-Swicegood Clinic was independently negligent (and granted a judgment n.o.v. accordingly), but I did find evidence to support its vicarious liability for Dr. Swicegood's negligence. The effect of this ruling was that a judgment was entered against both Dr. Swicegood (through his estate, as he was deceased by the time of trial) and Hull-Swicegood Clinic, jointly and severally, for the entirety of the actual damages found by the jury.

*Advanced Cast Stone, Inc. v. Kuiper*, Cause No. 97-10793(9/15/00): Advanced Cast Stone, Inc. (ACSI) and Mr. Kuiper had business dealings in connection with Kuiper allegedly acting as a distributor of ACSI's cast stones. The parties got into a dispute, and ACSI sued Kuiper who counterclaimed. I entered judgment on the jury verdict, except that I granted a judgment n.o.v. as to Kuiper's claim against ASCI under the Texas Deceptive Trade Practices Act (I awarded judgment to Kuiper on another theory of recovery). I also granted Kuiper's motion to disregard the jury's verdict as to certain credits. As to these matters, I found no evidence to support the jury verdict. In all other respects, I entered judgment on the jury verdict.



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*With respect to an element of damages:*

*Edwards v. Darby*, Cause No. 95-12339 (6/12/00): The Estate of Annie Edwards and several family members filed a medical malpractice lawsuit against two doctors and a health center arising from the death of Ms. Edwards. By the time of judgment, the claims against the center and one doctor had been settled. Judgment was entered on the jury verdict in favor of the four plaintiffs and against the remaining doctor, Dr. Darby, except that I granted a judgment n.o.v. as to one plaintiff, Sheila Loyd, with respect to $4844 in damages for past and future pecuniary loss. I awarded the other damages found by the jury to her, reduced for the contributory negligence of the decedent and any appropriate credits. As to Sheila Loyd, I found no evidence of pecuniary loss in the past or future as a result of the death of Annie Edwards.

*Phelps v. Sechrest*, Cause No. 97-10295 (9/1/99): This case involved a motor vehicle accident. Plaintiff Phelps was driving his car and a passenger (the other plaintiff) was riding with him when their car collided with a car driven by Defendant Sechrest. The jury found Sechrest 60% responsible and Phelps 40% responsible for the accident. The jury verdict stated "none" for reasonable costs of repair for the car owned by Phelps. Because it appeared to me that there was no evidence of probative force to sustain the jury's finding of "none" to that question and that Phelps had established his damages for cost of repairs as a matter of law, I granted a judgment n.o.v. in favor of Phelps for 60% of his cost of repair. In all other respects, I entered judgment on the jury verdict.

*Stone Products, Inc. v. Americast LLC*, Cause No. 01-4030 (2/10/03): Stone Products sued Americast for breach of contract and tortious interference in connection with its cast stone business. I entered judgment on the jury verdict for Stone Products, except that I granted a judgment n.o.v. with respect to an element of damages regarding one customer (Gay & Sons) and one theory. As to those matters, I found no evidence to support the jury verdict.

*Enmark Corp. v. Smith, Underwood & Perkins*, Cause No. 01-644 (3/21/03): Enmark and others sued a law firm and lawyer for legal malpractice in connection with the firm's handling of a case for Enmark. Enmark also alleged that the firm overcharged it. I entered judgment on the jury verdict for Enmark except with respect to the damages for overcharging. As to that element of damages, I found no evidence to support the amount awarded.

*Younts v. Vistar*, Cause No. 03-7593 (6/2/05): Ms. Younts sued Vistar for damages sustained in a fall at Vistar's premises. I granted judgment on the



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jury verdict for over $778,000 in actual damages, except that I granted a judgment n.o.v. as to future medical expenses. As to that element, I found no evidence to support an award of damages.



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# Response of Catharina Haynes Nominee to the U.S. Court of Appeals for the Fifth Circuit To March 8, 2008 Questions of Senator Edward M. Kennedy

Documents provided in response to Question 1

PDF 1 of 3

CAUSE NO. 01-8448-J

287

| | | |
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| TRINIDAD "TRINI" GARZA et al. Plaintiffs, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| DALLAS INDEPENDENT SCHOOL DISTRICT et al. Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 25, 2002, this case came on to be tried; all parties having waived a jury on the only remaining issues in dispute -- the amount of Plaintiffs' and Dr. Parrott's attorneys' fees and expenses in this case -- all matters in dispute were tried before and submitted to the Court.

The parties agree that the awards of attorneys' fees and expenses should be rendered only against Defendant DISD. Having considered the evidence presented and the contents of the file and proceedings before the Court judicially noticed, and having heard the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* An extensive discussion of the background of this case is unnecessary because the Court's holdings in this case have been memorialized in other orders. In summary, Plaintiffs brought this suit alleging that the DISD and its trustees violated the Texas Open Meetings Act (Govt. Code Chapter 551) by conducting improper closed sessions on redistricting(Count 1), holding improperly noticed meetings (Counts 2 and 3) and holding "staggered" meetings to avoid the Open Meetings requirements (Count 4). In light of the exigencies of the upcoming board election, a jury trial was scheduled on a "fast track" for December 17, 2001.



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In addition to suing the DISD, Plaintiffs sued each trustee in his/her official capacity, including Dr. Lois Parrott. Unlike the other trustees, Dr. Parrott took the position almost immediately that at least some improper meetings had taken place and gave Plaintiffs an affidavit to that effect. As a result, DISD refused to provide a defense to her, although it provided a defense to the other eight trustees and all agreed that any monetary liability for the judgment in this case would be borne by DISD, not the individual trustees' personal funds.

Ultimately, all issues on Counts 1, 2 and 3 and Dr. Parrott's cross-claim were either resolved by summary judgment or mooted by the summary judgment holdings, except for the amount of attorneys' fees and expenses for Plaintiffs and Dr. Parrott. Count 4 was nonsuited shortly before trial. The parties agreed to proceed with a bench trial on the attorneys' fees and expenses issues which was then held on January 25, 2002.

DISD conceded that Plaintiffs "substantially prevailed" on their claims, entitling them to reasonable attorneys' fees and costs of litigation under Government Code Section 551.142(b). On Dr. Parrott's cross-claim, the Court held that Dr. Parrott was entitled to a limited defense -- she was entitled to counsel to provide only a defense that was not duplicative of the efforts of DISD's counsel on behalf of the trustees as a whole (which efforts benefitted Dr. Parrott). Because DISD failed to comply with its obligation to provide a defense, Dr. Parrott is also entitled to reasonable and necessary attorneys' fees for prosecuting her cross-claim.

The Court will address each set of attorneys' fees in turn.



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**Plaintiffs' Attorneys Fees**

***What is a reasonable fee for the necessary services of Plaintiffs' counsel in this case?*** **Plaintiffs requested an award of $258,543.00 for attorneys' fees through the trial of this case. DISD argued that no more than $75,000 would be a reasonable fee through December 17, 2001. The Court has addressed Plaintiffs' reasonable attorneys' fees using the following factors:(1) the time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) the fee customarily charged in the locality for similar legal services; (3) the amount involved and results obtained; (4) the time limitations imposed by the client or the circumstances; (5) the experience, reputation, and ability of the lawyer performing the services; (6) the nature and length of the professional relationship with the client; (7) whether the fee was fixed or contingent on results obtained or uncertainty of collection before the legal services were rendered, and (8) the likelihood that the acceptance of this work would preclude other employment by the lawyer.** ***Arthur Anderson & Co. v. Perry Equip. Corp.***, **945 S.W.2d 812 (Tex. 1997);** ***Robertson County v. Wymola***, **17 S.W.3d 334, 345 (Tex. App. -- Austin 2000, pet. denied)(applying** ***Perry*** **factors to case where statute authorized recovery of "reasonable attorney's fees");** **Tex. Disc. R. Prof. Con. 1.04.**[1] **Having considered same, the Court finds**

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[1] Several of the experts who testified relied upon the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Because *Johnson* is a federal case, it is persuasive but not binding authority. The Court has relied primarily upon Texas authority for its conclusions herein. However, the Court notes that the *Johnson* factors are virtually identical to the Texas factors except that *Johnson* expressly addresses undesirability of a case and "awards in similar cases" as factors, while these factors are only implied in the Texas factors. *See Guity v. CCI Enterprise Co.*, 54 S.W.3d 526, 528 (Tex. App. – Houston [1st Dist.] 2001, no pet.)(federal and state standards are "substantially similar").



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that a reasonable fee for the necessary services of Plaintiffs' counsel through the conclusion of the January 25 trial is $157,380.[2] The Court provides a detailed examination of the factors considered in arriving at this number below.

*What Was At Stake*

At the outset, this case involved pursuit of a very important principle: open government. Plaintiffs sought injunctive and curative relief for Open Meetings Act violations rather than money damages. In bringing this action, Plaintiffs were assured that they would be opposed by skilled and competent counsel.

The Open Meetings Act addresses the right and need of all citizens to be informed of their government's deliberations on an issue as critical as redistricting. The evidence demonstrated that failure to enforce such rights can contribute to feelings of suspicion and disenfranchisement by some members of the community. The evidence showed that the relief sought and ultimately obtained was valuable to the community, as it restored faith in the process. Therefore, the rights sought to be vindicated in this case were and are worthy of an aggressive, skilled and substantial effort by Plaintiffs' attorneys.

In a larger sense, experienced, quality attorneys must receive adequate compensation when their efforts lead to vindication of important public rights so that citizens with meritorious cases will be able to secure capable attorneys in the future. Because most governmental entities have the resources to retain seasoned counsel, such as that employed

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[2] Although a specific breakdown is not required, this equates to a total of 531.6 requested hours through January 24, less 17 unnecessarily duplicative hours plus 10 hours for two lawyers to prepare for, attend and participate in the January 25 trial, multiplied by a blended rate of $300/hour.



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by DISD here, plaintiffs need to be on equal footing in order to make sure that if their case has merit, their rights will not be lost through their inability to retain equally effective counsel.

The uncontroverted evidence established that the Plaintiffs were represented by skilled, hard-working and effective attorneys. All lawyers involved in this case on both sides represented their clients zealously and with a high level of intellect and oral advocacy. The adversary process demanded nothing less in a case such as this one.

*A Fast-Track, Hard-Fought Case*

Undoubtedly, this case was on a "fast track." Circumstances provided less than three months' time from filing to scheduled jury trial, which is an extremely compressed schedule for a state district court case. The "fast track" required the attorneys to "drop everything" and turn substantial immediate attention to this case. More attorneys had to work on this matter than ordinarily would be necessary if the case had been spread over a year or eighteen months.[3] As a result some greater duplication of attorney time at hearings, depositions and client and attorney conferences is appropriate in this case than in cases not on a "fast track," because each attorney must be informed about the case in order to render necessary services and no one attorney can complete all the necessary tasks.

This case presented novel questions of fact and law, particularly in the area of remedies for any wrongdoing. It was a very hard-fought case. DISD's witnesses suggested that this was a straightforward case that presented few difficult questions. However, DISD's assertion is contradicted by the extensive briefs filed and positions taken

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[3] *See* Rules of Judicial Administration, Rule 6, providing time standards for disposition in civil cases.



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by DISD itself. For example, the so-called 11-minute gap in the notice of the October 1 meeting,[4] which Mr. Heath opined was a simple issue, sparked much debate and discussion. First, DISD did not acknowledge any notice problem until a footnote in its response to the summary judgment motion Plaintiffs had to file. Then, when DISD had to concede the time discrepancy at oral argument on the summary judgment, it argued that the discrepancy was not important, necessitating more briefing.[5] It was not until the hearing on December 14, 2 ½ months after the challenged vote, that DISD finally conceded that the lack of proper notice required a voiding of the vote. Thus, regardless of whether that issue was "simple," it still required Plaintiffs' counsel to spend many hours filing, arguing and briefing the issue and seeking summary judgment. Several other issues now characterized as simple occupied numerous hearings and briefs before finally being resolved. In addition, the remedies issue presented novel questions of law, requiring expedited briefing. Because of the lack of Texas case precedent on some issues, the parties had to research similar statutes in other states, adding to the time that had to be spent.

In the few short months this case was pending, over a dozen hearings were held, numerous client conferences and attorney conferences were conducted, multitudes of briefs and motions were filed and some depositions were taken. All such work was done on an accelerated timetable and in the face of intense public scrutiny.

The Court finds that this was an intense, difficult and novel case. As such, it

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[4] For the October 1 meeting, DISD failed to comply with Texas law requiring posting 72 hours before a scheduled meeting.

[5] DISD filed a letter brief on December 11, 2001, arguing that the timing deficiency in the October 1 notice should not result in a voiding of the redistricting vote taken at that meeting.



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is not surprising that it took several lawyers and hundreds of hours to conclude.

*Customary Fees and Uncertainty of Collection*

There was a great deal of testimony and argument about whether the specific rates charged by the attorneys in this case were "customary." Testimony about wide ranges of fees for various skill and experience levels[6] was presented from different witnesses. The witnesses also analyzed the average or "blended" rate charged. Finally, Mr. Miller addressed the need to take into account the special circumstances of this case with a "lodestar times multiplier" approach. *See Borg-Warner Protective Services Corp. v. Flores*, 955 S.W.2d 861 (Tex. App.--Corpus Christi 1997, no pet.). Regardless of the methodology applied, the Court concludes that the most important question is whether the overall fee awarded is reasonable in light of the factors listed above.[7] *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997). In this regard, it is significant that the hours billed in Plaintiffs' Exhibits 1 and 3 represent a substantial reduction (almost fifty percent)[8] over the "raw" hours. The hours presented to the Court are only those that, in the judgment of Plaintiffs' attorneys, were efficient and productive hours and are considerably less than the hours actually worked. Such hours are deserving of a higher rate than "raw" hours, where every hour worked is billed. The record and evidence demonstrates that Plaintiffs' attorneys made

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[6] The range of fees discussed in the various witnesses' testimony was $150 to $750 per hour.

[7] Admittedly, there are not that many instances were such actions are brought in Dallas and parties recover. Thus, what is "customary" may have to be viewed from the broader vantage of complex governmental litigation.

[8] The evidence established that 1048 hours were worked, only 531.6 of which were billed.



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effective use of associates with lower billing rates, thereby lowering the overall total.[9]

Plaintiffs' counsel took this case on a pro bono basis. Only if fees were recovered (and collected) against the DISD would it get paid. As a result, the fee was highly uncertain and its timing even more so. Evidence showed that this firm has a relationship with various minority communities that will extend beyond this case. The relationship is not one, however, of a corporate client who provides steady "bulk" work at a steady rate of pay for a reduced fee.

Mr. Perez testified that he had other paying work he could have done during this time period that he had to decline due to his work on this case. Further, he also testified that taking this case could have the effect of scaring off paying corporate clients because of the specter of "taking on the establishment."

All of these factors weigh in favor of not discounting the fees billed in Plaintiffs' Exhibits 1 and 3.

*The Result*

According to the testimony of Plaintiff Vaca and Commissioner Price, the results obtained have had an important impact on the community. The injunctive relief obtained, to the extent possible, has righted the wrong caused by the improperly closed sessions and notice violations. The public now has access to the Trustees' deliberations on a matter of great public importance. The vote taken at the improperly noticed meeting has

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[9] The attorney with the highest billing rate billed only 22.7 hours before the January 25 trial, which included two lengthy and substantial hearings before the court. The attorney with the second highest billing rate had extensive and substantial involvement in hearings, depositions and briefing in the case, but billed only 110 hours of the 531 hours charged.



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been voided. The principles involved and the results obtained justify a substantial award of fees in this case.

Based upon all relevant factors and the evidence presented, the Court finds that an overall fee of $157,380 through the trial of this case for Plaintiffs' attorneys' services is reasonable. The Court has considered all relevant factors for appellate attorneys' fees and finds as follows: (1) $50,000 is a reasonable attorneys' fee for Plaintiffs' defense of an appeal to the Court of Appeals; and (2) $50,000 is a reasonable fee for Plaintiffs' attorneys' work in connection with review by the Texas Supreme Court.

**Dr. Parrott's Attorneys' Fees**

***What is a reasonable fee for the necessary services of Dr. Parrott's counsel for the necessary defense of Dr. Parrott not duplicative of that generally provided by DISD's counsel and for the prosecution of the cross-claim?*** The Court's holding as to Dr. Parrott's fees was more narrow than that of the Plaintiffs. Whether Mr. Rosenthal's fees were reasonable for his representation of Dr. Parrott in its entirety[10] is not the question. Recovery against DISD is limited by the fact that the defense obligation found by the court was very limited in light of Mr. Moyé's zealous representation of the "body corporate" and the fact that Dr. Parrott's individual assets were not in jeopardy in this case. The Court ruled that only matters directly related to Dr. Parrott's defense that were not duplicative of the larger defense effort were to be reimbursed.

As a result, the Court finds that the reasonable and necessary fees for the non-

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[10] The protection of Dr. Parrott's other interests and reputation may justify the time spent by Mr. Rosenthal, but this would not be part of the DISD's defense obligation.



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duplicative defense of the case is $12,375 through the trial court resolution of the Plaintiffs' case and the reasonable and necessary fees for the prosecution of the cross-claim is $15,750 through the trial of this case for a total fee through trial of $28,125.[11] The Court has considered all relevant factors for appellate attorneys' fees and finds as follows: (1) $15,000 is a reasonable attorneys' fee for Dr. Parrott's defense of an appeal to the Court of Appeals; and (2) $15,000 is a reasonable fee for Dr. Parrott's attorney's work in connection with review by the Texas Supreme Court.

The non-duplicative defense of Dr. Parrott in this case did not require her counsel's attendance at all hearings, depositions and other proceedings. Nor did the prosecution of the cross-claim. Because DISD was taking the lead on the novel and difficult legal questions, the portion of Dr. Parrott's defense for which DISD should be responsible which was left for Mr. Rosenthal to provide was not particularly difficult. The prosecution of the cross-claim did involve some difficult and novel questions, and the "fast track" nature of this case imposed rather strenuous time limitations. The fee awarded is well within the fee customarily charged.

A particular "amount" was not involved initially. Nevertheless, Dr. Parrott was justified in seeking not be abandoned by the District when it was providing a defense for all of the other trustees all of whom were accused of conduct identical to that of Dr. Parrott. Dr. Parrott was successful in obtaining a finding of limited indemnity. The award for Dr. Parrott's prosecution of the cross-claim, while higher than the recovery on the cross-

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[11] Again, a breakdown is not required. In the interest of clarity, these figures represent 55 hours and 70 hours respectively at $225 an hour, a rate that DISD agreed was reasonable.



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claim, bears a reasonable relationship to that amount and to the complexities involved in prosecuting the cross-claim.

The undisputed evidence showed that Dr. Parrott's counsel has a fine reputation and background. His professional relationship with the client and the fixed or uncertain nature of the fee was not addressed by the evidence. The evidence established, however, that Mr. Rosenthal had to bring in contract attorneys to maintain his practice because of the time he spent on this case.

Based upon the above factors, the fee awarded to Dr. Parrott is reasonable.

**Litigation Costs**

Under Chapter 551.142(b), Plaintiffs are entitled to their "costs of litigation." Under DISD's duty to defend, Dr. Parrott is entitled to her expenses in defending the litigation and her taxable court costs for prosecuting the cross-claim. The Court finds Plaintiffs costs of litigation (other than attorneys' fees) to be $33,314.22.[12] Some of these costs would be taxable court costs. In recovering any such court costs, of course, Plaintiffs will not be permitted to duplicate the invoices and charges contained in Plaintiffs Exhibits 1-3. The Court finds Dr. Parrott's defense expenses to be $233.25.[13]

Concurrently with these findings of fact and conclusions of law, the Court is signing a final judgment that incorporates the amounts found herein.

The clerk of the court is directed to send a copy of this order to the following

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[12] This represents a 50% reduction of the copying charge fees to account for unnecessary duplication. It includes the costs for Plaintiffs' expert witness.

[13] The $25.00 filing fee is included in the taxable court costs awarded in the judgment.



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counsel of record, who participated in the trial.

SIGNED this 28th day of January, 2002.

JUDGE PRESIDING

cc: Daniel Perez, VIA FAX 214-653-1014
Eric Moyé, VIA FAX 214-712-4402
Norton Rosenthal, VIA FAX 214-752-4671



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CAUSE NO. 05-01393-J

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| DALLAS NATIONAL BANK<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| ALEXANDRA CHRISTIAN LTD. et al.<br>Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On June 6, 2006, this case came on to be tried; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence admitted, the arguments of counsel, and the post-trial briefing (which briefing closed on June 23), the Court makes these findings of fact and conclusions of law pursuant to TRCP 296-299 which does not require any particular form thereof.

*Affidavit of Allan Muns.* On June 23, 2006, the "Affidavit of Allan Muns" was filed. It contains no certificate of service and no transmittal letter. The Court assumes that this affidavit was filed by Mr. Muns, a non-party. Because it was filed after trial by a non-party on an ex parte basis and constitutes hearsay, the Court declines to consider it for any purpose.

*Background.* In the Spring and Summer of 2001, Defendants negotiated and ultimately signed a $300,000 (SBA) loan and guarantee with Plaintiff, secured by a certificate of deposit and inventory appraised at over one million dollars. Later than year, Defendants used the pledged certificate of deposit to pay down the note to $200,000. For a period of time, Defendants paid on the note. However, in late 2003, Alexandra Christian's business (high-end antiques) began to fail. Tiernan requested and received a deferment of her



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note for a few months. Thereafter, she closed down the store location at Routh Street and moved her inventory in part to Debris (an antique market), Sotheby's (an auction house) and her personal residence. The Sotheby's sale was a "catastrophe," according to Tiernan and yielded far less than expected. Plaintiff received none of these proceeds. It is unclear whether business or personal debts were paid with the proceeds. Thereafter, tensions between Plaintiff and Defendants escalated with a series of increasingly urgent letters from the Plaintiff demanding repayment and, ultimately, accelerating the note.

Thereafter, Plaintiff attempted to recover the collateral. Some was recovered and sold. However, Tiernan claimed that some of the original inventory of Alexandra Christian now belonged to her due to "like-kind" exchanges she performed without any documentation or verification. She alleged that some property in her home (seen and photographed by Plaintiff's agents) was either her own or that of her ex-husband, Allan Muns. Before and after the lawsuit was filed, the parties have disagreed over who owns what. The "tracing" evidence consisted largely of Tiernan's own testimony, both live and by deposition and testimony admitted as a exhibits.

*Did Alexandra Christian and Kelly Ann Tiernan fail to comply with their obligations to repay Dallas National Bank in accordance with the Note and Guarantee (respectively)?* Yes. This claim is essentially undisputed. Alexandra Christian did not pay the note in full, and Tiernan is liable on the guarantee. Plaintiff is entitled to recover on its breach of contract claim against Defendants, jointly and severally, in the amount of $147,947.63, together with pre-judgment interest not included in this sum at the note rate and post-judgment interest at the note rate. Attorneys' fees are discussed below.



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*Did Defendants commit theft within the meaning of the Texas Theft Liability Act?* No. As Defendants point out, the accusation against them is based upon the definition of theft contained in Chapter 32 of the Penal Code, while the Texas Theft Liability Act provides a civil cause of action only for violations of certain sections of Chapter 31 of the Penal Code. Accordingly, the Court finds against Plaintiff on this count.

*Did Defendants commit conversion as to items in which Plaintiff had a security interest, entitling Plaintiff to a constructive trust on those items?* Yes, as to the "traded items." Tiernan admits taking items in which Plaintiff had a security interest and simply "trading them out" in a "like-kind exchange" for items she owned. The Court finds that these transfers were undocumented and suspect. In the absence of proper appraisal and documentation, these transfers are no more than Tiernan taking secured property. These "trades" are in contrast to actually selling the inventory items to third-parties in arms-length transactions. A security agreement on inventory obviously contemplates such sales, with proceeds then going into the business to be used to pay the loan, purchase more items for sale and keep the business afloat. Thus, the Court concludes that as to items actually sold to third parties, no conversion occurred. As to items "traded," the Court concludes that this constitutes a conversion, and Plaintiff is entitled to a constructive trust on those items. In Exhibit 1 to Defendants' Proposed Findings of Fact and Conclusions of Law, the evidence regarding the "trades" is summarized in a readable fashion. Based upon the evidence presented, the Court finds and concludes that the items listed on this exhibit as "trade" should be incorporated into a judgment in which Plaintiff is given a constructive trust on those items to the extent necessary to satisfy the judgment for breach of contract described



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above. Proceeds from any sale of these items must be applied against the judgment entered in this case.

With respect to property that was never in the inventory of Alexandra Christian (whether listed as "Muns," "personal" or otherwise), the Court concludes that Plaintiff has failed to meet its burden of proving conversion as a factual and legal matter.[1] Thus, no other relief for conversion and constructive trust will be awarded.

*Accounting.* The Court finds and concludes that Defendants have already given the information they have available that would form the "accounting" sought. Accordingly, the Court declines to order any further accounting.

*Injunction.* The Court concludes that a permanent injunction should issue as to the constructive trust items barring Defendants from taking any action inconsistent with Plaintiffs' rights therein.

*Did Defendants make a misrepresentation of material fact, intending that Plaintiff rely thereupon and upon which Plaintiff did rely to its detriment?* No. Accordingly, the Court concludes that Plaintiff should take nothing on its fraud claim.

*Exemplary Damages for Conversion: By clear and convincing evidence, was the conversion committed with malice or gross negligence as those terms are defined in Chapter 41 of the Texas Civil Practice and Remedies Code?* No. Accordingly, the Court concludes that Plaintiff should take nothing on its claim for exemplary damages.

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[1] The Court also declines to award relief for or against Muns, a non-party herein. Although he could have intervened, he did not, and he is not required to do so. Under the due process clause, the Court cannot adjudicate the rights of non-parties in this case.



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*Attorneys' Fees: What is a reasonable fee for the necessary services of Plaintiff's attorney through the trial of this case?* $65,000. Plaintiff failed to proffer any evidence of appellate attorneys' fees. Accordingly, the Court declines to award same.

*Judgment.* In addition to the foregoing, costs of court should be taxed against Defendants. The Court declines to award any other relief. The Court orders Plaintiff's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document. He shall then circulate same to opposing counsel and for comment. Within seven days thereof, Plaintiff's counsel shall forward a proposed form of judgment to the Court together with any comments or agreements as to form received from Defendant's counsel.

The clerk of the court is directed to send a copy of this document to the following counsel of record, who participated in the trial.

SIGNED this 19th day of June, 2006.

JUDGE PRESIDING

cc: Michael Pezzulli, 17304 Preston Rd., Ste. 700, Dallas, TX 75252
Robert Nicoud, 1201 Main Str., Ste. 2470, Dallas, TX 75202



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CAUSE NO. 04-7852-J

| | | |
|---|---|---|
| APRIL SMITH<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| EARL ANGELL d/b/a UNCLE BUDDY'S<br>and RON FULGHAM<br>Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 29, 2005, this case came on to be tried; all parties having waived a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* Ms. Smith purchased a car from Uncle Buddy's pursuant to a retail installment contract. All parties agree that Ms. Smith made all payments on the car until the last payment. As to that payment, Ms. Smith says she tendered a check, and Uncle Buddy's denies receiving same. A few weeks after the last payment was due, Uncle's Buddy's repossessed the car and later gave notice of sale.[1] After the repossession, Ms. Smith stopped payment on the check she had tendered previously. This lawsuit ensued.

*Did Uncle Buddy's wrongfully repossess the car?* Yes. The Court finds that Ms. Smith did properly tender payment, which Uncle Buddy's decided not to cash and instead wrongfully repossessed the car. The Court concludes that, as a result of the wrongful

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[1] The Court finds this notice inadequate under Section 9 of the Texas Uniform Commercial Code. However, Defendants state that they have not sold the car in question.

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repossession, Ms. Smith's stop payment on the check was not improper. The Court concludes that Ms. Smith should prevail on her claim of wrongful repossession.

*Remedy.* The Court does not find by clear and convincing evidence that the requisite mental state for recovery of exemplary damages has been shown. Accordingly, the Court will not award exemplary damages. With respect to any other remedy, the Court concludes that the parties should be given additional time in which to submit briefing on the proper remedy for the wrongful repossession the Court has found in light of the above findings. Alternatively, the parties may agree upon a remedy. Accordingly, the parties shall submit briefing on the remedy or an agreement as to the remedy, with an accompanying form of judgment, no later than September 12, 2005.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 1st day of September, 2005.

JUDGE PRESIDING

cc: Herbert Landau, 6965 Abbey Court, Dallas, TX 75214
Charles Klein, 11615 Forest Central Drive, Ste. 330, Dallas, TX 75243

9-2-05 morning at nine (9) o'clock.
Court met pursuant to
present as of yesterday.

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CAUSE NO. 02-4066-J

| | | |
|---|---|---|
| HENRY SAENZ, JR.<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| KEN T. MCGUIRE<br>Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 21 and 23, 2003, this case came on to be tried; all parties having waived a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* Mr. Saenz was the owner of a Jaguar vehicle that was involved in a collision with a third party not involved in this case. The third party was covered by insurance which was to pay for repairs to the vehicle. Mr. Saenz took the car to Defendant's shop for repairs. The insurance company estimate and supplemental estimate came to a total of $3899.96 which the insurance company paid by check, a copy of which was admitted as Defendant's Exhibit 2 and which sums were retained by Saenz. The parties agree that Saenz paid only $2750. Saenz contends that the repairs were not done according to the estimate and that the paint work was unsatisfactory. He also claims that Defendant told him to pick up the car and bring it back for adjustments to the paint later at which time they would settle up the remaining amount owed. Defendant contends that Plaintiff simply took the car without permission, that no further repairs were needed and that Plaintiff owed $1157 at the



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time he picked up the car.

Defendant repossessed the car and sent a notice of sale to satisfy lien, a copy of which was admitted as Plaintiff's Exhibit 1. All agree that the amount set forth in that notice was incorrect. Defendant still holds the car today.

Plaintiff sued to get the car back and for various damage theories. Defendant counterclaimed for the balance of the invoice, repossession fees, storage fees and attorneys fees.

*Did Defendant fail to properly repair the vehicle?* The Court finds that Defendant did not properly match the paint. Plaintiffs contends that the entire quarter panel of the car should have been replaced, but the Court finds that, other than the paint, the car repair was properly done.

*What sum of money, if any, if paid now in cash would fairly and reasonably compensate Plaintiff for the repair costs? The measure of damages is the reasonable and necessary cost of repairing the paint job in question.* Plaintiff did not submit any credible evidence to prove the reasonable costs of a proper paint job, which is the only sum to which the Court finds he is entitled on a breach of contract theory. Accordingly, the Court cannot award Plaintiff any affirmative monetary recovery.

*Did Defendant properly repossess the car?* Construing Plaintiff's pleadings of "wrongful lien" liberally, the Court determined that Plaintiff is attacking the repossession of his car and the resulting storage and towing charges. The Court finds that the car was wrongfully repossessed. A repairman's lien is a possessory lien which is extinguished when the car is returned to the owner. *Kollision King, Inc. v. Castanon*, 968 S.W.2d 20 (Tex. App.



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– Corpus Christ 1998, no pet.).

In this case, Defendant contends that Saenz "stole" the car such that the lien would still attach. However, the Court finds that Saenz rightfully reacquired possession of the car with Defendant's consent. Accordingly, the repairmen's lien was not in effect when the car was repossessed. While Defendant might still be entitled to file a mechanic's lien, he was not entitled to repossess the car in the manner he did. Accordingly, Plaintiff is not responsible for any storage, repossession or towing charges. Plaintiff did not present any credible evidence of any other damages he may have suffered due to the repossession; accordingly, the Court will not award him any affirmative monetary relief. Plaintiff is entitled to possession of the car.

*Is Defendant entitled to recover any additional sums on the original invoice?* Because the work was not satisfactorily completed, the Court finds that Defendant materially breached the contract of repair such that Plaintiff does not owe Defendant any further sums on the invoice.

*Judgment.* The Court finds that Plaintiff is entitled to possession of the 1986 Jaguar in question; in all other respects, each side should take nothing against the other. Plaintiff is entitled to an award of his taxable court costs. The Court declines to award any other relief. The Court orders the parties to prepare a form of judgment that reflects the findings and conclusions herein within seven days of receipt of this document.



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The clerk of the court is directed to send a copy of this order to the following counsel of record and pro se parties, who participated in the trial.

SIGNED this 10th day of Feb, 2003.

JUDGE PRESIDING

cc: Henry Saenz, Jr., 5304 Norris #13, The Colony, TX 75056
Stephen L. Walker, 1400 Preston Rd., Ste. 200, Plano, TX 75093



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CAUSE NO. 04-979-J

| | | |
|---|---|---|
| APEX EXPRESS, INC. | ) | IN THE DISTRICT COURT OF |
| Plaintiff, | ) | |
| v. | ) | DALLAS COUNTY, TEXAS |
| DENNIS MCQUINN | ) | |
| Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 23, 2004, this case came on to be tried; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* Defendant McQuinn was in the delivery service business. In 2003, he agreed to sell his business to Apex Express, Inc. Plaintiff's Exhibit 1 (the "Agreement") contains the parties' agreements regarding the sale of the business, a note from Defendant to Plaintiff and an independent contractor agreement under which Defendant would work for Plaintiff. A few months after the contract was signed, the relationship between the parties deteriorated with each claiming the other breached the Agreement. Plaintiff filed this suit on February 6, 2004, fewer than four months after the Agreement was signed.

*Injunctive Relief.* The Agreement contains a covenant not to compete for 10 years. At trial, Defendant indicated that he is not opposing the request for injunctive relief. Accordingly, the Court will grant a permanent injunction as requested which should expire on October 20, 2013.

*Suit on the Note.* Defendant admits that he has failed to pay as required under the Note that is part of the Agreement. He did not dispute the amount of $17,500 due and owing



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under the Note. However, he argued he should receive an offset for the commissions he should have earned in the future, although he is no longer working for Plaintiff. Defendant failed to present any evidence of the amount of such an offset. The Court declines to award such an offset. The Court will award $17,500 to Plaintiff together with postjudgment interest at the statutory rate of 5% per annum.

*Unpaid Phone Bills.* The Court finds no agreement by Defendant to pay the bills in question and insufficient itemization of same. Accordingly, the Court declines to award relief to Plaintiff on this matter.

*What is a reasonable fee for the necessary services of Plaintiff's counsel in connection with the work done prosecuting the breach of contract action against Defendant?*

The Court is required to address reasonable and necessary attorneys' fees, considering the following factors:(1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The fee customarily charged in the locality for similar legal services; (3) the amount involved; (4) the time limitations imposed by the client or the circumstances; (5) the experience, reputation, and ability of the lawyer performing the services; (6) the results obtained; (7) whether the fee was fixed or contingent, and (8) the likelihood that the acceptance of this work would preclude other employment by the lawyer. *Arthur Andersen & Co. v. Perry*, 945 S.W.2d 812 (Tex. 1997). However, Plaintiff presented no evidence of any of these factors. It presented only its attorneys' testimony that his fee was $5827.44 and a fee bill (Plaintiff's Exhibit 7) containing no detail whatsoever of the work performed. The Court finds this evidence both legally insufficient and factually unpersuasive to support the amount sought.



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Under Civil Practice & Remedies Code Section 38.004, the Court may take judicial notice of the usual and customary fees and the contents of the file and proceedings before it. The Court has not observed all actions taken by Plaintiff's counsel. Based upon the file before the Court and the proceedings before the Court, the Court finds that a usual and customary fee for the work the Court can discern was performed would be $750. The Court awards this sum as reasonable and necessary attorneys' fees. Tex. Civ. Prac. & Rem. Code 38.003. Plaintiff is also entitled to its costs of court.

*Judgment.* The Court declines to award any other relief. The Court orders the Plaintiff's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document and circulate same to his opponent for comment. Within seven days thereof, Plaintiff's counsel shall forward a proposed form of judgment to the Court together with any comments as to form received from.

The clerk of the court is directed to send a copy of this order to the following counsel of record and pro se parties, who participated in the trial.

SIGNED this 25th day of Aug, 2004.

JUDGE PRESIDING

cc: J. Derrick Winfrey, 409 Sheffield Ave., Llano, TX 78643
Dennis McQuinn, 301 S. Tenth, Comanche, OK 73529



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CAUSE NO. 01-9126-J

| | | |
|---|---|---|
| INRECON LLC | ) | IN THE DISTRICT COURT OF |
| Plaintiff, | ) | |
| v. | ) | DALLAS COUNTY, TEXAS |
| JEANETTE RASHTI | ) | |
| Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On February 10, 2003, this case came on to be tried; all parties having waived a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* On October 24, 2000, a fire broke out at the Oui Lounge which was located in a strip shopping mall owned by Defendant Rashti and insured by two insurance companies. Rashti immediately hired Sal Turano as her public adjuster to help obtain resolution of the insurance claims. The Oui Lounge location was substantially damaged and all leaseholds on the premises suffered some damages.

Inrecon was contacted within a day or two of the fire. Thereafter, the bulk of the negotiations regarding the scope of work and cost of repair were among Turano (on behalf of Rashti), Inrecon employee Alex Kutos and the independent adjuster for the two insurance companies, Mr. Roeder. The uncontroverted evidence establishes that, after negotiations with Mr. Roeder, the parties agreed on a scope of work for a cost of repair of $152,000. The disagreement between the parties centers on whether Inrecon agreed to "eat" the depreciation amount that would be assessed on the cost of repair because the insurance policies were "actual cash value" rather than "replacement cost" policies. Rashti also contends that



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00825 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Inrecon agreed to be responsible for Turano's 7% fee plus tax and half her deductible.

*Did Inrecon and Rashti agree that Inrecon would perform renovation services on the Oui Lounge premises under the payment terms expressed in Plaintiff's Exhibit 1?*

Yes. The only written documentation of any agreement is contained in Plaintiff's Exhibit 1. The relevant portions are as follows: "The undersigned hereby understands that . . . she . . . [is] not liable for payment of sums in excess of the Insurance settlement unless specified below or in writing (except insurance deductibles). . . . General Conditions. If for any reason your claim is denied by your insurance carrier or they refuse to pay the costs of any and/or all work performed by ProTech INRECON, or you otherwise delay or prevent the payment of said insurance draft, or use it for other purposes, then the Insured/owner of the above mentioned property will be personally liable for any costs of services performed."

The Court has the duty to harmonize all portions of an agreement in an effort to give meaning to all provisions. Only if doing so results in an ambiguity will the court resort to doctrines such as contra proferentem. The first clause states that Inrecon will look to the "insurance settlement." The next clause states that Rashti will be personally liable for any amounts that the insurance carrier refuses to pay. These two clauses read together mean that the insurance carrier determines the scope of work and cost of repair, and Inrecon may not charge more or do more work than the insurance company agreed upon. In this case, the amount agreed upon for the scope of work was $152,000. If we accept Rashti's version of events, the carrier refused to pay about $31,000 of that amount because of the depreciation allowance. While the carrier's refusal to pay was not wrongful, it nevertheless was a refusal. In that circumstance, Rashti would have to pay that difference under the "General



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Conditions" clause .

Even if the Court gave no effect to the "General Conditions" clause, the "Insurance settlement" was for at least $194,000, much more than the bill in question. Rashti failed to demonstrate how much was actually paid to other contractors even if we accept her argument that those payments should be deducted from the "insurance settlement" to arrive at Inrecon's figures.

Plaintiff's Exhibit 1 in no way mentions Turano's fees. The Court does not find it credible that the parties had an oral agreement whereby Inrecon would be responsible for Turano's fees. Plaintiff's Exhibit 1 expressly requires Rashti to pay her own deductible.

*If so, did Rashti fail to comply with that agreement? Was such failure to comply excused by Inrecon's conduct?*

Thus, under any reasonable construction of Plaintiff's Exhibit 1, Rashti failed to comply with the agreement without excuse. It is undisputed that Rashti did not pay the entire amount requested based on her contention that the agreement did not require her to pay Inrecon anything representing depreciation deductions, half the deductible and Mr. Turano's fee. The Court has already found that the agreement was otherwise, so Rashti failed to comply by failing to pay. Rashti pleaded the following defenses: Inrecon materially breached the agreement, anticipatory repudiation, waiver, equitable estoppel, novation, modification, and/or accord and satisfaction. The testimony was uncontroverted that Inrecon performed the requisite work at the Oui Lounge; no criticisms of the workmanship were offered. The only disagreement between the parties is over the amount to be charged for the work, not the quality of the work performed. Although Rashti tendered a check for approximately



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$111,000 to Inrecon marked "paid in full," the undisputed evidence is that Inrecon never cashed it. Inrecon was not required to accept less than full payment with a restrictive endorsement.

The Court finds that no credible evidence supports any of the pleaded defenses.

*What sum of money, if any, if paid now in cash would fairly and reasonably compensate Inrecon for damages from the failure to comply? The measure of damages is the difference between the agreed upon price and the amount paid.*

The parties agreed that the cost of repair would be $152,000. To date, Rashti has not paid anything. Accordingly, the amount owed is $152,000.

*Quantum Meruit.*

Having found an express contract governing the relationship, there can be no recovery in quantum meruit.

*Did Inrecon engage in any false, misleading or deceptive act or practice that Rashti relied on to her detriment that was a producing cause of damages to Rashti? "False, misleading or deceptive act" means: (1) representing that goods or services had or would have characteristics that they did not have; (2) representing that an agreement confers or involves rights that it did not have or involve.*

No.

*What is a reasonable fee for the necessary services of Plaintiff's counsel in connection with the work done prosecuting the breach of contract action against Defendant?*

The Court has addressed reasonable and necessary attorneys' fees, considering the following factors:(1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The fee customarily charged in the locality for similar legal services; (3) the amount involved; (4) the time limitations imposed by the client or the circumstances; (5) the experience, reputation,



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and ability of the lawyer performing the services; (6) the results obtained; (7) whether the fee was fixed or contingent, and (8) the likelihood that the acceptance of this work would preclude other employment by the lawyer.

Having considered the foregoing, the Court finds a reasonable fee for the necessary services of Plaintiff's counsel to be as follows: (1) $7500 through the trial of this cause; (2) in the event of an unsuccessful appeal by Defendant to the Court of Appeals, $1500.00 for the appeal; (3) in the event of a petition for review to the Texas Supreme Court an additional $1500, conditioned that Plaintiff ultimately prevails; and (4) in the event the petition for review is granted and Plaintiff ultimately prevails, an additional $1500. Plaintiff is also entitled to its costs of court, contractual prejudgment interest on the principal award and postjudgment interest on the entire amount.

*Judgment.* The Court declines to award any other relief. The Court orders the Plaintiff's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document and circulate same to opposing counsel for comment. Within seven days thereof, Plaintiff's counsel shall forward a proposed form of judgment to the Court together with any comments as to form received from Defendant's counsel.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 11th day of Feb., 2003.

JUDGE PRESIDING

cc: Patrick Schurr, 13601 Preston Rd., Suite 600W, Dallas, TX 75240
C.D. Peebles, P.O. Box 92970, Southlake, TX 76092-0970



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CAUSE NO. 02-3160-J

| | | |
|---|---|---|
| LUIS ALATORRE<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| PRIMERO AUTO SALES LTD. et al.<br>Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 10, 2003 this case came on to be tried; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. The Court granted judgment as a matter of law in favor of Greater Texas Latino Foundation, leaving All Pro Collision, Inc., Primero Auto Sales, Ltd. and Primero Auto Sales Management, LLC as Defendants. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* Plaintiff contends that he was an employee of one or more of the Defendants and that he sustained an injury to his left wrist while at work on July 13, 2001. He contends that the injury caused him to incur medical expenses, miss work and suffer physical pain and mental anguish.

*On July 13, 2001, did Plaintiff sustain an injury while in the course and scope of his employment, if any, for one or more of the following: All Pro Collision, Inc., Primero Auto Sales, Ltd. or Primero Auto Sales Management, LLC?* No, to all three.

As a factual matter, the Court finds that Plaintiff was never an employee of Primero Auto Sales, Ltd. or Primero Auto Sales Management, LLC.



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With respect to All Pro Collision, the evidence of whether Plaintiff was an employee or an independent contractor and the evidence of whether he sustained an injury while at All Pro Collision was contested and contradictory. Mr. Castro testified that Plaintiff was paid "by the job" for specific cars and not as an employee. Plaintiff testified that he was paid $500/week as an employee. Both agreed he actually performed services at All Pro Collision for only about two weeks. The medical records contain evidence of some problem with the left wrist, though the description of the accident varies significantly among the various medical providers' records.

Considering all the evidence and the factual inconsistencies, the Court cannot find as a factual matter that it is more likely than not that Plaintiff sustained an injury in the course of scope of employment at All Pro Collision. Having made this finding, any other factual questions are irrelevant.

*Judgment.* The Court has this day signed a Final Judgment in conformity with these findings and conclusions.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 15th day of April, 2003.

JUDGE PRESIDING

cc: Mark Humphreys, 702 Dalworth, Grand Prairie, TX 75050
John Shumaker, 8222 Bruton Road, Dallas, TX 75217



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CAUSE NO. 01-11084-J

| | | |
|---|---|---|
| AMERICAN WAY, INC. | ) | IN THE DISTRICT COURT OF |
| Plaintiff, | ) | |
| v. | ) | DALLAS COUNTY, TEXAS |
| SOUTHWEST LAND & BLDG. et al. | ) | |
| Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 7 and 9, 2003, this case came on to be tried; all parties having waived a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* Image Commercial Contractors contracted to do remodeling work on behalf of owner/landlord (and Defendant) 1250 Mockingbird Associates for the "Attorney General space" on the third floor of the 1250 Mockingbird building. In turn, Image Commercial Contractors contracted with Plaintiff American Way, Inc. to perform the HVAC work that was part of the remodeling project. The project went smoothly for a time, and American Way received a partial payment for its work from Image Commercial Contractors. All parties agree that American Way did not have a direct contract with 1250 Mockingbird at the start of the project but, instead, acted as a subcontractor to Image Commercial. All also agree that at some point, Image Commercial left the job without completing the contract. American Way never received full payment of the contract price.

After Image Commercial abandoned the job, Matthew Bukin, on behalf of 1250 Mockingbird, began working directly with the subcontractors, including American Way, to finish various jobs. American Way contends that it finished its work and should be paid by



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1250 Mockingbird. 1250 Mockingbird, on the other hand, contends that American Way failed to complete the necessary tasks in a satisfactory fashion and that it had to hire another contractor at a higher price to complete the job.

American Way filed this lawsuit. By the time of trial, the Attorney General had been nonsuited. Image Commercial, brought in by a third-party action, agreed to indemnify 1250 Mockingbird for any amounts it was found to owe to American Way. It did not appear at trial. At trial, the Court granted judgment as a matter of law to Southwest Land & Building, the management company for the building in question. Thus, with respect to disputed fact issues, only two parties remain: American Way and 1250 Mockingbird.

American Way sued for breach of contract, quantum meruit (in the alternative) and foreclosure of a mechanic's lien. At trial, the Court granted judgment as a matter of law on the mechanic's lien because the lien affidavit failed to substantially comply with the statutory requirements. The Court will address the other two causes of action in more detail below.

*Did American Way and 1250 Mockingbird agree that American Way would perform HVAC remodeling services on the Attorney General premises for payment by 1250 Mockingbird?*

No. The parties agree that the original contract ran from 1250 Mockingbird to the general contractor, Image Commercial, and that no direct contract existed between 1250 Mockingbird and American Way. However, American Way argues that Plaintiff's Exhibit 15 is a "direct contract." Plaintiff's Exhibit 15 was sent more than five months after American Way said the project was substantially complete. At best, this letter could be construed as an offer to make an unspecified "payment" if American Way did certain enumerated things. American Way never accepted this "offer," and, indeed, contended that



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paragraph 1 of Plaintiff's Exhibit 15 was not its responsibility. Thus, there was never any meeting of the minds about Plaintiff's Exhibit 15's terms or on an amount of "payment." American Way should take nothing on its breach of contract claim.

*Is American Way entitled to recover under a theory of quantum meruit?*

Yes. In the alternative, American Way pleaded for relief under a quantum meruit theory. With respect to the work performed before the July 3 letter (and certainly before the January 31 "substantial completion" date), American Way had no reasonable expectation of payment from 1250 Mockingbird; 1250 Mockingbird had no reason to expect that it would have to pay American Way directly. *Crockett v. Sampson,* 439 S.W.2d 355, 358 (Tex. Civ. App. – Austin 1969, no writ). However, after 1250 Mockingbird got involved directly in the completion efforts and certainly after July 3, 1250 Mockingbird could reasonably have expected to pay American Way for its work performed after that date.

*If so, what is the reasonable value of the services performed?* $4218.40. The only testimony about the value of the later work was that it was "about the amount" of the retainage of $4218.40.

***What is a reasonable fee for the necessary services of Plaintiff's counsel in connection with the work done prosecuting the quantum meruit action against Defendant?***

The Court has addressed reasonable and necessary attorneys' fees, considering the following factors:(1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The fee customarily charged in the locality for similar legal services; (3) the amount involved and results obtained; (4) the time limitations imposed by the client or the circumstances; (5) the



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experience, reputation, and ability of the lawyer performing the services; (6) the results obtained; (7) whether the fee was fixed or contingent, and (8) the likelihood that the acceptance of this work would preclude other employment by the lawyer.

Having considered the foregoing, the Court finds a reasonable fee for the necessary services of American Way's counsel in prosecuting the quantum meruit claim to be as follows: (1) $3000 through the trial of this cause, with an additional $1000 if a motion for new trial is filed by 1250 Mockingbird which is overruled; (2) in the event of an unsuccessful appeal by 1250 Mockingbird to the Court of Appeals, $3750 for the appeal; (3) in the event of a petition for review to the Texas Supreme Court an additional $1750, conditioned that American Way ultimately prevails; and (4) in the event the petition for review is granted and American Way ultimately prevails, an additional $1750.

*What is a reasonable fee for the necessary services of Defendant's counsel in connection with the work done defending Plaintiff's claim for foreclosure of an invalid mechanic's lien?*

The Court has addressed reasonable and necessary attorneys' fees, considering the following factors:(1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The fee customarily charged in the locality for similar legal services; (3) the amount involved and results obtained; (4) the time limitations imposed by the client or the circumstances; (5) the experience, reputation, and ability of the lawyer performing the services; (6) the results obtained; (7) whether the fee was fixed or contingent, and (8) the likelihood that the acceptance of this work would preclude other employment by the lawyer. The Court notes



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that only time spent defending against the invalid mechanic's lien itself – as opposed to time spent on the case generally – is recoverable, and only such fees should be and will be awarded.

Having considered the foregoing, the Court finds a reasonable fee for the necessary services of 1250 Mockingbird's counsel on the lien issue to be as follows: (1) $1000 through the trial of this cause; (2) in the event of an unsuccessful appeal by American Way of the mechanic's lien issue to the Court of Appeals, $3750 for the appeal; (3) in the event of a petition for review of the lien issue to the Texas Supreme Court an additional $1750, conditioned that 1250 Mockingbird ultimately prevails on the lien issue; and (4) in the event the petition for review is granted on the lien issue and 1250 Mockingbird ultimately prevails, an additional $1750. The amount of the trial attorneys' fees may be offset against the amount owed by 1250 Mockingbird to American Way.

American Way is also entitled to prejudgment interest on the principal award and postjudgment interest on the entire amount. The Court finds that both sides prevailed in part and lost in part such that good cause exists to tax costs against the party incurring same.

*Judgment.* The Court declines to award any other relief. The Court orders American Way's counsel to prepare a form of judgment that reflects the findings and conclusions herein (as well as the stipulation from Image Commercial) within five days of receipt of this document and circulate same to opposing counsel for comment. Within seven days thereof, American Way's counsel shall forward a proposed form of judgment to the Court together with any comments as to form received from 1250 Mockingbird's counsel.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial. Mr. Sanford is responsible for sending a copy of this



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document to all other counsel of record.

SIGNED this 16th day of April, 2003.

Carlos Keyes
JUDGE PRESIDING

cc: Brian Sanford, 1701 N. Collins Blvd., Ste. 1100, Richardson, TX 75080
Alan Harlan, 14755 Preston Road, Ste. 600, Dallas, TX 75254



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ORIGINAL

CAUSE NO. 00-5612-J

| | | |
|---|---|---|
| CLAUDINE WOOLF | ) | IN THE DISTRICT COURT OF |
| Plaintiff, | ) | |
| v. | ) | DALLAS COUNTY, TEXAS |
| MARY KAY INC., a corporation et al. | ) | |
| Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried before a jury in November of 2002. Following rulings by the Court that, under the circumstances of this case, attorneys' fees would be the subject of a post-verdict bench trial, the attorneys' fees issue came on for trial on May 30, 2003 before the Court.

Having considered the evidence presented, as well as the contents of the file and proceedings before the Court (including the jury trial) judicially noticed, and having heard the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* An extensive discussion of the background of this case is unnecessary because the case has been the subject of a lengthy trial. In summary, Plaintiff brought this suit alleging that Defendant Mary Kay violated various prohibitions against discrimination. Plaintiff also filed suit for common law contract and tort claims. Plaintiff prevailed after a jury trial on one count of employment discrimination.

**Plaintiff's Attorneys Fees**

*What is a reasonable fee for the necessary services of Plaintiff's counsel in this case?* The Court has addressed Plaintiff's reasonable attorneys' fees using the following factors: (1) the time and labor involved, the novelty and difficulty of the questions involved, and the



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skill required to perform the legal services properly; (2) the fee customarily charged in the locality for similar legal services; (3) the amount involved and results obtained; (4) the time limitations imposed by the client or the circumstances; (5) the experience, reputation, and ability of the lawyer performing the services; (6) the nature and length of the professional relationship with the client; (7) whether the fee was fixed or contingent on results obtained or uncertainty of collection before the legal services were rendered, and (8) the likelihood that the acceptance of this work would preclude other employment by the lawyer. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997); *Robertson County v. Wymola*, 17 S.W.3d 334, 345 (Tex. App. -- Austin 2000, pet. denied)(applying *Perry* factors to case where statute authorized recovery of "reasonable attorney's fees"); Tex. Disc. R. Prof. Con. 1.04. Having considered same, the Court finds that a reasonable fee for the necessary services of Plaintiff's counsel through the conclusion of the May 30 trial is $325,000.00. The Court provides a detailed examination of the factors considered in arriving at this number below.

*Time, Labor, Novelty and Skill (Factor 1)*

Plaintiff sought damages for alleged discrimination by Mary Kay. Inherent in several causes of action, including the one upon which recovery was had, was the question of whether Plaintiff was an employee or an independent contractor of Mary Kay. At the bench trial, Ms. Alioto gave unrebutted testimony that Mary Kay's counsel told her that Mary Kay had never lost this issue.

Woolf alleged that she was the victim of discrimination during a period of pregnancy and cancer treatment. This country has recognized that job discrimination is a serious



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problem that must be addressed by comprehensive statutes providing appropriate damages and penalties. The federal government and the states of Texas and California are in agreement that job discrimination must not be tolerated. Therefore, the rights sought to be vindicated in this case were and are worthy of an aggressive, skilled and substantial effort by Plaintiff's attorneys.

In a larger sense, experienced, quality attorneys must receive adequate compensation when their efforts lead to vindication of important rights so that persons with meritorious cases will be able to secure capable attorneys in the future. Because a corporation such as Mary Kay will often have the resources to retain seasoned counsel, such as that employed in this case, Plaintiff needs to be on equal footing in order to make sure that if her case has merit, her rights will not be lost through her inability to retain equally effective counsel.

In the three years this case was pending in this case and in Texas federal district court, many hearings were held, numerous client conferences and attorney conferences were conducted, two mediations were attended, voluminous documents were presented as exhibits, multitudes of briefs and motions were filed (consuming 8 file jackets and several redwelds in the courts file) and a number of depositions were taken. The case culminated in an 8 day jury trial and half day bench trial. Plaintiff faced able counsel on the other side who filed lengthy, complex motions on several occasions, necessitating a thorough reply. The Court finds that this was an intense, difficult and complex case. As such, it is not surprising that it took hundreds of hours to conclude.

Defendant has criticized Plaintiff's counsel's timekeeping. It would have been better if Plaintiff's counsel had kept track of their time on a more consistent and regular basis.



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However, the Court declines to announce a standard whereby failure to keep daily records to the 1/10th of an hour would preclude all recovery. Instead, the Court has taken the imprecision into account in awarding fees.

The Court has also considered the issue of the time spent in California prior to the Texas litigation. Of course some work done in California would necessarily be of assistance to the Texas litigation; however, given the lack of precise information about the California litigation, the Court is unable to give much credit for the time spent litigating there. On the other hand, the Court will not penalize Plaintiff's counsel for the time they spent responding to the improvident Texas removal.

Ultimately, following various summary judgment hearings and a jury trial, Plaintiff prevailed only on one count of discrimination under California statutory law. In assessing the attorneys' fees requested, the Court has taken into consideration that several counts were presented, but only one was successful. The Court has also taken into account the testimony that the work done on the unsuccessful causes of action was "part and parcel" (i.e., intertwined) of the work on the successful count. *See RepublicBank v. Shook*, 653 S.W.2d 278 (Tex. 1983); *Duncan Land & Exploration, Inc. v. Littlepage*, 984 S.W.2d 318 (Tex. App. -- Fort Worth 1998, pet. denied).

While an exact calculation is not required for findings of fact and conclusions of law, the Court notes that the fee award translates to 1000 hours at $325/hour.

*Customary Fees and Uncertainty of Collection(Factors 2 and 7)*

There was a great deal of argument about whether the specific rates charged by the California attorneys in this case were "customary" for Dallas, Texas. While Ms. Pitt and Ms.



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Alioto do not regularly practice in Dallas, Texas, they demonstrated familiarity with customary fees in the locality.

In addition to testifying regarding their hourly rates, Ms. Alioto and Ms. Pitt testified about the need to take into account the special circumstances of this case with a "lodestar times multiplier" approach. *See Borg-Warner Protective Services Corp. v. Flores*, 955 S.W.2d 861 (Tex. App. – Corpus Christi 1997, no pet.). They requested their hourly rate times the number of hours further multiplied by a "lodestar" multiplier. Regardless of the methodology applied, the Court concludes that the most important question is whether the overall fee awarded is reasonable in light of the factors listed above.[1] *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997).

Plaintiff's counsel took this case on a contingency basis. Only if Plaintiff were successful would counsel be compensated. As a result, the fee was highly uncertain and its timing even more so. The case has now lasted over 5 years during which time Plaintiff's counsel has had to "front" the cost of their time.

*Time Limitations, Client Relationship and Other Work Preclusion (Factors 4, 6 and 8)*

The case did not involved unusual time limitations although it did involve periods of intense time involvement. Both attorneys testified that they developed a relationship with the Plaintiff, but the relationship is not one of a corporate client who provides steady "bulk" work at a steady rate of pay for a reduced fee. Both counsel testified that they had other

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[1] Admittedly, there are not that many instances where California discrimination cases are brought in Dallas and parties recover. Thus, what is "customary" may have to be viewed from the broader vantage of complex discrimination litigation.



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paying work they could have done during this time period that they had to decline due to their work on this case.

*Attorneys' Qualifications (Factor 5)*

Both attorneys testified that they are seasoned discrimination attorneys. Ms. Alioto has handled a number of high-profile cases in California and federal courts, and Ms. Pitt is well-known in her community for expertise in disability discrimination claims. This testimony was unrebutted.

An added layer of complexity in this case was the need to present California substantive law in the context of Texas procedural law. Plaintiff's attorneys brought to the table expertise in California substantive discrimination law that would not have been available from most Texas attorneys. The Court has taken this fact into account. On the other hand, the Court has also taken into account the inefficient use of local counsel to assist with local procedural matters. At least some of the time spent briefing and presenting matters to the Court could have been saved if local counsel were more effectively used.

*Amount Involved and Results Obtained (Factor 3)*

Although Plaintiff prevailed on only one claim, she received a substantial jury verdict and will receive a sizable judgment, even after the Court's rulings on Defendant's post-verdict motions. She also obtained a finding of employee status that, it appears, is a first of its kind against this defendant. The results obtained, therefore, are significant. The amount involved was also significant and justified expenditure of substantial time.

*Conclusion.* As stated above, the Court has determined to award $325,000. As previously stated to the attorneys, the Court will sign a final judgment that incorporates the amounts found herein.



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The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the bench trial.

SIGNED this 4th day of June, 2003.

JUDGE PRESIDING

cc: Angela Alioto, 700 Montgomery Str., San Francisco, CA 94111-2104
William Lamoreaux, via FAX 214.747.3212
John McCarthy, via FAX 214.880.0181
Carlyle Chapman, via FAX 214.740.8800



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CAUSE NO. 02-1429-J

| | | |
|---|---|---|
| SENAD ODOBASIC | ) | IN THE DISTRICT COURT OF |
| Plaintiff, | ) | |
| v. | ) | DALLAS COUNTY, TEXAS |
| LIBERTY MUTUAL INS. CO. | ) | |
| Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On June 2, 2003, this case came on to be tried; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* The parties agree that Plaintiff Senad Odobasic suffered an on the job injury in the course and scope of his employment for an employer insured by Defendant Liberty Mutual Insurance Company on May 6, 1998. During 1998, Mr. Odobasic received treatment (and, presumably, income benefits) paid for by Liberty Mutual. Indeed, income benefits and most of Mr. Odobasic's medical treatments are not contested here. The parties agree that Mr. Odobasic suffered cervical injuries. They disagree about the degree of injury to his lumbar region as a result of the on the job injury and compensability therefor. *See* Tex. Labor Code §410.301 *et seq.*

After a period of over a year in which Mr. Odobasic received no treatment, Mr. Odobasic presented to Dr. Eaton on February 23, 2000 with complaints of pain in his neck, shoulder and back. Shortly thereafter he landed in the emergency room with complaints of severe pain. Ultimately, Mr. Odobasic was treated by Dr. Payne and Dr. Eaton for what was termed "left radicular L5-S1 radiculopathy" (Plaintiff's Exhibit 47) and "degenerative disk



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disease, L4-5, L5-S1" (Plaintiff's Exhibit 71), which treatment included surgery on January 17, 2001. It is compensability for lumbar spine problems that Liberty Mutual disputes. It claims that the lumbar spine problems treated by the surgery were not the result of the compensable injury. The parties engaged in a Contested Case Hearing which was decided against Mr. Odobasic. (Defendant's Exhibit 2) He appealed to the Texas Workers' Compensation Commission ("TWCC") Appeals Panel which affirmed. (Defendant's Exhibit 1) Thereafter, he timely appealed to this court.

*Does the compensable injury of May 6, 1998, extend to and include Mr. Odobasic's lumbar herniated disc herniations at L4/5 and L5/S1?*[1] No. The evidence regarding the source of Mr. Odobasic's problems in 2000 (culminating in the January 2001 surgery) is conflicting and sometimes confusing. Dr. Payne was the only live expert witness. He testified that the lumbar fusion was necessitated by continuing pain from the May 1998 compensable injury. However, his determination of causation was based largely on the patient history of the May 1998 injury. I.e., "it must have been" the on the job injury. He admitted that normal "wear and tear" on the body of a person like Mr. Odobasic can result in the kind of objective findings revealed by the various diagnostic tests used on Mr. Odobasic. These tests do not establish the etiology of the problem.

A historical analysis of the medical records and reports does not support the theory that the admitted lumbar strain of May 1998 is the same injury/condition as the degenerative disk disease of 2000/2001. The Court respects that communication difficulties may have

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[1] This is the question answered by the Contested Case Hearing Officer and addressed by the TWCC Appeals Panel. By law, the Court is limited to addressing this same question. Tex. Labor Code § 410.302.



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played a part in Mr. Odobasic's treatment difficulties. However, that difficulty does not explain many of the medical records and certainly does not explain the gap in treatment. In the face of this conflicting evidence, the Court finds as a factual matter that the preponderance of the evidence does not support the causal link between the lumbar strain in May of 1998 and the degenerative disk disease of 2000/2001. Accordingly, the Court concludes as a matter of law that the decision of the Appeals Panel affirming the Contested Case Officer's denial of benefits for the lumbar spine should be affirmed. Tex. Labor Code §410.303.

*Judgment.* The Court orders the Defendant's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document and circulate same to opposing counsel for comment. If the parties agree upon a form of judgment, they shall send same to the TWCC in compliance with Texas Labor Code Section 410.258. Thirty days thereafter, they shall forward same to the Court with a certificate of compliance with said section. If the parties disagree on the form of the judgment, they shall submit that disagreement to the Court before forwarding a proposed judgment to the TWCC.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 18th day of June, 2003.

JUDGE PRESIDING

cc: Kathryn Colbert, 1515 Main Str., Dallas, TX 75201
Steve Backhaus, 14160 Dallas Pkwy., Ste. 607, Dallas, TX 75254-4367



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CAUSE NO. 03-676-J

| | | |
|---|---|---|
| INKJET INTERNATIONAL, LTD.<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| JASON SWEET et al.<br>Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW
REGARDING ATTORNEY'S FEES FOR SANCTIONS MATTERS

In its July 17 Order on Motion for Sanctions, the Court assessed certain sanctions against Defendants XL and Persad("Defendants") and stated: "Plaintiff has been put to unnecessary expense in bringing and prosecuting this motion and the underlying discovery. The Court will grant Plaintiff those expenses, including attorneys' fees. TRCP 215.1(d); TRCP 215.2(b)(2). If the parties cannot agree on the amount of same, they should set a hearing to determine the amount." The parties were unable to agree on an amount, and the Court heard evidence regarding reasonable and necessary attorneys' fees and expenses incurred in bringing and prosecuting the motion on August 11, 2003. The Court makes the following findings of fact and conclusions of law with respect to the amount of those fees and expenses.

*The Standard.* The Court has addressed reasonable and necessary attorneys' fees, considering the following factors:(1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The fee customarily charged in the locality for similar legal services; (3) the amount involved; (4) the time limitations imposed by the client or the circumstances; (5) the



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experience, reputation, and ability of the lawyer performing the services; (6) the results obtained; (7) whether the fee was fixed or contingent, and (8) the likelihood that the acceptance of this work would preclude other employment by the lawyer. *See Arthur Andersen & Co. v. Perry*, 945 S.W.2d 812 (Tex. 1997)(listing factors). The Court has addressed associated expenses by examining the reasonableness and necessity of those expenses in light of the work done, matters prosecuted and results obtained.

*Evidentiary Issues.* Defendants objected to the admission of certain portions of Plaintiff's Exhibit 1 because they were never given unredacted time records showing entries for time for which no recovery was sought. Defendants never moved to compel or otherwise attempted to obtain an order requiring production of the unredacted records. Mr. Strauss testified about the way in which the time entries were redacted. The Court finds that it was reasonable to redact the records leaving only those entries for which recovery was sought. Mr. Strauss testified about how he allocated time to those entries, and Defendants were free to cross-examine him.

While time records are some evidence of the time spent, they are not required. Nor is actual time spent dispositive of what a reasonable time to spend would be. The Court has considered Mr. Strauss's testimony, Plaintiff's Exhibit 1 and Defendants' Exhibit 1[1] in light of the factors set forth above to reach its findings.

*Attorney's Fees.* Defendants do not contest most of the time spent by

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[1] Some of the entries on Defendant's Exhibit 1 do not correspond to the entries on Plaintiff's Exhibit 1. *Compare* June 12 entry on Pl.1 for "POS" ("Review correspondence and documents from Mr. Strauss regarding discovery matters") *with* June 12 entry on Df. 1 for "WWM" ("Review correspondence and documents from P. Strauss regarding discovery matters").



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Plaintiff's attorneys in connection with the sanctions matters. They questioned the use of multiple attorneys, particularly attorneys from Haynes & Boone (appellate counsel), to assist in the various tasks. The Court has taken into consideration in assessing the fees whether there was any unnecessary duplication of effort and will not award fees for duplicative efforts. The Court finds the following amounts to be the reasonable fees for the necessary services of Plaintiff's attorneys in connection with the sanctions matters:

| | |
|---|---|
| Attorneys at Hallet & Perrin, P.C. | $39812.50 |
| Attorneys at Haynes & Boone, L.L.P. | $2895.00 |
| Total Attorneys' Fees | $42707.50 |

*Other Expenses.* Of the $23,624.35 in requested expenses, Defendants challenge only portions of the bills submitted by Whitco Security Group. *(See* Defendant's Exhibit 1). Defendants contend that these bills are imprecise and that the only time for which they should have to pay in connection with the sanctions is that spent on the "trash cover" conducted by Whitco at XL's place of business. Mr. Strauss testified that the "special project" was the "trash cover" and that he did not know the particulars of the other time spent. Having considered these arguments and the evidence presented, the Court finds that Plaintiff should recover the following expenses in connection with the Order on Motion for Sanctions:

| | |
|---|---|
| Depositions | $4149.85 |
| Whitco Security Group | $11090.16 |
| Copy Charges | $1516.41 |
| Westlaw Fees | $ 308.57 |
| Delivery Charges | $171.30 |
| Total Expenses | $17,206.29 |



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*Conclusion.* The Court awards a total of $59,913.79 in fees and expenses as part of the Order on Motion for Sanctions against XL and Persad, jointly and severally. This sum shall be paid to Plaintiff within 14 days of this order.

The clerk of the court is directed to send a copy of this order to all counsel of record.

SIGNED this 12th day of August, 2003.

JUDGE PRESIDING

cc: Patrick Strauss, via fax 214.922.4142
John Eichman, via fax 214.855.4300
Andrew Chatham, via fax 214.468.0994
Jacob Marshall, via fax 214.956.0203



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052

CAUSE NO.02-9911-J

| | | |
|---|---|---|
| CITICORP DINERS CLUB, INC. | ) | IN THE DISTRICT COURT OF |
| Plaintiff, | ) | |
| v. | ) | DALLAS COUNTY, TEXAS |
| DANIEL CHU | ) | |
| Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On February 16, 2004, this case came on to be tried; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence presented and the arguments of the parties, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* Defendant Chu was a longstanding cardholder of a Diners' Club card issued by Plaintiff. Under his agreement, he is responsible for the charges on that card. Various paragraphs provide for disputing charges made without authorization.

In 2001, a charge of approximately $25,000 was made at the Mansion Hotel with Chu's Diners' Club card. Chu never paid the charge, and Plaintiff sued.

At trial, Chu contended that the charge was not authorized. However, he presented no evidence of same.[1] Plaintiff presented evidence of credit card bills showing a charge to Chu's account of the Mansion bill.

*Did Chu fail to comply with his obligations under his agreement with Plaintiff? Was such failure to comply excused by an unauthorized use? If Chu failed to*

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[1] While Chu made reference to an affidavit in the file, he never offered into evidence, nor was it admitted into evidence. During his actual testimony on the witness stand, Chu did not deny authorization under oath.



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*comply without excuse, what sum of money should he pay to compensate Plaintiff for such failure, if any, to comply?* Under the Cardholder Agreement, Chu is responsible for charges made to his account. Chu admitted that the charge was made to his account and that he did not pay it.[2] To the extent he now contends it was not an authorized charge, he failed to show compliance with the Agreement's requirements for disputing a charge. He sent nothing in writing within 60 days. Plaintiff presented evidence of no such writing in its files and further presented evidence that Chu never orally took the position the charge was not authorized until after the lawsuit was filed. Indeed, Plaintiff's evidence demonstrated that Chu gave other reasons for his failure to pay which were inconsistent with claiming a lack of authority (e.g., failure to receive reimbursement for the charge, "applying for a loan").

In response, Chu never testified that he did send a writing. He simply cross-examined Plaintiff's witness to the effect that Chu "could have" sent a letter or made a phone call that was not recorded or reflected in the files. The Court finds that the charge was made to Chu's card account. Chu failed to timely or properly dispute the charge in question and, therefore, is not excused from paying it. Accordingly, Chu is responsible for the charge in the amount of $28,529.66.

*What is a reasonable fee for the necessary services of Plaintiff's counsel in connection with the work done prosecuting the breach of contract claim?* As a result of Chu's breach, Plaintiff is entitled to attorneys' fees. The Court has addressed reasonable and

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[2] *See, e.g.*, Plaintiff's Request for Admission to Defendant No. 5, Exh. 10, "Admit or Deny that the balance due to Plaintiff by Defendant under the agreement referred to in request number 1 is $28,529.66. Answer: Admit." Defendant also admitted that Plaintiff performed all of its obligations under the agreement in question. (Response No. 8, Exh. 10).



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necessary attorneys' fees, considering the following factors:(1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The fee customarily charged in the locality for similar legal services; (3) the amount involved; (4) the time limitations imposed by the client or the circumstances; (5) the experience, reputation, and ability of the lawyer performing the services; (6) the results obtained; (7) whether the fee was fixed or contingent, and (8) the likelihood that the acceptance of this work would preclude other employment by the lawyer. *Arthur Andersen v. Perry,* 945 S.W.2d 812 (Tex. 1997).

Having considered the foregoing legal standard in light of the evidence presented, the Court finds a reasonable fee for the necessary service of Plaintiff's counsel to be $3,450. Plaintiff is entitled to costs of court, prejudgment interest and postjudgment interest.

*Judgment.* Plaintiff's attorney shall prepare a judgment in conformity with these findings and conclusions within seven days of receiving this document and forward same to Defendant for comment. Defendant shall provide any objections to the form of the judgment in writing to Plaintiff's attorney within 5 days. Plaintiff's attorney shall either amend his form of judgment in conformity or include the objections in his letter forwarding the judgment to the court for signature. The clerk of the court is directed to send a copy of this order to the following counsel of record and pro se party, who participated in the trial.

SIGNED this 23rd day of Feb, 2004.

Carlton Kaye

JUDGE PRESIDING



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CAUSE NO.02-8757-J

| | | |
|---|---|---|
| ANTHONY LOPEZ etc. | ) | IN THE DISTRICT COURT OF |
| Plaintiff, | ) | |
| v. | ) | DALLAS COUNTY, TEXAS |
| CLOUD NINE ENTERTAINMENT et al. | ) | |
| Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On February 18, 2004, this case came on to be tried as between Anthony Lopez and Cloud Nine Entertainment;[1] all remaining parties having waived a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence presented and the arguments of the parties, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* Shortly after forming DVD Media Systems as a "d/b/a," Lopez met John Eckerd who wanted to utilize Lopez's services for purposes of transferring, replicating/duplicating and packaging a soccer video to VHS and DVD formats. Plaintiff's Exhibit 1 is Lopez's proposal, and Plaintiff's Exhibit 3 is the parties' agreement (the "Agreement"). While many of the relevant facts are disputed, it is agreed that Lopez and Eckerd communicated for a period of months, models of the VHS box were created, Lopez performed transferring services, and no orders were placed by Cloud Nine for the actual tapes or DVDs. Ultimately, negotiations to resolve the matter broke down, and this lawsuit was filed. Lopez sued Cloud Nine for breach of contract and fraud, as well as injunctive relief. Cloud Nine sued for breach of contract, negligent misrepresentation, fraud and violations of

[1] John Eckerd filed bankruptcy prior to trial. As such, the case is stayed as to him, and nothing herein should be construed as affecting his rights or imposing any obligations upon him individually.



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the Texas Deceptive Trade Practices Act. At trial, Cloud Nine conceded that the exception under Tex. Bus. & Comm. Code §17.49f applied such that Cloud Nine should take nothing on its DTPA claim. The remaining matters were submitted to the Court for determination.

*Did Cloud Nine fail to comply with its obligations under the agreement with Lopez? Did Lopez fail to comply with his obligations under the agreement with Cloud Nine?*

Lopez contends that Cloud Nine failed to comply with the Agreement by, among other things, failing to place a minimum order, violating the exclusivity clause and failing to provide a letter of credit. The Court agrees with Cloud Nine that the letter of credit requirement was never triggered. However, the Court finds that Cloud Nine failed to comply with the "minimum order" requirement, failed to comply with the exclusivity clause and also failed to provide the tape for transference (known as "authoring) to DVD format in the right format, necessitating rental of equipment to accomplish the "authoring." Lopez also spent "3 or 4 days" performing the "authoring" services.

Cloud Nine claims that Lopez breached the contract by failing to produce a finished sample VHS box cover. Lopez admits that he gave only a rough prototype, not a finished sample. However, nothing in the Agreement requires one "sample" to be created in "final" form. Thus, Lopez's failure to provide such a sample is not a breach.

*If so, what sum of money, if any, if paid now in cash would fairly and reasonably compensate for such failure, if any, to comply?* Lopez contends that he spent 3 or 4 days working on the DVD authoring after Cloud Nine already contracted with another vendor for the same work. Lopez also had to rent equipment that would have been unnecessary had the tape been supplied in the right format. Lopez also contends that he lost



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profits because of Cloud Nine's failure to comply with the minimum order requirements and seeks recovery of such profits.

The Court awards Lopez the $700 spent for the equipment rental and the reasonable value of the time spent unnecessarily on the DVD authoring process. Based on Lopez's testimony of 3-4 days, and the parties' Agreement providing for $125/hour for unscheduled work, the Court awards $3500. The Court declines, as a factual matter, to award the amount claimed for lost profits. While Lopez and Walker's bare testimony of a "net profit per" tape and DVD might be legally sufficient evidence of lost profits, it was not factually persuasive. No documentation, facts and figures, or other "backup" to the bare numbers was presented. The Court finds that Lopez failed to persuade the Court of an amount of lost profits that was lost and so awards only $1 as nominal damages for lost profits. Accordingly, the total awarded in damages for breach of contract is $4201.

*Did Cloud Nine commit fraud proximately causing damages to Lopez?* Lopez contends that Cloud Nine committed fraud by promising to have a letter of credit in place to provide financing for the contemplated orders. The Court answers "no" to this question.

*Did Lopez commit fraud or negligently misrepresent facts proximately causing damages to Cloud Nine?* Cloud Nine contends that Lopez overstated his capabilities by, among other things, stating that his address was a "suite," when it was an apartment, and referencing a "department" when he was the only employee of DVD Media Systems. The Court finds Cloud Nine did not prove it relied to its detriment on any such puffery. With respect to the alleged fraud that Lopez would perform the Agreement, this is merely a reconstituted breach of contract claim and, as such, fatal to a cause of action for negligent



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misrepresentation. Cloud Nine did not prove a false promise made with a present intent of not performing. The Court answers both parts of this question "no."

*What is a reasonable fee for the necessary services of Plaintiff's counsel in connection with the work done prosecuting the breach of contract claim?* The parties stipulated to $20,000 as reasonable attorneys' fees.

*Judgment.* Plaintiff's attorney shall prepare a judgment in conformity with these findings and conclusions within seven days of receiving this document and forward same to Defendant's attorney for comment. Defendant's attorney shall provide any objections to the form of the judgment in writing to Plaintiff's attorney within 5 days. Plaintiff's attorney shall either amend his form of judgment in conformity or include the objections in his letter forwarding the judgment to the court for signature. The clerk of the court is directed to send a copy of this order to the following counsel of record who participated in the trial.

SIGNED this 25th day of Feb, 2004.

JUDGE PRESIDING

cc: Donald E. Uloth, 2626 Cole Ave., Ste. 400, Dallas, TX 75204
Jenny Stephens, 2050 Bryan Tower, 2001 Bryan Str., Dallas, TX 75201



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CAUSE NO. 03-1623-J

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| C & M RETAINING WALLS, INC. | ) | IN THE DISTRICT COURT OF |
| Plaintiff, | ) | |
| v. | ) | DALLAS COUNTY, TEXAS |
| PHIPPS & COMPANY POOLS and | ) | |
| MICHAEL PHIPPS, Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 13, 2004, this case came on to be tried; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* Defendant Phipps & Company Pools[1] ("Phipps Co.") was hired to act as a general contractor in connection with a house being built at 160 Shepherd's Glen in Heath, Texas (the "Project"). It is undisputed that Phipps Co. hired Plaintiff[2] to construct a number of retaining walls for the Project and that Phipps Co, at the time this dispute arose, had paid Plaintiff approximately $200,000 for its work. However, at the end of Plaintiff's part of the Project, a dispute arose between the parties over certain offsets Phipps Co. claimed on monies still due to Plaintiff.

The parties stipulated that the "beginning balance," before discussion of offsets,

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[1] This is an assumed name of D&M Marine, Inc.

[2] Defendants have asserted that Plaintiff C&M Retaining Walls, Inc., improperly did business under the assumed name of "C&M Retaining Walls" without filing an assumed name certificate. This defect is required to be brought before the court by plea in abatement or it is waived. In any event, uncontroverted evidence establishes that Plaintiff filed such a certificate several months ago. Accordingly, any defect has been cured, and this irregularity does not affect any substantive rights of either side.



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remaining under the agreed price was $22,113.80 owed to Plaintiff. Phipps Co. further stipulated that, of that sum, it clearly owed $4,022.96 and tendered payment of that sum which was rejected. The Court instructed the parties at the close of the evidence to complete payment and acceptance of this sum before judgment is entered in this case. Thus, the remainder of this document will focus on the $18,090.84 in dispute and will reflect the assumption that the undisputed $4,022.96 has been paid and accepted (without waiver of Plaintiff's position that more is owed).

*Did Phipps Co. fail to pay the amounts due under its agreement with Plaintiff? Is Phipps Co. entitled to any offsets against the balance due?*

Yes to both questions. The Court will analyze the sums in dispute using the categories used by the parties. Plaintiff contended at trial that no offsets were due. Phipps Co. contended that the following offsets were due:

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| $9,753.34 | concrete for footing material |
| $3,617.50 | expense to Kevin Deal for repairs to front retaining wall that cracked |
| $1,220.00 | repair for wrought iron fence allegedly damaged by Plaintiff's workers |
| $3,000.00 | rebate of engineering services paid by Phipps Co. that it contends should have been paid by Plaintiff |
| $ 500.00 | extra cleaning costs for clean up Plaintiff allegedly failed to do |
| **$18,090.84** | **Total offsets claimed by Phipps Co.** |

Concrete. Because Plaintiff did not have its own concrete supplier in the Heath area, the parties agreed that Phipps Co. would supply the concrete necessary for Plaintiff's job at Plaintiff's expense. Two bills for concrete were disputed: $6765.63 pursuant to a Lattimore invoice and $2987.71 pursuant to a Swift Concrete invoice. The parties disputed whether concrete invoices had to be signed by someone from Plaintiff and whether this



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00860 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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concrete was actually used on Plaintiff's part of the Project. Plaintiff contended that all concrete invoices were signed by its person in charge. Phipps Co. disputed this and also proffered evidence that the only concrete deliveries ordered by Phipps Co. for this Project were for Plaintiff's part of the Project. Having considered the conflicting testimonial evidence and the relevant exhibits, the Court finds that Phipps Co. is entitled to an offset of $6765.63 in connection with this part of the offset claim; Plaintiff does not owe the $2987.71.

Kevin Deal wall repair. The parties agree that a portion of the retaining wall in the front of the property cracked, and that it was Plaintiff's responsibility to repair. Plaintiff did repair the wall in question, but it left the veneer work to Phipps Co. to be billed back to Plaintiff. Phipps Co. hired Kevin Deal to perform this work, and he charged $3617.50. Although it appears that, at the time, Plaintiff believed it would owe $850 for this work, Plaintiff now contends it owes nothing. Phipps Co., on the other hand, contends that all of Deal's bill was reasonable and necessary to correct problems Plaintiff created. Again, the evidence is disputed. Again, the Court has considered the relevant evidence and concludes that Phipps Co. is entitled to an offset of $850 for this work; Plaintiff does not owe the remaining $2767.50 of this part of the offset claim.

Fence Repair. Phipps Co. presented an eyewitness who testified that Plaintiff's workers backed into the neighbor's fence, damaging it and requiring replacement of a large section of the fence in the amount of $1220. Plaintiff denied that its workers damaged the fence, and it claimed the repair costs were excessive. Considering the evidence, the Court finds that Plaintiff's workers damaged the fence causing damage that had to be repaired in



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the amount of $1220 such that Phipps Co. is entitled to an offset for the entire $1220.

Engineering Services. As a result of demands by the Heath building inspectors, Plaintiff made Phipps Co. aware that additional, unanticipated engineering services would be required. Phipps Co. agreed to pay – and, in fact, did pay – an additional $3,000. However, once the parties started disputing the other charges discussed herein, Phipps Co. decided to back charge for the $3,000 already paid. The Court finds that Phipps Co. agreed to pay this amount and that, when it so agreed, it was not under economic duress (as it now claims). Accordingly, it is not entitled to a refund of this money.

Extra Cleaning Charges. It is undisputed that Plaintiff was required to clean up after itself on a daily basis. Plaintiff says it did so. Phipps Co. says it had to clean up after Plaintiff at the cost of $500. After reviewing the evidence, the Court is not persuaded that Phipps Co. paid or incurred $500 of extra clean up charges as a result of anything Plaintiff did or did not do. Accordingly, no offset is appropriate for this item.

Conclusion. Phipps Co. is entitled to offsets of $8835.63. Plaintiff is entitled to an additional payment (in excess of the undisputed sum discussed above) of $9255.21. As a result of the Court's disposition of the contractual claim, it is unnecessary to reach the alternative theories of quantum meruit and promissory estoppel.

*Did Defendants breach a fiduciary duty owed under Texas Trust Code Chapter 162, causing damages to Plaintiff?*

No. Plaintiff wholly failed to establish that Phipps Co. did not maintain an account as required by Sections 162.006 and 162.007 of the Texas Trust Code. Plaintiff also failed to establish the requisite "intent to defraud" under the definition contained in Section



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162.005 of the Texas Trust Code. At best, Plaintiff demonstrated that Phipps Co. refused to pay certain disputed funds. The Court found herein that such refusal was partially justified, partially not, but the Court did not find bad faith on either side. Plaintiff's evidence does not rise to the level necessary to meet Chapter 162, common law breach of fiduciary duty or any other standard that would result in personal liability of Mr. Phipps or liability for exemplary damages by either Defendant. As a result, it is unnecessary to reach the question of any defenses.

*What is a reasonable fee for the necessary services of Plaintiff's counsel in connection with the work done prosecuting the breach of contract action against Phipps Co.?*

The Court has addressed reasonable and necessary attorneys' fees, considering the following factors:(1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The fee customarily charged in the locality for similar legal services; (3) the amount involved and results obtained; (4) the time limitations imposed by the client or the circumstances; (5) the experience, reputation, and ability of the lawyer performing the services; (6) the results obtained; (7) whether the fee was fixed or contingent, and (8) the likelihood that the acceptance of this work would preclude other employment by the lawyer.

In assessing this case, the Court has taken into account all of the above factors, including the fact that Plaintiff prevailed on only a little more than half the claim in question. Having considered the evidence in light of the foregoing factors, the Court finds a reasonable fee for the necessary services of Plaintiff's counsel to be as follows: $5,000. Plaintiff is also



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217

entitled to its costs of court, equitable prejudgment interest at the rate of 5% per annum[3] on the principal award and postjudgment interest on the entire amount at the rate of 5% per annum.[4]

*Judgment.* The Court declines to award any other relief. The Court orders the Plaintiff's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document and circulate same to opposing counsel for comment. Within seven days thereof, Plaintiff's counsel shall forward a proposed form of judgment to the Court together with any comments as to form received from Defendant's counsel.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 19th day of April, 2004.

JUDGE PRESIDING

cc: Wesley Maness, 1000 Ballpark Way, Ste. 300, Arlington, TX 76011
Jeffrey Irion, P.O. Box 5527, Gun Barrel City, TX 75147

4-20-04 It is now ordered that Court stand adjourned until ... morning at nine (9) o'clock ... Court met pursuant to adjournment and there ... present as of yesterday.

[3] Unless the contract sets forth a different rate.

[4] Unless the contract sets forth a different rate.



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CAUSE NO. 03-46-L

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|---|---|---|
| NAT'L BANNER CO.<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| ADAM SAROTE<br>Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 20, 2003, this case came on to be tried; no jury having been requested, all matters in dispute were tried before and submitted to the Court. The only parties remaining before the Court are Plaintiff National Banner Company and Defendant Adam Sarote, the other defendant having been discharged in bankruptcy. The parties provided post-trial briefing pursuant to the Court's schedule, with such briefing concluding on September 19, 2003. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* This case involves the sale of printing equipment by Adam Sarote's company, Mustang, to Plaintiff NABCO. NABCO contends that it advised Sarote of its specific requirements – a printing press that could do four-color ultraviolet process printing and that Sarote affirmed that the printing press sold to NABCO could do the job required. Instead, NABCO contends that it got equipment that was only marginally useful and that could not do the kind of advanced color printing for which it was purchased. NABCO sued Mustang for breach of contract and warranty and Mustang and Sarote on various extracontractual theories. NABCO also contends that Mustang is Sarote's alter ego



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and is, therefore, liable for Mustang's breach of contract and breach of warranty, if any. After Mustang's bankruptcy, the case proceeded against Sarote only.

The Court agrees that Sarote is responsible for his own torts and DTPA violations. Determination of liability for those counts, therefore, does not require an alter ego analysis. The contract at issue was clearly between NABCO and Mustang, thus, NABCO's efforts to hold Sarote liable for Mustang's contract require analysis of the alter ego claims.

*Did Sarote engage in any false, misleading or deceptive acts or practices that were a producing cause of damages to NABCO?* Yes. Sarote represented that the goods in question – the printing press – was of a particular quality when it was of another. Sarote, knowing that NABCO intended to use the press for four-color printing, stated: "This press will do awesome 4 color process on vinyl." The parties have debated the meaning and import of the word "awesome." Suffice it to say that Sarote's representation was, at a minimum, that the press would do four color printing in a way that would allow NABCO to sell the vinyl processed as a quality product. This representation was completely false. The press was in poor shape and, while it might have been able to do some types of printing, was completely inadequate for the job. This kind of conduct is exactly that which the DTPA was enacted to sanction.

Sarote also represented that the "warranty agreement" conferred rights or remedies that he later denied the warranty contained, in violation of Texas Business &



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Commerce Code Section 17.46b(12) and (19).[1] He told NABCO it was a complete 90 day warranty, but at trial, he contended the warranty covered only that the machine would turn on. Indeed, he changed his story at trial several times as to what the warranty meant.

*Was such conduct committed knowingly?* No as to the first violation, yes as to the second. Sarote was certainly reckless in failing to inspect the machine and making statements about the machine's abilities without having any idea if they were true, but there is no evidence he actually knew the machine was in such poor shape. On the other hand, he clearly knew that he had misrepresented the warranty to NABCO.

*Did Sarote commit fraud?* Yes, Sarote recklessly misrepresented the quality of the printing press knowing that NABCO was relying on his representation and intending that they so rely. He also made promises of a warranty with no intention of keeping that promise. The Court makes this finding of fraud by a preponderance of the evidence and by clear and convincing evidence.

Because the Court finds fraud and DTPA violations, it is not necessary to address negligent misrepresentation. The Court agrees with Defendant that "unjust enrichment" is a doctrine used in the absence of an express contract. Because this case involves an express contract, "unjust enrichment" is not appropriate.

*What sum of money, if paid now in cash, would fairly and reasonably compensate NABCO for the damages resulting from the misconduct found above?* The "benefit of the bargain" measure of damages allows for recovery of the difference between

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[1] Mustang was the actual party which gave the warranty, so Sarote is not responsible for its breach, if any, unless he is the alter ego. However, Sarote *can* be liable for making misrepresentations about the warranty terms.



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the value as represented and the value received. No evidence was presented of what this machine (20 years old, used, etc.) would be worth if it could do "awesome" four-color printing properly. The "out of pocket" measure of damages provides recovery of the difference between the value paid and the value received. NABCO paid $49,000. Mr. Goldfarb testified that the press is actually worth somewhere between $10,000 and $25,000. The Court awards actual damages of $35,000 for fraud and violation of the DTPA. The Court finds that NABCO would not have bought the press but for the misrepresentations about the warranty. Therefore, the $35,000 figure is applicable to both forms of DTPA violations found. The Court declines to award any other actual damages claimed.

*What sum of money, if any, should be awarded as additional damages because the conduct was committed knowingly?* Sarote showed absolutely no remorse or concern about the effects of his conduct. His attitude was that his financial problems justified his treatment of NABCO. The Court finds that an additional amount of $20,000 should be awarded.

*What sum of money, if any, should be awarded as punitive damages, considering the factors under the law?* The Court awards $20,000 in punitive damages. The DTPA recovery and the fraud recovery are for the same damages, thus, Plaintiff will have to elect between the two.

*What is a reasonable fee for the necessary services of Plaintiff's counsel in connection with the work done prosecuting the DTPA claim?* The Court has addressed reasonable and necessary attorneys' fees, considering the following factors:(1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to



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perform the legal services properly; (2) The fee customarily charged in the locality for similar legal services; (3) the amount involved; (4) the time limitations imposed by the client or the circumstances; (5) the experience, reputation, and ability of the lawyer performing the services; (6) the results obtained; (7) whether the fee was fixed or contingent, and (8) the likelihood that the acceptance of this work would preclude other employment by the lawyer. *Arthur Andersen & Co. v. Perry*, 945 S.W.2d 812 (Tex. 1997).

Having considered the foregoing, the Court finds a reasonable fee for the necessary service of Plaintiff's counsel for prosecuting the DTPA action: (1) $50,000 through the trial of this cause (including time for the appeal which already took place); (2) in the event of an unsuccessful appeal by Defendant to the Court of Appeals, $15,000 for the appeal; and (3) in the event of a petition for review to the Texas Supreme Court as to which the Plaintiff ultimately prevails, an additional $1,000; and (4) in the event the petition is granted and Plaintiff ultimately prevails, an additional $15,000. Plaintiff is also entitled to its costs of court, prejudgment interest on the actual damages and postjudgment interest on the entire amount.

*Alter Ego.* The Court finds that Sarote is not liable for Mustang's debts under an alter ego theory, regardless of whether the Court applies Florida law or Texas law. The Court finds that NABCO at all times knew it was dealing with a corporation. No misrepresentations were made as to Mustang's corporate status, capitalization, financial stability, or size. The Court finds that Sarote did mix his personal and corporate finances on occasion. Although the Court finds that Sarote did commit fraud, he did not "use the corporate form" for the purpose of that fraud, and he has been found liable for his individual fraud in any event. Similarly, the corporate form itself was not used for an improper purpose.



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There was nothing unjust about the corporate form here, and the use of the corporate form has not permitted Sarote to evade responsibility for his own torts. Because of the Court's ruling on alter ego, it is unnecessary to discuss the theories of recovery that were asserted against Sarote only on an alter ego basis.

*Judgment.* Within seven days of receipt of these Findings, Plaintiff shall prepare a form of judgment and forward it to Defendant's counsel for approval as to form. Defendant's counsel shall respond within 5 days. Thereafter, Plaintiff shall tender the judgment to the Court with Defendant's approval as to form or any notations of disagreement as to form.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this ____ day of _____, 2003.

_____
JUDGE PRESIDING

cc: Keith Verges, 901 Main Str., Ste. 3400, Dallas, TX 75202
Tailim Song, 2911 Turtle Creek Blvd., Ste. 1400, Dallas, TX 75219



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CAUSE NO. 02-7759-J

| | | |
|---|---|---|
| CONSTRUCTURE | ) | IN THE DISTRICT COURT OF |
| Plaintiff, | ) | |
| v. | ) | DALLAS COUNTY, TEXAS |
| JULIE MORRIS | ) | |
| Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 25, 2003, this case came on to be tried; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* Constructure contracted to do remodeling work on behalf of Julie Morris at her newly purchased home on Northhaven Road. The Contract was effective October 1, 2001. (Pl. Exh. 2). Defendant contends that Plaintiff was unresponsive and unable to meet her timeframe for completion. By letter dated October 29, 2001, the construction manager recommended termination of the contract. (Pl. Exh. 1), and Constructure was fired.

Constructure filed this suit contending that it was entitled to its contracted for percentage of the project alleging that it was prevented from completing the project by Ms. Morris's unjustified termination. Ms. Morris, on the other hand, contends that Constructure's Kevin Dillingham lied about his status as an architect and failed to perform tasks in a timely and professional manner.

Constructure also contends that Ms. Morris failed to fully pay for work already performed. Ms. Morris contends that she has paid all that is owed.



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*Did Ms. Morris, without excuse, fail to comply with her agreement to pay for remodeling services (1) with respect to work already performed; and (2) with respect to future work not completed due to Constructure's termination?* Yes as to the first question. No as to the second. With respect to the demolition work performed by Constructure, no credible evidence was offered demonstrating anything other than that Constructure did the work and should be paid. Plaintiff offered uncontradicted evidence that Ms. Morris did not pay all invoices for the work already performed. The Court finds that Ms. Morris without excuse failed to pay for demolition work already performed.

However, with respect to Plaintiff's claim for the entire contract price for future work not performed due to the termination, the Court finds that the termination was justified and Ms. Morris's failure to complete the contract with Constructure was excused. The Court bases this finding on two independent grounds: the Contract itself and Mr. Dillingham's fraud.

Under Paragraph 25.2 of the Contract, "[A]t [Ms. Morris's] option, and upon certification by the Architect [here, the Construction Manager] that sufficient cause exists to justify such action, [Ms. Morris] may terminate the Contract . . . ." On October 29, 2001, the Construction Manager certified that sufficient cause existed to terminate the Contract. The Court finds that this certification was reasonable under the circumstances, such that Ms. Morris's termination of Constructure was proper under the Contract.

Alternatively and additionally, the Court finds that Mr. Dillingham misrepresented his status as an architect to Ms. Morris. When Mr. Dillingham represented himself as an architect to Ms. Morris he knew that he was not, he intended that she would rely on this assertion, Ms. Morris did rely on this assertion and would not have entered into the particular



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contract in the timeframe in question had she known the truth. Thus, she is excused from complying further with the contract after payment for work fully performed.

*What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff for Ms. Morris's failure to pay for demolition work completed? The Court will consider only the portion not already paid.*

Plaintiff did not introduce the invoices in question but Mr. Dillingham did testify in this regard. Based upon the testimony presented by Plaintiff and Defendant, the Court finds the sum of $7025 still due and owing.

*What is a reasonable fee for the necessary services of Plaintiff's counsel in connection with the work done prosecuting the breach of contract action against Defendant?*

The Court has addressed reasonable and necessary attorneys' fees, considering the following factors:(1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The fee customarily charged in the locality for similar legal services; (3) the amount involved and results obtained; (4) the time limitations imposed by the client or the circumstances; (5) the experience, reputation, and ability of the lawyer performing the services; (6) the results obtained; (7) whether the fee was fixed or contingent, and (8) the likelihood that the acceptance of this work would preclude other employment by the lawyer. The Court has also taken into consideration that Mr. Guillot's testimony about attorney's fees was directed to recovery on the Contract as a whole. Plaintiff, however, has prevailed on only a small part of the overall claim.

Having considered the foregoing, the Court finds a reasonable fee for the necessary services of Plaintiff's counsel in prosecuting the claim to the extent it was successful:



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(1) $3125 through the trial of this cause; (2) in the event of an unsuccessful appeal by Julie Morris to the Court of Appeals, $15,000 for the appeal; and (3) in the event of a petition for review to the Texas Supreme Court an additional $8500, conditioned that Plaintiff ultimately prevails.

Constructure is also entitled to prejudgment interest on the principal award and postjudgment interest on the entire amount. The Court finds that both sides prevailed in part and lost in part such that good cause exists to tax costs against the party incurring same.

*Judgment.* The Court declines to award any other relief. The Court orders Constructure's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document and circulate same to opposing counsel for comment. Within seven days thereof, Constructure's counsel shall forward a proposed form of judgment to the Court together with any comments as to form received from Defendant's counsel.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 2nd day of September, 2003.

JUDGE PRESIDING

cc: Patrick Guillot, 2100 McKinney, Ste. 1401, Dallas, TX 75201
Ed Walts, 2828 N. Harwood, Ste. 1600, Dallas, TX 75201



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CAUSE NO. 99-8055-J

| | | |
|---|---|---|
| GUNTER STROMBERGER<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| LAW OFFICES OF WINDLE TURLEY<br>et al. Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On July 28, 2003 this case came on to be tried; all parties having waived a jury on the only remaining issue -- Defendants' counterclaim under Texas Business & Commerce Code § 17.50c – all matters in dispute were tried before and submitted to the Court. The Court received post-trial briefing which closed on August 13, 2003. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* Stromberger filed this lawsuit in October of 1999 contending that Defendants committed legal malpractice and fraud, breached their fiduciary duty and violated the Texas Deceptive Trade Practices Act ("DTPA") in connection with Mr. Stutz's representation of Stromberger while Stutz was employed by the Law Offices of Windle Turley. Stromberger contended, and Defendants do not dispute, that Stutz began representing him in 1985 in connection with a lawsuit ultimately removed to federal court involving claims against Stromberger and claims by Stromberger against C&M Imports and Chris Nasrallah under Civil Action No. CA3-89-1122-R (the "Federal Action"). The Court has taken judicial notice of the Court's file which reflects documentation from the Federal



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# *Garrison & Krisjansons, P.C.*

*Attorneys at Law*

*1203 Sheridan Avenue*
*Cody, Wyoming 82414*

*G. Mark Garrison* — *Email: garrison@wavecom.net* — *tel.* *(307) 527-7595*
*Brigita S. Krisjansons* — *brigita@wavecom.net* — *fax* *(307) 527-7596*


February 6, 2008

The Honorable Patrick Leahy
Chairman
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
U.S. Senate Committee on the Judiciary
152 Senate Dirksen Building
Washington, D.C. 20510

Re: Richard Honaker nomination

Dear Senate Members,

This is written as support for the nomination of Richard Honaker for the seat of Federal District Judge. I know Mr. Honaker as a man of honor and integrity with a wealth of experience that is perfectly suited for the job.

Please consider this letter in support of Mr. Honaker when making a decision on this Court vacancy and feel free to call upon me if necessary to answer any questions regarding the purpose and intent of this letter. Thank you.

Sincerely yours,

Garrison & Krisjansons, P.C.

By,

G. Mark Garrison

cc: Richard Honaker

Action to the effect that the file was administratively closed in November of 1989, and Stutz withdrew in July of 1991. Stromberger denies knowing about the closure and withdrawal until about the time of filing this lawsuit. In this lawsuit, Stromberger contended that he thought the long delay in his case was normal because Stutz told him it would take "5or 6 years" to resolve the Federal Action.

Despite Stromberger's claim that he trusted Stutz to handle the matter, in 1991, he requested Stutz to turn over the files to attorney Tom Nash, which Stutz did shortly before he withdrew. (Counter-Plaintiff's Trial Exhibits 15 and 16). Nothing happened in the Federal Action from the date of Stutz's withdrawal in 1991 until after this lawsuit was filed.

Stromberger filed this lawsuit in October of 1999. By orders dated November 30, 2000 and February 13, 2001, the Court granted Defendants summary judgment on limitations (finding no fact issue on the "discovery rule") on various causes of action, including the DTPA. Following the Texas Supreme Court's clarification of the "*Hughes* tolling rule," on February 22, 2002, the Court vacated the portion of the February 2001 order regarding negligence and gross negligence. *See Underkofler v. Vanasek*, 53 S.W.3d 343 (Tex. 2001)(holding that a legal malpractice case based on litigation malpractice is tolled as to allegations of negligence while the underlying case is being litigated). Because the Federal Action was only administratively closed and never actually finally adjudicated, the Court determined that the *Vanasek* ruling applied to the negligence claims in this case. However, *Vanasek* reaffirmed that the DTPA statutory discovery rule was not subject to the "*Hughes* tolling rule" such that the Court's summary judgment on DTPA was undisturbed



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and remained in place.

Thereafter, the Court abated the case to allow the parties to complete the Federal Action. Stromberger filed two motions to reopen the Federal Action which were denied by the federal district judge. Stromberger never sought to file a petition for writ of mandamus or appeal of this ruling. Accordingly, the Court concluded that no further resolution of the Federal Action would be forthcoming and further abatement was inappropriate. The Court set the case for trial on July 28, 2003. Shortly before the trial was to commence, Plaintiff advised the Court and opposing counsel that he would be nonsuiting all claims. The effect of the nonsuit was to leave only Defendants' DTPA counterclaim for trial. At the trial, both sides waived a jury, and the Court proceeded to try the issue of whether the DTPA action was groundless in law or fact, brought in bad faith or brought for harassment and also the amount of Defendants' attorneys' fees. Stromberger did not testify live or appear at the trial. Windle Turley was called as a witness by Defendants, and Stromberger called Stutz. The Court also took judicial notice of the file and heard deposition testimony.

*Was Stromberger's DTPA claim groundless in fact or law or brought in bad faith or brought for purposes of harassment?* The parties dispute whether or not a lawsuit filed after limitations has run is groundless as a matter of law. *See, e.g., Campos v. Ysleta General Hospital*, 879 S.W.2d 67, 73 (Tex. App. – El Paso 1994, writ denied)(holding that survival action was groundless when brought after limitations expired). In this case, Stromberger claims he was relying on Stutz and thus did not "discover" his alleged misrepresentations. Stromberger has persisted in claiming that Stutz has never turned over



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his file materials and that those materials were then destroyed in a fire at the Turley offices some years later. Despite Stromberger's repeated assertions that Stutz lost relevant file materials, at trial, Stutz testified that he sent all original file materials to Nash in 1991, well before the 1994 fire that destroyed some file materials at the Turley offices. Stutz also produced documentary evidence to support his testimony. (Counter-Plaintiff's Trial Exhibits 15 and 16). Stromberger offered no controverting evidence to this testimony.

Thus, Stromberger had Stutz's file for eight years before he sued. The Federal Action docket sheet showed the administrative closure and Stutz's withdrawal for eight years before Stromberger sued. In 2000 and 2001, the Court found in this case as a matter of law that Stromberger knew or should have known of his DTPA claim well before October of 1997 – more than two years before he filed suit.

At trial, Stromberger also offered no evidence of the supposed "repeated" contacts he had with Stutz over the course of the 1990's. *See* Plaintiff's Third Amended Petition, pg. 3 (alleging "repeated" assurances from Stutz). The evidence presented shows that Stromberger has lied about his communications with Stutz. The evidence further shows that whatever the status of the case – about which Stutz allegedly lied – Stutz's entire file was turned over to Nash eight years before this lawsuit was filed.

Defendants presented evidence that Nasrallah's finances have suffered since the mid-1980's perhaps explaining why Stromberger has not further pursued the action against Nasrallah despite the Court's granting of several abatements in which to do so. Nasrallah's deteriorating finances may also be the reason why Nash, after receiving the file in 1991, never took any action to pursue the Federal Action or any other means of recovery



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from Nasrallah.

Section 17.50(c) imposes liability on the plaintiff for the defendant's attorneys fees if the DTPA action was groundless in law *or* groundless in fact *or* brought in bad faith *or* brought for harassment. It is not necessary for the Court to decide whether all lawsuits filed after limitations has run are "groundless in law." Under the facts of *this* case, the Court finds that the DTPA claim, when filed, was groundless in law. The Court also finds that it was brought in bad faith. Accordingly, the Court does not reach the question of whether the case was groundless in fact or brought for harassment.

*What is a reasonable fee for the necessary services of Defendants' counsel in connection with the work done defending the DTPA action?* The Court has addressed reasonable and necessary attorneys' fees, considering the following factors:(1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The fee customarily charged in the locality for similar legal services; (3) the amount involved; (4) the time limitations imposed by the client or the circumstances; (5) the experience, reputation, and ability of the lawyer performing the services; (6) the results obtained; (7) whether the fee was fixed or contingent, and (8) the likelihood that the acceptance of this work would preclude other employment by the lawyer. *Arthur Andersen v. Perry,* 945 S.W.2d 812 (Tex. 1997). The Court concludes that Defendants are entitled to recover only those fees necessarily incurred in defending the DTPA action. While it is true that segregation of fees is not required where time spent on causes for which recovery is not permitted is intertwined with the DTPA work, under the facts of this case, the Court finds that segregation is possible and necessary.

Having considered the foregoing legal standard in light of the evidence



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presented, the Court finds a reasonable fee for the necessary service of Defendants/Counter-Plaintiffs' counsel for defense of the DTPA action, to be as follows: (1) $50,000 through the trial of this cause; (2) in the event of an unsuccessful appeal by Stromberger to the Court of Appeals, $35,000 for the appeal; and (3) in the event of a petition for review to the Texas Supreme Court as to which Defendants ultimately prevail, an additional $20,000. Defendants are also entitled to costs of court and postjudgment interest.

*Judgment.* The Court is signing a Judgment consistent with these finding on this date.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 20th day of August, 2003.

JUDGE PRESIDING

cc: Doug Perrin, Copeland Tower, 1250 E. Copeland Rd., Ste. 744, Arlington, TX 76011
Robert Hoffman, 1601 Elm Str., Ste. 3000, Dallas, TX 75201



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# Response of Catharina Haynes Nominee to the U.S. Court of Appeals for the Fifth Circuit To March 8, 2008 Questions of Senator Edward M. Kennedy

Documents provided in response to Question 1

PDF 2 of 3

CAUSE NO. 03-04831-J

041

| | | |
|---|---|---|
| DALLAS COUNTY,<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| DOMINGA JIMENEZ,<br>Defendant, | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 24, 2004, this case came on to be tried. Because no party requested a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence admitted and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* Dominga Jimenez is an employee for the Dallas County Child Support Office. At the time of the incident in question, she worked in the George L. Allen, Sr. Courts building, located at 600 Commerce Street, Dallas, Texas 75202. On July 17, 2002, Ms. Jimenez and Helen Garcia decided to go to lunch together. Helen Garcia drove her personal vehicle with Ms. Jimenez riding as a passenger. Upon returning from lunch and pursuant to their customary practice, Ms. Garcia dropped off Ms. Jimenez at the Jackson Street curb outside the Jackson Street entrance to the George Allen Courts building. While walking from the curb to the steps leading into the building, Ms. Jimenez tripped and fell over uneven pavement on the public sidewalk abutting the Jackson Street entrance to the George Allen Courts building, approximately 8 feet away from the entrance.

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042

Ms. Jimenez attempted to collect worker's compensation benefits from Dallas County as a result of the injury sustained during this fall. Dallas County contested this claim for benefits and the issue was brought before a hearing officer at the Texas Workforce Compensation Commission. The hearing officer found that the fall occurred within the course and scope of Ms. Jimenez's employment, and, as a result, a compensable injury had occurred. This finding was appealed and affirmed by the TWCC Appeals Panel. This action is brought on appeal from the Appeals Panel decision.

*Did Dominga Jimenez suffer a compensable injury when she fell on the sidewalk outside the George L. Allen Sr. Courts building on July 17, 2002?* No. In order for an injury to be compensable, the injury must have occurred within the course and scope of employment. *See Payne v. Galen Hosp.Corp.*, 28 S.W.3d 15, 18 (Tex. 2000). The general rule is that injuries occurring while an employee is going to or coming from work are not within the course and scope of employment and thus not compensable. *Texas Gen. Indem. Co. v. Bottom*, 365 S.W.2d 350 (Tex. 1963). An exception to this general rule, known as the access doctrine, applies when an employer has evidenced an intention that the particular access route or area be used by the employee in going to and from work, and where such access route or area is so closely related to the employer's premises as to be fairly treated as a part of the premises. *Texas Comp. Ins. Co. v. Matthews*, 519 S.W. 630, 631 (Tex. 1974). Based on this exception, the Contested Case Hearing Officer found that Ms. Jimenez's injury was in the course and scope of her employment.

*Intent.* There are three entrances to the George Allen building: from the street on the Jackson side of the building, from the street on the Commerce side of the building,



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and through the parking garage below the building (arriving through a door on the ground floor). Ms. Jimenez usually used the ground floor entrance. There was evidence that some employees (but not Ms. Jimenez) parked across Jackson Street from the building or rode the DART trains (Union Station is located closest to the Jackson Street entrance) and, therefore, used the Jackson Street entrance.

Thus, it is true that some employees, like the general public, used the Jackson Street entrance to this building regularly. However, the Court finds that Dallas County did not evidence an intent that a particular access route or area be used by Ms. Jimenez in going to and from work. To evidence an intent, there must be a showing that it was the employer's desire for a *particular* entrance to be used by the employee. *See Matthews*, 519 S.W.2d at 631. Thus, the Court concludes, that to evidence an intent in this test means more than mere knowledge that employees use a particular entrance as one of several ways into a building. The evidence showed that all three entrances were equally available to employees and the general public and that no specific entrance was mandated or suggested to the employees. There were no signs suggesting that this was an employee entrance. Although Ms. Garcia was a supervisor in Ms. Jimenez's department, on the occasion in question, she was acting as a friend in dropping Ms. Jimenez off at the Jackson entrance. To find evidence of intent in this case would mean that every entrance to every building where employees were not explicitly prohibited from using that entrance would satisfy the first prong of the *Matthews* test. This Court declines to extend *Matthews* that far.

*Closely Related to the Premises.* The Court further finds that the location of the injury was not so closely related to the premises to become, in practical effect, part of the

premises. As a matter of law, the sidewalk is a part of the street and a duty to exercise ordinary care to maintain such sidewalk in a reasonably safe condition rests upon the city, not upon the abutting property owner; the facts of this particular case are in accord with the case law. *Grappotte v. Adams*, 130 Tex. 587, 111 S.W.2d 690 (1938). It is possible, however, that the abutting property owner can assume this duty of care and bring an injury on a public sidewalk within the access doctrine exception. *See Kelty v. Traveler's Ins.Co.*, 391 S.W.2d 558, 565 (Tex. Civ. App. – Dallas 1965).

This Court finds that the County did not take control or assume a duty of care over the sidewalk in this case. While the County did use the sidewalk in question for various purposes, it always requested permission from the city. This implies subservience rather than control. Dallas County officials knew that they were not free to do as they wished to the sidewalk and had to ask permission to raise the boiler, disable parking meters, use the sidewalk for construction, etc.

On one occasion, the County did repair part of the sidewalk around the George Allen building. However, even on this occasion, the County asked the city for permission and acted only because the city declined to do so. This one occasion is quite different from the conduct in *Kelty*, where the employer assumed a general duty to repair and maintain the sidewalk and did so frequently.

Generally, an injury which occurs in the use of public streets or highways in going to and returning from the place of employment is not compensable because such an injury is suffered as a consequence of risks and hazards to which all members of the traveling public are subject rather than risks and hazards having to do with the work or business of the employer. *Evans v. Illinois Employers Ins. of Wausau*, 790 S.W.2d 302,

304 (Tex. 1990); *Texas Gen. Indem. Co. v. Bottom*, 365 S.W.2d 350, 353 (Tex. 1963). 045
The Court finds that Dallas County has proven that the access doctrine does not apply such that the general rule applies. The uneven sidewalk was a risk that all of the general public were subject to whether they were going to the George Allen building or to any other destination in which they would use the sidewalk as a mode of access to that destination.

*Did Dominga Jimenez have disability resulting from a compensable injury sustained on July 17, 2002?* The Court need not address this question because it finds that there was no compensable injury.

*Judgment.* The Court orders Plaintiff's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document. He shall then circulate same to opposing counsel for comment. Within seven days thereof, Plaintif's counsel shall forward a proposed form of judgment to the Court together with any comments or agreements as to form received from Defendant's counsel. At the same time, Plaintiff's counsel shall forward the proposed judgment to the Texas Workers' Compensation Commission in accordance with law and notify the Court after thirty days has passed from such transmission, together with proof of such transmission.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 18th day of June, 2004.

JUDGE PRESIDING

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CAUSE NO. 03-11713-J

| | | |
|---|---|---|
| DT ELECTRICAL MANAGEMENT<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| NICHOLS FAMILY PARTNERSHIP et al.<br>Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Court on this day is this case which, no jury having been requested, was tried to the Court on February 21, 2005 and March 1, 2005[1]. The Court, having considered the evidence and the arguments of counsel, makes the following findings of fact and conclusions of law pursuant to TRCP 296, which provides no particular form for same:

*Background.* Plaintiff DT Electrical Management ("DT") is an electrical contractor that performs electric work for homes and businesses. A few years before this trial, DT began doing work for Defendant Rex Nichols ("Nichols") and companies in which Nichols had some form of interest. On the early jobs, DT was paid in full. The payor was not Nichols, personally, but some company in which Nichols had an interest. During this timeframe, DT contends that Nichols introduced DT's owner, Mr. Stephens ("Stephens"), to Steve Willingham ("Willingham") as his general manager. Nichols denies meeting Stephens or talking to him on the phone prior to this litigation.

It is undisputed that DT performed some work at a project known as Lightning Motorsports, located on property owned at that time by Defendant Nichols Family

[1] Because the Court granted Plaintiff leave to introduce some additional evidence, the Court gave Defendants the opportunity to offer rebuttal evidence to the new evidence by informing the Court by letter no later than March 4, 2005, that they wished to do so. No such letter was received. The Court considers the evidence closed.



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Partnership, Limited ("Nichols Partnership") in the 2002-03 time period. On December 3, 2003, that property was transferred to Defendant Centerwell Limited Partnership ("Centerwell"). It is also undisputed that DT performed some work at Nichols' residence located on Maplewood. Finally, some miscellaneous work was done, allegedly at Nichols' request, at projects known as Garland Car Wash, Walnut Car Wash and Addison Airport. DT contends that invoices totaling $55,059.25 for Lightning Motorsports, $6347.64 for Nichols' home and $2018.12 for the other projects remain unpaid.

Nichols, Nichols Partnership and Centerwell contend that, whatever is owed to DT on Lightning Motorsports, it is owed by Defendant Oil Well Austin, Inc. ("Oil Well Austin"), which was the general contractor on the project. DT contends it never heard of Oil Well Austin until well after the work was done and Stephens was trying to get paid. At that point, he said, Willingham directed him to Oil Well Austin. Oil Well Austin has defaulted in this case, thereby admitting the allegations against it. An interlocutory default has been entered against it, which should be included in the final judgment in this case.[2]

*Did Nichols agree to hire DT to perform work on the projects in question and pay it for same? If so, on behalf of what person(s) or entity(ies)?* The Court finds that Nichols hired DT on the Lightning Motorsports, Maplewood and miscellaneous projects. The Court finds that Nichols individually hired DT on the Maplewood project. On the

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[2] The Court has overruled the answering Defendants' argument that the interlocutory judgment against Oil Well Austin constitutes "one satisfaction," negating Plaintiff's ability to pursue the other Defendant. Any recovery for actual damages against the other Defendants, of course, must be joint and several with Oil Well Austin and any payment by Oil Well Austin must be credited against the judgment as a whole, benefitting all. However, the undisputed evidence shows Plaintiff has received no "satisfaction" of any kind from Oil Well Austin as of the time of trial.



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Lightning Motorsports, the Court finds that Nichols was acting on behalf of the owner, Nichols Partnership. With respect to the miscellaneous projects, the Court finds DT failed to prove who owned those projects (other than Oil Well Austin, which defaulted and thereby admitted liability) and who hired him. Accordingly, the Court declines to award any money with respect to the miscellaneous projects (Invoices 157, 218 and 207) as against any answering Defendants.

*If so, did Nichols and Nichols Partnership fail to comply with such agreement?* Yes. No one has paid the invoices in question.

*What sum of money, if paid now in cash, would fairly and reasonably compensate DT for the failure to comply found?* With respect to Maplewood, DT proved up its invoices, and Nichols failed to put on any competent evidence refuting the invoices. Some mention was made of an electrical short at the pool, but no expert testimony was presented proving that DT performed some defective work or otherwise failed to do its job properly. Accordingly, the Court awards the entirety of the invoices claimed with respect to Maplewood against Nichols in the amount of $6,347.64.

With respect to Lightning Motorsports, again, the quality of the work was not challenged. However, Defendants challenged whether the work was performed in accordance with the "time plus materials" agreement and challenged the markups on and supporting documentation for the invoices, as well as the failure to credit one invoice for payment to a subcontractor. Having considered all of the evidence presented in view of the arguments made, the Court finds that $40, 882.71 should be awarded to DT against Nichols Partnership.



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*Can DT enforce a constitutional lien against Centerwell, the current owner of the Lightning Motorsports property?* A constitutional lien need not be filed and is effective against the owner. However, it is effective against a subsequent purchaser only if it has actual or constructive notice of the lien. The evidence before the Court shows that Rex Nichols was on notice prior to the transfer to Centerwell of DT's claim of a lien on the Lightning Motorsports premises. Rex Nichols signed the Deed of Trust that was part of the transfer to Centerwell on behalf of Centerwell. Nichols was an officer in both Nichols Partnership and Centerwell. Under the circumstances, Centerwell is not a bona fide purchaser of the Lightning Motorsports property which took without notice of the DT claim. However, given the ruling above, the amount of the constitutional lien is $40, 882.71. DT is entitled to foreclose its lien in that amount.

*Attorneys' Fees and Costs.* Because the Court has ruled that DT should recover $6,347.64 from Nichols and $40,882.71 from Nichols Partnership in actual damages, it is the prevailing party entitled to court costs and attorneys' fees. Taking into account the relevant factors governing award of attorneys' fees[3], the Court finds that DT should recover attorneys' fees as follows: $1000 from Nichols for services performed through the trial of this case, and $10,000 from Nichols Partnership for services performed through the trial of

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[3] The Court considered the following factors: (1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) The fee customarily charged in the locality for similar legal services; (4) The amount involved and results obtained; (5) The time limitations imposed by the client or the circumstances; (6) The nature and length of the professional relationship with the client; and (7) the experience, reputation and ability of the lawyer performing the services.



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this case. The trial attorneys' fees are awarded severally (and also severally as to those already awarded against Oil Well Austin). If this case is appealed to the Court of Appeals, as against those appealing Defendants who are unsuccessful, the Court finds $7500 to be a reasonable attorneys' fees and a like amount against those appealing Defendants who are ultimately unsuccessful if a petition for review is filed in the Texas Supreme Court.

*Judgment.* The Court declines to award any other relief requested by any party. Plaintiff is ordered to prepare a proposed Judgment in conformity herewith and circulate to all other parties and then to the Court in accordance with Dallas County Local Rules. The clerk of the court is directed to send a copy of this order to counsel of record.

SIGNED this 10th day of March, 2005.

JUDGE PRESIDING

cc: Counsel of Record



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CAUSE NO. 02-5554-J

| | | |
|---|---|---|
| HENRY DONALDSON<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| DIGITAL GENERATION SYSTEM<br>Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 29, 2003, this case came on to be tried; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. The Court permitted post-trial briefing which concluded on October 23, 2003. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* Plaintiff Henry Donaldson was the President and CEO of Defendant DG Systems. Due to various corporate transitions, Donaldson decided he wanted to leave the company. Richard Harris, Chairman of Defendant's Board, wanted to continue Donaldson's services. Harris and Donaldson negotiated an Employment Agreement and Stock Option Agreement admitted into evidence as Plaintiff's Exhibits 1 and 2 respectively. As a result, Donaldson remained with the company in some capacity until March 31, 2001. All parties agree Donaldson left all employment with the company on this date and that he was not terminated for cause.

Thereafter, some time in July of 2001, Donaldson contacted the company and stated that he wished to exercise his stock options. Although the timing is disputed, the parties agree that some time in August of 2001, Donaldson was told he could not exercise his options. Donaldson



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00893 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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contends that he was told the Board had not approved the options. Defendant's witness, Mr. 150 Choucair, contends he told Donaldson that the options had expired on April 30, 2001. Donaldson never put his request to exercise the options in writing. He filed this lawsuit in June of 2002.

At issue is whether or not Donaldson could (and, if he could, effectively did) exercise his options in July or August of 2001. If he could and did, what amount is he owed? The dispute over exercisability centers on two conflicting paragraphs in the two agreements, which paragraphs the Court has found are, by virtue of this conflict, ambiguous. The Employment Agreement (Pl. Exh. 1) states in paragraph 2(c) as follows:

> **Stock Options.** Subject to the approval of the Board, the Company shall grant [Donaldson] an incentive stock option covering 150,000 shares of the Company's Common Stock. The exercise price of such option shall be equal to the fair market value of such stock on the date of grant. The term of such option shall be 10 years, subject to earlier expiration one year following the termination of [Donaldson's] Employment or other service with the Company. . . . The grant of such option shall be subject to the other terms and conditions set forth in one of the Digital Generation Systems, Inc Stock Option Plans and in the Company's standard form of stock option agreement. . . .

By contrast, the Incentive Stock Option Agreement (Pl. Exh. 2) states in paragraphs 3(i)(d), 7 and 11 as follows:

> 3(i)(d) In no event may this Option be exercised after the date of expiration of the term of this Option as set forth in Section 11 below.
>
> 7. Termination of Status as an Employee. In the event of termination of [Donaldson's] Continuous Status as an Employee, he may, but only within thirty days after the date of such termination (but in no event later than the date of expiration of the term of this Option as set forth in Section 11 below), exercise this Option to the extent that he was entitled to exercise it at the date of such termination. To the extent that he was not entitled to exercise this Option at the date of such termination, or if he does not exercise this Option within the time specified herein, the Option shall terminate.
>
> 11. Term of Option. This Option may not be exercised more than seven (7)



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151

years from the date of grant of this Option and may be exercised during such term only in accordance with the Plan and the terms of this Option.

Finally, the 1992 Stock Option Plan for DG Systems (Def. Exh. 3) states in paragraph 9(b):

> (b) Termination of Status as an Employee or Consultant. In the event of termination of an Optionee's Continuous Status as an Employee or Consultant (as the case may be), such Optionee may, but only within thirty (30) days (or such other period of time, not exceeding three(3) months in the case of an Incentive Sock Option or six (6) months in the case of a Nonstatutory Stock Option, as is determined by the Board with such determination in the case of an Incentive Stock Option being made at the time of the grant of the Option) after the date of such termination (but in no event later than the date of expiration of the term of such Option as set forth in the Option Agreement), exercise his Option to the extent that he was entitled to exercise it at the date of such termination. . . .

The Employment Agreement seemingly gives Donaldson one year after termination to exercise his option, while the Stock Option Agreement (and the Plan to which it is subject[1]) seemingly give Donaldson only thirty days. The Court will address construction of these documents below.

*What was the agreement between Donaldson and Defendant regarding how much time Donaldson had to exercise an option after termination of employment: one year or thirty days? Did he effectively exercise his option within that time?* The parties agree that the documents must be read together. Plaintiff contends that the negotiators of the agreement – Donaldson and Harris – agreed that Donaldson was to have one year after termination. However, Harris's testimony is equivocal and demonstrates that Harris has no recollection of actually discussing the

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[1] The Board of Directors did not unambiguously grant Donaldson more than thirty days. The Board Minutes, Plaintiff's Exhibit 4, reference various agreements as Exhibits C and D, but they are not attached and, so far as anyone knows, were never attached.



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one-year term. Further, this "recollection" would put the agreement of the parties in direct opposition to even the most generous grant of time (six months for a Nonstatutory Option) in the 1992 Stock Option Plan. The Court finds that the agreements themselves provide the answer for what "trumps" what. Because the Employment Agreement expressly refers to and is made subject to the Plan and the Stock Option Agreement, but the Stock Option Agreement is not made expressly subject to the Employment Agreement, the Stock Option Agreement's contrary term controls. It is undisputed that Donaldson made no effort to exercise his option within thirty days. Accordingly, his claim for breach of contract based upon the Option must fail.

Even if he could have exercised his option within one year, he was not excused from making a demand in writing by any conduct of Defendant. Thus, Plaintiff's claims in this case must fail.

As a result of these findings, the Court need not reach the question of how and as of what date to measure damages. Nor need it reach the question of Plaintiff's attorney's fees.

*Judgment.* The Court is signing a Judgment in conformity herewith

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 10th day of November, 2003.

JUDGE PRESIDING

cc: Jody Sheets, 700 N. Pearl Str., Ste. 520, Dallas, TX 75201
William Dunn, 1601 Elm Str., Ste. 3000, Dallas, TX 75201



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NO. 06-2872-J

| | | |
|---|---|---|
| KUM SUN HENDRICKSON, | § | IN THE DISTRICT COURT |
| | § | |
| *Plaintiff,* | § | |
| | § | |
| VS. | § | OF DALLAS COUNTY, TEXAS |
| | § | |
| MICHELLE (KI KYUNG) KIM et al., | § | |
| | § | |
| | § | |
| *Defendants.* | § | 191ST JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Court on this day is this case in which Plaintiff Hendrickson seeks a temporary injunction against Defendant Kim. The Court files these findings of fact and conclusions of law pursuant to Texas Rules of Civil Procedure 296-299, which require no particular form thereof.

*Background: The First Case.* In July of 1999, Defendant Kim alleges that Plaintiff Hendrickson signed a contract for deed for a property at 6322 Royal Lane (the "Property") which had previously been Hendrickson's home. Hendrickson never relinquished possession of the Property. Instead, she filed suit on September 12, 2001, under Cause No. 01-7902, which ultimately came to the 191st District Court (the "First Case"). The Court takes judicial notice of the contents of the court file and docket sheet of the First Case. Kim answered and filed a counterclaim on October 29, 2001. Hendrickson alleged that the Contract for Deed was procured by fraud and that a memorandum purporting to memorialize a $9,000 credit on the down payment was also fraudulent or obtained through duress. She sought a declaration that the Contract for Deed and memorandum were null and void. Kim



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00897 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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responded that the Contract for Deed and memorandum were valid and sought specific performance of the Contract for Deed.

*Jury Trial in the First Case.* The right to trial by a jury is a cornerstone of American jurisprudence. Indeed, the Declaration of Independence mentions the curtailing of jury trials as one of the grievances the colonies had against the king. The Bill of Rights to the United States Constitution guarantees the right to trial by jury in most cases as does the Texas Constitution. Hendrickson requested and received a jury trial. This Court presided over a three-day jury trial in June of 2004, in which Hendrickson testified fully with the aid of an interpreter agreed by the parties. Hendrickson was represented by counsel throughout the proceedings, including the jury trial. Kim was represented by counsel at the trial.

The jury returned a verdict against all of Hendrickson's claims and in favor of Kim which was received and accepted by the Court without objection. The jury verdict included the following: "Question No. 1: Did Kum Sun Hendrickson fail to comply with Plaintiff's Exhibit 2 [the Contract for Deed]? Jury's Answer: Yes." The jury found no excuse for the failure to comply. "Question No. 6A: Was Kum Sun Hendrickson induced to enter into Defendant Kim Exhibits 4 and 5 [receipt for down payment] by duress? Jury's Answer: No. Question 6B: Was there no consideration given to Kum Sun Hendrickson for Defendant Kim Exhibits 4 and 5? Jury's Answer: No." In Question Number 9, the jury also found a meeting of the minds between Hendrickson and Kim over the language of the Contract for Deed. Thus, the jury found that it was Hendrickson, not Kim, who breached the Contract for Deed and that nothing Kim did excused this breach.

Following the verdict, the parties then attempted to agree on a form of



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00898 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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judgment and ultimately came before the Court on a motion for judgment. On August 19, 2004, the Court entered a judgment on the jury verdict in the presence of all counsel (including Mr. Chae, who represents Hendrickson here), and a copy of the judgment was given to counsel for both sides. The law gives parties the right to appeal a trial court judgment within a certain time. No such appeal was taken, and the judgment became final and binding on both parties thereto.

*The Judgment in the First Case.* The Judgment in the First Case entitled Kim to immediate possession of the Property and required Kim to begin making payments to Hendrickson thereafter beginning September 1, 2004. The Judgment also awarded Kim $15,000 in attorneys' fees; the parties stipulated to the reasonableness of that amount. Thus, the first act of compliance should have been Hendrickson turning over the Property to Kim. This never occurred. Hendrickson's attorney apparently sent a letter offering to vacate the premises, but he conditioned that offer on the payment by Kim of a down payment in the amount of $11,000, something not required by the Judgment (and, indeed, barred by the judgment). Mrs. Hendrickson's attorney agreed during closing argument in this case that this letter (Plaintiff's Exhibit 8) does not evidence compliance with the court's judgment and, indeed, is evidence of a breach.

*More Lawsuits.* Within a few days of the First Case Judgment becoming non-appealable, Kim filed an eviction action in justice of the peace court and was awarded possession. Hendrickson did not obey this Court's order or the justice of the peace court order. Neither did she pursue the appropriate remedy for challenging a Court's judgment – that of appeal. Instead, she filed a bankruptcy petition, delaying enforcement of the First



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00899 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Case Judgment for another 18 months or so while Hendrickson and Kim litigated in federal bankruptcy court. Ultimately, the bankruptcy judge dismissed the bankruptcy, finding Hendrickson filed it in bad faith. Yet again Kim sought to evict Hendrickson. Yet again Hendrickson neither complied with the various courts' orders nor filed an appeal; instead, she filed yet another lawsuit which was assigned to the 192nd District Court. The judge of that court granted a temporary restraining order, which was ultimately extended by agreement, and transferred the case to this court pursuant to the Dallas County Local Rules.

*The Present.* Thus, seven years have passed since Hendrickson signed the Contract for Deed – a document that a lawfully-constituted jury has found was valid – yet Hendrickson remains on the Property. After four lawsuits, countless hours and the combined resources of at least four judges and twelve jurors, Hendrickson still fails to accept the results of the very proceedings she has instituted.

Hendrickson appears to believe sincerely that she has been wronged. She is obviously well-regarded in her community, as evidenced by the numerous people who appeared to give her support during the temporary injunction hearing. It is undisputed that she is suffering from a longstanding serious medical condition. However, the undersigned judge is not permitted to consider her own personal feelings or allow any feelings of sympathy to affect her rulings. The Code of Judicial Conduct mandates: "A judge shall not be swayed by partisan interests, public clamor, or fear of criticism." Canon 3(B)(2). Thus, it is impermissible for this Court to take into consideration the emotions and feelings of Hendrickson's friends, including those who attended the Court proceeding, however well-meaning, well-intentioned or sincere they may be. In assessing this case, the Court must



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00900 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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follow Texas law, which requires consideration of all positions and arguments, but provides for finality of judgments such that there will be an end to litigation.

Plaintiff has argued that Kim also has not complied with the Judgment. The Court does not condone any party failing to comply with a court order. Nor does the court condone the manner in which the eviction was handled[1] or any theft, if theft occurred,[2] of property incident thereto. In this proceeding for a temporary injunction, however, the burden is upon Hendrickson to prove her entitlement to extraordinary relief. "For a temporary injunction to issue, [Hendrickson] must plead and prove (1) a probable right of recovery, (2) that imminent, irreparable harm will occur in the interim should the injunction be denied, and (3) that no adequate remedy at law exists." *AIG Risk Management v. Motel 6 Operating, L.P.*, 960 S.W.2d 301, 306 (Tex. App. – Corpus Christ 1997, no pet.).

*Probable Right of Recovery.* It is unnecessary to analyze the other elements of a temporary injunction, because Hendrickson cannot meet this element. In this lawsuit, Hendrickson seeks a declaration that the Contract for Deed is void for Kim's alleged breach thereof, as well as damages for alleged theft of personal property. The latter claim would provide only for money damages, something not before the Court at this time; thus, the Court will focus on the former claim. Hendrickson has failed to establish a probable right of recovery in that she has not shown a breach that is not excused by Hendrickson's own prior material breach.

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[1] The Court acknowledges, however, that the details of such eviction are within the jurisdiction of the justice of the peace court rather than this court.

[2] Hendrickson alleges that Kim stole her personal property. That question is not before this Court, and the Court makes no finding regarding this allegation.



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First, under the Judgment, Kim was entitled to immediate possession as of the date of the Judgment. Payments under the Contract for Deed (whatever their amount), on the other hand, were not required to begin until September of 2004. Thus, Hendrickson breached first. The Court finds this breach material.[3] In the absence of possession, Kim should not be required to pay for the Property. Hendrickson's counsel cited to the Contract for Deed that allows Hendrickson to retake possession if Kim fails to pay. The Contract for Deed contemplated simultaneous payment of the down payment and possession in August of 2001. This did not occur. Kim did pay at least $9,000 of the down payment (as found by the jury in the First Case) and the attorneys indicated before this Court that she attempted to pay the other $2,000 but was refused. Hendrickson, on the other hand, did not tender possession back in 2001 or in 2004. The jury in the First Case, having heard all the details of the down payment and all other pertinent matters, found that Hendrickson breached by failing to turn over possession of the Property. They also found this breach was not excused by any alleged wrongdoing of Kim.

Logically, of course, when judgment was entered in August of 2004, the Court could not go back in time to make things happen as they should have under the Contract for Deed. Instead, the Court, in keeping with the jury's verdict which was entirely in Kim's favor, ordered possession first, then payment, with the monthly payments (and tax and insurance) starting on September 1, 2004 (the future), rather than 2001 (the past). Again, if

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[3] Hendrickson's counsel argued that failure to turn over possession was not material. It is difficult to see how that could be so. Under the Contract for Deed, the only thing Kim was getting for the next fifteen years was possession. It is not only material, it is the essence of the contract.



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Hendrickson (or her counsel) believed this ruling was incorrect, the proper remedy was appeal, not noncompliance. However, this ruling was not appealed.

In her filings in this case, in the letter her attorney sent in August of 2004 (Plaintiff's Exhibit 8), and in the letter her present counsel sent in May of this year (Plaintiff's Exhibit 4), Hendrickson contended that Kim must pay her a down payment of $11,000 before Kim is entitled to possession.[4] In this lawsuit, Hendrickson also alleged arrearages of $51,000. Paragraph 10 of the live pleading in this case sets forth these allegations as a basis for the argument that Kim has failed to comply with the Contract for Deed, justifying cancellation thereof and an injunction. Kim contends that she has paid at least $9,000 of the down payment. The Court agrees.

In her petition in the First Case, Hendrickson sought to avoid the effect of a memorandum agreeing that Kim had paid $9,000 of the down payment. She expressly prayed for a finding that the memorandum was void. The jury found against her on all of her claims, and the Court entered a take-nothing judgment against Hendrickson on the jury verdict. Her arguments about the $9,000 here (and her attorney's attempts to collect that amount in August 2004 and May 2006) are an improper attempt to relitigate the matters already decided in a three-day jury trial. Indeed, given that a take-nothing judgment was entered on all claims by Hendrickson, one could argue that the proper construction of the Judgment is that no down payment of any kind is still owed.

With respect to payments in arrears, the Judgment specifies otherwise. The

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[4] During closing arguments, Hendrickson's counsel retreated from the position Hendrickson had previously taken in Plaintiff's Exhibits 4 and 8 and two pleadings filed in this court – that an $11,000 down payment was owed.



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Judgment says to begin making the payments as of September 2004. It does not require payments in arrears. At the time of the Judgment, Hendrickson, as found by the jury, had improperly withheld possession from Kim for the entire duration of the Contract for Deed. Thus, in specifically enforcing the contract, the Court did not order any payment to "catch up." Indeed, the Court entered a take-nothing judgment against Hendrickson based on the jury's findings.

The Court concludes that Hendrickson has failed to prove a probable right of recovery on her claims regarding possession of the Property.

*Doing Equity and Unclean Hands.* Additionally, the Court concludes that Hendrickson, as a person seeking equity, has failed to do equity, to the detriment of Kim. "For a complainant to be entitled to relief in equity, it is necessary that he bring himself within the full meaning of the maxims that he who seeks equity must do equity, and that he who comes into equity must come with clean hands. These maxims comprehend not only the previous conduct of the complainant toward the defendant, but also the attitude of the complainant toward the defendant throughout the litigation. The complainant must in good conscience offer to do equity and to have the court accord to the defendant all of his rights." *Union Gas Corp. v. Gisler*, 129 S.W.3d 145, 153 (Tex. App. – Corpus Christi 2003, no pet.). "The doctrine [of unclean hands] applies against a litigant whose own conduct in connection with the same matter or transaction has been unconscientious, unjust, marked by want of good faith, or violates the principles of equity and righteous dealing." *Flores v. Flores*, 116 S.W.3d 870, 876 (Tex. App. – Corpus Christi 2003, no pet.).

The Court finds that Hendrickson has taken no steps to comply properly with



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00904 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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the jury's verdict and Court Judgment in the First Case. Instead, she has had the benefit of the Property for almost five years longer than the Contract for Deed provided. Indeed, Hendrickson continues to take an inconsistent position as to compliance with the Judgment in the First Case. At various times in her testimony, she indicated that she would relinquish possession if Kim returned the allegedly stolen property, if a down payment were made or if the Contract were complied with by making "necessary" payments. However, during questioning in closing argument, Hendrickson indicated through her attorney that she does not want to leave the home because it is close to where she obtains medical treatment. The Court finds that Hendrickson has no intent of leaving the Property voluntarily. Kim has thus been harmed by being deprived of the Property to which a jury found she was entitled.

Hendrickson has not shown good faith. Through her attorneys by letter and in her two petitions in this court, she has claimed at least four times to be entitled to an $11,000 down payment, a totally baseless claim as a result of the verdict and judgment in the First Case. To avoid the eviction ordered in the September/October 2004 time frame, she filed a bankruptcy in bad faith. She continues to refuse to relinquish possession of the Property. She has failed to "do equity" and has "unclean hands," to the detriment of Kim.

The Court concludes that the future circumstances are irrelevant to the situation here presented. However, given that her counsel argued strenuously about the hardships upon Hendrickson, the Court notes that Hendrickson presented no evidence that the monthly payments she should begin receiving upon relinquishment of possession of the home would be insufficient to find and pay for a place to live near the medical facility she uses. Nor did she present anything other than a mere statement that she would truly be



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00905 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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homeless if the injunction were to issue. As the Court stated during the hearing, the Court recognizes that leaving one's home of many years is difficult. However, that is the effect of the unappealed jury's verdict from two years ago following a full trial on the merits.

The Court concludes that the application for temporary injunction should be denied, without prejudice to its renewal if future events warrant it, and also concludes that the temporary restraining order should be dissolved. In so doing, the Court in no way countenances any disrespectful or damaging conduct by Kim or any theft of Hendrickson's personal property.

The clerk of the court is directed to send a copy of this order to a counsel of record for each party and to all pro se parties.

SIGNED this 5th day of June, 2006.

JUDGE PRESIDING

cc: David Gibson, 3500 Oak Lawn Ave., Ste. 640, Dallas, TX 75219
William Rossini, 1201 Main Str., Ste. 2470, Dallas, TX 75202
Don Chae, 3010 LBJ Freeway, Suite 750, Dallas, TX 75234
Grant Brenna, 411 Elm Str., Ste. 500, Dallas, TX 75202

[illegible] now ordered that Court stand adjourned until [illegible] morning at nine (9) o'clock, Court shall pursuant to adjournment, and [illegible]



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CAUSE NO. 99-6992

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| AMERICAN NATIONAL PROPERTY<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| HERMAN AND DEBORAH PATTY<br>Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 3, 2000 came on to be tried this case; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. The evidence closed on May 4, 2000; the Court ordered the parties to submit further briefing with a final submission date of May 24, 2000. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* This case involves a claim for fire loss filed by Defendants on their policy of insurance with Plaintiff arising out of a dwelling fire of September 1, 1998. All parties agree that the building was a total loss and that if Defendants are the owners of the property in question, they are entitled to policy proceeds equal to the face value of the policy of $75,300. However, after the claim for loss was filed, Plaintiff learned of a "bill of sale" between the Pattys and the Haskins from which Plaintiff concluded that the Pattys were mere mortgagees, not owners. It is undisputed that the amount remaining due under the "Bill of Sale" would be $12,000. Thus, Plaintiff contends that it owes only $12,000 for the fire loss and previously tendered same. As a result, Plaintiff's claim for declaratory relief and the Defendants' counterclaim for breach of contract turn on the question of the construction



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of the "Bill of Sale" in light of the policy provisions. Additionally, the Court found that the Pattys had either pled or were entitled to a trial amendment on a cause of action for violation of the prompt pay portion of 21.55 and for violations of Texas Insurance Code article 21.21 §4(10)(i)(ii)&(iv) made actionable under Article 21.21 §16.

Plaintiff seeks its attorneys fees pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code. Defendants seek attorneys' fees under Chapter 38 of the same code in the amount of $500.

*Did the Bill of Sale convey present title to the property in question such that the Pattys ceased to be owners and became only mortgagees?* The primary dispute in this case boils down to the meaning and effect of the "Bill of Sale" document between the Pattys and the Haskins. Plaintiff has cited generic cases involving construction of a deed between a grantor and grantee. However, this case involves a third party seeking to limit its obligations under an insurance contract due to a purported deed. As such, the rules of construction urged by Plaintiff are less helpful particularly where, as here, the purported grantor and grantee both agree that the "Bill of Sale" was NOT a deed and where, as here, the insurance policy in issue must be construed against the Plaintiff.[1] *See Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984)("It is well-established that insurance policies are strictly construed in favor of the insured in order to avoid an exclusion of coverage.") Thus, the provision limiting the insurance amount to the Pattys' supposed "insurable interest" must be construed against the carrier.

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[1] Cases construing deeds to convey the "maximum estate possible" are also not helpful here, as such cases involve admitted conveyances; here, the question is whether or not the document IS a conveyance, not the extent of the estate conveyed.



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Plaintiff argues that the Bill of Sale constitutes a present conveyance because it uses the word "sale." *See Young v. Rudd*, 226 S.W.2d 459 (Tex. Civ. App. – Texarkana 1950, writ ref'd n.r.e.). However, it is the intention of the parties, as determined by the entire document, that is controlling. *Brown v. Byrd*, 512 S.W.2d 753, 758 (Tex. Civ. App. – Tyler 1974, no writ); *L.A. Durrett & Co. v. Iley*, 434 S.W.2d 367, 370 (Tex. Civ. App. – Dallas 1968, writ ref'd n.r.e.).

The Bill of Sale does not clearly convey present title with a mortgage interest in the Pattys. Instead, it sets out a payment plan to purchase the house. The Court finds the "Bill of Sale" to be an unambiguous contract for sale. However, even if the "Bill of Sale" were ambiguous, the Court would find for the Pattys. The court can look to the conduct of the parties after signing the document in question to determine intent. *See, e.g., Shults v. Bartz*, 431 S.W.2d 416, 420 (Tex. Civ. App. – Fort Worth 1968, no writ); *see generally Nat'l Union Fire Ins. Co. v. CBI Industries*, 907 S.W.2d 517, 520 (Tex. 1995). The parties' conduct after the contract was signed also demonstrates that the "Bill of Sale" was not a deed – for example, the Pattys maintained insurance on the house for the full amount of its value. In view of the fact that the insurance policy in question must be construed against the carrier and in view of the language of the "Bill of Sale," the Court concludes that the "Bill of Sale" was a contract to sell the house upon completion of the payments set forth rather than a present conveyance of title.

Under this analysis, the Haskins' return of the keys was a sufficient recission



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of the contract of sale.[2] "Rescission of a contract for the sale of realty by the vendor reinvests title in him as completely as if the contract had never been executed, and puts an end to a lien given by the contract for the purpose of securing its performance. . . . The rescission of a contract by mutual consent does not require a formal agreement or release, but may result from any act or any course of conduct of the parties which clearly indicates their mutual understanding that the contract is abrogated or terminated or from the acquiescence of one party in its explicit repudiation by the other." *Smart v. American Bank & Trust Co.*, 70 S.W.2d 299, 303-04 (Tex. Civ. App. – Fort Worth 1934, writ dism'd).

The Court finds that the Bill of Sale was not a deed. The Court further finds that any interest the Haskins had in the property in question was extinguished at the time the keys were returned to the Pattys.

The parties agree that the house was a total loss. Accordingly, under the policy, the Pattys are entitled to the face amount of $75,300, less the deductible of $250, for a total of $75,050.

*Does Plaintiff owe a penalty under 21.55?* Article 21.55 of the Texas Insurance Code provides for an 18% per annum penalty if timely payment is not made. The penalty is owed if full payment is not timely made regardless of whether or not the insurance company had a good faith basis for failing to pay. Accordingly, the Court finds that Plaintiff owes the Pattys two years' worth of 18% of $75,050 or a total penalty of $27,018.

*Did Plaintiff engage in any of the following unfair settlement practices that*

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[2] The Court agrees with Plaintiff that if the "Bill of Sale" were really a deed, returning the keys would not constitute a reconveyance.



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*was/were a producing cause of damages to the Pattys: (a) misrepresenting to a claimant a material fact or policy provision relating to coverage at issue; (b) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear; or (c) failing to provide promptly to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or for the offer of a compromise settlement of a claim?* The only damages claimed under Article 21.21 were mental anguish damages. The Court finds that Mr. Patty did not suffer any mental anguish. The Court finds that any violations of (a) or (c) above were not a producing cause of damages to Mrs. Patty. With respect to (b), the Court finds that liability never became reasonably clear, the carrier's position on coverage was reasonable. Thus, the Court declines to award damages under Texas Insurance Code article 21.21.

*Judgment.* The Court declines to award any other relief. The Court orders the Pattys' counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document. He shall then circulate same to all other counsel of record for comment. Within seven days thereof, the Pattys' counsel shall forward a proposed form of judgment to the Court together with any comments received from Plaintiff.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 12th day of June, 2000.

JUDGE PRESIDING



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CAUSE NO. 99-7568

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| BRAVO-WHISKEY FLUG.<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| EMIR ADEL CHEHAB<br>Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On October 5, 2000 came on to be tried this case; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. The evidence closed on October 5, 2000; the Court ordered the parties to submit further briefing with a final submission date of October 30, 2000. The Court granted leave to defendant to amend his answer regarding the proper parties to this suit and, accordingly, granted Plaintiff leave to amend its petition to join as parties plaintiff the owners of Bravo-Whiskey FlugzeughandelsgesellschaftmbH ("Bravo-Whiskey"). Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* This case involves a claim by Bravo-Whiskey that it was the owner of a Cessna aircraft. It contends that it agreed with Defendant Chehab that Chehab would sell the Cessna in the United States and remit the proceeds, less Chehab's commission, to Bravo-Whiskey. Chehab agrees that this was the initial deal, but said the deal changed and that he ultimately purchased the Cessna for a cash payment made in Frankfurt, Germany to Heinrich Brücher, a principal of Bravo-Whiskey. Mr. Brücher denies that this payment ever occurred. It is undisputed that, after receiving the Cessna, Chehab



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titled it in the name of a corporation of which he was the principal and sold it to a person named Chuck Smith, not a party herein. It is undisputed that the proceeds from this sale were not remitted to Plaintiffs or any of them. Chehab contends he had already purchased the aircraft for cash by this point. Bravo-Whiskey disputes this contention.

Plaintiff seeks damages for breach of contract, conversion and fraud, its attorneys fees pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code and exemplary damages.

*Standing*. Defendant contends that Bravo-Whiskey never owned the plane in question because it was not formed until after the plane was purchased. The Court finds that corporate promoters may take actions, later ratified by the corporation, on behalf of the corporation before it is formed. The Court finds that Brücher and Dietrich Weikert purchased the Cessna on behalf of Bravo-Whiskey and that, by its actions, including, but not limited to, filing this suit, Bravo-Whiskey ratified that purchase and became the owner of the Cessna. Accordingly, the Court finds that Bravo-Whiskey had standing to sue. In the alternative, the Court finds that if actions are taken on behalf of a corporation which are never ratified by the corporation (or which corporation is never formed), then the promoters (Brücher and Weikert) become the real parties in interest and are entitled to sue on the causes of action that would otherwise have been that of the corporation. Thus, were it to be that Bravo-Whiskey did not own the plane, then Brücher and Weikert would be entitled to recover in its place. In other words, Defendant cannot evade the results of his conduct found below by a shell game between the corporation and its owners.

*Did the parties have a contract whereby Defendant would sell the aircraft*



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*in question on behalf of Plaintiffs or any of them? If so, did the failure to comply with the agreement to sell and remit the proceeds, if any, cause damages to Plaintiffs or any of them?* Yes. The Court finds that Brücher, on behalf of Bravo-Whiskey, entered into an agreement with Chehab whereby Chehab would sell the aircraft and remit the proceeds less commissions to Bravo-Whiskey. The Court finds that Chehab instead took the plane, sold it through a corporation and kept the money. The Court finds that the alleged Frankfurt payment testified to by Chehab and denied by Brücher never occurred. Accordingly, Chehab failed to comply with the contract causing damages to Bravo-Whiskey.

*Did Defendant convert the aircraft in question?* Yes. Chehab took the aircraft until false pretenses, exercised dominion and control over the aircraft to the exclusion of Bravo-Whiskey and the other proceeds and then kept the money received.

*Did Defendant make a misrepresentation of a material fact or a promise with no intention of fulfilling the promise to Plaintiffs or any of them intending them to rely upon the misrepresentation or promise and upon which they relied to their detriment?* Yes. The Court finds that Chehab promised that he would sell the aircraft and remit the proceeds less a commission. At the time Chehab made the promise, he had no intention of fulfilling it. The Court finds the evidence of his intention to include his concoction of the Frankfurt payment story, his conduct immediately after taking possession of the plane and his denials of Brücher's allegations, as well as his demeanor on the stand.

In this regard, the Court notes that fraud does not require privity of contract as suggested by Defendant. Thus, even if Brücher and Weikert were the actual owners of the Cessna and even if the contract were with Bravo-Whiskey, they could still recover for the



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damages suffered by the fraud practiced upon them. Because the Court is awarding the damages to Bravo-Whiskey, it is not awarding fraud damages to Brücher and Weikert. However, they would be entitled to those damages if Bravo-Whiskey did not recover them.

*What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff for the damages resulting from the conduct found?* Defendant has contended that Plaintiff cannot seek the proceeds from the sale to Chuck Smith due to the failure to state this measure of damages in response to Requests for Disclosure. The Court finds as follows in this respect: (1) the rule in question at most requires exclusion of the evidence regarding the other measure; that evidence came in without objection. The rules do not require that a party be disallowed recovery on a measure of damages prayed for in the pleadings, known to the other party, and which is less than the amount set forth in the request for disclosure. (2) In the alternative, the Court finds lack of unfair surprise or unfair prejudice based upon the evidence presented. Defendant was well aware of and the source of the information concerning the amount of the proceeds. The amount of the proceeds is less than the amount stated in response to the request for disclosure and was requested in the plaintiff's pleadings. Additionally, this matter was not raised before trial. Defendant contends that he would have been entitled to an offset for the commission on a proceeds damages theory. However, having breached the contract first under these circumstances, Defendant is not entitled to a commission for a sale he made and then stole/kept the proceeds.

The Court makes a factual finding that the proceeds of the sale measure of damages comes to $105,000.



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With respect to fair market value, the Court finds that the sale to Chuck Smith and the admission by Chehab provide some evidence of the fair market value of the aircraft in question at the time and place of the conversion, and as a measure of damages for fraud and breach of contract. The Court makes a factual finding that the fair market value of the aircraft at the relevant time was $105,000.

With respect to exemplary damages, the Court finds that Plaintiff proved fraud by clear and convincing evidence. The Court also finds that Plaintiff proved by clear and convincing evidence that Chehab had a specific intent to cheat and do substantial injury to Plaintiff.

The Court then considered the following factors in order to determine what sum of money, if any, should be assessed against Chehab and awarded to Bravo-Whiskey as exemplary damages: (a) the nature of the wrong; (b) the character of the conduct involved; (c) the degree of culpability of Chehab; (d) the situation and sensibilities of the parties concerned; and (e) the extent to which such conduct offends a public sense of justice and propriety. The Court finds that Chehab intentionally stole the aircraft and then its proceeds, warranting exemplary damages, in light of the above factors, of $10,500.

*Statute of Limitations.* As a result of the finding that Bravo-Whiskey has standing to bring this action, the statute of limitations defense is moot. In the alternative, the Court finds that the amended petition joining Brücher and Weikert relates back to the filing of the original petition in Bravo-Whiskey's name. Further, Defendant failed to plead this defense. Accordingly, the statute of limitations does not bar the recovery set forth herein on the conversion claim. The other claims are subject to a four year statute of limitations; four years has not yet passed from the date of the events in question.



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*Attorneys' fees.* Plaintiff alleged that a demand was made for payment of the proceeds. Defendant failed to deny this allegation, such that he cannot now complain of any alleged failure to comply with Texas Civil Practice & Remedies Code Chapter 38. In the alternative, the Court finds some evidence that Plaintiff demanded a sum and none was paid. A demand for one amount does not negate a later claim for attorneys' fees when a different amount is sought. In any event, since the Court's findings as to damages yield a figure of $105,000, the amount of the proceeds, the Court finds that defendant was given adequate Chapter 38 notice of same. Accordingly, Bravo-Whiskey is entitled to attorneys' fees on its breach of contract claim. The Court has addressed reasonable and necessary attorneys' fees, considering the following factors: (1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The fee customarily charged in the locality for similar legal services; (3) the amount involved; (4) The time limitations imposed by the client or the circumstances; and (5) the experience, reputation, and ability of the lawyer performing the services. The Court finds a reasonable and necessary fee to be as follows: (1) $20,000 through the trial of this cause; (2) in the event of an unsuccessful appeal by Defendant to the Court of Appeals, $5,000 for the appeal; and (3) in the event of a petition for review to the Texas Supreme Court as to which the Plaintiff ultimately prevails, an additional $5,000. Plaintiff is also entitled to its costs of court, prejudgment interest and postjudgment interest.

*Judgment.* The Court declines to award any other relief. The Court orders the Plaintiffs' counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document. In so doing, Plaintiff shall be required to elect remedies as among the causes of action pleaded. She shall then circulate



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same to all other counsel of record for comment. Within seven days thereof, Plaintiffs' counsel shall forward a proposed form of judgment to the Court together with any comments as to form received from Defendant.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 2nd day of November, 2000.

JUDGE PRESIDING

cc: Jennifer L. Davis, McGlinchey Stafford, 1001 McKinney, Suite 1500, Houston, TX 77002
Robert Ruotolo, Law Offices of Eric Ryan, 12700 Preston Road, Suite 145, Dallas, TX 75230



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CAUSE NO. 99-4326

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| PRESTON NAT'L BANK<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| RICHARD JACKSON<br>Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On October 26, 2000 came on to be tried this case; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. The evidence closed on October 26, 2000; the Court ordered the parties to submit post-trial briefing the time for which has now passed. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* In 1996, Blazing Kahncepts, Inc. ("BKI") obtained a loan from Plaintiff, guaranteed by Robin Mueller and secured by BKI's receivables and inventory. BKI and Mueller found themselves in increasing financial difficulties resulting in a failure to pay the loan. BKI entered into an agreement with Koh-I-Noor to sell some of the inventory to raise cash. Koh-I-Noor reneged on that agreement resulting in litigation between Koh-I-Noor and BKI, the settlement of which is the subject of this lawsuit.

It is undisputed that Koh-I-Noor paid $136,500 to settle its lawsuit with BKI. It is also undisputed that $80,000 of those proceeds went to Plaintiff and that Plaintiff retained the inventory made the subject of the Koh-I-Noor suit. Plaintiff alleges

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that it was entitled to receive all of the proceeds of the Koh-I-Noor suit, save and except $8,125 that was to go to Jackson. Instead, some $48,375.00 was paid from the Koh-I-Noor suit to Mueller and others designated by her. As a result, Plaintiff sues for breach of contract, conversion, breach of fiduciary duty, breach of duty of good faith and fair dealing, and negligent misrepresentation. The court will consider each cause of action in turn.

*Did Plaintiff and Jackson have an agreement whereby Jackson would pay all the proceeds from the Koh-I-Noor settlement to Plaintiff, less $8,125? If so, did Jackson fail to comply with that agreement without excuse, causing damage to Plaintiff?* The Court finds that Plaintiff and Jackson agreed that Plaintiff would release its lien on the inventory and, in turn, Plaintiff would receive the proceeds from the Koh-I-Noor settlement less $8,125. It is undisputed that Plaintiff never released the inventory, but, instead kept it and ultimately donated it to charity. Thus, Plaintiff itself failed to comply with the agreement such that Jackson is excused from any failure to comply.

*Did Jackson convert the proceeds from the Koh-I-Noor suit?* Plaintiff's conversion argument is based upon some implication that, because of Plaintiff's security interest in the inventory, Jackson could not sell the inventory without remitting the proceeds. However, Jackson never exercised dominion over the inventory. No evidence exists that the settlement check was made out to Plaintiff and forged or in any other way taken. In the absence of the inventory being taken, the settlement money itself was never identified to Plaintiff such that it was not converted. Accordingly, the Court finds no conversion.

*Did Jackson have a fiduciary duty or duty of good faith and fair dealing to*

that it was entitled to receive all of the proceeds of the Koh-I-Noor suit, save and except $8,125 that was to go to Jackson. Instead, some $48,375.00 was paid from the Koh-I-Noor suit to Mueller and others designated by her. As a result, Plaintiff sues for breach of contract, conversion, breach of fiduciary duty, breach of duty of good faith and fair dealing, and negligent misrepresentation. The court will consider each cause of action in turn.

*Did Plaintiff and Jackson have an agreement whereby Jackson would pay all the proceeds from the Koh-I-Noor settlement to Plaintiff, less $8,125? If so, did Jackson fail to comply with that agreement without excuse, causing damage to Plaintiff?* The Court finds that Plaintiff and Jackson agreed that Plaintiff would release its lien on the inventory and, in turn, Plaintiff would receive the proceeds from the Koh-I-Noor settlement less $8,125. It is undisputed that Plaintiff never released the inventory, but, instead kept it and ultimately donated it to charity. Thus, Plaintiff itself failed to comply with the agreement such that Jackson is excused from any failure to comply.

*Did Jackson convert the proceeds from the Koh-I-Noor suit?* Plaintiff's conversion argument is based upon some implication that, because of Plaintiff's security interest in the inventory, Jackson could not sell the inventory without remitting the proceeds. However, Jackson never exercised dominion over the inventory. No evidence exists that the settlement check was made out to Plaintiff and forged or in any other way taken. In the absence of the inventory being taken, the settlement money itself was never identified to Plaintiff such that it was not converted. Accordingly, the Court finds no conversion.

*Did Jackson have a fiduciary duty or duty of good faith and fair dealing to*

***Plaintiff and, if so, did he breach it?*** The Court finds as a matter of law that Jackson's sole legal duty was to his clients, Blazing Kahncepts and Mueller. Because their interests in some ways were adverse from Plaintiff, he could not have represented Plaintiff and, indeed, at varying times Plaintiff was represented by its own counsel and was adverse in a lawsuit to Blazing Kahncepts and Mueller. The Texas Rules of Disciplinary Conduct impose various obligations on Jackson to avoid misleading non-clients as to their status and to clarify confusion in regard to same. If Plaintiff believes those rules were violated, it must should file a grievance with the appropriate authorities. The Court finds as a factual matter that Plaintiff did not believe Jackson was its attorney. Even if it did, however, Plaintiff's subjective belief that Jackson was looking out for it does not create a fiduciary duty nor does it create a duty of good faith and fair dealing.

*Negligent Misrepresentation.* The Court finds that the tort of negligent misrepresentation does not extend as far as Plaintiff suggests. However, even if it did, the Court finds that Jackson made no misrepresentation upon which Plaintiff relied upon to its detriment. Plaintiff received *both* $80,000 and the inventory securing about $125,000 worth of debt. Plaintiff's own mishandling of the inventory caused whatever damages it suffered through loss in value of the inventory. Further, Jackson never misstated anything.

Even if the Court were inclined to create some new cause of action to encompass an attorney's mishandling of third party money, and it is not, the facts of this case would not support such a cause of action. The fact that the Plaintiff both retained the inventory and received money negates any equitable argument in Plaintiff's favor.

*Judgment.* The Court declines to award any other relief. As a result of the

foregoing rulings, it is unnecessary to consider any of the remaining defenses urged by Jackson. The Court orders Jackson's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document. He shall then circulate same to all other counsel of record for comment. Within seven days thereof, Jackson's counsel shall forward a proposed form of judgment to the Court together with any comments received from any other party.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial; Jackson's counsel of record is ordered to immediately forward a copy of same to any counsel of record and pro se parties not listed below by hand delivery or facsimile.

SIGNED this 8th day of December, 2000.

JUDGE PRESIDING

cc: William Compton, 1717 Main Street, Suite 4100, Dallas, TX 75201
Roger Yale, 17110 Dallas Parkway, Suite 290, Dallas, TX 75209

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CAUSE NO. 00-5192-J

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| REX NICHOLS<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| CUSTOM RESIDENTIAL PAINT<br>CONTRACTING, INC. Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Court on this day is this case which, no jury having been requested, was tried to the Court on April 5, 2001. Prior to the commencement of evidence presentation, Plaintiff Rex Nichols ("Nichols") announced a nonsuit, and the Court signed an order of dismissal without prejudice of same; Defendant/Counterclaimant Custom Residential Paint Contracting, Inc. ("Custom Paint") announced in open court on the record a nonsuit of its counterclaim for attorneys fees under the DTPA, leaving in place only the counterclaim for breach of contract for alleged unpaid invoices and associated attorneys' fees under Tex. Civ. Prac. & Rem. Code Ch. 38. The Court, having considered the evidence and the arguments of counsel makes the following findings of fact and conclusions of law pursuant to TRCP 296, which provides no particular form for same:

*Background.* The undisputed evidence demonstrates that Nichols was the owner of a home constructed for him at 8181 Douglas Avenue as to which Custom Paint provided paint work. The work apparently commenced in 1998 and continued into 1999. The exact nature of that work, its duration and whether remedial work was done by Custom Paint prior to the fall of 2000 is disputed. However, the only work at issue before this court is that alleged to have been done in the September/October 2000 time period. Thus, it is not



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necessary to resolve the numerous factual discrepancies in the testimony regarding the pre-2000 work.

*Did the parties agree in writing in September 2000 to an arrangement whereby Custom Paint would perform "touch up" paint work for Nichols and Nichols would compensate Custom Paint at an hourly rate of 32.50?* In support of Custom Paint's claim of a written agreement, Custom Paint proffered Defendant's Exhibit 2, a one page document purporting to be a contract for this work dated September 8, 2000. This is the only document alleged to be the written agreement in question. The document is signed by Steve Willingham, whom Joe Mear of Custom Paint described as "Nichols' superintendent." Nichols described Willingham as an employee of the general contractor building his house. There is no evidence of actual authority on the part of Willingham to sign this contract for Nichols.

There is some evidence of apparent authority in that Willingham signed other contracts for Nichols contained in Defendant's Exhibit 3, and Nichols paid for the work described in those contracts. The last such contract proffered was signed in March of 1999. The contract at issue was signed in September of 2000. To the extent that Willingham may have had apparent authority in his "superintendent/general contractor" role during the construction of the house, there is no evidence that such "authority" would continue into perpetuity or for another eighteen months. To the extent that Defendant's Exhibit 3 could be read that way, the Court is unpersuaded as a factual matter that Willingham had apparent authority to sign Defendant's Exhibit 2 on Nichols' behalf in September of 2000. The Court finds that there was no written contract.



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*If not, did the parties agree orally in August or September 2000 to an arrangement whereby Custom Paint would perform "touch up" paint work for Nichols and Nichols would compensate Custom Paint at an hourly rate? If so, what was that rate?* The parties agree that Nichols and Mear spoke in the August/September 2000 time frame about Custom Paint conducting additional work at the residence. It is undisputed that, by that time, Custom Paint had sued for and collected on unpaid invoices from Nichols. It is also undisputed that Nichols had already sued Custom Paint in this cause although the citation had not yet been served and there is no evidence Custom Paint knew about the suit. From there, the stories of the two witnesses in question – Mear and Nichols – differ widely.

Mear testified that he returned Nichols' call in which Nichols sought additional work to address problems not of Custom Paint's making. Nichols testified that he had already paid Custom Paint to do the initial work and then to redo the paint work. He stated that Mear initiated the call sequence in order to "do right by him" and "make things right," apparently as the result of some attack of conscience. Mear testified that he faxed the invoices for the work in question (Defendant's Exhibit 1) on September 21, September 29 and October 3, 2000, that those invoices were never paid and that he never heard any complaints or challenges to the invoices until this trial. Nichols offered no testimony to the effect that he did not receive the invoices or that he contested them prior to the week of trial. The Court finds that it is more likely than not that Nichols agreed to pay Custom Paint an hourly rate for the work done in September of 2000 and invoiced by Defendant's Exhibit 1. The parties also dispute the amount of the hourly rate. Nichols indicated it had always been $25/hour. Mear said Nichols agreed to $32.50. The Court finds the rate to have been



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$25/hour. Accordingly, the Court finds an agreement to perform touch up work at the Nichols' residence in the September 2000 time period at the rate of $25/hour plus materials.

*If so, did Nichols fail to comply with such agreement?* Yes. Nichols admits that he did not pay the invoices in question.

*What sum of money, if paid now in cash, would fairly and reasonably compensate Custom Paint for the failure to comply found?* The Court has deducted $7.50/hour from the rates charged in light of its finding that the agreed rate was $25/hour. As a result, Invoice No. 3021 would be reduced to $691.49, Invoice 3022 would be reduced to $465.26 and Invoice 3023 would be reduced to $412.50 for a total principal amount of actual damages of $1569.25. The Court concludes that Custom Paint should recover $1569.25 from Nichols in actual damages.

*Attorneys' Fees and Costs.* Because the Court has ruled that Custom Paint should recover $1569.25 from Nichols in actual damages, it is the prevailing party entitled to court costs and attorneys' fees. Taking into account the relevant factors governing award of attorneys' fees[1], the Court finds that Custom Paint should recover attorneys' fees as follows: $1000 for services performed through the trial of this case.

*Judgment.* The Court declines to award any other relief requested by any

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[1] The Court considered the following factors: (1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) The fee customarily charged in the locality for similar legal services; (4) The amount involved and results obtained; (5) The time limitations imposed by the client or the circumstances; (6) The nature and length of the professional relationship with the client; and (7) the experience, reputation and ability of the lawyer performing the services.



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party. The Court is signing a judgment in conformity with these findings of fact and conclusions of law.

The clerk of the court is directed to send a copy of this order to counsel of record.

SIGNED this 16th day of April, 2001.

JUDGE PRESIDING

cc: Counsel of Record



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CAUSE NO. 93-7266 076

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|---|---|---|
| NAT'L CASUALTY CO.<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| LANE EXPRESS, INC.<br>Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 2, 2001 came on to be tried this case; all parties having waived a jury on the only remaining issue -- National Casualty's claim for attorneys' fees in this case -- all matters in dispute were tried before and submitted to the Court. The only parties remaining before the Court are Plaintiff National Casualty Company and Defendant Lane Express, Inc., the other defendants having been granted a summary judgment affirmed on appeal. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* This case originally involved a claim by Plaintiff against Defendant Lane Express and two others, seeking reimbursement for sums paid to a third party as a result of an event for which Plaintiff was required to pay by statute but for which Plaintiff alleged there was no actual insurance coverage. Ultimately, on cross-motions for summary judgment, the trial court granted summary judgment to all defendants. On appeal, the Court of Appeals affirmed the summary judgment as to all defendants, except Lane Express. As to that defendant, the Court of Appeals found as matter of law that Plaintiff was entitled to reimbursement of the $500,000 paid and remanded to the Court for consideration



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of Plaintiff's attorneys' fees claim. As a result of the Court's grant of summary judgment on Plaintiff's claims seeking attorneys' fees from other cases as damages in this case, the case proceeded to trial on the issue of attorneys' fees for work done in the prosecution of Lane Express on the contract reimbursement claim in this case only.

Plaintiff seeks attorneys fees pursuant to Chapter 38 of the Texas Civil Practice and Remedies Code. Plaintiff presented only one witness: its attorney, Sam Boyd, as a fact and expert witness on attorneys' fees. Defendant presented Pat Long as an expert on attorneys' fees.

*Did Plaintiff present the claim more than thirty days before trial?* Section 38.002 of the Texas Civil Practice & Remedies Code requires presentment of the claim, but it prescribes no particular form for such presentment. The Court finds as a matter of law that Plaintiffs Exhibits 3 and 4 constitute some evidence of a demand sufficient to submit the matter to the trier of fact. As a matter of fact, the Court finds that the claim was presented to Defendant Lane Express more than thirty days prior to trial. No one disputes that Plaintiff is represented by counsel and that the sum in question was not paid within thirty days of Exhibits 3 and 4. Accordingly, the Court finds that the requirements of Chapter 38 were met.

*What is a reasonable fee for the necessary services of Plaintiff's counsel in connection with the work done prosecuting the breach of contract action against Lane Express, considering only work done by attorneys?* The Court has addressed reasonable and necessary attorneys' fees, considering the following factors:(1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The fee customarily charged in the locality for similar legal



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services; (3) the amount involved; (4) the time limitations imposed by the client or the circumstances; (5) the experience, reputation, and ability of the lawyer performing the services; (6) the results obtained; (7) whether the fee was fixed or contingent, and (8) the likelihood that the acceptance of this work would preclude other employment by the lawyer.

Mr. Boyd and Mr. Long both testified regarding all of these factors except the fourth. Mr. Long also did not address the eighth item, but Mr. Boyd did. Both parties presented documents analyzing the time spent and the fees actually charged the client. Plaintiff also presented an exhibit constituting the actual narratives and billings to the client. The Court also took judicial notice of the entire file.

Mr. Boyd explained that he took the case on a mixed hourly and contingent basis. He would receive $110/hour for lawyer time and $60/hour for legal assistant time, regardless of the result. However, if recovery were obtained, Mr. Boyd was entitled to the greater of a one-third contingency fee or the number of hours expended times $110/hour for attorneys and $60/hour for legal assistants. He also explained that the pure hourly rate charged was much less than the rate normally charged for similar services and that the contingent fee arrangement was in consideration of this differential and to allow for a premium under certain circumstances.

The actual fee, hourly or contingent, charged to the client is not dispositive of the question of recoverable attorneys' fees. *Arthur Anderson & Co. v. Perry*, 945 S.W.2d 812 (Tex. 1997). However, it is certainly a relevant consideration. *Id.* at 818. In *Perry*, the Texas Supreme Court required that triers of fact assess a specific dollar amount, rather than a percentage of an unknown judgment and that they consider the factors listed above.



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However, the Court did not preclude an award that approximated the contingency fee, so long as it was supported by the above factors. Such reasoning applies even when the party contracting for the fee is "sophisticated" and not in need of funds. *See Transcontinental Gas Pipeline Corp. v. Texaco, Inc.*, Case No. 01-98-00488-CV (2000 Tex. App. Lexis 3781) (Tex. App. – Hous. [1st Dist.] 2000, no pet. hist.)(allowing recovery of a sum certain that approximated the contingent fee charged to the commercial client by the lawyer, even though dividing that sum by the hours spent by counsel would result in a very high hourly rate).

This case involves a mixed fee. Plaintiff's counsel was assured of getting some payment, regardless of the outcome, but he would receive a much lower fee that usual unless he were successful. Plaintiff seeks recovery of fees based on Boyd & Associates' standard hourly rates of $275/hour for Mr. Boyd and $175/hour for Ms. Perry resulting in attorneys' fees for time attributable to lawyers in the amount of $326,058. A flat one-third contingent fee would be approximately $280,000, using Plaintiff's number of approximately $350,000 as a rough estimate of the prejudgment interest owed, together with the $500,000 in actual damages ordered by the Court of Appeals.

Mr. Long testified that a reasonable fee for the attorneys' time would be between $125,000 and $166,000.[1] Defendant argues that Plaintiff's fee should be based solely upon the $110/hour rate because that was the agreement and lawyers in Dallas County often charge insurance clients less than other clients. However, the latter point was rebutted by Mr. Boyd, who explained that the lower rates are charged for insurance defense work, not

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[1] It was Mr. Long's position that the legal assistant time was clerical, based upon his understanding of Mr. Boyd's testimony. The Court did not understand Mr. Boyd's testimony quite the same way as discussed below.



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for representing the insurance company as a named party. Mr. Long also stated that he was charging and had charged insurance companies fees in the range of $250-$300/hour. Defendant further argued that there was no showing that someone of Mr. Boyd's skill level was required for this matter. The parties hotly disputed whether this was a relatively straightforward case or a complex case. The Court has made its own judgment from the file judicially noticed.

Defendant also argued that certain amounts were not properly segregated and should not be considered by the Court. The Court agrees that Plaintiff bears the burden of segregation; Plaintiff did present some evidence regarding segregation. The Court has considered the segregation issue in making its award.

Having considered the foregoing, the Court finds a reasonable fee for the necessary service of Plaintiff's counsel, considering attorneys' time only to be as follows: (1) $264,545.00 through the trial of this cause (including time for the appeal which already took place); (2) in the event of an unsuccessful appeal by Defendant to the Court of Appeals, $20,000.00 for the appeal; and (3) in the event of a petition for review to the Texas Supreme Court as to which the Plaintiff ultimately prevails, an additional $10,000.00. The Court declines to award postjudgment collection amounts on the record presented, without prejudice to an award of those fees in the particular collection action brought. Plaintiff is also entitled to its costs of court, prejudgment interest on the $500,000 award and postjudgment interest on the entire amount.

***What is a reasonable fee for the necessary services of Plaintiff's counsel in connection with the work done prosecuting the breach of contract action against Lane Express, considering only work done by legal assistants?*** Defendant separately addressed



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the legal assistant time under *Gill Savings Assn. v. Internat'l Supply Co., Inc.*, 759 S.W.2d 697, 702 (Tex. App. – Dallas 1988, writ denied). Defendant challenged the legal assistant fees generally on two grounds: (1) the alleged clerical nature of the work performed, and (2) the lack of evidence regarding the legal assistant's qualifications. The Court has examined the time sheets and considered the testimony presented. The Court finds as a factual matter that 85% of the work performed by legal assistants was of a type that would otherwise be performed by a lawyer. Had Plaintiff established the qualifications of the legal assistants as required by *Gill*, the Court would find factually that the reasonable and necessary fee for their time through trial would be $55,998 (with $0 for future appeals). The Court finds, however, as a matter of law, that the failure to prove the qualifications of the legal assistants in accordance with *Gill* requires that the Court award nothing for their time. In sum, then, the Court finds that the award should be a total of $264,545.00 through trial, together with the conditional attorneys' fees of $20,000 for the court of appeals and $10,000 for the Texas Supreme Court.

*Judgment.* The parties are to submit a judgment in accordance with these findings, the Court's previous rulings and the previous decision of the Court of Appeals.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 3rd day of January, 2007 2000.

JUDGE PRESIDING

cc: Sam Boyd, One Galleria Tower, 21st Floor, 13355 Noel Rd., Dallas, TX 75240
Rustin Polk, 3303 Lee Parkway, Suite 500, Dallas, TX 75219

6 It is now ordered that Court stand [illegible] morning at nine (9) o'[illegible] Court met pursuant to adjou[illegible] tions present as of yesterday.

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CAUSE NO. 99-5146-J

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|---|---|---|
| FIVE STAR DISTRIBUTING<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| IBRAHIM SARRIS d/b/a PEACHTREE<br>Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 18, 2001 came on to be tried this case; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. The evidence closed on April 18, 2001. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* Plaintiff Five Star Distributing, L.P. ("Five Star") is a seller of petroleum-based products. Defendant Ibrahim Sarris d/b/a Peachtree Store ("Sarris") owned a convenience store that sells gas. Sarris and Five Star entered into an agreement whereby Five Star sold gas to Sarris, essentially on an open account. The parties agree that this relationship continued for a period of time until Sarris stopped paying. Thereafter, Five Star purported to assign its claims against Sarris to Switzer Petroleum Products, Inc. ("Switzer Petroleum"), not a party herein. Switzer Petroleum filed an action on this debt in County Court at Law No. 2 of Collin County, Texas under Cause No. 2-82-97 ("Collin County Lawsuit"). At the trial of that action, the Court held that Switzer Petroleum failed to prove the assignment of the Five Star/Sarris cause of action by a preponderance of the evidence and granted judgment for Sarris.



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Although the timing is in dispute, at some point, Five Star and Switzer Petroleum entered into a "revocation of assignment," purporting to revoke the previous alleged oral assignment. Five Star also filed the instant lawsuit on the same account that had been the subject of the Collin County Lawsuit. The suit was filed as a sworn account. In responding, Sarris did not deny (indeed has never denied owing money) the accounting itself. Instead, Sarris asserted defenses based upon the Collin County Lawsuit and the defense of usury. The Court will address the claims and defenses in turn.

*Did Sarris fail to comply with its agreement to pay for products and related services provided?* Yes. Evidence was presented to support the account in question. Further, under Rule 185, Sarris did not deny the particulars of the account, relying instead on his affirmative defenses. Thus, the Court finds that Sarris failed to pay for the matters that are alleged in the petition.

*What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff for the damages resulting from the conduct found?* The sworn account demonstrates that the amount due is $20,806.81.

*Are the obligations under the parties' agreement avoided by Sarris' defenses arising from the Collin County Lawsuit?* Sarris has alleged the defenses of res judicata, collateral estoppel and judicial estoppel. The Court will address each in turn.

The preclusive effect of county court at law judgments is more limited than that of district court judgments.[1] Tex. Civ. Prac. & Rem. Code § 31.004. The effect is limited to the

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[1] This statement is not true of the Dallas County Courts at Law. Tex. Govt. Code §25.0592(d).



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matters actually determined among the parties therein. The most that can be said of the Collin County Lawsuit judgment is that it determined that Sarris does not owe Switzer Petroleum anything because Switzer Petroleum was not the proven assignee of Five Star. Nothing in the judgment demonstrates that the debt demonstrated in this proceeding is not owed. Nothing in the judgment binds or purports to bind Five Star. Thus, the Court finds that the defenses of res judicata and collateral estoppel do not bar the action here.

Judicial estoppel addresses the situation of a party taking inconsistent positions in two different judicial proceedings. Five Star, of course, was not a party to the Collin County Lawsuit. Five Star also argues that its position was not inconsistent: it reasonably believed that it had assigned the cause of action but believed that the Collin County court found differently, thus necessitating Five Star's suit. It is not necessary to determine whether the positions were inconsistent, because "the doctrine of judicial estoppel requires success by the party sought to be estopped in the first proceeding and then an inconsistent position in a subsequent proceeding." *Lesser v. Allums*, 918 S.W.2d 81, 85 (Tex. App.–Beaumont 1996, writ denied); *accord Sperc v. Fleming, Hovenkamp & Grayson, P.C.*, 25 S.W.3d 863, 871 (Tex. App. – Houston [14th Dist.] 2000, pet. filed). Far from being successful, Switzer Petroleum lost on the assignment issue. Thus, judicial estoppel does not apply here.

*Did Five Star "charge" usurious interest?* It is undisputed that, prior to the first suit, Five Star made a demand that included interest charges at the rate of 12% per annum, despite the fact that no agreement for interest existed. The lawful rate, in this situation, is 6%. Tex. Finance Code § 302.002. Thus, the rate "charged" is double, but not more than double, the



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lawful rate.[2] Under these circumstances, principal is not forfeited, but the creditor, Five Star, may owe penalties and attorney's fees. Thus, the claim of usury is not a defense to the sworn account as a whole but may provide an offset. Sarris admitted that he failed to prove the amount of interest unlawfully charged. His attorney stated in open court that he restricts his request for usury recovery or offset to attorney's fees.

In response, Five Star admits the unlawful charging but contends that it cured the usury pursuant to statute. *See* Tex. Finance Code 305.103. However, that section requires written notice of the violation to have been given by Five Star to Sarris before Sarris gave notice to Five Star. The evidence shows that, in this case, it was the other way around. No other exonerative provision has been cited. The Court finds that the usury was not cured and that, under 305.003, Sarris is entitled to *reasonable* attorney's fees incurred in bringing the usury action. The Court finds that this amount is an offset to the amount Sarris owes Five Star.

*Attorneys' fees.* The Court has addressed reasonable and necessary attorneys' fees of both parties, considering the following factors: (1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The fee customarily charged in the locality for similar legal services; (3) the amount involved; (4) The time limitations imposed by the client or the circumstances; and (5) the experience, reputation, and ability of the lawyer performing the services. The

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[2] This is true even if the "charge" covers the first 30 days after the amount is due and payable, an open question under the facts presented. Previously, such "charges" were automatically double usury because no amount of interest was lawful. More recent legislation changed that outcome. Tex. Finance Code § 305.102.



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Court finds a reasonable and necessary fee for Five Star's attorney in bringing the sworn account to be $4500 through the trial of this cause. Plaintiff is also entitled to its costs of court, prejudgment interest and postjudgment interest. With respect to defendant's attorney's fees, the Court finds that little time was actually or reasonably devoted to the usury claim. The Collin County Lawsuit issues devoured most of defense counsel's time. The Court, therefore, finds a reasonable attorney's fee for prosecution of the usury claim to be $3,000. This amount shall be offset against the award to Five Star against Sarris.

*Judgment.* The Court declines to award any other relief. The Court orders the Plaintiff's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document. He shall then circulate same to opposing counsel for comment. Within seven days thereof, Plaintiff's counsel shall forward a proposed form of judgment to the Court together with any comments as to form received from Defendant.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 3rd day of May, 2001.

JUDGE PRESIDING

cc: Lloyd Ward, 1717 Main Street, Suite 5700, Dallas, TX 75201
Jack Kennedy, 320 N. Travis Street, Suite 207, Sherman, TX 75091



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CAUSE NO. 00-00749-J

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|---|---|---|
| MEANS & MERSHON BUILDERS<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| JAMES MARK BUNTING<br>Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 7, 2001 came on to be tried this case; all parties having waived a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence presented, the stipulations of the parties and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* Defendant Bunting and his wife are the owners of a beautiful, older home on Beverly Drive. They hired Plaintiff Means & Mershon to provide remodeling work and add a breakfast room to their home. The Buntings and Means & Mershon disagreed on the quality of some of the work performed, which disagreement culminated in Mr. Bunting's filing of Cause No. 99-2983-M in the 298th Judicial District Court of Dallas County, Texas styled *James (Mark) Bunting v. Means & Mershon Builders, Inc.*. The parties ultimately settled their disputes by way of a Compromise Settlement Agreement and accompanying Rule 11 agreement (Bunting Exh. 2) which, in turn, referred to a July 15, 1999 letter (Bunting Exh. 1) for the "detail regarding the various repairs." Essentially, the parties agreed that Means & Mershon would perform certain specified repairs within a certain time frame and, in return, Mr. Bunting would pay the remainder of the contract price (less an agreed upon reduction for certain tile issues) in the amount of $20,343. The Settlement Agreement



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set forth a detailed plan for completing the work, certifying the result, agreeing or disagreeing on the result and binding mediation, if necessary.

Although the Settlement Agreement reflects a degree of cooperation, the implementation of the Settlement Agreement was fraught with problems and the parties' relationship again deteriorated fairly promptly. Despite signing the Settlement Agreement in late September of 1999, by early January of 2000, there were already threats of litigation. This action was filed on January 31, 2000, approximately four months after the Settlement Agreement was signed.

Although the attorneys have demonstrated a great deal of professionalism and efficiency in making appropriate stipulations and saving their clients litigation costs by presenting their case expeditiously, the parties apparently continue to disagree, resulting in the trial recently held.

Means & Mershon sues to recover the $20,343 discussed in the Settlement Agreement. Mr. Bunting countersues to recover for alleged costs of repair and delays caused by the failure to go to binding mediation. The Court will address the salient points in turn.

*Did Mr. Bunting fail to comply with his agreement to pay in accordance with the terms of the Settlement Agreement? Did Means & Mershon fail to comply with its agreement to complete certain repairs in a good and workmanlike fashion? If "yes" to either question, is either party excused from compliance?* The Settlement Agreement required certain work to be done by Means & Mershon within a certain time frame, certification of same to be made and either payment or specification of what is wrong and payment of the remainder to be made by Mr. Bunting. Means & Mershon presented evidence of compliance with the



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Settlement Agreement, except for the hardwood floors. As to the hardwood floors, unrebutted evidence was presented establishing repeated efforts to obtain permission for the flooring subcontractor to come to the Bunting home, but no permission was given. The Court finds that the failure to allow the subcontractor to enter the home constitutes a complete excuse to the failure to complete the hardwood flooring work under paragraph 1c of the Settlement Agreement.

Mr. Bunting contends that Means & Mershon was late in completing the repairs. However, the unrebutted evidence demonstrated that many of the delays were caused by other contractors, not under Means & Mershon's control, who were performing unrelated but interconnected work at the home or by unavailability of the home as a result of the Buntings' schedule. The Court finds the short delay in providing the certification of completion and completing the work was justified by delays not of Means & Mershon's (or its subcontractor's) making.

Mr. Bunting also challenges the quality of the workmanship. The Court finds that Means & Mershon completed the work required (except for the hardwood floors discussed above)in a good and workmanlike manner with the possible exception of the wrought iron railing and some of the paint work. The Court will address each of these in turn.

Pictures taken approximately a year after the repair work was performed show a number of "bad connections" between the wrought iron railing and the stucco as well as a number of rust spots. It is not clear when those "bad connections" became apparent and when the rust surfaced. The Court finds that Mr. Bunting failed to properly notify Means & Mershon of the bad connections. No evidence was presented of compliance with paragraph



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2 of the Settlement Agreement at any time, much less within ten days of the certification letter (Plaintiff Exh. 8)[1] With respect to the rust, it apparently became apparent only after some time; therefore, it represents a warranty item, discussed below.[2] Thus, the Court finds that the rusting problem and the "bad connections" do not present an excuse from compliance with the payment obligations.

Similarly, Mr. Bunting presented evidence of paint work problems (*see, e.g.*, Bunting Exhs. 33-36, 40, 43, 44, 47, 48, and 50). The Court agrees that these should have been remedied. However, it is unclear when the paint problems became apparent and, again, no evidence of compliance with Settlement Agreement paragraph 2 was provided, timely or otherwise. Accordingly, these problems do not excuse non-compliance with the payment obligations. The remaining problems noted by Mr. Bunting, including hairline cracking, do not present a failure to comply on the part of Means & Mershon.[3]

The Court notes that Mr. Means agreed that he would have repaired the wrought iron railing problems and paint work[4] problems identified if properly notified of same.

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[1] Mr. Bunting's attorney states he did not get this letter until it was resent on December 21, 1999. Plaintiff's Exh. 8 shows a fax confirmation for December 2. Regardless, Mr. Bunting never wrote a letter complying with paragraph 2 of the Settlement Agreement. The time question, therefore, is not a material one.

[2] While the parties disagree on the scope of the warranty under the Settlement Agreement, all agree that wrought iron railing was warranted against rust for a year.

[3] The Court finds that the alleged leak in the kitchen was not part of the Settlement Agreement scope of work.

[4] Means & Mershon contends that the one year warranty covered only rusting, not paint cracking. Nevertheless, Mr. Means indicated he would have been willing to remedy these defects if he had been properly notified of the situation.



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*What sum of money, if any, is necessary to remedy the warranty problems?* The Court need not reach the question of whether Means & Mershon was "properly" notified of the above warranty items, because the Court is unable, under the evidence presented, to order a remedy for the situation. Mr. Bunting's attorney stated that they did not wish the remedy of specific performance; thus, the Court need not reach the legal question of whether such a remedy is available here. With respect to money damages, even if the Court were to accept Bunting Exhibit 20 as a statement of the reasonable cost for the repairs described therein, the repairs contemplated by Bunting Exhibit 20 far exceed the warranty work required. For example, instead of repairing the wrought iron railing, Bunting Exhibit 20 contemplates installing a new one. Instead of touch up paint, Bunting Exhibit 20 contemplates a much more extensive project.

The Court understands the desire of an owner of a high-end home such as this one to achieve something close to perfection. However, the Court cannot award sums based upon subjective expectations but rather only on the evidence and as allowed by law. No evidence was presented of the cost of the actual warranty repairs found to be required by the Court. Accordingly, Mr. Bunting's claim for breach of warranty must fail for lack of proof of the legal damages recoverable.

*Did Means & Mershon fail to comply with the binding mediation provisions of the Settlement Agreement?* The Court understands Mr. Bunting's counsel's frustration with the time it has taken to resolve this case and with the fact that binding mediation was not completed. However, because Mr. Bunting never complied with paragraphs 2 and 3 of the Settlement Agreement, the binding mediation provisions of paragraph 4 were never triggered. Thus, the Court finds Means & Mershon was never obligated to comply, although



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it may have been more expeditious to do so.

*What sum of money, if any, does Mr. Bunting owe to Means & Mershon?* The Court has found that Means & Mershon substantially complied with its obligations under the Settlement Agreement or that compliance was excused. The Court finds that $20,343 is, therefore, owing under the Agreement. Because of the failure of damages under the breach of warranty counterclaim, no offset exists. Accordingly, Means & Mershon should recover from Mr. Bunting $20,343, all lawful prejudgment and postjudgment interest and the stipulated attorneys fees. Mr. Bunting takes nothing on his counterclaims.

The Court again thanks counsel and their clients for their professionalism in presenting this matter to the Court.

*Judgment.* The parties are to submit a judgment in accordance with these findings, the parties stipulations as to attorneys' fees and the Court's previous rulings within twenty days of the date of signing these findings and conclusions. Mr. Stubblefield shall be responsible for coordinating same.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 8th day of May, 2001.

JUDGE PRESIDING

cc: David Stubblefield, 2305 Ridge Road, Suite 201, Rockwall, TX 75087
Martyn Hill, 1415 Louisiana, 22nd Floor, Houston, TX 77002



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CAUSE NO. 01-01357-J

| | | |
|---|---|---|
| NORTHWEST INVESTMENT GROUP INC., et al. Plaintiffs, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| CITY OF DALLAS, TEXAS et al. Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 22, 2001 came on to be tried this case; all parties having waived a jury, all matters in dispute were tried before and submitted to the court. Having considered the evidence presented, the stipulations of the parties, the briefing presented by the parties and the arguments of counsel, the court makes these findings of fact and conclusions of law pursuant to Texas Rule of Civil Procedure 296 which does not require any particular form thereof.

***Background of the Facts.***

This recitation of the background draws from largely undisputed facts presented by evidence and stipulation of the parties. Plaintiff Northwest Investment Group, Inc. (hereinafter "Plaintiff") is the owner of an "adult cabaret" known as "Baby Dolls" located in the Bachman Lake area of Dallas. Plaintiff Steve Craft is a nominal plaintiff, due to the fact that his name appears on the license in question. Defendant, the City of Dallas (hereinafter "City"), is a municipality within the State of Texas. Defendant Terrell Bolton is the Chief of Police for the City of Dallas and is a nominal defendant in that he is charged with the duty of enforcing the revocation provisions in question herein. Baby Dolls features



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dancing entertainment that falls within the provisions of Dallas City Ordinance Chapter 41A, which regulates sexually oriented businesses (known as "SOBs").

The long history of disputes between the City and various owners of establishments similar to Baby Dolls as well as Baby Dolls itself is chronicled elsewhere, most notably in a series of appellate and federal district court decisions. The most recent such published decision between the parties to this case is that of United Stated District Judge Jerry Buchmeyer in May of 2000 wherein he upheld Dallas City Ordinance Chapter 41A against a general constitutional challenge to the language of the zoning regulations. *Baby Dolls v. City of Dallas*, 114 F. Supp. 2d 531 (N.D. Tex. 2000). Judge Buchmeyer did not address the licensing provisions here at issue in any detail in his opinion.

Following Judge Buchmeyer's decision, Plaintiff was required to obtain a license to operate a sexually oriented business in order to continue offering "adult entertainment" by dancers at the level of attire previously offered.[1] On May 25, 2000, the City of Dallas Permit and License Appeal Board granted Plaintiff an exemption from the location restrictions imposed by Dallas City Ordinance Section 41A-13; Plaintiff was issued a license to operate a sexually oriented business as an Adult Cabaret on that same date. The license term is for one year, through May 25, 2001.[2] Def. Exh. 18.

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[1] While the matter was pending in the federal district court, Baby Dolls operated under the terms of an injunction prohibiting the City from enforcing the zoning/licensing provisions of Chapter 41A.

[2] Arguably, the issue of this particular license is moot as of May 25. However, in light of both parties' agreement that the fact of revocation is a factor considered in renewing or issuing a new license, the Court finds this controversy is not moot.



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Dallas City Ordinance Section 41A-10 governs license revocations. It provides, in pertinent part, "The chief of police shall revoke a license if the chief of police determines that: on two or more occasions within a 12-month period, a person or persons committed an offense occurring in or on the licensed premises of a crime [including public lewdness] for which a conviction has been obtained, and the person or persons were employees of the sexually oriented business at the time the offenses were committed." Dallas, Tex., Rev. Ordinances Ch. 41A § 10(b)(6)(hereinafter "Dallas Ordinance").

Pursuant to this section, Chief Bolton issued a letter in January of 2001, revoking Plaintiff's license for the Baby Dolls location in question, alleging that more than two convictions for public lewdness on the premises in question occurred within the last 12 months. It is undisputed that the offense dates of all but one of the convictions[3] in question predate the issuance of the May 25, 2000 license and that the May 25, 2000 license is the first SOB license this location has ever had. In other words, it is undisputed that at the time of the required two offenses in question, Plaintiff did not have a license for that location. Instead, Plaintiff was operating at that location as a result of a federal court injunction barring the city from enforcing the "specified anatomical area" definitions of Chapter 41A. It is also undisputed that, by the time of the convictions in question, the license had been issued and

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[3] The ordinance requires that the conduct occur on "two or more" occasions. Thus, one offense within the relevant time period is insufficient. Lisa Silva's offense date is listed on Def. Exh. 6 (judgment) and Def. Exh. 12 (police report) as June 26, 2000. The revocation letter (Def. Exh. 16) lists Silva's offense date as Feb. 17, 2000, giving the same cause number for that offense as the one listed on Def. Exhs. 6 and 12, which evidence the June date. The discrepancy, while curious, does not affect the outcome here, because the other four offenses clearly occurred prior to May 25, 2000, and one offense is insufficient for revocation.



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that these dates are within 12 months of the revocation date.

Specifically, the offense dates and conviction dates for each employee are as follows:

| Employee | Offense Date | Conviction Date | Def. Exh. No. |
|---|---|---|---|
| Jeanette Lynn Leister | 2/18/2000 | 9/21/2000 | 4 |
| Sonia Maritza Madrid | 3/4/2000 | 9/21/2000 | 5 |
| Lisa Silva | 6/26/2000 | 12/12/2000 | 6 |
| Jamie Laverne Bills | 2/17/2000 | 11/8/2000 | 7 |
| Delicia McDaniel | 2/18/2000 | 10/25/2000(deferred) | 8 |

Pursuant to Dallas Ordinance Section 41A-11, Plaintiff timely appealed the revocation to this court. After a hearing before the court, the parties agreed to an accelerated trial schedule with an agreed temporary injunction restraining the revocation to maintain the status quo in the interim. Thus, this case has taken only three months from filing[4] to final trial and decision on the merits.

***Contentions of the Parties and Background of the Law.***

Plaintiff attacks the license revocation on two fronts: (1) Plaintiff claims that the ordinance as written was improperly enforced against it based upon statutory construction arguments premised upon the fact that, on the dates of the required two offenses in question, there was no license and also that it was not operating a "sexually oriented business" at that time; and (2) Plaintiff also challenges the ordinance as enforced as unconstitutional under the Texas constitution because, it alleges, (a) the City has engaged in discriminatory enforcement of the ordinance, (b) revoking a license for conduct engaged in without proof of management's knowledge constitutes a substantive due process violation, and (c) the

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[4] This case was filed on February 20, 2001. It was transferred to this court on March 2, 2001, after the judge of the 298th District Court, where this case was originally assigned, recused himself.



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effect of requiring the dancers to wear more clothing is to unduly burden their "erotic message," and, therefore, constitutes an unlawful prior restraint. Plaintiff requests that the court reverse the revocation, grant declaratory relief and award attorneys' fees. The City denies Plaintiff's allegations and seeks an order upholding the revocation, denying declaratory relief and declining to award Plaintiff's attorneys' fees. The parties have agreed, however, that the court should not consider the constitutional challenges to the ordinance unless Plaintiff fails to prevail on the statutory construction issues.

*Statutory Construction.* The statutory construction question here appears to be one of first impression. It also appears to be unique in the City of Dallas in that all other Dallas SOB revocations described to the court involved premises that were licensed as of the offense dates in question. Thus, resolution of the statutory construction question in this case should have no direct bearing on other revocation cases that may be pending.

Statutory analysis begins by analyzing the language of the statute in question. Courts construe statutes to give effect to legislative intent. *Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939 (Tex. 1993). "The Legislature's intent is determined from the plain and common meaning of the words used." *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997). All words should be given effect and not treated as surplusage, where at all possible. *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987). The same rules of statutory construction apply to municipal ordinances. *Heard v. City of Dallas*, 456 S.W.2d 440, 443 (Tex. App. -- Dallas 1970, writ ref'd n.r.e.). "The meaning of a provision in an ordinance should be determined by the object sought to be accomplished." *Heard*, 456 S.W.2d at 444. The stated intent of the ordinance is "to regulate



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sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city." Dallas Ordinance Sect. 41A-1(a).

***Application of Law to Facts***

*Applying the ordinance as written, did Chief Bolton properly revoke Plaintiff's license based upon the convictions in question?* Using the rules of construction discussed above, the court first looks at the language of the ordinance itself. Plaintiff argues that the revocation provision in question, section 41A-10(b)(6), does not apply because it refers to "an offense occurring in or on the licensed premises," and the offenses in question where not committed when the premises were "licensed premises." Plaintiff points to other subsections of the same revocation provision that reference only "the premises." *See e.g.*, Dallas Ordinance Sects. 41A-10(b)(2)&(3). Plaintiff argues that using the phrase "the premises" in one part of the section and "the licensed premises" in another must be given effect by interpreting "licensed premises" to mean premises where a license is extant. Otherwise, Plaintiff argues, "licensed" is treated as surplusage.

Defendant argues, on the other hand, that "licensed premises" is merely a shorthand for "the premises of an establishment that holds the license that is to be revoked," and distinguishes the sections that refer to "the premises" by pointing out that those provisions refer to the "licensee," so there is not a need to speak of the "licensed premises." However, there is a subsection, Section 41A-10(b)(7), that uses both the term "licensee" and "licensed



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00951 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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premises" in the same subsection.[5]

The term "licensed premises," unlike "licensee"[6] is not defined. In a case involving a liquor license, the Court held that the issuance of a license *creates* a "licensed premises." *Shruck v. State*, 740 S.W.2d 819 (Tex. App.--Houston [1st Dist.] 1987, pet. ref'd). Although that case involved a different statute, it references the tautological point that a premises cannot be a "licensed premises" until a license is issued. In other words, there is no such thing as a "licensed premises" until there is a license. Thus an "offense occurring in or on the licensed premises" necessarily means one occurring on a premises that is licensed. Because the ordinance is unambiguous, it is unnecessary to address the question of whether deference should be given to the Chief of Police's contrary determination or whether the Chief of Police has given this section a consistent interpretation.[7]

*Conclusion.*

The court concludes, therefore, that the Chief of Police erred by revoking Plaintiff's license based upon convictions for offenses that occurred before the premises were "licensed

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[5] This subsection provides for revocation if "a licensee or an employee has knowingly allowed any act of sexual intercourse, sodomy . . . to occur in or on the licensed premises." Dallas Ordinance Sect. 41A-10(b)(7).

[6] "'Licensee'" means a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a license." Dallas Ordinance Sect. 41A-2(14).

[7] In his deposition, Senior Corporal David Michals testified that it would be "in error" to revoke a license based on pre-license offenses. At trial, Senior Corporal Michals stated that he had been confused in his deposition and that, upon rereading of the ordinance, he believed this revocation to be appropriate. There was also testimony that Captain Jack Bragg, not Senior Corporal Michals, is the official charged with determining whether to issue the revocation, although he relies upon Senior Corporal Michals to "bring him the cases."



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 00952 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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premises." The court need not, therefore, reach the issue of whether this establishment was a "sexually oriented business" prior to May 25, 2000.

The parties have asked the court not to address the constitutional challenges to the ordinance presented if Plaintiff succeeded on the statutory construction issue. Further, general principles of statutory construction require that, in construing statutes, the court reach constitutional issues only if necessary to decide the question before it.[8] As a result, the court will dismiss without prejudice the declaratory judgment allegations and deny without prejudice Plaintiff's request for attorneys' fees. While failing to reach the constitutional challenges to the ordinance may result in future litigation between these parties, the court is not free to give advisory opinions or reach questions not presented by or which are withdrawn by agreement of the parties, particularly where those opinions involve constitutionality of statutes or ordinances. The court also notes that these same parties are engaged in federal litigation in which the constitutional issues presented can be fully litigated, if necessary.

Nothing in this ruling, therefore, prevents the City from applying Section 41A-10(b)(6) to revoke a sexually oriented business license based upon convictions for offenses occurring "on the licensed premises," i.e., the premises after they became licensed.

The court is signing a final judgment concurrently herewith.

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[8] The selective enforcement question does not present one of statutory construction. Instead, it involves facts specific to this case. Plaintiff failed to persuade the court that it was the victim of selective or discriminatory enforcement in this particular case. While the court has found that the Chief erred, it also finds that the error was not the result of a discriminatory motive or any similarly wrongful conduct.



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The clerk of the court is directed to send a copy of these findings and conclusions to the counsel listed below by fax and regular mail.

SIGNED this 23rd day of May, 2001.

JUDGE PRESIDING

cc: Charles Quaid, via fax 214-373-6688 and regular mail
Jason Schnette, via fax 214-670-3515 and regular mail



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047

CAUSE NO. 99-9813

| | | |
|---|---|---|
| ESKENDER BEHRE<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| RAFULUL MOHAMMED HABIB and<br>F& M BUILDERS, Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On July 23, 2001 came on to be tried this case; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to Texas Rule of Civil Procedure 296 which does not require any particular form thereof.

*Background.* This case involves an alleged agreement between Plaintiff Eskender Berhe ("Berhe") and Defendants Rafulul Mohammed Habib and F&M Builders (collectively "Habib")[1] under which Habib would build a convenience store/gas station for Berhe. While both parties admit the agreement, they dispute its terms, whether it was breached by Habib and, if so, whether any of Habib's delays were caused by Berhe's conduct.

Plaintiff seeks damages for breach of contract and violations of the Texas Deceptive Trade Practices Act ("DTPA"), its attorneys fees pursuant to Chapter 38 of the Texas Civil Practice and Remedies Code and the DTPA and associated interest and costs.

*Did the parties agree that Habib would build a convenience store/gas station within four months for Behre and pay subcontractors out of checks remitted to him? If so, did Habib fail*

[1] F&M Builders is a d/b/a for Habib.



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*to comply with the agreement causing damages to Berhe?* Yes. The Court finds that Berhe and Habib agreed that Habib would construct the convenience store/gas station in question within four months. Habib failed to comply with that agreement by repeated delays, causing harm to Berhe. Further, Habib failed to pay subcontractors out of funds paid to him for that purpose, causing Berhe to have to pay some subcontractors twice.

*Was such failure to comply excused by Berhe's conduct or matters out of Habib's control, such as weather?* While some evidence was presented about weather delays and delays in financing, the evidence does not support a finding of excuse for the lengthy delay demonstrated. Nor does the evidence excuse Habib's failure to pay subcontractors.

*Did Habib make a misrepresentation of the quality of services in violation of the DTPA that was a producing cause of damage to Berhe?* Yes. The Court finds that Habib represented that he had the staffing and ability to construct the store/station in a reasonable time when, in fact, he did not.

*What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff for the damages resulting from the conduct found?* Berhe claimed damages for double payments to subcontractors, additional work done to remedy poor work by Habib and additional interest on its note that it had to pay as a result. Little in the way of documentation was presented to substantiate the damages alleged. The Court finds as a factual matter that the damages that should be awarded are $35,730. The Court declines to award any of the other damages claimed.

*Attorneys' fees.* Plaintiff alleged that a demand was made for payment. Defendant failed to deny this allegation, such that he cannot now complain of any alleged failure to comply



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with Texas Civil Practice & Remedies Code Chapter 38. Further, no abatement was sought under the DTPA, so Habib cannot complain of the failure to give adequate notice under the DTPA. Alternatively, the Court finds some evidence of demand was presented. The Court finds attorneys' fees should be awarded to Plaintiff. The Court has addressed reasonable and necessary attorneys' fees, considering the following factors: (1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2)The fee customarily charged in the locality for similar legal services;(3) the amount involved; (4) The time limitations imposed by the client or the circumstances; and (5) the experience, reputation, and ability of the lawyer performing the services. The Court finds a reasonable and necessary fee to be $10,000. Berhe is also entitled to its costs of court, prejudgment interest and post-judgment interest.

*Judgment.* The Court declines to award any other relief. The Court orders Berhe's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document. He shall then circulate same to Habib's counsel for comment. Within seven days thereof, Plaintiff's counsel shall forward a proposed form of judgment to the Court together with any comments as to form received from Defendant. The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 1st day of August, 2001.

JUDGE PRESIDING

cc: Lorenzo Brown, 1704 N. Hampton Rd., DeSoto, TX 75115
T. Craig Shiels, 1100 Atrium II, 1701 N. Collins Blvd., Richardson, TX 75080



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CAUSE NO. 00-8453J

| | | |
|---|---|---|
| COMERICA BANK<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| BARNEY BROCK<br>Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On October 31, 2001 came on to be tried this case; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence admitted and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* This case concerns Mr. Brock's guaranty of a certain indebtness of Dorson, Inc. (d/b/a Daven Products and hereinafter "Dorson") to Plaintiff Comerica Bank. Following Dorson's bankruptcy filing, Plaintiff sued Brock to collect on the guaranty. The Court has previously granted a partial summary judgment finding that the amount due under the note is undisputed, subject to the question of reasonable notification of the sale and the effect of any failure to give such notice upon the amount owed.

*Michigan Law regarding "Reasonable Notification."* Prior to the commencement of trial, the Court considered briefing and argument on the question of whether, under Michigan law (which all parties agree applies here pursuant to the contract in question), a secured party's failure to give "reasonable notification" of the time and place of a sale of collateral to a guarantor results in the discharge of the guarantor entirely or



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whether it merely provides an argument for offset for the "amount of the loss" occasioned by the failure of notice. The Court held that Michigan law in effect at the time in question[1] provided that the failure to give reasonable notice presents an absolute bar to pursuing a deficiency against the debtor/guarantor who was entitled to, but did not receive, such notice. Mich. Comp. Laws Ann. 440.9504(2000); *Asset Acceptance Corp. v. Robinson*, 244 Mich. App. 728, 625 N.W.2d 804 (2001); *Honor State Bank v. Timber Wolf Const. Co.*, 151 Mich. App. 681, 391 N.W.2d 442 (1986). The factual question presented for trial, then, was whether such reasonable notification was given.

*Did Comerica give Brock reasonable notification of the time and place of the sale of Dorson collateral underlying the note in question?* No. The Court finds that it is unnecessary to the resolution of this case to determine whether oral notification is sufficient or whether written notification must be given. Even if Mr. Kehl's testimony is accepted, he admitted that he gave only the date of the sale, not the time and place. Thus, even if oral notification were permissible, this notification would not be sufficient. No other witness testified that Brock was given any kind of oral notification, and Brock denied it. The argument that Brock "must have known" about the sale fails to carry Comerica's burden of showing that the secured party gave the guarantor notice as required by statute, and the Court finds that Brock was not aware of the time and place of any sale of Dorson collateral prior to November 13.

---

[1] Both Texas and Michigan have enacted sweeping changes to their respective Article 9s. The effective date of these changes, however, is after the November 2000 sale at issue here. Accordingly, the Court addresses the law as it applied at the time of the disputed sale: November 15, 2000.



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It is undisputed that Comerica did send written notice on November 13 by mail to Brock and by fax to Cooter Hale, alleged to be Brock's attorney. The Court finds that it is unnecessary to resolve the dispute over Hale's authority to accept service of the fax for the reason that even if Hale's receipt at 3:00 p.m. on November 13, 2000 is deemed to be Brock's receipt, notification of a sale such as this less than 48 hours before the time of the sale (10:00 a.m. on November 15, 2000) is not reasonable notification. Thus, the Court finds that the November 13 notice did not meet the requirements of the statute. As a result, Comerica is barred from pursuing the deficiency against Brock, and he should recover his costs of court.

*Judgment.* The Court declines to award any other relief. The Court orders the Defendant's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document. He shall then circulate same to opposing counsel for comment. Within seven days thereof, Defendant's counsel shall forward a proposed form of judgment to the Court together with any comments as to form received from Plaintiff's counsel.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 1st day of Nov, 2001.

JUDGE PRESIDING

cc: Gerald Bright, 3102 Oak Lawn, Suite 525, Dallas, TX 75219
Jeffrey Seckel, 500 N. Akard, Suite 3550, Dallas, TX 75201



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CAUSE NO. 00-6138-J

154

| | | |
|---|---|---|
| JAMES GEESLIN d/b/a DAL-METRO RESTORATION Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| MLD TGR d/b/a AUTUMN BREEZE APTS. And WILC AUTUMN BREEZE LTD. Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On October 29, 2001 this case came on to be tried; the parties having waived a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence admitted, the arguments of counsel, and the materials filed by the parties on November 2 and 6, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* The parties agree that this case concerns work done at the Autumn Breeze Apartments in February of 1999 by Plaintiff as a result of flooding at the apartment complex. During the night of February 21, 1999, Plaintiff received a call from Assistant Manager Marla Mackay regarding flooding at the Autumn Breeze Apartments. Mr. Geeslin and another worker arrived at the apartment complex, where they observed flooding of three units and were asked to perfo m immediate remediation work. Ms. Mackay represented that she had the authority to enter into the necessary paperwork for this remediation. When the work was concluded, Plaintiff invoiced Defendant which then took the position that Ms. Mackay did not have the authority to sign the contract in question and that the charges were too high. No payments were made by Defendant of any kind.



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Defendant has also counterclaimed, alleging that Plaintiff violated the DTPA by its representations regarding the pricing of the services/materials in question, to which Plaintiff has responded by alleging a bad faith filing of the DTPA.

*Additional Exhibit.* In view of testimony regarding the zones set forth in the 1997 "Bluebook," the Court granted leave for any party to submit the relevant page from the 1997 "Bluebook" regarding the zones in question. Plaintiff proffered the entire book, which the court declines to admit (and will leave with the Court reporter as a bill exhibit). The Court does admit Plaintiff's Exhibit 15 consisting of a copy of the front cover of the book and Page XIV.

*Did Defendants and Plaintiff agree that Plaintiff would perform water damage restoration and remediation work at the Autumn Breeze Apartments for the approximate sum of $4600?* No. The answer to this question turns upon the authority of Ms. Mackay. While the Court does not condone the practice of having an assistant manager on premises without authority to sign contracts to handle emergencies (which this clearly was), Plaintiff had the obligation to ascertain Ms. Mackay's authority before performing the work. Other vendors in the business apparently do not respond to emergency calls without making sure the apartment complex in question is on an approved list or without contacting the owner. The Court finds that Ms. Mackay did not have actual authority and that no statements were made or actions taken by the owner that gave her apparent authority. Ms. Mackay clearly intended to enter into a contract on the part of Defendants (and not in her individual capacity as suggested by Defendants), but she lacked the authority to do so. Accordingly, no valid express contract between the Defendants and Plaintiff was ever formed.



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*Is Plaintiff entitled to recover in quantum meruit?* Defendants have denied the existence of a contract, yet claim that the presence of an express contract negates recovery in quantum meruit. Plaintiff was entitled to plead alternative theories and recover on that which the evidence supports. *Freeman v. Carroll*, 499 S.W.2d 668 (Tex. Civ. App. - Tyler 1973, writ ref'd n.r.e.). If the Court had found an express contract between the parties, then no recovery in quantum meruit could be had. Having found the opposite, recovery in quantum meruit is permitted. The Court finds that Plaintiff furnished valuable services and materials in the form of water extraction and restoration to Defendants, Defendants used and enjoyed those services and materials and they were provided under such circumstances as reasonably notified the Defendants that the Plaintiff in performing such services and providing such materials was expecting payment therefor. Defendants received and accepted the benefits of Plaintiff's work and repairs and owe the reasonable value of the necessary services rendered, labor done and materials furnished.

*What sum of money, if any, if paid now in cash would fairly and reasonably compensate Plaintiff for the reasonable value of the necessary labor done, material furnished and services rendered by Plaintiff to Defendants?* Based upon the conflicting evidence presented, the Court finds the following: $2471.15, together will prejudgment interest at the rate of six percent per annum beginning March 28, 1999 and ending on the date of judgment, and postjudgment interest at the lawful rate from the date of judgment until paid.

*Attorneys' Fees.* The Court has addressed reasonable and necessary attorneys' fees, considering the following factors:(1) The time and labor involved, the novelty and



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difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The fee customarily charged in the locality for similar legal services; (3) the amount involved; (4) the time limitations imposed by the client or the circumstances; (5) the experience, reputation, and ability of the lawyer performing the services; (6) the results obtained; (7) whether the fee was fixed or contingent, and (8) the likelihood that the acceptance of this work would preclude other employment by the lawyer. Under Chapter 38 of the Texas Civil Practice & Remedies Code, the Court can take judicial notice of the usual and customary attorney's fees and the court's file in a bench trial and does so take notice. The Court finds that Plaintiff should be awarded reasonable and necessary attorney's fees of $3500 through the trial of this cause, additional conditional appellate attorneys' fees of $5,000 if this case is appealed to the Court of Appeals, but Defendants are unsuccessful, and an additional conditional award of $3,500 if a petition for review is filed to the Texas Supreme Court, but Defendants are ultimately unsuccessful.

*Did Plaintiff commit any false, misleading or deceptive act or engage in an unconscionable course of conduct that was a producing cause of damages to Defendants?* No. Accordingly, the Court finds no recovery should be had on Defendants' counterclaims.[1]

*Judgment.* Costs of court should be taxed against Defendants. The Court declines to award any other relief. The Court orders the Plaintiff's counsel to prepare a form

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[1] No mention was made of Plaintiff's counterclaim under Texas Business & Commerce Code Section 17.50(c) until his closing argument and no evidence was presented that Defendants filed their counterclaim in bad faith or for the purposes of harassment. The Court need not reach the issue of groundlessness because no evidence was presented of any attorneys' fees incurred solely as a result of the DTPA filing and Plaintiff is already being awarded its court costs on another claim.



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of judgment that reflects the findings and conclusions herein within five days of receipt of this document. She shall then circulate same to opposing counsel for comment. Within seven days thereof, Plaintiff's counsel shall forward a proposed form of judgment to the Court together with any comments as to form received from Defendants' counsel.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 6th day of November, 2001.

JUDGE PRESIDING

cc: Lisa Duffee, 8115 Preston Road, Suite 270, Dallas, TX 75225
Craig Bernstein, 2911 Turtle Creek Blvd., 1200 Park Place, Dallas, TX 75219

11-7-01 Now hereon that Court stand adjourned until morning at nine (9) o'clock.
Court met pursuant to adjournment and there were present on all yesterday.



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# Response of Catharina Haynes Nominee to the U.S. Court of Appeals for the Fifth Circuit To March 8, 2008 Questions of Senator Edward M. Kennedy

Documents provided in response to Question 1

PDF 3 of 3

448

CAUSE NO. 00-5852-J

| | | |
|---|---|---|
| DAVID MOORE D/B/A DAVID MOORE CONTRACTORS, Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| BIGELOW DEVELOPMENT CORP., BUDGET SUITES OF AMERICA LIMITED LIABILITY CO., TX-344 and BIGELOW ARIZONA-CASA CARRANZA LLC, Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On November 26, 2001 this case came on to be tried; the parties having waived a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence admitted and the arguments made, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* The parties agree that this case concerns a contract between Defendant Bigelow Development Corporation ("Bigelow") and Plaintiff David Moore d/b/a David Moore Contractors ("Moore"), admitted into evidence as Defendant's Exhibit 1 (the "Contract"). Under the terms of the Contract, Moore was required to perform and supply brick, stone and EFIS labor and materials for the Budget Suites of America Hotel #344, located at Belt Line and Marsh (the "Hotel"). The parties agree that Moore did not complete all the work contemplated by the Contract, but they disagree as to the reason. Moore contends that Bigelow failed to pay draw requests timely making it unfeasible for him to continue. Bigelow contends that Moore failed to complete the work properly, timely and



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safely. Moore sued Defendant Bigelow as well as Budget Suites of America LLC TX-344 and Bigelow Arizona-Casa Carranza LLC for breach of contract and quantum meruit. Bigelow counterclaimed and asserted as an offset its completion costs on the project as well as attorney's fees under the Contract and under Chapter 38 of the Texas Civil Practice & Remedies Code.

*Liability of Budget Suites of America LLC TX-344 and Bigelow Arizona-Casa Carranza LLC.* These defendants are not parties to the Contract nor was any evidence presented that would establish their liability for any of the construction costs associated with the Hotel. Accordingly, the Court concludes that Moore should take nothing against Budget Suites of America LLC TX-344 and Bigelow Arizona-Casa Carranza LLC.

*Did Bigelow fail to comply with its agreement to pay Moore for work performed and materials furnished in connection with the Hotel?* Yes. Bigelow's own documents show retainage held for work performed and materials furnished. It is undisputed that Bigelow did not pay the Contract price.

*Did Moore fail to complete the work required under the Contract?* Yes. Moore admits that he failed to complete all of the work required under the Contract. Although he contends that this was caused by Bigelow's failure to make appropriate interim payments, nothing in the Contract permits Moore to stop work in the face of a dispute over draws. Thus, while Bigelow should have paid Moore, Moore should not have stopped work. As a result, Moore is entitled to payment but Bigelow is entitled to an offset under paragraph 7 of the Contract.

*What sum of money, if any, if paid now in cash would fairly and reasonably*



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*compensate Moore for his damages under the Contract? What sum of money, if any, if paid now in cash should be awarded to Bigelow as an offset for its cost of completion or actual damages under paragraph 7?* The total Contract price originally was $1,002,060.00. Bigelow established contract amendments in the amount of $17,390. The Court finds as a factual matter that Bigelow failed to establish an agreement for an additional claimed amendment of $32,000 (*see* Defendant's Exh. 67). Bigelow also established a total of $20,125.75 in backcharges (*see* Defendant's Exhs. 3-13). Additionally, Bigelow established that it paid other laborers/suppliers to complete the work under paragraph 7 of the contract as follows: Michael Germain: $24,300; Ed Teal: $349,882.50; and Trinity Hydro-Tech: $33,800.00, for a total of $407,982.50. Finally, the parties stipulated that Moore or Moore and his suppliers jointly were paid $484,895.25.

Thus, before considering any other costs or damages to Bigelow, the total remaining contract price is $71,666.50. The only other "damages" alleged by Bigelow under paragraph 7 of the Contract was the cost of the indemnity bond premium and attorneys' fees. The Court will address each in turn.

With respect to the bond premium, the Court finds that this is neither a cost of completion nor an "increase in cost . . . for the period of delay." Paragraph 7 is concerned with timely completion of the Hotel and costs/damages associated with the failure to comply therewith. Nothing in paragraph 7 suggests that it imposes liability on either party in connection with the filing of a lien or disputes over payment. The Court declines to award the premium cost.

With respect to attorneys' fees, the Contract does provide for recovery of



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same. Again, it is in connection with the cost of completion/delay paragraph, paragraph 7 of the Contract. Thus, it does not authorize a general recovery of all fees expended in connection with this dispute. With respect to attorneys' fees as damages under paragraph 7, the Court has examined the evidence presented and determined the amount recoverable under paragraph 7 for attorneys' fees to be: $16,101.25.

Thus, after all offsets and credits are allowed, the amount remaining due from Bigelow to Moore is $55,565.25, together with prejudgment interest from February 29, 2000 to the date of judgment at six percent per annum and postjudgment interest thereon at the rate of ten percent per annum from the date of judgment until paid. This does not take into account the $1852 previously awarded against Moore and to Defendants by the Court as costs in connection with the prior trial setting of August 6. If that sum has not yet been paid, it may be offset against the award made in the final judgment.

*Chapter 38 attorneys' fees.* Moore failed to present any evidence of attorneys' fees. Bigelow is not the prevailing party and, therefore, is not entitled to an award of Chapter 38 fees in addition to the paragraph 7 fees already awarded above. Accordingly, the Court declines to award any additional attorneys' fees.

*Judgment.* Costs of court should be taxed against Bigelow. The Court declines to award any other relief. The Court orders the Defendants' counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document. He shall then circulate same to Mr. Moore for comment. Within seven days thereof, Defendants' counsel shall forward a proposed form of judgment to the Court together with any comments as to form received from Mr. Moore.



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The clerk of the court is directed to send a copy of this order as set forth below.

SIGNED this 27th day of November, 2001.

Carlton Hayne
JUDGE PRESIDING

cc: David Moore, 700 Secretary Dr., Suite 138, Arlington, TX 76015
Paul Underkofler, 1601 Elm Str., Suite 3300, Dallas, TX 75201
Douglas Gerrard, 4000 South Eastern Ave., Suite 220, Las Vegas, NV 89119



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CAUSE NO. 00-5591-J

006

| | | |
|---|---|---|
| GIANT SIGN CORP.<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| CORRAL GROUP INC.,<br>Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 23 and 24, 2002, this case came on to be tried; the parties having waived a jury, all matters in dispute were tried before and submitted to the Court. The parties submitted written closing arguments on January 28 and 29. Having considered the evidence admitted and the arguments made, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* This case involves the construction and sale of exterior signage at two Golden Corral locations, referenced by the parties as the Forest Lane and Irving locations. The Forest Lane sign was completed and installed; Plaintiff claims defendant owes a balance of approximately $12,000 on the sign. Defendant claims that the sign was not built to specifications and counterclaimed for alleged damages as a result.

The Irving sign was never completed. The parties dispute the reasons therefor and whether or not Defendant owes anything or is entitled to a refund on deposit for the Irving sign.

*Forest Lane Sign.* It is undisputed that Plaintiff installed a sign at the Forest Lane location. Plaintiff contends that the total contract price was $29,227.50 (including tax). Plaintiff admits that Defendant paid an initial $10,000 and an additional $7,000; therefore,



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Plaintiff contends, Defendant owes $12,227.50. 007

Defendant contends that the sign was not built to specifications in that, for example, the neon housings should have been "300," but instead were "200," causing repeated shortings. Defendant also contends that inferior paint and metal was used on the sign and pole resulting in rusting and early fading, as well as other problems.

Plaintiff contends that Defendant accepted the sign under the UCC. The Court agrees. Defendant has made no efforts to return the sign after discovering the alleged problems. It has kept and used the sign for four years. Testimony over whether or not problems were even reported to Plaintiff was conflicting. The Court finds that, if Defendant intended not to accept the sign or to revoke any acceptance thereof, it failed to communicate that intention within a reasonable time. As a result, Defendant owes the contract price, subject to any offset discussed below.

Defendant contends that Plaintiff failed to make warranty repairs. Again, the testimony was conflicting as to demands for same. Other than one repair trip, Plaintiff's witnesses indicated Plaintiff had not been contacted. Mr. Perales said he made repeated calls; no documentation of same was produced. The Court finds that Defendant failed to make the necessary demands for warranty work. Even if Defendant had demanded the warranty work, no evidence of cost of repair was presented.

Accordingly, the Court finds that Defendant owes Plaintiff $12,227.50 on the Forest Lane sign.

*Irving Sign.* Again, no one disputes that the sign was never completed. The contract (see Plaintiff's Exhibit 2) is silent as to whether it can be canceled, but Plaintiff's



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demand letter suggested that it could. The Court finds, that the contract was canceled after some performance under the contract had begun.[1] The witnesses differed in their testimony of the amount of work that had already been done when the contract was canceled. The Court finds that an appropriate compensation for the work done to date was the deposit already made of $10,000. Thus, the Court finds that Plaintiff should receive nothing additional on the Irving sign, but Defendant is not entitled to its deposit back because substantial work had already been performed when the contract was canceled.

As a result, Plaintiff should recover the principal amount of $12,227.50 from Defendant, together with prejudgment and postjudgment interest as allowed by law and costs of court. The parties stipulated to reasonable and necessary attorneys' fees. Thus, Plaintiff should recover $11,540 up to the date of trial together with $1500 for trial preparation and presentation.

*Judgment.* The Court declines to award any other relief. The Court orders Plaintiff's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document. He shall then circulate same to Defendant's counsel for comment. Within seven days thereof, Plaintiff's counsel shall forward a proposed form of judgment to the Court together with any comments as to form received from Defendant's counsel.

The clerk of the court is directed to send a copy of this order as set forth below.

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[1] Defendant has sought to amend its counterclaim to add recission. Whether or not such a late amendment would be appropriate, recission is not an appropriate remedy when substantial performance has begun.



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SIGNED this 4th day of February, 2002.

JUDGE PRESIDING

cc: T. Rick Frazier, 5495 Belt Line Road, Suite 100, Dallas, TX 75240
Richard Dobbyn, 2944 Motley Dr., Suite 101, Mesquite, TX 75150



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CAUSE NO. 01-02980-J

| | | |
|---|---|---|
| DOROTHY PYBAS, Individually and as Representative and Heir of the Estate of Herschel Pybas, Deceased; and SHARI L. DENTON, Individually and as Heir of the Estate of Herschel Pybas, Deceased, | § | IN THE 191st JUDICIAL |
| | § | DISTRICT COURT OF |
| V. | § | |
| CIGNA HEALTHCARE OF TEXAS, INC., doing business as CIGNA HEALTHCARE FOR SENIORS | § | DALLAS COUNTY, TEXAS |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried to a jury and judgment entered on the jury verdict on January 3, 2003. Defendant has filed a request for findings of fact and conclusions of law in connection with the Court's granting of Plaintiffs' Rule 270 request regarding standing issues raised by Defendant for the first time after the jury was discharged. The Court has examined Rules 296 and 297 and concludes that Findings of Fact and Conclusions of Law are not required in this circumstance. Nevertheless, because the question of whether Findings of Fact and Conclusions of Law are required under a circumstance such as this is relatively novel, and in the interest of justice, the Court makes the following findings of fact and conclusions of law on the issue requested:

### FINDINGS OF FACT

1. Plaintiff Dorothy Pybas is the surviving spouse of Herschel Pybas. Herschel and Dorothy Pybas were married continuously for 54 years and were married at the time of Mr. Pybas's death on January 29, 1999. Herschel Pybas was never married to anyone other than Dorothy Pybas.

2. Plaintiff Shari L. Denton is the only child of Herschel and Dorothy Pybas. Herschel Pybas had no other children.

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3. Herschel Pybas died intestate on January 29, 1999.

4. No probate administration proceeding was ever opened concerning Mr. Pybas and his estate.

5. Herschel Pybas had no unpaid debts at the time of his death.

6. Dorothy Pybas filed this suit as "Representative and Heir of the Estate of Herschel Pybas, Deceased." Co-plaintiff Shari L. Denton filed this suit as "Heir of the Estate of Herschel Pybas, Deceased."

7. The pleadings on which Plaintiffs went to trial included the statement that the case was being "brought under the authority of the Wrongful Death Act and the Survival Statute of the State of Texas, Tex. Civ. Prac. & Rem. Code, section 71.001 - 71.011, 72.021, and otherwise under Texas law, by Plaintiff DOROTHY PYBAS, the surviving spouse of Herschel Pybas and Plaintiff SHARI DENTON, the surviving child of Herschel Pybas; . . . ." (Plaintiffs' Third Amended Petition, ¶ 64.)

8. Defendant filed no pleadings before or during trial challenging Plaintiffs' standing or legal capacity to bring this suit, and did not object to the submission of various jury questions that presupposed Plaintiffs' standing and capacity.

9. The evidence presented at trial constitutes some evidence that Dorothy Pybas and Shari Denton have standing to bring this action.

10. The evidence presented at the October 16, 2002 Rule 270 hearing regarding the issue of Plaintiffs' standing demonstrates without question that Plaintiffs have standing.

11. The issues underlying standing are not controversial.

12. The jury would not have been entitled to consider who benefits from the Estate's recovery in determining liability and damages in this case.



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13. The standing evidence presented during trial and during the October 16, 2002 Rule 270 hearing does not present any relevant jury questions.

14. The offering of the additional evidence during the October 16, 2002 Rule 270 hearing was necessary to the due administration of justice and did not and will not cause undue delay.

15. Plaintiffs exercised due diligence in obtaining and presenting this evidence.

CONCLUSIONS OF LAW

1. To the extent that CIGNA's challenge to the Plaintiffs' ability to pursue their claims raises a question of their legal capacity, that challenge has been waived both by CIGNA's failure to file a Rule 93 verified pleading and by CIGNA's failure to object to the charge on this ground. TEX. R. CIV. P. 93; *Nootsie, Ltd. v. Williamson Cty. Appr. Dist.*, 925 S.W.2d 659, 662 (Tex. 1996); *Haley v. GPM Gas Corp.*, 70 S.W.3d 114, 120 (Tex. App. — Amarillo 2002, *no pet. hist.*); *General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993).

2. Dorothy Pybas and Shari Denton were personally aggrieved by Herschel Pybas's death and therefore have standing to bring this action. *Nootsie, Ltd., supra.*

3. Plaintiffs have standing to bring a survival claim on behalf Herschel Pybas's estate by virtue of TEX. PROB. CODE §§ 37 and 38(b)(1).

4. Because standing is a jurisdictional question and thus a matter of law, the jury would not have been called upon to answer any questions pertaining to Plaintiffs' standing; rather, the trial court is charged with reviewing the pleadings and evidence to determine the issue of subject-matter jurisdiction. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998); *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).

5. An action to recover damages for wrongful death is for the exclusive benefit of the



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deceased's surviving spouse, children, and parents. TEX. CIV. PRAC. & REM. CODE § 71.004(a); *Shepherd v. Ledford*, 962 S.W.2d 28, 31 (Tex. 1998).

6. The Survival Statute (TEX. CIV. PRAC. & REM. CODE § 71.021(b)) provides that only a personal representative, administrator, or heir may sue on an estate's behalf.

7. Because Herschel Pybas died intestate, the claims he would have had against CIGNA vested immediately in Dorothy Pybas and Shari Denton, as his sole legal heirs. TEX. PROB. CODE § 37.

8. Plaintiffs have established, without any contradictory evidence, that no administration was pending and none was necessary with regard to Herschel Pybas's estate. Although this specific evidence was made part of the record after the jury returned its verdict, the jury would not have had before it any questions regarding the issue of Plaintiffs' standing and thus the Court's reception of Plaintiffs' evidence, done while the Court retained plenary power over this case (and before entry of judgment), was timely and proper. The evidence received at the October 16, 2002 hearing was not controversial and was necessary to the due administration of justice. TEX. R. CIV. P. 270. That evidence conclusively establishes that Plaintiffs have standing to pursue their claims against CIGNA.

9. In any event, the evidence presented during trial constitutes some evidence of Plaintiffs' standing. As a result of the uncontroverted evidence of Plaintiffs' standing, and because the petition on file at the time of trial was adequate, it is not necessary for Plaintiffs to supplement their pleadings, and the Court has therefore denied Plaintiffs' Motion for Leave to File First Supplement to Third Amended petition.

10. Although Plaintiffs' third amended petition did not specifically allege that no administration was pending and none was necessary, the Court liberally construes the petition in



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support of standing, *Garcia v. Caremark, Inc.*, 921 S.W.2d 417, 421 (Tex. App. — Corpus Christi 1996, *rehearing overruled*), particularly since no special exceptions were ever filed. CIGNA has in any event been given the opportunity to controvert Plaintiffs' standing. It has not done so.

11. In sum, Plaintiffs have standing to raise both their wrongful-death claims and their survival action.

Signed this 7th day of February, 2003.

JUDGE PRESIDING

cc: J. Don Gordon
500 N. Sam Rayburn Frwy.
Suite 200
Sherman, TX 75091

George Parker Young
1320 South University Drive
Suite 405
Fort Worth, TX 76107

James Johnson
6500 Greenville Ave.
Suite 345
Dallas, TX 75206

Brent Cooper
900 Jackson Str.
Suite 100
Dallas, TX 75202



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CAUSE NO. 97-5235 265J

| | | |
|---|---|---|
| JAMES PLUMLEE<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| ELECTROCOM AUTOMATION, INC.<br>Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Court on this day is this case tried to the bench on October 12, 1999. As directed by the Court, the parties submitted proposed findings of fact and conclusions of law on October 19, 1999, at which time the Court considered the case submitted for decision. Having considered the evidence presented and the applicable law, the Court makes the following findings of fact and conclusions of law:

1. In December of 1991, Lockland Associates, Inc.("Lockland") entered into a written "Engagement and Fee Agreement"(the "Contract") with Defendant Electrocom Automation, Inc. ("Electrocom"). Plaintiff James Plumlee ("Plumlee") is Lockland's assignor under the Contract. Plumlee was the primary contact at Lockland with respect to the Contract.

2. The Contract provided for a 30% fee under certain circumstances for the recruitment and hiring of "the individual specified" in the attachment, a "Sr. Specialist/IMHS Project Leader." Tim Little was hired with Lockland's help for this position, and Lockland received a commission thereon. "The position" to which the 30% fee was applicable was therefore filled, and Lockland paid therefor.

3. The Contract also provided for a 20% fee under certain circumstances for

recruitment and hiring of "candidates needed by Electrocom for IMHS in other specialty positions not listed . . . at the option of Electrocom."

4. It is undisputed that, during 1992, two individuals were hired at Electrocom with Lockland's help, Lockland invoiced for same and Lockland was paid for same. It is also undisputed that Lockland and Plumlee took no action to recruit or cultivate any prospects pursuant to the Contract after July of 1992. The dispute in this case centers around whether or not Lockland (now Plumlee, through his assignment) is entitled to a commission with respect to two other individuals: Keith Corrigan ("Corrigan") and Horace Sharp ("Sharp").

5. In 1994, Sharp provided engineering services to Electrocom for approximately three months. At that time, Sharp was employed by Pollack and Skan, Inc., a type of engineering "temp" service. Sharp was never employed by Electrocom, and he never received a salary from Electrocom. No credible evidence demonstrated the total paid to Pollack and Sam, Inc. for Sharp's services or for how many hours he provided engineering services to Electrocom through Pollack and Sam, Inc. Plumlee admitted that, absent some sort of "conspiracy" (of which there was no evidence), he would not be entitled to a commission if Sharp were employed by Pollack and Sam, Inc., when he performed "temp" type services for Electrocom. The Court concludes that Plumlee's claim for a commission based upon Sharp is not supported by the preponderance of the credible evidence and, therefore, fails.

6. Corrigan was recruited by Lockland in 1992 for a position with Electrocom. In 1992 and 1993, Corrigan neither interviewed for nor was offered the "Sr. Specialist/IMHS Project Leader" for which a 30% commission would be applicable if the Contract terms were met. Therefore, the claim for a 30% commission with respect to Corrigan should be denied.

7. Corrigan was interviewed for and offered another position in 1992, that of

Engineering Specialist, constituting another "specialty" under the Contract. However, Corrigan declined that position at that time.

8. In April of 1993, Electrocom ran an ad for an "Associate Program Manager" position.[1] Corrigan saw the ad and called a person at Electrocom whom he had met through his 1992 interviewing process. Neither Plumlee nor Lockland was contacted by Electrocom or Corrigan in connection with the 1993 recruitment and hiring efforts. Corrigan was offered the position of Associate Program Manager in 1993 and accepted that offer, commencing employment in June of 1993. Even after learning these facts, Lockland never submitted an invoice for a commission on Corrigan, as it had on the two individuals in 1992.

9. The 1993 Corrigan hiring was not a "recruitment by Lockland at the option of Electrocom under [the Contract] with a separate specification." Contract, ¶5. Electrocom proved that the 1993 Corrigan hiring was not the result of Lockland's work, but rather a result of Electrocom's ad. The 1993 Corrigan hiring took place more than a reasonable time after the cessation of work by Lockland (admittedly no later than July 31, 1992). Thus, the Court concludes that the 20% contingency fee is not owed.

10. The Court finds that this case was brought within the limitations period as the first alleged "breach" was committed in June of 1993, within four years of the suit's filing. The Court further finds that the defenses of estoppel and laches are inapposite here.

11. With respect to Electrocom's claim that this case was frivolous, the Court finds that, particularly with respect to the Corrigan claim, Plumlee had a good faith, albeit incorrect, basis for filing and pursuing this suit. Accordingly, no sanctions against Plaintiff

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[1] Defendant's Exhibit 9 suggests that the 1992 position and the 1993 position had the same title: "Associate Program Manager." However, Corrigan directly refuted Defendant's Exhibit 9 with his testimony that the two positions had different titles.

**410**

are warranted. Any claims or defenses not specifically addressed herein are denied.

The Court has this day signed a final judgment in conformity with the findings and conclusions herein.

The clerk of the court is directed to send a copy of this document to counsel of record.

SIGNED this 20th day of October, 1999.

JUDGE PRESIDING

cc: Counsel of Record

CAUSE NUMBER: 03-11643-J

| | | |
|---|---|---|
| BRIAN WATSON | § | IN THE DISTRICT COURT OF |
| PLAINTIFF | § | |
| | § | |
| VS. | § | |
| | § | DALLAS COUNTY, TEXAS |
| DANNIE FLECK, STB, INC., ATBL, INC., | § | |
| JOHN MEKLER, JM PIZZA, INC., | § | |
| and BETTE ADAMS | § | |
| DEFENDANTS | § | 191ST JUDICIAL DISTRICT |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 27th day of October, 2004, came on to be considered Defendants John Mekler and JM Pizza, Inc.'s Special Appearance. The Court, after considering the Motion, having examined the pleadings, considered the evidence, and hearing the arguments of counsel, is of the opinion that Defendant John Mekler's special appearance should be granted and Defendant JM Pizza, Inc.'s special appearance should be denied.

I.

1. Jurisdiction is proper in this Court because Plaintiff's claims are within the jurisdictional limits of this Court. Additionally, jurisdiction is proper over Defendant JM Pizza, Inc. pursuant to CPRC §17.042. More specifically, jurisdiction is proper over Defendant JM Pizza, Inc. because the evidence demonstrates it maintains continuous and systematic contacts with Texas.

II.

2. In support of its ruling regarding JM Pizza, Inc., this Court makes the following Findings of Facts and Conclusions of Law:



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**Findings of Fact**

**FOF #1:** Dannie Fleck is a resident of Texas. Dannie Fleck owns 49% of JM Pizza, Inc., is an Officer and Director of JM Pizza, Inc., and performs at least some of his obligations as an Officer and Director of JM Pizza, Inc. out of his home office in Texas. Some of the duties that he has performed in Texas on behalf of JM Pizza, Inc. are the following:

(a) He orders advertising/advertising material from various vendors;

(b) He orders store equipment;

(c) He ordered equipment from Domino's to be shipped to Texas for him to deliver to Oklahoma;

(d) He delivers JM Pizza, Inc.'s equipment to Oklahoma;

(e) He negotiated an agreement with National Linen Service to supply and deliver linen to JM Pizza's stores; and

(f) He responded to one unemployment filing in June of 2004 and three filings in September of 2004 on behalf of JM Pizza.

**FOF #2:** JM Pizza, Inc., through Dannie Fleck, recruited Laurie Coles, who at the time was a Texas resident, to work as a manager for JM Pizza, Inc. in Oklahoma.

**FOF #3:** JM Pizza, Inc. is supervised by Domino's's employee, Barbara Waltz, who resides in Texas.

**FOF #4:** All of JM Pizza, Inc.'s commissary orders come from the Domino's commissary in Texas.

**FOF #5:** JM Pizza, Inc. participates in Domino's Pizza, L.L.C.'s national advertising, some portion of which is directed towards residents of Texas. This includes national television advertising during Monday Night Football and Nascar Events.



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**Conclusions of Law**

In order to exercise personal jurisdiction over a nonresident defendant under the concept of general jurisdiction:

> the nonresident defendant must purposefully do some act or consummate some transaction in the forum state; [if the cause of action does not arise from the in-state act, the contacts must be continuing and systematic]; and the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

*Schlobohm v. Schapiro*, 784 S.W.2d 355, 358 (Tex. 1990).

Through Fleck and others as discussed above, JM Pizza had purposeful continuous and repeated contacts with Texas that were substantial. These contacts were not random or attenuated. By the numerous activities it performed in Texas, JM Pizza purposefully availed itself of the privilege of doing business in Texas, thus invoking the benefits and protections of Texas law.

Exercising jurisdiction over JM Pizza in this case does not offend traditional notions of fair play and substantial justice, taking into account the factors enumerated above. As demonstrated by the facts of this case, the quality, nature, and extent of Defendant's activities directed at Texas justify the conclusion that Defendant should expect to be haled into a Texas court. Defendant will not suffer an unfair burden coming from the relatively close state of Oklahoma and litigating this case in Texas. Also, Texas certainly has an interest in adjudicating a dispute between a Texas resident and a foreign corporation involving an alleged conspiracy to breach fiduciary duties owed to that resident, especially considering that much of this litigation arose out of the settlement of Texas litigation. While personal jurisdiction cannot be based at the outset on judicial economy



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and convenience, when evaluating "the basic equities of the situation," judicial economy can play a role. Here, it makes no sense to litigate the underlying alleged breach of fiduciary duty and events growing out of it in Texas, while trying the same facts and the alleged conspiracy in Oklahoma. Under the circumstances here presented, it is not inequitable or offensive to expect JM Pizza to defend its alleged conduct in Texas.

SIGNED this 1st day of Dec, 2004.

JUDGE PRESIDING

Mark Allan, 909 Lake Carolyn Pkwy., 17th Floor, Irving, TX 75039
Jeffrey Matthews, 1201 Elm Str., Ste. 5400, Dallas, TX 75270
Jacob Marshall, 4315 W. Lovers Lane, Dallas, TX 75209
Charles Appler, 1750 Valley View Lane, Ste. 120, Dallas, TX 75234



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391

CAUSE NO. 05-1410-J

| | | |
|---|---|---|
| CALYPSO WATERJET SYSTEMS, INC. Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| FLOW INTERNAT'L CORP. Et al. Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following findings of fact and conclusions of law in support of its Order Denying Special Appearance:

Calypso Waterjet Systems, Inc. ("Calypso"), is a Texas corporation which manufactures and distributes waterjet systems. Calypso filed this suit against Counter Intelligence Incorporated in connection with three waterjet cutting systems that Counter Intelligence ordered. These waterjet systems were ordered "FOB Dallas." (Exhs. A and C to Plaintiff's Response to Special Appearance). Thus, title to the systems was to be transferred to Counter Intelligence in Dallas, Texas. The first order was placed on Calypso letterhead with a Dallas address (Exhibit A). Thus, Counter Intelligence was aware that it was contracting with a Texas party for the purchase of these items. Invoices were sent from Dallas and were paid by Counter Intelligence checks sent to Dallas (Exhibits M and N to Plaintiff's Response to Special Apperance). Counter Intelligence also had telephone discussions with a Calypso representative located in Dallas, Texas, in regards to the software capabilities of the two waterjet systems that were referenced in Exhibit C. Calypso contends that Counter Intelligence failed to pay for one of the waterjet systems ordered under Exhibit C and, therefore, breached a contract arising out of its contacts with Texas.

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Additionally, Counter Intelligence has been a party to an exclusive 392
distribution agreement with Consentino USA to sell stone slab products called Silestone and to use the Silestone log and goodwill since December of 1999. Consentino USA is headquartered in Stafford Texas. This relationship has resulted in numerous payments by Counter Intelligence to Consentino in Texas exceeding $13 million dollars over approximately six years via over 200 wire transfers to Consentino's Texas account. Counter Intelligence's relationship with Consentino forms the basis for its website marketing, including press releases issued from Houston, Texas, contained on Counter Intelligence's website. Counter Intelligence also advertises to its customers the warranty provided by Consentino. Counter Intelligence and Consentino had meetings in Texas to discuss joint marketing on a nationwide basis. The relationship is ongoing and continuing.

The Court concludes that Counter Intelligence has sufficient minimum contacts with Texas to permit jurisdiction to be exercised over it in this case. The Court concludes that Counter Intelligence has purposefully availed itself of the privilege of doing business in Texas, and that maintenance of this suit in Texas would not offend traditional notions of fair play and substantial justice. The Court concludes that Defendant Counter Intelligence's Special Appearance should be denied.

The clerk of the court is directed to send a copy of this to a counsel of record for each party.

SIGNED this 13th day of Jan, 2006.

JUDGE PRESIDING

cc: Counsel of Record

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205

CAUSE NO. 05-01410-J

| | |
|---|---|
| CALYPSO WATERJET SYSTEMS, INC.<br><br>VS.<br><br>FLOW INTERNATIONAL CORPORATION and COUNTER INTELLIGENCE, INC. | 191ST DISTRICT COURT<br>DALLAS COUNTY, TEXAS |

**Additional Findings of Fact and Conclusions of Law**

In response to requests from both Calypso and Counter Intelligence,[1]
The Court makes the following Additional Findings of Fact and Conclusions of Law in connection with its Order Denying Special Appearance.

**Findings of Fact**

| | | Granted | Denied |
|---|---|---|---|
| A-1. | Defendant Counter Intelligence, Inc. is a Maryland corporation with its principal place of business in Maryland, ~~and it has never had a place of business~~ in Texas. | X | |
| A-2. | Counter Intelligence, Inc. satisfied the payment terms as to the first order, Exhibit A. | | X |
| A-3a. | Counter Intelligence, Inc. did not have substantial continuous and systematic contacts with the State of Texas before and at the time this lawsuit was filed. | | X |
| A-3b. | Counter Intelligence, Inc. had substantial continuous and systematic contacts with the State of Texas before and at the time this lawsuit was filed. | X | |
| A-4a. | Plaintiff's claims do not arise from or relate to any act by Counter Intelligence, Inc. by which it purposefully availed itself of the benefit and protections of Texas's laws. | | X |
| A-4b. | Plaintiff's claims arise from or relate to an act or acts by Counter Intelligence, Inc. by which it purposefully availed itself of the benefit and protections of Texas's laws. | X | |

1 [1] Requests numbered A "were made by Defendant Counter Intelligence; B "were made by PLAINTIFF.



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206

B-1. Counter Intelligence participated in numerous of phone calls with a Calypso representative located in Dallas, Texas regarding various servicing issues pertaining to the first waterjet system that was delivered to Counter Intelligence. (Ex. B to Plaintiff's Response to Special Appearance, at pages 40-44).

X Granted ____ Denied

B 2. Calypso prepared and forwarded thirty (30) invoices from Dallas, Texas to Counter Intelligence in response to their orders for various replacement parts and materials used in the operation of the first Calypso waterjet system. (Ex. M to Plaintiff's Response to Special Appearance, and Ex. B at pages 130-32).

X Granted ____ Denied

B 3. Counter Intelligence sent nineteen (19) checks by mail to Calypso in Dallas, Texas to pay for the balances owed pursuant to these thirty (30) invoices. (Ex. N to Plaintiff's Response to Special Appearance, and Ex. B at pages 133-35).

X Granted ____ Denied

B-4. From 2000 through mid-2005, one hundred percent (100%) of the countertops manufactured and installed by Counter Intelligence were made of Silestone obtained from Cosentino USA. (Ex. B. to Plaintiff's Response to Special Appearance, at pages 77-78).

X Granted ____ Denied

B-5. Currently, ninety percent (90%) of the countertops manufactured and installed by Counter Intelligence are made of Silestone obtained from Cosentino USA. (Ex. B. to Plaintiff's Response to Special Appearance, at pages 77-78).

X Granted ____ Denied

B-6. On its website, Counter Intelligence states that it is the "#1 Silestone Distributor in the Country" as well as the "2004 Conquistador of the Year," which is an award given by Cosentino USA to its best distributor. (Ex. B to Plaintiff's Response to Special Appearance, at pages 101-03).

X Granted ____ Denied



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6- 7. The over $13 million dollars in payments made by Counter Intelligence to Cosentino USA's Texas bank account can be broken down by year as follows: 20.

| | |
|---|---|
| 2000 | $467,000.00 |
| 2001 | $775,000.00 |
| 2002 | $1,601,948.71 |
| 2003 | $2,914.821.43 |
| 2004 | $3,679,754.14 |
| 2005 | $4,144,778.21. |

(Exs. H, I, J, K to Plaintiff's Response to Special Appearance, and Ex. B. at pages 114-22).

0 Granted ____ Denied

6- 8. Counter Intelligence has no intent to terminate its ongoing and continuing relationship with Cosentino USA (Ex. B to Plaintiff's Response to Special Appearance, at 126-30).

0 Granted ____ Denied

**Conclusions of Law**

| | | Granted | Denied |
|---|---|---|---|
| 1a. | This Court concludes that it cannot constitutionally exercise general personal jurisdiction over Counter Intelligence, Inc. | ____ | X |
| 1b. | This Court concludes that it can constitutionally exercise general personal jurisdiction over Counter Intelligence, Inc. | X | ____ |
| 2a. | This Court concludes that it cannot constitutionally exercise specific personal jurisdiction over Counter Intelligence, Inc. | ____ | X |
| 2b. | This Court concludes that it can constitutionally exercise specific personal jurisdiction over Counter Intelligence, Inc. | X | ____ |



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These additional findings and conclusions are in addition to those made by the Court in its Findings of Fact and Conclusions of Law signed on January 18, 2006, and are *not* in lieu thereof.

The clerk of the court is directed to send a copy of this order to all counsel of record.

SIGNED this 31st day of Jan, 2006.

JUDGE PRESIDING



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CAUSE NO. 00-715
(Consolidated with 01-3544)

| | | |
|---|---|---|
| FEDERAL INS. CO.<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| SANDY STARK<br>Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Court on this day is this case which was tried upon stipulated facts to the Court on July 13, 2001. A jury having been waived, all disputes of fact and law were submitted to the Court. The Court issues these findings of fact and conclusions of law in compliance with Texas Rule of Civil Procedure 296, which requires no specific form for same.

The Court hereby adopts by reference the Joint Stipulations of fact agreed by the parties and admitted into evidence as Joint Exhibit 1. The Court also judicially notices the appeals panel decisions in question.

The parties agree that Mrs. Stark sustained a compensable injury to the cervical area in the course and scope of her employment. Although it is not necessary to restate every factual stipulation, the Court notes that the parties agree that the current disability to perform work, to whatever extent it may exist, derives from complications of surgery performed to alleviate the cervical spinal difficulties. The parties also agree: "Claimant's cervical spinal surgery was not approved . . . and thus spinal surgery was not reasonable and necessary medical treatment for the compensable injury of January 6, 1996."



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Joint Stipulation, ¶ 18.

The question presented is whether, when the cause of an inability to work is admittedly the product of complications from an unauthorized surgery, which surgery would never have occurred but for the compensable injury, the inability to work is "a direct result of the employee's impairment." Tex. Labor Code § 408.142(a)(2) Appeals Panel Decision 992458 found that it was, and Appeals Panel Decision 010396 followed the earlier ruling.

The Appeals Panels misapplied the law by assuming that anything not expressly excluded from compensation is included. Instead, the statutory framework actually sets forth specifically what is included. With respect to income benefits, the statute states: "An employee is entitled to income benefits *as provided by this chapter*." Tex. Labor Code § 408.081(a). Thus, income benefits are specifically set forth in the statute, and the employee is entitled to no more and no less.

Nowhere does the statute say that the situation presented here gives rise to supplemental income benefits. Instead, Appeals Panel 992458 relied upon the case of *Maryland Casualty Co. v. Sosa*, 425 S.W.2d 871 (Tex. Civ. App. – San Antonio), *writ ref'd n.r.e per curiam*, 432 S.W.2d 515 (Tex. 1968). That case, of course, was decided under the old law, and it does not analyze the statutory bases for the decision. The system of benefits and definitions attendant thereto are quite different between the old law and the new law. However, the definition of "injury" applicable at the time of *Sosa* (*see* Tex. Rev. Stat. Ann. Art. 8306 § 20(repealed)) and that of today is the same. *See* Tex. Labor Code § 401.11. Thus, the Court will analyze *Sosa* here.

In *Sosa*, the Court held: "The law is well settled that where an employee



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sustains a specific compensable injury, he is not limited to compensation allowed for that specific injury if such injury, *or proper or necessary treatment therefor*, causes other injuries which render the employee incapable of work." 425 S.W.2d at 873 (emphasis added). In this case, by virtue of Joint Stipulation No. 18, the carrier has established that the treatment was not proper or necessary. To the contrary, it was found not to be reasonable and necessary by virtue of the second opinion ruling by the Texas Workers Compensation Commission. Thus, even if *Sosa* is applicable to this case, the Appeals Panel misapplied that standard when it found that the effects of *unnecessary* treatment were covered.

The Court finds that obtaining unauthorized, unreasonable and unnecessary medical treatment for a compensable injury breaks any causal link between the effects of that treatment and the impairment in question such that any disabling effects of the treatment are not the "direct result of the impairment." Accordingly, the Appeals Panel decisions in question should be reversed.

*Judgment.* The parties are to submit a judgment in accordance with these findings and conclusions within twenty days of the date of signing these findings and conclusions. Mr. Colburn shall be responsible for coordinating same. The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 20th day of July, 2001.

JUDGE PRESIDING

cc: Stuart Colburn, 5300 Bee Caves Road, Building III, Suite 200, Austin, TX 78746
Daniel Morris, 6333 Forest Park, Suite 222, Dallas, TX 75235

3 [illegible] morning at nine (9) o'clock. Court files pursuant to adjournment and these [illegible] present as of yesterday.

CAUSE NO. 04-10690-J

| | | |
|---|---|---|
| J&P CAPITAL INVESTMENT | ) | IN THE DISTRICT COURT OF |
| Plaintiff, | ) | |
| v. | ) | DALLAS COUNTY, TEXAS |
| LARRY DUGGER etc. | ) | |
| Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 16, 2005, this case came on to be tried; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence presented, the stipulations of the parties and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* In October of 2002, Plaintiff's predecessor leased certain space in the "Northwest Junction" shopping center on Northwest Highway to Defendant (the "Premises"). In late 2003, Plaintiff bought the property and began functioning as Defendant's landlord. At the time Defendant first moved into the Premises, a spa and a topless bar were already operating in the shopping center. The previous tenant of the Premises was a tanning salon alleged by Defendant to have conducted its business to include sexually oriented matters. Defendant's lease expressly prohibits him from operating a sexually oriented business or from engaging in certain other activities. Plaintiff's Exh. 1, ¶3.03(a). However, it also states: "The prohibited uses set out herein apply to Tenant's and Tenant's successors' and assigns' use of the Premises only and do not in any way limit Landlord's or any other tenant's rights with respect to the Shopping Center. If any conflict shall develop between Tenant and any other tenant of the Shopping Center regarding any provisions in this Lease



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or in leases to other tenants in the Shopping Center, Landlord shall be the sole arbitrator of such conflict."

In late 2003, Plaintiff leased space in the Shopping Center to two more "spas." Over time, Defendant began to experience problems with customers he believed were customers of the "spas" who came to his place of business and asked about the availability of "girls" for "services." He also witnessed the solicitation of prostitution in the parking lot, and graffiti was spray-painted on the building. He testified that his sales went down to the extent that he could not longer profitably maintain his business. He abandoned the Premises in the summer of 2004, having paid rent through February of 2004. The lease was for a period until October of 2007. The Premises were recently relet to a business selling merchandise similar to that which Defendant sold.

It is undisputed that no physical barriers to Defendant's business ever existed. Defendant continued to operate the same business he had before the two "spas" moved in; the only change in his business was that it decreased. Plaintiff sued for unpaid rent through the month of trial. Defendant responded by admitting non-payment of rent but asserting the defenses of (a) impossibility; (b) failure to mitigate; and (c) constructive eviction.

*Did Defendant fail to comply with the lease in question? If "yes," is Defendant's failure to comply excused by the defenses of impossibility, failure to mitigate and/or constructive eviction?* It is undisputed that Defendant ceased paying rent in February of 2004. Thus, he failed to comply with the lease in question. The dispute among the parties centers on whether that failure to comply was excused by any or all of the defenses mentioned above. The Court will address each defense in turn.



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*Impossibility.* The undisputed evidence shows that continued maintenance of the store at the Premises was not physically impossible in any way. Indeed, until he abandoned the Premises, Defendant was operating a store at the Premises and was, indeed, doing exactly what he had been doing all along – selling women's clothing. The only change alleged by Defendant after the arrival of the new "spas" was the decrease in profitability.

The defense of impossibility does not relieve Defendant of his obligations here. "Where the obligation to perform is absolute, impossibility of performance occurring after the contract is made is not an excuse for nonperformance if the impossibility might have reasonable been anticipated and guarded against in the contract." *Huffines v. Swor Sand & Gravel Co., Inc.*, 750 S.W.2d 38, 40 (Tex. App. – Fort Worth 1988, no writ). Here, Defendant easily could have demanded a provision in the lease restricting the type of tenants with which the landlord could enter into a lease. To the contrary, paragraph 3.03e expressly gives the landlord the discretion to lease to other tenants and resolve inter-tenant disputes.

Economic impracticability, which is the essence of Defendant's assertion, does not relieve a contracting party of his obligations: "Texas courts have held contractual obligations cannot be avoided simply because the obligor's performance has become more economically burdensome than anticipated." *Id.* at 40. Nothing prevented Defendant from continuing his business, and, indeed, he did so until he moved out. The Court finds that factually and legally this defense does not apply.

*Mitigation.* After Defendant moved out, Plaintiff placed a sign in the window and showed the Premises to potential lessees. Ultimately, Plaintiff did re-lease the Premises, and it does not seek future damages here. With respect to past damages, Defendant has failed to



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01000 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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prove any amount of damages that could have been avoided if Plaintiff had done more.[1] *Cole Chemical & Distributing, Inc. v. Gowing*, No. 14-03-01092-CV (Tex. App. – Houston [14th Dist.] March 15, 2005, n.p.h.)(holding that a defendant has the burden of proving an amount that could be saved through mitigation). Defendant also did not establish anything else that Plaintiff should have done. The Court finds that Defendant's failure to comply is not excused by the defense of mitigation.

*Constructive Eviction.* Under Texas law:

> The essential elements of constructive eviction are as follows: (1) An intention on the part of the landlord that the tenant shall no longer enjoy the premises, which intention may be inferred from the circumstance; (2) A material act by the landlord or those acting for him or with his permission that substantially interferes with the use and enjoyment of the premises for the purpose for which they are let; (3) The act must permanently deprive the tenant of the use and enjoyment of the premises; (4) The tenant must abandon the premises within a reasonable time after the commission of the act.

*Downtown Realty, Inc. v. 509 Tremont Building, Inc.*, 748 S.W.2d 309, 311 (Tex. App. – Houston [14th Dist.] 1988, no writ). The Court finds that Defendant abandoned the premises within a reasonable time of the acts claimed; however, the Court finds against the Defendant on the other elements. First, the Court finds as a factual matter that Plaintiff did not intend to deprive Defendant of the use of the Premises. This shopping center had a spa, a topless bar and other establishments that might be considered undesirable before the Defendant got there. Defendant's business was located in what had formerly been a less than savory tanning salon. Nothing indicates that Plaintiff changed the orientation of the shopping center. The Court does not find any credible evidence that Plaintiff leased to the two "spas"

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[1] Plaintiff's manager testified that putting an ad in the newspaper is not a useful method for advertising commercial lease space.



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with an intent to harm Defendant.

The Court finds as a factual matter that "persons acting with the landlord's consent" did not substantially interfere with Defendant's business. No evidence showed any action of the landlord or any tenant of the landlord that caused any harm to Defendant. Instead, the harm claimed by Defendant was alleged obnoxious behavior by patrons of other tenants. Defendant did not point to anything – short of evicting the other tenants – that he asked the landlord to do that would have solved the problem. Defendant also failed to establish that it would have been reasonable for Plaintiff to have evicted the other tenants. Finally, the only evidence that these "obnoxious customers" caused a decline in his business was Defendant's own opinion. One other witness – a topless dancer employed at a nearby club – indicated she didn't like walking by the "spas" to get to the Premises. However, she continued to shop there, even if she did so "less frequently." She did not indicate that, overall, she bought fewer items.

The final element – permanent deprivation – is not demonstrated factually or legally. The defense of constructive eviction cannot be used to avoid the terms of a contract a party knowingly signed. Again, this contract permits the landlord to lease to tenants, even undesirable ones, in a shopping center already containing businesses of a sexual nature. The Court finds and concludes that the defense of constructive eviction does not excuse Defendant's nonperformance.

*What sum of money, if any, would fairly and reasonably compensate Plaintiff for such failure to comply?* $39,376.97, together with interest, stipulated attorneys' fees and taxable costs.

*Judgment.* The parties stipulated to attorneys' fees on the record. Accordingly, the



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Court is this day signing a judgment proffered by Plaintiff for the amounts set forth herein.

The clerk of the court is directed to send a copy of this document to the following counsel of record, who participated in the trial.

SIGNED this 17th day of May, 2005.

JUDGE PRESIDING

cc: James Eppright, 4230 LBJ Freeway, Ste. 300, Dallas, TX 75244
Daniel Ayers, 2901 N. Dallas Parkway, Ste. 100, Plano, TX 75093



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CAUSE NO. 99-2922

| | | |
|---|---|---|
| MONICA NEMTZEANU<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| WALNUT VILLA APTS., L.L.C.<br>Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Court on this day is this case which was tried to the bench on October 19, 1999, both parties having waived a jury. At the conclusion of the evidence, the Court ordered a briefing schedule to allow for written closing arguments and citation to authorities in support of each side's position. The Court sets forth herein its findings of fact and conclusions of law pursuant to TRCP 296 which prescribes no particular form for such findings and conclusions.

*Background.* Ms. Nemtzeanu entered into a contract for the sale of the Walnut Villa Apartments with Mr. Robinson in his representative capacity in November of 1998. The parties thereafter entered into several amendments, agreeing to several extensions of the closing deadline. The final amendment (hereinafter the "Sixth Amendment"), drafted by Ms. Nemtzeanu's representative (and fiancé), stated: "The perties hereto agree to amend the contract of sale as follows: The closing date shall be extended to within 1 business days [sic] after Midland Bank are [sic] ready to close and have delivered all the necessary closing documents to the Title company."

In April of 1999, the parties began to disagree about issues including the condition of the property and whether or not Plaintiff was acting with sufficient speed in



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bringing about the financing approval and closing. Several letters were exchanged, finally culminating in Mr. Robinson's refusal to proceed on behalf of the seller and the filing of this lawsuit by the purchaser. Plaintiff seeks reformation of the contract to reflect the correct owner as seller, specific performance of the contract and attorneys' fees. Alternatively, Plaintiff seeks damages for fraud for alleged misrepresentations regarding the property's ownership. Defendant avers that the contract should be considered terminated and that specific performance cannot be ordered in the absence of a clear, definite contract of sale, claimed by defendant to be lacking here.

*Reformation.* The testimony was uncontradicted that all parties intended to enter into a contract of sale for the Walnut Villa Apartments located at 3925 West Walnut, Dallas, TX (the "Property") and that Mr. Robinson intended to bind whatever entity was the true owner of the Property. The facts clearly establish a mutual mistake, justifying the remedy of reformation of the contract to reflect the correct owner, Walnut Villa Apartments, L.L.C.

*The Sixth Amendment.* All parties agree that the bank was not prepared to close at the time of Mr. Robinson's termination letter and the filing of this lawsuit. No credible evidence demonstrates a readiness to close even now. Thus, the closing could not occur immediately even if the Court ordered it.

This fact highlights the problem with the Sixth Amendment – as written, it is too indefinite to be enforced and would violate the Rule against Perpetuities, embodied in Article 1, Section 26 of the Texas Constitution. *Brooker v. Brooker*, 106 S.W.2d 247 (Tex. 1937). "Our Constitution declares that perpetuities are contrary to the genius of a free government and shall never be allowed. This constitutional provision expresses one of the



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cardinal and basic principles of our system of government. It is not a mere rule of construction." *Id.* at 254.

The Sixth Amendment is unlimited in time. As written, the amendment would allow Midland Bank to delay forever the closing simply by not being "ready to close" or by not forwarding the closing papers to the title company. Nothing in the amendment requires that Midland Bank act within a reasonable time or act reasonably. The provision as written is void as too indefinite and as violative of the Rule Against Perpetuities. *See Peveto v. Starkey*, 645 S.W.2d 770 (Tex. 1982)(voiding interest that violated rule); *Garza v. Sun Oil Co.*, 727 S.W.2d 115 (Tex. App. – San Antonio 1986, no writ)(same).

To avoid the harshness of the Rule Against Perpetuities, some courts have implied a reasonable time when the time set forth is indefinite. *Hallmon v. Safeway Stores, Inc.*, 368 F.2d 400 (5th Cir. 1966). If a "reasonable time" limitation were imposed upon the contract, the Court would then have to resolve whether the delay in closing was reasonable or unreasonable.

The Court has considered the testimony of how long it customarily takes to reach a closing and the circumstances presented in this case and finds that the delay in closing was longer than a "reasonable time." Thus, even if the contract were reformed to impose a reasonable time limitation, the Court would find that the time expired before Mr. Robinson's termination letter of April 23, 1999.

*Fraud/Negligent Misrepresentation.* The Court finds that Defendant did not commit fraud or make a negligent misrepresentation which caused damages to Plaintiff, particularly in light of the findings above.



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*Remedies.* If the Sixth Amendment is void, then the contract of sale expired by its own terms prior to Mr. Robinson's termination letter. If a reasonable time is implied, then that time had passed by the time of Mr. Robinson's letter. Accordingly, the Court cannot require specific performance of the contract; instead, the contract should be considered as expired or terminated, no later than April 23, 1999.

The question then becomes what to do with the earnest money. The Court finds that Seller/Defendant did not breach the contract of sale and did not contribute to the delay in obtaining financing. However, the Court finds that, under the circumstances, the delay in obtaining financing was not entirely the Purchaser/Plaintiff's fault either, though Plaintiff did contribute to the delay. Accordingly, the Court finds that equity requires that the contract be declared terminated and the earnest money returned.

*Attorneys' Fees and Costs.* The Court finds that Plaintiff was not the "prevailing party" and, therefore, no award of attorneys' fees should be made to her. Because the Court finds that the contract should be terminated, but the earnest money returned, the Court finds that justice and equity require that costs be taxed against the party incurring same. TRCP 141.

*Preparation of Judgment.* The Court has prepared a judgment in conformity with the findings and conclusions herein, in the form set forth as "Exhibit A" hereto. The parties are directed to file any objections to its form no later than November 17, 1999, at which time the Court will sign the appropriate form of judgment reflecting the findings herein.

The clerk of the court is directed to send a copy of this document to all counsel of record.



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SIGNED this 10th day of Nov., 1999.

JUDGE PRESIDING

cc: Counsel of Record



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CAUSE NO. 00-8885-J

074

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|---|---|---|
| INTERCONSULT INC.<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| JPJ ARCHITECTS, INC. et al.<br>Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 9, 2002, this case came on to be tried; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* In late 1997, Defendant JPJ Architects contacted Plaintiff Interconsult, Inc. regarding providing engineering services for a Club Corp. project in Caracas, Venezuela (the "Caracas Project"). Interconsult sent several letters (Plaintiff's Exhibits 1-3) to JPJ regarding its services, but no document was ever signed by both parties. The parties dispute the terms of their agreement. Nevertheless, it is undisputed that Interconsult provided engineering services and site visits to the Caracas Project at JPJ's request. It is also undisputed that Club Corp. ultimately terminated the project due to circumstances beyond JPJ and Interconsult's control. Club Corp. apparently set a deadline of June 30, 1998 for the submission of all invoices for work performed before termination. The parties dispute whether this deadline was communicated to Interconsult.

Invoices represented by Plaintiff's Exhibits 11, 13, 14, 15, and 16 were



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submitted prior to June 30, 1998 and were paid by JPJ on or before September 11, 1998. It is disputed when the invoice represented by Plaintiff's Exhibit 12 ("Exh. 12 Invoice") was submitted to JPJ, but it was never paid. Additionally, Interconsult admits sending an invoice well past June 30 on March 17, 1999, represented by Plaintiff's Exhibit 28 ("Exh. 28 Invoice"). JPJ refused to pay the Exh. 12 and Exh. 28 Invoices, alleging that they were received after the June 30, 1998 Club Corp. cutoff and, therefore, were not paid by Club Corp. JPJ admits that Interconsult performed the work represented by the Exh. 12 Invoice, but denies that Interconsult did all of the work contemplated by the "base price" for which the Exh. 28 Invoice charges.

The Court will address each issue in turn.

*Was there an agreement between Interconsult and JPJ for Interconsult to provide engineering services to JPJ for the Caracas Project? If so, what were the payment terms?* Yes. Mr. Jensen testified that the three letters marked as Plaintiffs Exhibits 1-3 constituted the contract, and Ms. Blackmon from JPJ admitted that there was a "verbal agreement" to same. The parties' dispute about the contract appears to center on the payment terms. Plaintiff's Exhibit 1 states: "We assume contract requirements would follow the standard AIA contract, including payment schedule." It also states: "The fee will be $28,000, payable at usual AIA rates." It is undisputed that no AIA contract was actually signed. Nevertheless, JPJ argues that these references are to Defendant's Exhibit 3, a standard AIA contract. No contrary evidence of any other AIA contract was offered. Additionally, testimony was offered that the industry standard was "pay when paid" as set forth in Defendant's Exh. 3 ¶10.3.6, further supporting the position that Defendant's Exhibit 3



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reflects the correct payment terms.

Interconsult in essence attempts to ignore this language. Since Interconsult was the author of the language and admits that Plaintiff's Exhibit 1 is part of the contract, the Court cannot simply ignore the language. The Court finds that the Plaintiff's Exhibit 1 language quoted above means that JPJ will attempt to pass through invoices to the owner and pass through remittances to Interconsult.

However, the Court finds that this payment arrangement does not excuse JPJ from payment simply because it does not get paid. Neither Plaintiff's Exhibits 1-3 nor Defendant's Exhibit 3 excuses JPJ from payment if it is never paid. Where the owner refuses to pay without excuse, JPJ is still liable to Interconsult.

*Did JPJ fail to comply with such agreement as to the Exh. 12 invoice? Was such failure to comply, if any, excused by Interconsult's failure, if any, to forward the Exh. 12 invoice before June 30, 1998?* The Court finds that the work underlying the Exh. 12 Invoice was performed and JPJ failed to comply with its agreement to pay. The question then becomes whether or not Interconsult failed to forward the invoice before June 30, 1998 and, if so, whether that failure excuses JPJ's failure to comply.

The Court finds no basis whatsoever in Plaintiff's Exhibits 1-3 or Defendant's Exhibit 3 for the imposition of an artificial deadline for submission of invoices. The testimony regarding industry standards for terminations is irrelevant because the parties never agreed to be bound by the industry standard. Thus, Interconsult's failure to send the invoice before June 30, 1998, if that is what occurred, does not excuse JPJ's performance. The Court need not resolve, therefore, whether or not the invoice was sent before June 30, 1998. The



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Court finds that JPJ owes for the $7685 charged in Plaintiff's Exh. 12.

*Did JPJ fail to comply with such agreement as to the Exh. 28 invoice?* The parties dispute whether the work reflected by Plaintiff's Exhibit 28 was actually performed. The invoice was for the remaining 20% of the "base price" of $28,000 originally agreed upon. Interconsult contends that it completed the requisite drawings and, therefore, was entitled to be paid the whole amount of the base price. JPJ contends that the base price contemplated review of submittals which was never performed due to the early termination. JPJ also contends that 20% of the base price reflects the price for the submittal review. Interconsult counters that the actual percentage attributable to submittal review would be less than 20%, even if the base price included review of submittals. The Court finds that the base price included review of submittals which was never performed and that 20% represents a reasonable allocation from the base price for the review. Accordingly, JPJ did not fail to comply with its agreement by refusing to pay the $5600 invoice.

*Quantum Meruit.* As a result of the finding of an express contract, there can be no recovery in quantum meruit.

*What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff for the damages resulting from the conduct found?* $7685

*Did JPJ overpay any invoice such that such overpayment should be offset against the amount found above?* No.

*Attorneys' fees.* The Court has addressed Interconsult's reasonable and necessary attorneys' fees, considering the following factors: (1) the time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the



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legal services properly; (2) the fee customarily charged in the locality for similar legal services; (3) the amount involved; (4) the time limitations imposed by the client or the circumstances; and (5) the experience, reputation, and ability of the lawyer performing the services. The Court finds a reasonable and necessary fee for Interconsult's attorney in prosecuting the Exh. 12 invoice to be $9300 through the trial of this cause. Plaintiff is also entitled to its costs of court, prejudgment interest and postjudgment interest.

*Judgment.* The Court declines to award any other relief. The Court orders the Plaintiff's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document and circulate same to opposing counsel for comment. Within seven days thereof, Plaintiff's counsel shall forward a proposed form of judgment to the Court together with any comments as to form received from Defendant.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 14th day of January, 2002.

JUDGE PRESIDING

cc: Darrell Smith/Zan Moltz, Two Turtle Creek Village, 3838 Oak Lawn Ave., Ste 750, Dallas, TX 75219
Elizann Carroll/Stuart Kasinke, 901 Main Str., Ste. 4300, Dallas, TX 75202



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CAUSE NO. 03-7631-J 273

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| TRIAD REALTY SERVICES, LTD. et al. Plaintiffs, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| PREMIERVEST MANAGEMENT Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On June 4, 2004, the parties appeared before the Court for a hearing on Defendant's special appearance. On June 17, 2004, the Court notified the parties that it had determined to deny the special appearance.[1] On June 29, 2004, Defendant requested findings of fact and conclusions of law. On July 13, 2004, Plaintiffs filed proposed findings of fact and conclusions of law. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* On or about February 1, 1991, Carmel Realty and Defendant Premiervest Management Company entered into an agreement regarding management and other services for properties located in Illinois. Def. Exh. 4 (hereinafter the "Contract") Plaintiff Triad is alleged to be the successor in interest to Carmel Realty. Plaintiff's Petition alleges (and Defendant has not disputed) that the Contract terminated in May of 2003. Plaintiff has sued over an alleged failure to remit funds and otherwise fulfill termination obligations under the agreement. Defendant filed a special appearance contesting this

[1] Defendant has misnamed the court's letter as a "judgment," which it clearly was not.



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Court's jurisdiction over it. 276

*Procedural Issues.* Defendant contends that Plaintiffs did not make allegations of specific jurisdiction and, therefore, the court is limited to considering general jurisdiction. Without reaching the question of whether that is a correct statement of the law, the Court finds that Plaintiffs did make allegations of specific jurisdiction, albeit in the venue section: "a substantial part of the events and conduct of Defendant and in particular their obligations giving rise to the claims asserted are performable in Dallas, Dallas County, Texas ..." Plaintiff's Original Petition, ¶3.03; *see also* Plaintiff's First Amended Original Petition, ¶ 3.03. In the absence of special exceptions, the Court concludes that this is a sufficient allegation of contacts giving rise to specific jurisdiction.

*Specific Jurisdiction.* The Court finds that the Contract contemplated substantial and continuing contacts with Texas. The place for sending notices and other communications "required or permitted hereunder" to Plaintiff was Texas. Contract, ¶8.02. One of the areas of disagreement in this case, paragraph 7.01, requires the return of various items by "deliver[y] to the Owner's Agent." Construing paragraph 7.01 with paragraph 8.02, the Court finds that one of the disputed matters in this case – the delivery of certain items upon termination -- was to be performed in Texas.[2]

Additionally, *Defendant* designated a Texas address as the place for notices to be sent to Defendant. Contract, ¶8.02. Thus, although the underlying properties were

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[2] Under paragraph 7.01, some items were to be left at the property in question, located in Illinois. However, the paragraph clearly required "delivery" of some of the items to Plaintiff. Under paragraph 8.02, that "delivery" would take place in Texas.



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located in Illinois, the contract clearly contemplated notices, demands and communications flowing between Plaintiff and Defendant in Texas. These provisions support Plaintiff's allegation that the contract was performable, at least in part, in Texas.

It is Defendant's burden to negate this basis for jurisdiction. Defendant has attempted to do so by claiming that paragraph 8.02 is a "mistake" and names a "nonexistent corporation"[3] as the place for receiving notices. Defendant presented no evidence that anyone ever attempted to correct this "mistake." Defendant presented no evidence that this was a "mutual mistake" or that it was a unilateral mistake of Defendant made with the knowledge of Plaintiff of the mistake. To the contrary, Defendant expects the Court to take the word of its witness, Michael Green, 13 years after the fact. Interestingly, Defendant's other witness, Joseph Grosz, the person named in the Contract to received notices for Defendant, does not claim that paragraph 8.02 is a "mistake."[4] Only Michael Green, who was not the party signing on Defendant's behalf (only an attesting witness), claims it was a mistake. The Court finds Mr. Green's testimony unbelievable on this point.

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[3] Mr. Green also contends that the address in paragraph 8.02 is actually that for PremierVest Corporation which is "unrelated" to Defendant. Thus, Defendant expects the Court to believe that there is a mistake in paragraph 8.02 that no one ever noticed or corrected, and that the mistake is listing a nonexistent corporation that just happens to have the exact address of PremierVest Corporation (see Def. Exh. 1). PremierVest Corporation is allegedly "unrelated" to Defendant, yet has a similar name and just happens to have Joe Grosz (whose credibility was impeached by evidence of his federal conviction for conspiracy to commit bank fraud) working for it, just like he works for Defendant. The Court does not find this argument credible or the underlying testimony believable.

[4] Mr. Green also claimed that Mr. Grosz had contacts with Texas but only as an "agent of Plaintiff." Mr. Grosz himself never said that in his affidavit. Mr. Green's testimony in this regard is also not credible.



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Additionally, even if the Court accepted Mr. Green's testimony, a unilateral mistake by one party to a Contract is not a basis for setting aside a contractual provision. Thus, the Court concludes that Defendant has not negated the Contract's contemplation that the parties would be exchanging notices and communications between two Texas addresses. Defendant has also not negated that part of the obligations in question here – some of those contemplated by paragraph 7.01 – was performable in Texas. The allegations in this lawsuit arise out of this same Contract.

By agreeing to a long term Contract which contemplated communications flowing between Defendant and Plaintiff's location in Texas and by designating a Texas address at which Defendant would receive notices and communications, Defendant purposefully directed activities towards Texas. Such contacts are not random or attenuated.

Under the circumstances, the Court concludes that Defendant is amenable to this Court's jurisdiction under the Texas long-arm statute and that exercise of jurisdiction over Defendant does not violate due process under federal law under a long line of cases analyzing minimum contacts and traditional notions of "fair play and substantial justice." *See, e.g., Scholobom v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990)(conforming the Texas test for personal jurisdiction to the federal test).

*General Jurisdiction*. The Court need not reach the issue of whether exercise of general jurisdiction would be appropriate here, given its findings above. However, the Court notes that the evidence presented by Defendant falls far short of "negating every basis" for general jurisdiction.

The clerk of the court is directed to send a copy of this document to the



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following counsel of record, who participated in the hearing.

SIGNED this 14th day of July, 2004.

JUDGE PRESIDING

cc: Mitchell Madden, 1800 Valley View Lane, Ste. 150, Dallas, TX 75234
Alicia Matsushima, 2400 Two Houston Center, 909 Fannin Str., Houston, TX 77010



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CAUSE NO. 05-6264-J

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|---|---|---|
| APOSTOLIC ASSEMBLY OF THE FAITH IN CHRIST JESUS, INC. Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| SALVADOR RODARTE et al. Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On December 15, 2005, this case came on to be tried;[1] no party having requested a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* Plaintiff is the national organization for the Apostolic Assembly of the Faith in Christ Jesus, Inc. Defendant Rodarte, then a minister credentialed by Plaintiff, was the pastor of a church in Dallas which held services originally at 2701 and/or 2703 Iroquois Drive, Dallas, TX 75212 (the "Iriquos Property"). Later, it moved to 4858 Bernal Drive, Dallas, TX 75212 (the "Bernal Property"). He served in that capacity for a number of years until Plaintiff relieved him of his pastoral credentials. After this happened, Rodarte locked out members of the congregation who had worshiped at the Bernal Property location for years from entering the church. This lawsuit ensued.

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[1] A document was filed in this case entitled "Original Answer with Counterclaim" on January 4; however, it appears to be the answer to another lawsuit, not this one. The Court disregards this document as untimely, in any event.



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*What can this Court decide?* The parties have briefed and argued the question of this Court's power, and limits thereon, to decide matters that touch upon ecclesiastical issues. In applying the law to the facts of this case, the Court concludes that it can address questions of property ownership and alleged taking of property. However, the Court cannot determine (1) who should be the rightful pastor of a congregation; (2) which members of the congregation, if any, can be excluded from the church or admitted to the church building; and (3) Rodarte's compliance with the tenets of Plaintiff to which he allegedly subscribed by filing credential applications. Nor can the Court decide property ownership on ecclesiastical principals.

*Ownership of Iriquos and Bernal Properties.* The Iriquos Property was in the name of Defendant Lluvias de Gracia Apostolic Church of Dallas, Texas, Inc. ("Defendant Lluvias") before it was sold to a church unrelated to the principals here. Accordingly, the Court finds and concludes that Defendant Lluvias is the party entitled to receive the mortgage payments therefrom.

In its most recent petition, Plaintiff stated that title to the Bernal Property was in Defendant Lluvias' name. This statement constitutes a judicial admission. Following trial, Plaintiff contended that the "Lluvias de Gracia" entity referenced in the deed to the Bernal Property is not Defendant Lluvias, but rather the "local congregation." To the extent that Plaintiff seeks to establish title to the Bernal Property it lacks standing to do so.[2] Plaintiff is neither this undefined "local congregation" nor any of the persons listed as grantee on the deed. Indeed, if it is now Plaintiff's contention that the grantee is anyone other

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[2] Standing is a component of the Court's subject matter jurisdiction.



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than Defendant Lluvias, all of the persons listed as grantees in any capacity would need to be joined in the litigation so that their interests could be determined. The Court concludes that Plaintiff cannot challenge Defendant Lluvias' ownership of the Bernal Property.

*Plaintiff's Causes of Action.* Plaintiff seeks various forms of relief under several legal theories all of which turn upon one or more of the following events: (1) Defendant Rodarte's alleged promise and failure to comply with his promise to deed the Bernal Property to Plaintiff; (2) Defendant Rodarte's alleged taking of church monies for himself; and (3) Defendant Rodarte's lockout of people who previously worshiped at the Bernal Property church. The Court will address each theory in turn.

*Bernal Property Deed.* Several exhibits were offered and admitted into evidence for various limited purposes which were in Spanish and were without a certified translation. The Court is not permitted to use its own knowledge of Spanish to review these documents as to which no translation was provided. Thus, as far as alleged promises made in letters written in Spanish without translation provided, the Court cannot consider these matters. With respect to the remaining evidence, Plaintiff's representative, Samuel Valverde testified that Defendant Rodarte made promises in 1993 and 1996 to deed the Bernal Property to Plaintiff, but he did not do so.

Thus, Plaintiff discovered, well more than four years before this lawsuit was filed, that Rodarte had not deeded the Bernal Property to Plaintiff. If, as Plaintiff contends, he was required to do so or committed fraud or breach of fiduciary duty by failing to do so, Plaintiff suffered legal injury by his failure to do so at that time. Thus, limitations began running in the 1990's and had long passed before this litigation was filed. Accordingly, the



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Court concludes that the causes of action based upon promises to deed the Bernal Property to Plaintiff are barred by limitations.

Plaintiff's argument that Rodarte's annual signature on his pastoral credential application constitutes some kind of promise to follow the tenets of Plaintiff (including national ownership of church property) suffers from the same problem – Plaintiff knew he wasn't complying. Additionally, the Court declines to interfere in ecclesiastical matters, such as construction of Rodarte's sincerity of belief.[3]

*Taking Money.* Congregation members made contributions by writing checks to "Lluvias de Gracia." Defendants contend that these were monies to be used by Defendant Lluvias. Plaintiff contends that these were for the "local congregation." Plaintiff also contends that Defendant Rodarte has used this money for his own personal use and that he is the "alter ego" of Defendant Lluvias. However, at trial, it was shown that the money went to Defendant Lluvias's account but not that Defendant Rodarte actually personally took the money or that the money was not used for church purposes. No persuasive evidence of alter ego was presented. The Court finds that Plaintiff has failed to meet his burden of proof in this regard.

*Lockout.* The Court in no way condones the conduct of Defendant Rodarte in locking out people from the Bernal Property who had been worshiping there for many years. However, Mr. Rodarte's son testified that they are still running a church at the Bernal Property under the Lluvias de Gracia name. No evidence to the contrary was offered. As

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[3] Indeed, it is not unheard of for someone to have a sincere belief in a church tenet and, nevertheless, fail to follow it. Such is not the basis for civil liability.



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such, the Court is not permitted to decide which members of a church should be permitted to attend church and which should not because such a decision would impermissibly interfere with church governance and ecclesiastical matters.

As a result of the foregoing findings, the Court concludes that Plaintiff is not entitled to relief. Defendants filed a counterclaim for attorneys fees, but presented no evidence of same at trial. The Court declines to consider the Affidavit of Attorneys fees filed more than a month after the trial concluded. The Court grants relief that any lis pendens filed by Plaintiff should be released as part of the final judgment and awards taxable costs to Defendants. In all other respects, the Court concludes that no other relief should be granted to either party.

*Judgment.* The Court orders the Defendant's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document and circulate same to opposing counsel for comment. Within seven days thereof, Defendant's counsel shall forward a proposed form of judgment to the Court together with any comments as to form received from Plaintiff.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 16th day of January, 2006.

JUDGE PRESIDING

cc: Matthew Motes, 4025 Woodland Park #198, Arlington, TX 76013
Kenneth Thomas, 16970 Dallas Parkway, Bldg. 300, Dallas, TX 75248



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ORIGINAL

CAUSE NO. 04-02665-J

| | | |
|---|---|---|
| HORTENCIA WARDLOW, INDIVIDUALLY AND AS HEIR AND PERSONAL REPRESENTATIVE FOR THE ESTATE OF AND AS WRONGFUL DEATH BENEFICIARY OF CARLOS JUAQUIN MUNOZ, DECEASED | § | IN THE DISTRICT COURT OF |
| Plaintiff, | § | |
| VS. | § | DALLAS COUNTY, TEXAS |
| SPECTRASITE COMMUNICATIONS, INC.; DOTY-MOORE TOWER SERVICE, INC.; ELK RIVER, INC.; TRINITY SLING AUTHORITY, INC,. AND ANDERSON-FOREMAN ENGINEERS, INC, | § | |
| Defendants | § | |
| VS. | § | |
| 529900 ONTARIO LIMITED A/K/A NIAGARA SAFETY PRODUCTS | § | |
| Defendant/Third-Party Defendant | § | J-191ST JUDICIAL DISTRICT |

**FINDINGS OF FACT & CONCLUSIONS OF LAW**
**(Regarding Garrison's Special Appearance)**

The Court heard Garrison's Special Appearance on January 27, 2006, and signed an order granting it on February 2, 2006. At the hearing, the Court took judicial notice of and considered as evidence all competent evidence attached to the various special appearances filed by Garrison and attached to the responses thereto filed by Plaintiff and Defendant Elk River. No live testimony was presented. Pursuant to the request of Defendant Elk River, the Court makes the following Findings of Fact and Conclusions of Law:

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## FINDINGS OF FACT

1. Garrison Tool & Die, Ltd. is in the business of manufacturing sub-components of fall protection equipment. Garrison's products are incorporated by other entities into completed items of fall protection equipment.

2. The GL-3100 Ladder Hook is one of the sub-components of fall protection equipment which is manufactured by Garrison.

3. Garrison is a limited company which is organized and existing under the laws of Canada.

4. Garrison's sole place of business is at 41 Russel Street, Fort Eerie, Ontario, Canada. This is where all of Garrison's employees work and where Garrison's products are manufactured.

5. Garrison has never maintained an office or warehouse in the State of Texas.

6. Garrison has never maintained a bank account in the State of Texas.

7. Garrison is not registered to conduct business in Texas and does not have an agent for service of process in Texas.

8. Garrison either sells its products to either Miller Equipment or provides them to 529900 Ontario Limited a/k/a Niagara Safety Products (Niagara) for distribution according to a commissioned sales arrangement.

9. In 2004, Garrison sold 4,532,791 items of merchandise. Three hundred of these items were sold to Miller Equipment. The remainder of the 4,532,791 items of merchandise were distributed by Niagara.

10. Miller Equipment is a Pennsylvania corporation with its principal place of business in Franklin, Pennsylvania.

11. While Garrison instructs Niagara to sell its products, Garrison does not exercise any control as to the selection of Niagara's customers or the geographic markets in which Niagara sells the products.

12. The only products which are shipped by Garrison from Garrison's manufacturing facility are those which are sold to Miller Equipment. Garrison does not ship any products to Texas from its manufacturing facility.



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13. Garrison is aware of the fact that Niagara distributes Garrison's products throughout North America. Garrison is not sure what percentage of its products are sold by Niagara to entities in Texas.

14. The GL-3100 Ladder Hook in question was sold by Niagara to Defendant Elk River, Inc., (Elk River), an Alabama corporation.

15. Garrison does not advertise or market its products in the State of Texas.

## CONCLUSIONS OF LAW

1. A trial court may only assert jurisdiction over a non-resident defendant if the exercise of jurisdiction is consistent with traditional notions of fairness and equity which are embodied in the Due Process Clause of the Fourteenth Amendment. The minimum contacts test seeks to ensure that a non-resident defendant is not summoned to litigate in Texas based upon an overly tenuous relationship with the state.

2. The focus of the minimum contacts inquiry is on the quality and nature of the contacts as well as the overall relationship between the defendant, the litigation, and the State of Texas. Random, fortuitous, or attenuated contacts with the State of Texas do not satisfy the minimum contacts test.

3. Specific jurisdiction exists when a non-resident defendant purposely engages in activities in the forum state and the litigation at issue arises out of or is directly related to those activities. In contrast, general jurisdiction arises when a nonresident defendant maintains "continuous and systematic" contacts with a foreign state. Rising above the degree of contact which is required to establish specific jurisdiction, general jurisdiction is predicated upon a showing that the non-resident defendant has engaged in substantial activities within the forum state.

4. The sale of a GL-3100 Ladder Hook by Niagara to an Alabama corporation does not create a sufficient nexus between the litigation and the State of Texas for specific jurisdiction over Garrison to be appropriate.

5. Mere forseeability that the stream of commerce may deliver a product into a forum state is not a suitable benchmark for the exercise of specific jurisdiction. Garrison is not amenable to specific jurisdiction in Texas based upon the fact that it was foreseeable that Elk River might sell a completed positioning lanyard to a Texas corporation.

6. For the exercise of personal jurisdiction to be appropriate, there must be an indication that Garrison intended to purposefully service the Texas market.



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7. Garrison has not made an attempt to service the Texas market.

8. There is no factual or legal basis for a finding of specific jurisdiction as to Garrison.

9. Corporate entities are presumed to be separate under Texas law and a party who attempts to assert personal jurisdiction against one defendant based upon the contacts of another entity has the burden of pleading and proving why the presumption of corporate separateness should be disregarded.

10. Garrison and Niagara are separate corporations and there is no factual or legal basis for disregarding their corporate separateness under the single business enterprise, alter ego, joint enterprise and/or any other "veil-piercing" theory under the evidence presented at the Special Appearance hearing.

11. The defining feature of an agency relationship is the principal's right to control the actions of the agent. In this context, control refers not only to the right to assign tasks but also authority over the manner and means by which the agent completes the tasks.

12. Agency relationships are not presumed to exist and the burden of proof to establish agency rests with the party who asserts the existence of the relationship.

13. There is no agency relationship between Garrison and Niagara.

14. Niagara's contacts with the State of Texas should not be imputed to Garrison for jurisdictional purposes and the question of whether or not Garrison is amenable to personal jurisdiction in Texas should be decided solely on the basis of Garrison's own contacts with the state.

15. Garrison's contacts with the State of Texas do not rise to the level of continuous and systematic and are too shadowy and thin to support the exercise of general jurisdiction.

The Court finds and concludes that Garrison's special appearance should be granted.

SIGNED this 28th day of Feb, 2006.

JUDGE PRESIDING



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ORIGINAL

NO. 04-02665-J

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| HORTENCIA WARDLOW, INDIVIDUALLY AND AS HEIR AND PERSONAL REPRESENTATIVE FOR THE ESTATE OF AND AS WRONGFUL DEATH BENEFICIARY OF CARLOS JUAQUIN MUNOZ, DECEASED | § | IN THE DISTRICT COURT OF |
| V. | § | DALLAS COUNTY, TEXAS |
| SPECTRASITE COMMUNICATIONS, INC.; DOTY-MOORE TOWER SERVICES INC.; ELK RIVER, INC.; AND TRINITY SLING AUTHORITY, INC. | § | 191ST JUDICIAL DISTRICT |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
**(Regarding Niagra's Special Appearance)**

**I.**
**Backgrounnd**

In this lawsuit, the family of Carlos Munoz alleges that a GL3100 hook manufactured by Garrison Tool & Die Ltd. ("Garrison") failed causing Munoz to fall to his death from a tower on which he was working on June 16, 2003. Plaintiff alleges that Defendant Garrison sold the hook in question to Defendant 529900 Ontario Limited a/k/a Niagara Safety Products ("Niagra") who sold it to Defendant Elk River, Inc. ("Elk River"). In turn, Elk River allegedly sold the product to Defendant Trinity Sling Authority, Inc. ("Trinity"), which ultimately sold the product to Defendant Doty-Moore Tower Services, Inc. ("Doty-Moore"). Elk River asserts indemnity and contribution claims against Niagara.

Niagara filed a special appearance, asserting that it was not subject to personal jurisdiction in Texas, to which Elk River and Plaintiff responded. An oral hearing on Niagara's special appearance was conducted on January 27, 2006; on February 2, 2006,



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the Court denied Niagara's special appearance. At the hearing, the Court took judicial notice of and considered as evidence all competent evidence attached to the various special appearances filed by Niagara and attached to the responses thereto filed by Plaintiff and Defendant Elk River. No live testimony was presented. In response to a request from Niagara, the Court makes the following findings of fact and conclusions of law:

## II.
## Findings of Fact

1. Garrison manufactures safety hardware, such as the main hardware components that are used to construct a safety harness and lanyard, including the GL3100 hook involved in the accident made the basis of this lawsuit.

2. Niagara is a company that distributes safety hardware. Niagara sells Garrison's products, including the GL-3100 hook in question, throughout the United States. Sixty to sixty-five percent of Niagara's sales are a result of sales to US companies. Niagara has made in-person sales calls throughout the United States.

3. Niagara has a booth at the National Safety Congress Trade Show, which takes place at different locations throughout the United States each year. At the trade show, Niagara shows its product and makes its catalog available. Part of the reason the hooks comply with ANSI is because Niagara is trying to market the hooks in the United States.

4. Niagara presently has eight active customers in Texas. Niagara has had at least some contact with sixteen (16) Texas customers. Niagara regularly receives purchase orders from customers in Texas. Niagara contracts with and employs a Texas company,



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Rodia, to sell and ship products to Mexico. Niagara prepares the packaging slips and labels for Rodia, its Texas shipping agent for subsequent distribution in Mexico.

5. From May 3, 2001 through November 30, 2005, Niagara sold 19,612 GL 3100 series ladder hooks in Texas. There was never a period of time from May 2001 through November 2005 wherein Niagara was not selling products to companies in Texas. From May 3, 2001 through November 30, 2005, Niagara grossed nearly a quarter of a million dollars from its sales of GL 3100 ladder hooks in Texas, while it grossed $1,357,569.34 from its sales of all products in Texas. During the fiscal year of May 2001 to April 2002, 8.34% of Niagara's total sales were in Texas. From May of 2002 to April of 2003, Niagara sold $297,125.81 worth of merchandise to Texas. From May of 2003 to April of 2004, Niagara sold $176,244.77 worth of merchandise to Texas. These figures do not include Niagara's sales of product to distributors who then subsequently sold the product to persons or entities in Texas. Niagara continues to sell in the Texas market, and it has not indicated an intention to discontinue sales in Texas.

6. Niagara sells GL3100 hooks to Elk River. Niagara presumes that the companies Niagara sells GL3100 hooks to are going to turn around and sell the hooks to someone else. Niagara wants Elk River to sell as many GL-3100 hooks as they can because then Niagara will make more money. Niagara sells GL-3100 ladder hooks to a company in Texas called Web Devices. Niagara also has another customer in Texas called, "All Safety."

7. The Court finds that Niagara is aware that its customers re-sell its products, including the GL3100 model hook, throughout the United States. Niagara sells to re-



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sellers like Elk River, not end users. Niagara has employed a distribution system to re-sell its products throughout the United States, including the State of Texas.

8. Niagara sends its catalog to its customers in Texas, and therefore advertises in Texas. Niagara talks to its customers in Texas for the purpose of distributing and selling the GL-3100 hook in Texas, as well as to clarify purchase orders, track purchase orders, track sales and give its Texas customers a status. Niagara advertises and markets not only the GL-3100 hook, but a sundry of other fall protection equipment in Texas for sale. Niagara's catalog contains all of the products that are available for sale by Niagara in Texas, including but not limited to the GL3100 model hook. Niagara makes a profit from its sales of products in Texas.

9. Niagara expects that its GL3100 hooks, such as the hook made the basis of this lawsuit, will be purchased or used in Texas. Niagara's intent and purpose is to serve the market in Texas. Niagara intends to sell products, including the GL3100 model hook made the basis of this lawsuit, throughout the United States. Niagara intends to serve the United States' market, which includes an intent to serve the State of Texas.

10. The hook made the basis of this lawsuit is from the "02L" batch and was manufactured by Garrison in 2002. Niagara has sold hooks from the "02L" batch throughout the United States, including to All Safety in Texas and Web Devices in Texas.

11. Niagara identifies a post office box in New York as its address on its website. The Niagara website has a template for customers to fill out an order to contact Niagara. Niagara has received emails through its website system from people in the United States.

If Niagara gets an email through its website system from a potential customer in Texas, Niagara will call the customer on the telephone.

12. Doty Moore is a Texas corporation with its principal place of business in Texas. Munoz maintained an address in Texas. Trinity Sling is located in Texas.

## III.
## Conclusions of Law

1. Niagara is subject to personal jurisdiction in Texas. Plaintiff and Elk River pleaded sufficient allegations against Niagara to bring Niagara within the provisions of the Texas long-arm statute. Niagara did not negate all bases of personal jurisdiction in its special appearance. At all relevant times, Niagara was and is doing business in Texas as defined by the Texas long-arm statute.

2. Niagara purposefully established minimum contacts with Texas so that Niagara could reasonably anticipate being sued in Texas. Niagara has sufficient contacts with the State of Texas to subject Niagara to general jurisdiction in Texas. The exercise of jurisdiction over Niagara comports with fair play and substantial justice.

3. Niagara's contacts with Texas are continuous and systematic. Niagara continuously and systematically does business in Texas and continuously and systematically sells products in Texas. Niagara also continuously and systematically advertises in Texas, markets products in Texas, communicates with its customers in Texas and solicits business in Texas. Niagara's continuous and systematic sales to and purposeful availment of the Texas market subject Niagara to general jurisdiction in Texas.



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4. Niagara's website is sufficiently interactive to be considered as part of its contacts with Texas.

5. The exercise of jurisdiction in this case comports with traditional notions of fair play and substantial justice. Niagara regularly does business in Texas, regularly sells products in Texas, negotiates the sale of its products in Texas with its Texas customers, communicates with its Texas customers, advertises and markets products in Texas, and calls Texas customers to solicit business. Further, the burden of defending a lawsuit in Texas on Niagara in this case is minimal as shown by Niagara's attendance at conferences and in-person sales calls throughout the United States as part of its marketing strategy. Texas has a strong interest to protect citizens from, and compensate them for, injuries resulting from defective products. Further, Texas has an interest to regulate the quality of products directed to its stream of commerce. Texas has an interest in adjudicating this dispute.

The Court finds and concludes that Niagra's special appearance should be denied.

SIGNED this 28th day of April, 2006.

JUDGE PRESIDING

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CAUSE NO. 03-11272-J

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| JRW AVIATION, INC. | ) | IN THE DISTRICT COURT OF |
| Plaintiff, | ) | |
| v. | ) | DALLAS COUNTY, TEXAS |
| THE JONES COMPANY, | ) | |
| Defendant. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On March 5, 2004, this Court heard Defendant's Special Appearance. Having considered the evidence presented and the arguments of counsel, the Court makes these findings of fact and conclusions of law as requested by Defendant.

Plaintiff conceded, and the Court concludes, that there is not a basis for general jurisdiction against Defendant in this Court. Instead, the parties and the Court focused on whether Defendant's contacts with Texas regarding the transaction in question were sufficient to give rise to specific jurisdiction.

In order to assert specific jurisdiction over Defendant, the Defendant must have purposefully committed some act or consummated some transaction in the forum state, the cause of action must arise from that transaction and the assumption of jurisdiction by the State of Texas must not offend traditional notions of fair play and substantial justice. *Guardian Royal Exchange Assurance, LTD. v. English China Clays,* 815 S.W.2d 223, 226 (Tex. 1991).

In this case, Defendant's CEO testified (and later attempted to recant) in his affidavit that Epps Aviation was a "broker for the purchaser." Although this point is not dispositive, the Court finds that Epps was acting on Defendant's behalf or, alternatively, as a middleman for the two parties. It is clear (and the Court so finds) that Defendant knew it was consummating a transaction with a Texas corporation for the sale of plane located in Texas and owned by a Texas corporation



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regardless of Epps' status.

Defendant also knew that the plane would be overhauled by Raytheon Dallas (located in Texas). Jones knew that the modifications it requested were performed[1] in Texas. It sent its chief pilot to Texas to inspect the aircraft. Finally, final review, inspection and delivery was expected and contemplated by the parties to take place in Texas. In this respect, the fact that the final sale was not consummated is not dispositive. The fact remains that Defendant anticipated and agreed that it would take delivery in Texas; the Court concludes that partial performance of the contract was to occur in Texas. *See Ball v. Bigham*, 990 S.W.2d 343, 348 (Tex. App. – Amarillo 1999, no pet.)(contemplated delivery in Texas constituted knowledge that partial performance would occur in Texas such that the defendant's "contacts with Texas in this regard were purposeful").

The events that occurred and were contemplated to occur in Texas were not random or attenuated. The Court concludes that Defendant's contacts with Texas were sufficient to support specific jurisdiction over it in Texas in connection with this transaction. As demonstrated by the facts of this case, the quality, nature, and extent of Defendant's activities directed at Texas – with regard to this transaction – justify the conclusion that Defendant should expect to be haled into a Texas court if a dispute arose from this transaction. Defendant will not suffer an unfair burden litigating this case in Texas. Also, Texas certainly has an interest in adjudicating a dispute between a Texas corporation and a foreign corporation involving property located in Texas and modifications to that property which were performed (properly or not) in Texas pursuant to a contract.

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[1] The parties dispute the extent of the performance, and the Court here does not intend to determine the merits of that dispute.



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The Court further finds that the Special Appearance was not verified as required by Texas Rule of Civil Procedure 120a. Thus, as an independent ground for the Court's April 2 order, the Court finds and concludes that the Special Appearance was defective. *See Casino Magic Corp. v. King*, 43 S.W.3d 14, 18 (Tex. App. – Dallas, pet. denied)(attaching affidavit that does not verify the special appearance is not compliance with TRCP 120a).

SIGNED this 28th day of April, 2004.

JUDGE PRESIDING

cc: David Joeckel, 500 N. Akard Str., Ste. 4242, Dallas, TX 75202
Brian Newby, 801 Cherry Str., Ste. 2100, Fort Worth, TX 76102



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CAUSE NO. 00-8519-J 254

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| ADELFA IRENE SALAZAR<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| M-REAL ESTATE, INC., LLOYD E. WARD AND OPTION MORT. CORP., Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On March 19, 2002, this case came on to be tried; the parties having waived a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence admitted, the arguments of counsel, and the briefing filed thereafter, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296 which does not require any particular form thereof.

*Background.* This case involves a property located at 1720 S. Houston School Road, Lancaster, Dallas County, Texas (the "Property"). Originally, Adelfa Salazar owned the Property which was encumbered by a first lien in Defendant Option One. M-Real Estate claimed a second lien on the Property by virtue of a Deed of Trust (Plaintiff's Exhibit 2) securing a note (Plaintiff's Exhibit 1). Despite the fact that Ms. Salazar executed an affidavit of non-homestead naming a different property as her homestead (see Plaintiff's Exhibit 3), and expressly disclaiming any homestead interest in the Property, she later claimed the Property was her homestead.

Ms. Salazar defaulted on her obligations to both Defendants resulting in their posting of the Property for foreclosure. Although M-Real Estate originally bought the



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Property from Option One at a foreclosure sale, Option One later took the position that the sale was void because Salazar had filed bankruptcy prior to the sale. Litigation between Option One and M-Real Estate over this matter was resolved with M-Real Estate paying off Option One's note. Additionally, M-Real Estate agreed "to indemnify Option One with regard to any action brought by Adelfa Salazar, or any other party, in connection with or associated with the terms and conditions of this agreement between Option One and M-Real Estate."

In the meantime, M-Real Estate had foreclosed upon its lien on the Property. During the Salazar bankruptcy, M-Real Estate had obtained an Order to Lift Stay allowing the foreclosure to proceed. However, Salazar obtained an "Unopposed" Order on Motion to Avoid Lien (see Plaintiff's Exhibit 4) voiding M-Real Estate's lien as an illegal lien upon a homestead.

Salazar sued M-Real Estate, Ward and Option One. Salazar and Option One settled their disputes. Option One cross-claimed for indemnity against Ward. The Court disposed of all of Plaintiff's counts against Ward by summary judgment or judgment as a matter of law. The Court also granted M-Real Estate judgment as a matter of law on Counts VII and VIII, leaving only Counts VI (wrongful foreclosure) and Count IX (declaratory judgment) by Plaintiff against M-Real Estate. M-Real Estate also counterclaimed against Plaintiff for declaratory relief, breach of contract and fraud. M-Real Estate nonsuited its contribution claim against Option One after Option One settled with the plaintiff. The Court granted summary judgment to Option One on M-Real Estate's defenses to the indemnity claim (except as to those withdrawn by M-Real Estate) and that Option One was entitled to



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indemnity for Count VII of the Petition. Thus the case remains to be decided as to the following: (1) Plaintiff's claims for wrongful foreclosure and declaratory relief against M-Real Estate; (2) M-Real Estate's counterclaims against Plaintiff;[1] and (3) Option One's entitlement to indemnity on Counts VIII and X and the amount of any such indemnity.

*Did M-Real Estate wrongfully foreclose?* No. The Court finds that the Order on Motion to Avoid Lien was procured without notice to Defendant M-Real Estate, though represented to the Court as "unopposed." The Court finds that the Order in question is void as against M-Real Estate. Salazar executed an affidavit of non-homestead. As such, she cannot now claim that the Property was her homestead. M-Real Estate properly foreclosed on the Property.

*Is either side entitled to declaratory relief?* M-Real Estate is entitled to a declaration that Salazar's interest in the Property has been foreclosed and that as between Salazar, Option One and M-Real Estate, M-Real Estate holds (or held before the sale to Aycock) title.

*Is M-Real Estate entitled to recover on its counterclaims for breach of contract, quantum meruit and fraud?* Because there was a valid contract between the parties, there can be no quantum meruit. As for the breach of contract, the Court has found that M-Real Estate properly foreclosed on the Property. M-Real Estate did not present proper

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[1] A person named Aycock has since purchased the Property from M-Real Estate. The Court cannot make any determination as to Aycock's rights because he was not joined in this lawsuit. Thus, any declaratory relief is limited to relief between Plaintiff and M-Real Estate.



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evidence of any deficiency owed.[2] As for fraud, the Court is not persuaded that fraud occurred.

*Is Option One entitled to indemnity on Counts VIII and X?* M-Real Estate agreed "to indemnify Option One with regard to any action brought by Adelfa Salazar, or any other party, in connection with or associated with the terms and conditions of this agreement between Option One and M-Real Estate." M-Real Estate argues that Counts VIII and X are not "associated with" the terms and conditions of the settlement agreement. Testimony was presented, and Salazar's petition itself was received into evidence.

In the "facts" section of the Petition, Plaintiff alleged: "Notwithstanding this knowledge [of M-Real Estate's alleged wrongful foreclosure efforts], Option One stood idly by and allowed M-Real Estate to proceed with its unlawful foreclosure .... Additionally, after the unlawful foreclosure, Option One engaged in negotiations with M-Real Estate that would permit M-Real Estate to maintain control of Salazar's property. Option One and M-Real Estate negotiated a so-called 'short sale' agreement that would allow M-Real Estate to purchase Salazar's property without Option One foreclosing on its lien on Salazar's property." Cross-Plaintiff's Exhibit 3, ¶ 11. The Court finds that this was a clear reference to the settlement agreement.

Count VIII. Count VIII alleges that Option One "conspir[ed] to grant an economic advantage to M-Real Estate at the expense of Salazar." The Court finds that this

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[2] The evidence showed that the Property was sold to Aycock for $205,000, an amount greater than the debt on the Property. Although M-Real Estate also sought to recover the value of improvements made, M-Real Estate did not demonstrate by credible evidence that the fair market value of the property foreclosed upon at the time of foreclosure was less than the debt upon the Property. Thus, no recovery is proper.



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was a reference to the settlement agreement. Option One is entitled to indemnity on this Count.

Count X. Plaintiff alleged that "Option One failed to have warned Salazar and protect her from the unlawful lien of M-Real Estate as a reasonable and prudent mortgagee would have done under the circumstances. Instead, Option One embraced M-Real Estate and actually encouraged it to foreclose on its unlawful and unconstitutional lien. Option One . . . failed to exercise a reasonable degree of care which resulted in the real property being wrongfully foreclosed upon by M-Real Estate. As a proximate result of Option One and Ward's negligence Salazar has suffered damages...." The Court finds that this count references only M-Real Estate's foreclosure and not the settlement agreement. Therefore, it is not covered by the M-Real Estate indemnity. Thus, M-Real Estate owed indemnity to Option One for Counts VII and VIII but not for Count X. The Court finds that Option One should recover its expenses of $958.

*Attorneys' Fees.* Option One also pled for reasonable and necessary attorneys' fees under Chapter 38 of the Civil Practice & Remedies Code. The Court takes judicial notice of the reasonable and customary fees, the contents of its file and the work performed in hearings and trial before the Court. In addition, Option One presented testimony as to the work performed. Although Option One did not segregate between recoverable and non-recoverable claims, the Court finds that the testimony presented, as well as the taking of judicial notice, provides some evidence from which the Court can make a determination as to attorneys fees recoverable for prosecuting the cross-claims for indemnity on the counts with respect to which the Court found indemnity was owed. M-Real Estate is also entitled to attorneys' fees as are equitable and just for prevailing on the declaratory



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judgment action as between it and Salazar.

The Court has addressed reasonable and necessary attorneys' fees, considering the following factors:(1) The time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) The fee customarily charged in the locality for similar legal services; (3) the amount involved; (4) the time limitations imposed by the client or the circumstances; (5) the experience, reputation, and ability of the lawyer performing the services; (6) the results obtained; (7) whether the fee was fixed or contingent, and (8) the likelihood that the acceptance of this work would preclude other employment by the lawyer.

Based upon these factors, the Court finds that Option One should recover attorneys' fees from M-Real Estate of $11,278 through the trial of this cause, additional conditional attorneys' fees of $1500 if M-Real Estate files a motion for new trial but is unsuccessful, additional conditional appellate attorneys' fees of $4,500 if this case is appealed to the Court of Appeals, but M-Real Estate is unsuccessful, an additional conditional award of $4,500 if a petition for review is filed to the Texas Supreme Court, but M-Real Estate is ultimately unsuccessful and an additional conditional award of $6500 if review is granted by the Texas Supreme Court, but M-Real Estate is ultimately unsuccessful.

Based upon the above factors, the Court finds that M-Real Estate should recover from Salazar reasonable and necessary attorneys' fees as follows: $4250.

*Judgment.* Costs of court should be taxed against Salazar. The Court declines to award any other relief. The Court orders Option One's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document. He shall then circulate same to opposing counsel for comment.. Within seven



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days thereof, Option One's counsel shall forward a proposed form of judgment to the Court together with any comments as to form received from opposing counsel.

The clerk of the court is directed to send a copy of this order to the following counsel of record, who participated in the trial.

SIGNED this 20th day of April, 2002.

JUDGE PRESIDING

cc: Raphael Wilkins, 1924 Calumet, Suite 200, Houston, TX 77004
Lloyd Ward, 1717 Main Str., Suite 5700, Dallas, TX 75201
Scott Conrad, 4131 N. Central Expwy., Dallas, TX 75204



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CAUSE NO. 05-00405-J

| | | |
|---|---|---|
| TOWNE CROSSING STATION, LLC<br>Plaintiff, | ) | IN THE DISTRICT COURT OF |
| v. | ) | DALLAS COUNTY, TEXAS |
| 3600 R.E.D. GROUP, L.L.C. et al.<br>Defendants. | ) | 191st JUDICIAL DISTRICT |

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On July 6, 2006, this case came on to be tried; no party having requested a jury, all matters in dispute were tried before and submitted to the Court. Having considered the evidence admitted and the arguments of counsel, the Court makes these findings of fact and conclusions of law pursuant to TRCP 296-299 which does not require any particular form thereof. Mr. Boorhem was nonsuited without prejudice the morning of trial, so the trial proceeded only as to the corporate defendant and Mr. Steele

*Background.* Plaintiff's predecessor-in-interest and Defendant 3600 R.E.D. Group, LLC d/b/a The Feed Bag ("The Feed Bag") entered into a lease for a restaurant at the Towne Crossing shopping center in Mesquite; as amended, the term of the Lease was through 2008. The Amendment to the Lease (see Pl. Exh. 2) required a guarantee of the Lease "for the first three years" of the Amendment. Similarly, the attached Guaranty, signed by Boorhem and Steele, was limited in time: "Notwithstanding anything to the contrary herein, this Guaranty shall be limited to the 1st three years of the extended term, from 10/1/01 - 9/30/04." Guaranty, ¶15.

In 2003, The Feed Bag stopped paying rent and abandoned the leased premises. Thereafter, several delinquent rent notices were sent, to no avail. In November



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of 2004, Plaintiff's predecessor-in-interest wrote a demand letter (Pl. Exh. 4), electing a remedy under Sectoin 22.2(c) of the Lease. When payment was not forthcoming, this lawsuit was filed in January of 2005. The leased premises were re-letted to another tenant in late 2005.

*Did The Feed Bag and Erik Steele, without excuse, fail to comply with their obligations to pay Plaintiff in accordance with the Lease and Guaranty (respectively)?* Yes. Defendant offer as an excuse the alleged "prior material breach" involving late reimbursement of several tenant finish out items. However, Defendants offered only vague testimony from an interested witness about the alleged breach and alleged harm therefrom. No documentation was provided, and this testimony was not persuasive. Additionally, after the alleged breach, Steele on behalf of The Feed Bag executed a Tenant Estoppel Certificate (Pl. Exh. 11) which stated that the tenant had accepted the demised premises with no further work required and further stated: "To the best of Tenant's knowledge, no Default on the part of Landlord exists under the Lease in the performance of the terms, covenants and conditions of the Lease required to be performed on the part of the Landlord." The Court finds no excuse for the failure to pay.

*If so, what sum of money is owed under the Lease? Does the Guaranty cover that entire amount or only a portion thereof?* With respect to The Feed Bag's liability under the Lease, the Court finds $114,938.19 (inclusive of interest as of November 30, 2005) due and owing. The parties dispute the proper construction of the Guaranty's temporal limitation. Under Steele's view, the Guaranty only guaranteed sums representing breaches or amounts due under the Lease for the time period through September 30, 2004. Under



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Plaintiff's view, any breach of the Lease during the term of the Guaranty permits the landlord to seek all sums from the guarantor, regardless of what time period those sums represent.

The operative phrases are "limited to the first three years" and "for the first three years." Plaintiff argues that acceleration of the entire amount of rent due under the Lease from the date of breach to the end of the Lease term is automatic and, therefore, it occurred within the "term" of the Guaranty. However, the remedies section of the Lease contains a number of different remedies at Landlord's election. The landlord here did not seek any such remedies or make any election until November of 2004 (after the time period of the Guaranty) when it elected Section 22.2(c). Section 22.2(c) is not an automatic acceleration of all sums due in the future. Instead, it contemplates charging the tenant every month into the future until the premises are relet. Indeed, the November letter sought only the amount of money due at that time, consistent with Section 22.2(c). Thus, the time period for which Plaintiff seeks to hold Steele liable extends beyond the term of the Guaranty.

Indeed, none of the remedies in Section 22 of the Lease allow full acceleration, automatic or otherwise, of all rental payments due over the remaining term of the Lease. The closest provision to acceleration is 22.2(c)(ii) which provides for recovering the discounted amount of all future rentals *less the actual rental value* of the premises as a settlement. The landlord is required to "demand" this "settlement." In this case, no evidence was presented that this was a "premium lease" or that the landlord ever demanded such a settlement (or what the amount of such a settlement would have been). Thus, Defendants' reading of the Lease and Guaranty is the only reasonable construction, taking those documents as a whole.



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The Court finds and concludes that Steele only owes as a principal amount the amounts attributable to the term of the Guaranty, which is $38,975.92 together with interest thereon through November 30, 2005 of $5383 and pre-judgment interest on the principal amount from that date through the date of judgment at the rate of 18% per annum. Thus, The Feed Bag and Steele are jointly and severally liable for that sum, and The Feed Bag only is liable for the additional amount of $70,579.27, together with pre-judgment interest on the principal amount at the rate of 18% per annum from November 30, 2005, until the date of judgment. Attorneys' fees are discussed below.

*Attorneys' Fees: What is a reasonable fee for the necessary services of Plaintiff's attorney through the trial of this case?* $13,500. The Court awards this sum jointly and severally against the two remaining defendants.

*Judgment.* Under Finance Code Section 304.002, the post-judgment interest rate is 18% per annum on the entire judgment from the date of judgment until paid. In addition to the foregoing, costs of court should be taxed against Defendants The Feed Bag and Erik Steele. The Court declines to award any other relief. The Court orders Plaintiff's counsel to prepare a form of judgment that reflects the findings and conclusions herein within five days of receipt of this document. He shall then circulate same to opposing counsel for comment. Within seven days thereof, Plaintiff's counsel shall forward a proposed form of judgment to the Court together with any comments or agreements as to form received from Defendant's counsel.

The clerk of the court is directed to send a copy of this document to the following counsel of record, who participated in the trial, as well as Mr. Boorhem.



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SIGNED this 12th day of July, 2006.

JUDGE PRESIDING

cc: James Mosser, 17110 Dallas Parkway, Ste. 290, Dallas, TX 75248
Michael Aigen, 3102 Oak Lawn Ave., Ste. 777, Dallas, TX 75219
S. Ross Boorhem, 444 Brookhurst, Dallas, TX 75218



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# SUBMISSIONS FOR THE RECORD

## STATEMENT OF SENATOR LAMAR ALEXANDER

**Nomination of S. Thomas Anderson**
**to be U.S. District Judge for the Western District of Tennessee**

**Hearing before the Senate Judiciary Committee**
**February 21, 2008**

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I want to thank Chairman Leahy and Senator Specter for scheduling this hearing. I am in Tennessee this week attending long scheduled events and visiting with local officials about the recent tornado damage. Only that schedule would keep be from attending this hearing in person because I have great respect for Judge Anderson. I appreciate this opportunity to submit a written statement on his behalf.

I would offer three reasons why Judge Anderson's nomination to serve as U.S. District Judge for the Western District of Tennessee is an especially worthy one – and one that I hope will receive prompt approval by the United States Senate.

First, Tom Anderson is already a judge. In 2003, the federal district judges of Western Tennessee selected Tom Anderson unanimously as a U.S. Magistrate Judge following a merit process that included more than three dozen applicants.

Second, Tom Anderson has been first chair on more than two hundred cases tried in federal court and has earned extraordinary respect from lawyers and judges in Tennessee. For example, Senior District Judge Thomas Higgins drove more than 100 miles from Nashville to Tom Anderson's investiture ceremony as magistrate judge in Jackson in 2003 to commend Anderson's practice as an attorney. All of us who know Judge Higgins know that he is meticulous and plain-spoken. His unsolicited appearance for Judge Anderson was considered by all those in attendance as a great compliment to Tom Anderson's professionalism. So along with my statement, I am submitting a transcript of Judge Higgins' remarks from that ceremony on January 16, 2004.

Prior to serving on the bench, Tom Anderson spent nearly 20 years in private practice. In addition to his extensive litigation experience, he also served as an Administrative Law Judge for the Tennessee Claims Commission and as Assistant Commissioner for the Tennessee Department of Transportation.

Finally, although Judge Anderson has been nominated by a Republican President, he has strong support from Tennessee Democrats. A number of West Tennessee Democrats have written to the Judiciary Committee to urge confirmation of Judge Anderson's nomination, including: State Senator Roy Herron; Charles Farmer, the former mayor of



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Jackson; James Strickland, Jr., the former chairman of the Memphis/Shelby County Democratic Party; Tommy Green, chairman of the Tennessee Municipal League; and Mike McWherter, a prominent local businessman and son of former Governor Ned McWherter. It is worth noting that Mike McWherter had formed an exploratory committee to challenge me in this year's race for the U.S. Senate before deciding to spend more time with his family – so Judge Anderson's nomination is one issue that would have united both parties' candidates on the campaign trail if Mike McWherter had decided to be a candidate for the U.S. Senate.

The deep reservoir of goodwill for Judge Anderson in Tennessee reflects the fact that he is experienced, fair-minded, and well-respected. He is also a husband and father of three who has been active in the community, including: having served as a Board Member of Methodist Hospital in Lexington, Tennessee and the Carl Perkins Child Abuse Center in Jackson, Tennessee; and helping to establish the Beech River Branch of the YMCA in Lexington and serving as its first Chairman of the Board.

I hope the Judiciary Committee will move quickly to approve Judge Anderson's nomination so that the full Senate can confirm him before Chief Judge James Todd – who has served with distinction – takes senior status.



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# REMARKS OF SENIOR JUDGE THOMAS A. HIGGINS

## EXCERPTED FROM TRANSCRIPT OF INVESTITURE OF J. THOMAS ANDERSON AS U.S. MAGISTRATE JUDGE WESTERN DISTRICT OF TENNESSEE

## JANUARY 16, 2004

**Statement of Senator John Cornyn**

***Confirmation Hearing for Catharina Haynes to the U.S. Court of Appeals for the Fifth Circuit***

Mr. Chairman, I am pleased to support the nomination of Catharina Haynes of Dallas to the U.S. Court of Appeals for the Fifth Circuit.

I am proud to concur with the American Bar Association's unanimous opinion that Ms. Haynes is "well qualified" for a seat on the federal appellate bench. Her record as both a state judge and a member of the civil bar amply demonstrates the legal acumen, the commitment to justice, and the dedication to public service required for those nominated to serve on our nation's appellate courts.

It is truly a pleasure to recommend confirmation of a Texas lawyer with a career-long record of dedication to public service and equality before the law. Ms. Haynes has served as a volunteer for pro bono legal aid clinics, providing legal assistance to people who otherwise would be unable to afford to have a will probated or resolve family law issues. Ms. Haynes helped develop a brochure for pro se litigants, opening the doors of justice in what can be a daunting and intimidating system for disadvantaged litigants. This pattern of helping the less fortunate navigate the legal system bespeaks a commitment to the ideal of equal justice for all. This is but one aspect of Ms. Haynes's service to her community.



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Since 2005, Ms. Haynes has been a Director of the Vickery Meadow Learning Center, a non-profit organization that promotes literacy among the residents of a low-income Dallas neighborhood. Ms. Haynes teaches pre-GED classes at the Learning Center. Ms. Haynes's direct involvement in her community demonstrates that her dedication to the rule of law is matched by her passion for public service.

Ms. Haynes demonstrated this commitment to public service in 1998, when she gave up a prestigious and lucrative partnership at the Baker Botts law firm to take the bench as a state district court judge on the 191st District Court in Dallas. As a former district court and appellate judge, I can attest that the district judge's experience seeing actual litigants and the real-world consequences of their legal disputes is invaluable for later service on the appellate bench. The fundamentals of judging—analyzing the arguments presented to the court in light of the facts and the law—are similar at the district and appellate level. But Ms. Haynes's experience as a district court judge will undoubtedly remind her each day that the consequences of a judge's decisions always have a human face.

As a state court judge, Ms. Haynes gained deep experience in many areas of substantive law including commercial litigation, personal injury, employment, insurance bad faith litigation, and intellectual property. State court judges interpret and apply federal statutory and constitutional law, which are, of course, the



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supreme law of the land, binding on judges in every state. In presiding over nearly 300 trials, Judge Haynes distinguished herself for her work ethic and commitment to the rule of law.

Ms. Haynes's intellect and diligence have been evident throughout her legal career, starting with her extraordinary academic record. After graduating first in her class from Florida Institute of Technology at the age of 19, Judge Haynes went on to graduate, with distinction, second in her class at Emory University School of Law at the age of 22. In her 21-year legal career, she has been involved in a wide variety of complex civil cases in both state and federal courts.

Ms. Haynes's professional excellence has been repeatedly recognized and honored by her peers in the legal community. Her many awards include the State Bar of Texas Presidential Commendation, the Dallas Association of Young Lawyers Foundation Award of Excellence, and the Dallas Women Lawyers Association Louise B. Raggio Award, which is awarded annually to a Dallas-area attorney who has worked to advance women in the legal profession, shown outstanding legal proficiency and the highest level of ethics, and made a significant contribution to the profession.

It is fitting that Ms. Haynes has received awards for her contributions to the legal profession, given that she has dedicated significant energy to promoting the professionalism and ethics that are central to the rule of law. She has written and



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spoken extensively on issues of civil trial litigation, professionalism, and ethics. Among her many professional leadership positions, she has served on the board of the Dallas Bar Association and the Professional Ethics Committee of the State Bar of Texas. Her life's work speaks to a belief in the high calling of a career in law, and a steadfast and accomplished pursuit of the profession's highest ideals.

Let me say in closing how much I appreciate the chairman holding this hearing. I look forward to working with the chairman to give Ms. Haynes a prompt up-or-down vote in this Committee, and on the Senate floor.

-30-

U.S. Senator Dianne Feinstein

**Introduction of Judge John Mendez**
**at Judicial Nominations Hearing**
**February 21, 2008**

I am pleased to introduce today's nominee for the district court in the Eastern District of California: Judge John A. Mendez.

Let me begin by explaining the urgency of filling this judgeship. Simply stated, the Eastern District of California is in a crisis. In 2005 and 2006, the district had the highest number of case filings in the nation. In 2007, the district ranked second out of all 94 Federal judicial districts in the number of new cases filed.



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Regrettably, the bench in the Eastern District has been understaffed throughout this period of heavy case filings. A temporary judgeship in the district expired in 2004 because the Senate failed to extend it. As a result, average caseloads in the Eastern District increased by 18 percent from 2004 through 2006, even as average caseloads nationwide declined.

In this Congress, I am pleased to be a co-sponsor of S. 1327, which would recreate the temporary judgeship in the Eastern District. The bill has already passed the Senate and is currently pending in the House.

In addition to re-creating the expired temporary judgeship, we clearly need to fill the judgeships that already exist in the Eastern District. Judge John Mendez is the nominee for a seat that was vacated in June 2007.



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Judge Mendez is a native Californian and is currently a judge on the Sacramento County Superior Court. He was born in Oakland and graduated with distinction from Stanford University, with a degree in political science. He went on to earn a law degree at Harvard Law School.

After law school he returned to California and worked in private practice in San Francisco from 1980 to 1984. From February 1984 through July 1986, Judge Mendez served as an Assistant United States Attorney in San Jose. He was assigned to the Criminal Division in the U.S. Attorney's office, and became a specialist in criminal law and procedure.

In 1986, Judge Mendez moved to Sacramento and returned to private practice. He focused on civil litigation and business litigation and rose to become a partner at the law firm of Downey, Brand, Seymour & Rowher.



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Judge Mendez was appointed as United States Attorney in San Francisco in 1992, the final year of George H.W. Bush's presidency. He served as U.S. Attorney for one year and was personally involved in major civil litigation and a criminal appeal in the Ninth Circuit Court of Appeals.

After leaving the U.S. Attorney's office, Judge Mendez was Of Counsel to the law firm Brobeck, Phleger & Harrison in San Francisco from 1993 to 1995. In the summer of 1995 he returned to Sacramento and joined the firm of Somach, Simmons & Dunn as a shareholder. His practice included complex commercial and environmental litigation and white-collar criminal defense work, as well as counseling clients on regulatory compliance.

Governor Gray Davis recognized his potential as a judge in 2001 and appointed him to the Sacramento County Superior Court. Judge Mendez was elected to retain that position in 2002 and continues to serve as a Superior Court Judge today.



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In addition to his service to the State of California, Judge Mendez has served the legal profession through leadership positions in the Hispanic National Bar Association and the Sacramento Chapter of the Federal Bar Association.

In California we have developed a bipartisan process for selecting Federal district court nominees. Under this system a committee of lawyers known as the Parsky Commission, which includes Democrats and Republicans, recommends qualified applicants to the President.

I am proud of this system, and pleased to report that Judge Mendez was recommended unanimously by the Parsky Commission to be nominated as a Federal district judge. By all accounts, he would make an excellent addition to the Federal bench in Sacramento.

I thank the Chairman for holding today's hearing and I urge my colleagues to move quickly in confirming Judge Mendez to the Federal district court.



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Statement of Senator Patrick Leahy,
Chairman, Senate Judiciary Committee,
Judicial Confirmation Hearing
February 21, 2008

Today the Committee is holding another hearing on judicial nominations. This is the second such hearing within two weeks.

The Committee is pleased to welcome the senior Senator from Virginia who is joining us today. Senator Warner has always appreciated the importance of the judiciary and the significance of judicial nominees. I was pleased to work with Senator Warner when his support for Roger Gregory helped the Senate finally to confirm the first African American to serve on the Fourth Circuit. Indeed, Judge Gregory was the first judicial nominee confirmed during my chairmanship in 2001.

Today, we will hear from Catharina Haynes, who has been nominated from Texas for a judgeship on the Court of Appeals for the Fifth Circuit. I know that Senator Cornyn is very interested in seeing her nomination proceed. We will also hear from Stanley Thomas Anderson, whose nomination to the United States District Court for the Western District of Tennessee is one that Senator Alexander raised with me. Our final nomination is that of John A. Mendez for appointment to the United States District Court for the Eastern District of California. Each of these nominations has the support of the home-state Senators.

Recently, the President and several Republican Senators held a partisan, political rally with judicial and executive nominees at the White House. I was surprised to see Judge Haynes at that photo opportunity, especially since I had already announced her hearing for today.

The facts are that during the last seven years, despite the efforts of the Bush administration to pack the federal courts and tilt them sharply to the right, this Committee and the Senate have worked hard to consider judicial nominations. The fact that we are proceeding today, during a congressional recess, is yet another indication of our efforts.

Last year the Senate confirmed 40 judicial nominees. That topped the total achieved in any of the three preceding years under Republican leadership. It was also more judges than were confirmed in 1996, 1997, 1999, or 2000, when a Republican-led Senate was considering President Clinton's nominations. Indeed, in the almost three years that I have chaired the Committee, the Senate has confirmed 140 of President Bush's lifetime appointments to our federal courts. That compares favorably to the total of 158 confirmations during the more than four years of Republican leadership of the Senate during this presidency.

I said that we would treat this President's nominees more fairly than Republicans treated President Clinton's, and we have. We have not pocket filibustered more than 60 of this President's judicial nominees, as had been done to President Clinton's nominees. We have not opposed them in secret or anonymously. On the contrary, during my chairmanship the views of home-state Senators, as reflected in the blue slips submitted to



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the Committee, were made public for the first time. We have considered nominations openly and on the record. We have proceeded with consideration of nominations I opposed, which is something that never happened under previous Republican leadership.

Today, we consider a nominee to the Fifth Circuit, a court to which 12 of the 16 active judges have been appointed by Republican Presidents. Republican efforts to stack this court included stalling consideration of several of President Clinton's outstanding nominees. Judge Jorge Rangel of Texas, Enrique Moreno of Texas, and Alston Johnson of Louisiana were never accorded the kind of hearing that Ms. Haynes is having today. Despite the fact that those on the other side of the aisle refused to proceed on any nominations to Fifth Circuit during President Clinton's entire second term, we are proceeding today.

In stark contrast to the practice of the earlier Republican leadership, when President Clinton's outstanding Fifth Circuit nominees were stalled without a hearing, I have held hearings on all six of the Fifth Circuit nominees of this President during my chairmanship, and the Committee has voted on all of the previous five. Vacancies on the Fifth Circuit are at an all-time low. Indeed, the vacancy for which Ms. Haynes has been nominated is the only one that exists on the Circuit. Contrast this with the situation during the Clinton years when the Chief Judge of the Circuit declared a Fifth Circuit emergency because of multiple vacancies that Republicans Senators refused to help to fill.

The Republican Senate chose to stall consideration of Circuit nominees and maintain vacancies during the Clinton administration. That Republican inaction increased the Circuit vacancies to 26 at the end of President Clinton's second term, and they rose to a high of 32 with the additional resignations during the change of administrations. By contrast, we have helped reduce Circuit court vacancies across the country to as low as 13 in 2007.

If the White House would work with us and with home-state Senators, we could have made even more progress. It is unfortunate that valuable time has been wasted on nominations such as the recently withdraw nomination of Duncan Getchell to one of Virginia's two vacancies on the Fourth Circuit. President Bush chose to ignore the bipartisan recommendations from Senator Warner and Senator Webb in making that nomination. We lost a year because of that ill-advised effort. Now that the nomination has finally been withdrawn, I wish that the White House would work with Senators Warner and Webb to name well-qualified, consensus nominees they both support so that we could move forward to fill those Virginia vacancies to the Fourth Circuit before the Thurmond Rule comes into force.

I would rather see us work with the President on the selection of nominees that the Senate can proceed to confirm than waste precious time fighting about controversial nominees who he selects in order to score political points.

# # # # #

**Ranking Member Arlen Specter**
**Statement for the Record**
**Judicial Nominations Hearing - February 21, 2008**

I want to thank Chairman Leahy for scheduling this judicial nominations hearing and Senator Warner for serving as Ranking Member. Since this hearing was scheduled during recess and without prior consultation with the Republican members of the Committee, it was impossible for the Republican members of the Committee to rearrange their schedules and attend today's hearing. Three Committee members were in the Middle East and the others were performing important work in their home states. I was prepared to cancel my previously scheduled work in Pennsylvania to attend this hearing until Senator Warner, who was in Washington, graciously agreed to attend.

While this hearing is a step in the right direction, I am still concerned that the confirmation process is not proceeding in a satisfactory manner, especially with respect to circuit court judges. Prior to this hearing, the Committee had not held a hearing for a circuit court nomination since September 25, 2007, nearly five months ago. And, the Committee only held hearings for four circuit court nominees in all of last year.

There are currently 10 nominations to the circuit courts pending in Committee, three of which are ripe for hearings, including Judge Haynes, and a fourth should be ready shortly. A fifth nominee, former Acting Attorney General



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Peter Keisler, is ready for a Committee vote and has been waiting for over a year and a half to get such a vote. Two of the nominees ready for hearings are nominated to the Fourth Circuit Court of Appeals. The Fourth Circuit, in particular, is in great need of new judges since one-third of the positions on that court are vacant. Despite the urgency to fill these vacancies, two Fourth Circuit nominees who are ready for hearings have been waiting for an exceptionally long time, one for over 200 days and another for over 150 days.

The importance of confirming circuit court nominees cannot be overstated. It is one of the Senate's most important functions. For the past quarter century, the number of circuit court confirmations in the final Congress of a presidency has averaged at 24, and the number of district court confirmations has averaged at 94. A Republican Senate confirmed 15 circuit court judges and 57 district court judges in President Clinton's final two years. Thus far in this Congress, the Senate has confirmed only 6 of President Bush's circuit court nominees and 34 district court nominees. Merely to keep pace with President Clinton's confirmation numbers in his final two years, the Senate must confirm 9 more circuit court nominees and 23 more district court nominees this year.

President Bush is even farther behind President Clinton in total confirmations when contrasting their entire terms, since President Clinton confirmed 65 circuit court and 305 district court judges while President Bush has



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so far confirmed only 57 circuit and 237 district court judges. At this point, if things don't change in our confirmation process in the Senate, the President's court appointments, to both circuit and district courts, will be an historic low for a two term President in modern times.

Although the circuit court nominees get the most attention, the district court nominations are also very important. Most federal litigation occurs at the district level, and thus, the workload of these judges is often very heavy. I am pleased that Judge Mendez and Judge Anderson were listed on today's hearing agenda, but I would also like to mention several other district court nominees who have been waiting an extraordinarily long time for a hearing in the Committee. One of these nominees, Tom Farr, nominated to the Eastern District of North Carolina, has been waiting well over a year for a hearing. He is unanimously well qualified, is nominated to fill a judicial emergency, and has the strong support of both of his home state senators. Two other nominees are from Senator Warner's home state of Virginia and have been waiting since November for their hearings. We have a busy agenda, but I have spoken with Chairman Leahy, and he has reiterated his belief that nominees with home state support should receive committee process in due course. I am hopeful that all of these nominees will receive hearings in the very near future, and I look forward to working with the Chairman to ensure that the President's nominees receive prompt consideration by the Committee.



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**Senator John Warner**

**Senate Judiciary Committee Hearing on Nominations**

**Opening Statement – February 21, 2008**

Chairman Leahy, thank you for holding this confirmation hearing and for extending to me the courtesy of joining the Senate Judiciary Committee today as Ranking Member.

Today's hearing represents a unique opportunity for me. For twenty-nine years, I have had the honor and privilege of serving in the United States Senate. During my Senate service, pursuant to Article II, Section 2, I have participated in the Constitutional process of "advice and consent" for the confirmation of 1,445 nominees to the federal courts. I also have appeared before this Committee to introduce a number of the fine Virginians who have been nominated to serve in the federal judiciary. However, this is my first opportunity to serve on the other side of this Committee's dais.



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Over the years, I have served as the Chairman and Ranking Member of the Senate Armed Services Committee and, on occasion, extraordinary circumstances prevented me from attending a scheduled hearing. From time to time, I have had to ask my colleagues to assume these duties so that my Committee could continue its important work. Such is the case today for my colleagues on this side of the aisle. Many have important prior commitments which prevent them from attending today's hearing. While some are conducting business in their home states, I understand that others are participating in a CODEL in the Middle East.

For these reasons, I appreciate the chance today to join with Chairman Leahy and these distinguished nominees as they appear before the Committee.



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I would like to welcome the three nominees to today's hearing: Catharina Haynes, John A. Mendez, and Stanley Thomas Anderson. I congratulate each of you on your nominations. All three of the nominees have served, or are currently serving, as judges.

The first nominee, Judge Catharina Haynes, is nominated to a position on the U.S. Court of Appeals for the Fifth Circuit that has been designated a "judicial emergency." Judge Haynes received her B.A., *with highest honors*, from the Florida Institute of Technology in 1983, where she was first in her class. In 1986, she received her J.D., *with distinction,* from Emory University School of Law where she was second in her class and Order of the Coif.



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After law school, Judge Haynes joined the law firm of Thompson & Knight as an associate. In 1988, she joined the law firm of Baker Botts as an associate. She became a partner at Baker Botts in 1995. At Baker Botts, Judge Haynes had a broad civil trial and appellate practice, and she is Board Certified in Consumer and Commercial Law by the Texas Board of Legal Specialization, which is a designation shared by less than 100 attorneys in Texas. This specialty encompasses transactions involving consumers, sales of goods or services, lending transactions, insurance, and deceptive trade practices.

In 1998, she was elected to the bench of the 191st District Court for Dallas County. She was reelected for another four-year term in 2002, which expired in December 2006. In January 2007, she rejoined Baker Botts as a partner. The ABA has rated Judge Haynes as "well qualified."



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Judge John Mendez is nominated to the Eastern District of California, which is also a judicial emergency. Judge Mendez received his B.A. from Stanford University, graduating with distinction in 1977, and then received his J.D. from Harvard Law School in 1980. After spending a few years in private practice, Judge Mendez became an assistant United States Attorney for the Northern District of California. Then, after returning to private practice for a few more years, he served as U.S. Attorney for the Northern District of California where his jurisdiction included all federal cases in the coastal counties of California from Monterey County to the Oregon border.



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The remainder of his career in private practice, beginning in 1993, involved complex commercial and environmental litigation, white collar criminal defense, and regulatory and administrative compliance counseling. In 2001, he was appointed to be a Sacramento County Superior Court judge, and he won election to a six-year term in that position in 2002. Judge Mendez has received a substantial majority rating of "Well Qualified" from the American Bar Association, with a minority rating of "Qualified."



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Finally, Judge Thomas Anderson has been nominated to the Western District of Tennessee. Judge Anderson received his B.S. from the University of Tennessee at Martin in 1976 and his J.D. from the University of Memphis School of Law in 1980. After a few years in private practice, Judge Anderson was appointed first as a Commissioner and then as an Administrative Law Judge to the Tennessee Claims Commission. When his tenure expired, he opened Anderson Law. In 2003, Judge Anderson was selected to be a U.S. Magistrate Judge for the Western District of Tennessee, a position he holds today. The American Bar Association Standing Committee has rated Judge Anderson unanimously "qualified."

Again, I commend the nominees, and I thank Chairman Leahy for the opportunity to join the Judiciary Committee today.



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# NOMINATION OF MARK S. DAVIS, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA; DAVID GREGORY KAYS, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI; DAVID J. NOVAK, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA; STEPHEN N. LIMBAUGH, JR., TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MISSOURI; AND ELISEBETH C. COOK, TO BE ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE

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**THURSDAY, APRIL 3, 2008**

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

The Committee met, pursuant to notice, at 2:20 p.m., in room SD–106, Dirksen Senate Office Building, Hon. Herb Kohl, presiding.

Present: Senators Specter and Kyl.

## OPENING STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. The Committee will come to order.

We welcome a distinguished panel of five nominees before us today, as well as the nominees' families and friends who are here in support.

We also welcome the home State Senators who are here to introduce them: Senator Warner and Senator Bond, who are here now, and Senator Webb and Senator McCaskill, who may arrive.

Judicial nominations are among the most important duties of the Senate Judiciary Committee. The Senate has a responsibility to ensure that any nominee possess the qualifications, integrity, and the independence necessary to carry out his or her responsibilities to the American people.

A Federal judgeship is a lifetime appointment, so we take this responsibility most seriously. Today the committee will consider four District Court nominations, two in Virginia and two in Mis-



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souri. All four enjoy the strong support of their home State Senators. We will also consider the nominee for Assistant Attorney General for the Office of Legal Policy in the Department of Justice.

We will proceed in the following manner. After opening statements from any Committee members, we would like for the Senators present to introduce their nominees. Then we will invite the nominees themselves to take the oath, as well as present any opening remarks or introduce their family and their friends. Then we will take the time for questions.

Senator Specter is here, and we ask him for his comments.

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

Senator SPECTER. Well, thank you very much, Mr. Chairman. I am delighted to see our colleagues, Senator Warner and Senator Bond, here today for purposes of making introductions. Senator Webb has just joined us. We welcome the nominees and their families and we will do our best to process these nominations through the Committee for up-or-down votes.

Earlier today in this room we had an extended discussion on the confirmation process. I think it is only fair to let all the nominees and others interested in what is going on, candidly, about the difficulties of the confirmation process. We have had a practice of slow-downs during the last 2 years of a presidency. It happened in the last 2 years of President Reagan, the last 2 years of President Bush the first, and happened in the tenure of President Clinton, where Republicans were in control for 6 years.

In 2005, we had very extended filibusters and challenge of changing the rules on filibustering with the so-called Constitution, or nuclear, option. It is my hope we'll be able to process these nominees. We're obviously concerned about the qualifications. As the Chairman, Senator Kohl, has commented, lifetime appointments are very, very important. But I do believe we need to proceed with the hearings and evaluation and vote up or down on these nominees. I will do my best to move the process forward.

So, on with the show, Mr. Chairman.

Senator KOHL. Thank you very much, Senator.

Senator SPECTER. Senator Warner is next to you.

Senator KOHL. If you would like to make your introduction, Senator Warner.

## PRESENTATION OF MARK DAVIS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA AND DAVID J. NOVAK NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA BY HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you, Mr. Chairman, and my lifetime friend, Senator Specter. Senator Specter and I have been here, we're going into our 30th year in this institution. I value the friendships that I've had with you, sir, and Senator Specter, and the chairman of this Committee, Chairman Leahy, and many others. I've appeared before this Committee, I'm not sure how many times, Mr. Chairman, but I know that I have either introduced or

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sat here on behalf of every member of the Federal judiciary in the Commonwealth of Virginia.

I just think it's one of the most important functions of a United States Senator to work with the President, to work with his colleagues in the Senate, in the advice and consent process. I commend you, Mr. Chairman, for the dedicated work that you had.

Today, our two nominees are from Virginia. It's an unusual situation. I'm privileged to introduce Chief Judge Spencer, the Federal District Court of the Eastern District of Virginia, who has come on behalf of the candidates today. I'd ask if Judge Spencer might rise to be recognized. Thank you, Your Honor.

We also have Judge Morrison of the State Court of Virginia who has come on behalf of—Judge Morrison, we thank you.

Now, Mr. Chairman, I would like unanimous consent to place into the record my statement. I see my colleague is here. I can be very brief, because the records speak for themselves and need not have this old, crackly voice here, which is not working too well today, to cover it.

The first nominee I'd like to address is Judge Davis. He's Chief Judge on a division of our State Court. This young man started in my office as an intern, Mr. Chairman, and then came back and worked on the staff in my office. His whole judicial career, up through his position as Chief Judge, is carefully outlined in this statement. Without any hesitation, I unequivocally back this nomination and am very, very proud to see one of my staff members come before the U.S. Senate to be recognized under the advice and consent constitutional procedures for elevation to the judiciary. I thank you.

Next, is a gentleman, Mr. Novak, whom I have come to know in the process with my good friend, Senator Webb and I. We work together as a team and we interview extensively many, many individuals carefully before we first submit the names to the President, and then before we come here. I wish to thank Senator Webb. I've worked in a similar capacity with all of my partners here in the Senate and the State of Virginia, be they Republican or Democrat, to see that we put forward for the judiciary only those we deem qualified.

Now, this young man, having been a Federal prosecutor myself many, many years ago, I would call him the prosecutor's prosecutor. He has done so much in his lifetime in the prosecutorial work to see that people are fairly prosecuted and to carry out the law of the land, which allegedly has been broken in the various prosecutions. Again, his entire biography and all the important positions that he's held are captured in detail in my statement. Likewise, I put my unequivocal support behind this fine gentleman.

I wish to also bring to the Chairman's attention and that of the distinguished Ranking Member that I have spoken to either the Senators themselves or their senior staff on behalf of this Committee. There is a matter with Mr. Novak. It's being reviewed within the Department of Justice. There's knowledge in here with your staff, and I'm confident that this matter will be completely resolved prior to the action of this Committee.

And last, Mr. Chairman, I introduce Ms. Elisebeth Cook. Now, each of these distinguished candidates has their family here. Per-

haps, I think your protocol is, when they come they introduce their own families. She's joined by members of her family today. This fine nominee is nominated to serve as the Assistant Attorney General responsible for leading the Office of Legal Policy, or the OLP, as we know it. That serves as the principal office for the planning, development, and coordination of high-priority policy initiatives from the Department of Justice, and works closely with the President on the selection process for the Federal judiciary.

Again, Phi Beta Kappa. I need not go further. It's all in here, an extraordinary career for this magnificent female professional.

I thank you, distinguished Chairman and the distinguished Ranking Member, and ask again that my full statement be placed in the record.

Senator KOHL. Thank you, Senator Warner. It shall be done, without objection.

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

Senator KOHL. Senator Webb, would you like to speak?

## PRESENTATION OF MARK S. DAVIS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA AND DAVID J. NOVAK, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA BY HON. JIM WEBB, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WEBB. Thank you, Mr. Chairman and Ranking Member Specter. I would like to begin by associating myself with all the remarks of our senior Senator from Virginia. Actually, as he was giving his remarks, I was sitting here remembering that, 24 years ago this very month, Senator Warner sat next to me during my confirmation hearing to be Assistant Secretary of Defense, and introduced me. So when we're talking about trying to move things forward in a bipartisan manner here in the Senate, that is one example among many of how we have been able to work over many years together.

I would like to add my own strong support for the nominations of Judge Mark Davis and Mr. David Novak, and also I'm pleased to join Senator Warner in introducing Elisebeth Cook Collins, who is a Virginian who has been nominated as Assistant Attorney General for Legal Policy at the Department of Justice. We all know the role that the Constitution assigns the Senate in the advice and consent process with respect to our judgeships. These are lifetime appointments.

Virginians expect our Senators to take very seriously our constitutional duties and to look beyond party affiliations to impartial, balanced, fair-minded criteria in examining those people who we are going to trust in those fiduciary responsibilities.

Senator Warner and I, early on, undertook a careful and deliberative joint process in order to find the most qualified judicial nominees. This process involved a thorough records review, rigorous interviews jointly held, asking for the opinions of the bar associations, many different bar associations in Virginia, and through that process we jointly concurred in the high qualifications of Judge Davis, and also Mr. Novak.

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So, without going into any duplicative detail in terms of qualifications, I would ask that my full statement be inserted into the record of this hearing, and I would like to associate myself in full measure with what Senator Warner has already said.

Senator KOHL. Thank you, Senator Webb. Without objection, it will be done.

Senator WEBB. Thank you, Mr. Chairman.

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

Senator KOHL. We have two Senators from Missouri with us at this point. Senior Senator Chris Bond?

**PRESENTATION OF DAVID GREGORY KAYS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI AND STEPHEN N. LIMBAUGH, JR., NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MISSOURI BY HON. CHRISTOPHER S. BOND, A U.S. SENATOR FROM THE STATE OF MISSOURI**

Senator BOND. Thank you very much, Mr. Chairman, Senator Specter.

I, too, would associate myself with the general comments made by the distinguished senior Senator from Virginia. He always says it well, and he did again today. I thank the members of the Committee for holding this hearing to consider the nominations for the Eastern and Western Federal District Court benches in Missouri, the Honorable Stephen Limbaugh and the Honorable Greg Kays, or as he's known in the formal papers, as David Gregory Kays, so there is no confusion about referring to him by his middle name.

Your holding these hearings today, reporting these nominees favorably, and ensuring the full Senate approve their nomination will help show that the Federal judicial nominating process can work to provide Federal judges our courts so desperately need.

I'm so pleased and proud to be able to be here today, along with my colleague, Senator McCaskill, to introduce such outstanding nominees to the Federal bench. Both Judge Kays and Judge Limbaugh share bipartisan support, both have fine judicial minds, and are public servants. They both represent the values and character of my Missouri constituents.

Judge Kays hails from Lebanon, Missouri, a mid-sized city in Southwest Missouri. Folks from Southwest Missouri are hard-working, God-fearing, family loving. Of course, I like to think of all Missourians that way, but they're particularly proud to do so. But you will see today, as I see, that Judge Kays' sharp legal mind and record of experience as a State Circuit Court judge—that's a trial judge—are matched equally by a midwesterner's modesty, earnestness, and commitment to duty and service.

Now, Kansas City is in the Western District of Missouri and produces many big-city lawyers and judges, some of whom I was also proud to recommend, but I am especially happy that this occasion will allow the nomination and hopeful confirmation of a judge from Laclede County.

Judge Limbaugh also hails from a mid-sized city, Cape Girardeau, on the Mississippi River in southeastern Missouri. Judge Limbaugh and his entire family, which includes more than

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one greatly distinguished judge, represents the excellence that can be achieved and produced in Missouri.

I would note that his grandfather, one of the leaders of the Bar for many years in southeast Missouri, I heard him speak when he was 100 years old, a very compelling speaker who told me at the time that he had practiced law with my grandfather some 50 years before, Judge Rush Limbaugh, Sr. was still a very active and effective advocate at that time.

Judge Stephen Limbaugh is a gentleman. Even his colleagues on the Supreme Court, who from time to time disagree with him, believe there to be no finer man or judge than Steve Limbaugh. They believe, and I agree, that Judge Limbaugh has the attributes necessary to be an outstanding Federal judge. So, this process thus far has worked as it should.

Outstanding candidates with fine legal minds, exceedingly fine character, and bipartisan support are here before you today. I urge you to embrace these models of integrity and excellence. You will be proud, I assure you, of the service they provide to the Federal court, and we are especially proud of them in Missouri.

I thank you and the Committee.

Senator KOHL. Thank you for your statement, Senator Bond.

Senator McCaskill.

**PRESENTATION OF DAVID GREGORY KAYS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI AND STEPHEN N. LIMBAUGH, JR., NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MISSOURI BY HON. CLAIRE M. MCCASKILL, A U.S. SENATOR FROM THE STATE OF MISSOURI**

Senator MCCASKILL. Thank you, Mr. Chairman, and thank you, Senator Specter, for being here.

I want to first—maybe the right word today would be to say "ditto" to the words of the other Senators from Virginia, and certainly my senior citizens—

[Laughter.]

Senator BOND. Senator. Senator.

Senator MCCASKILL. Excuse me. The senior Senator from Missouri.

Let me tell you that I have a connection to both of these nominees. Greg Kays is from my mother's hometown and where I spent part of my childhood. And although I don't know him as well personally as I do Judge Limbaugh, I will tell you that there has been an outpouring of support for Greg Kays from his community.

It's a small-knit community and there are a lot of people that live in Lebanon that don't share my politics, but even those who share my politics said, listen, this is a good man. He has been a fine trial judge. As someone who has spent some time in a courtroom, as I know my colleague from Pennsylvania has, what you want from a trial judge is respect for lawyers in the courtroom and respect for the law, and an understanding that the judge is there to serve the public and not their ego. In fact, Greg Kays has that reputation among everyone who appears in his courtroom, and I think he would be an outstanding member of the Federal bench and he would be, in fact, replacing another trial judge from Lebanon, Mis-

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souri, a fairly small community in southwest Missouri that I feel very close to.

As to Judge Limbaugh, I consider him a friend. I think that I would quote briefly from a letter that was sent to me by Judge Wolfe of the Missouri Supreme Court: "Judge Limbaugh has served with distinction on the Missouri Supreme Court for many years, and two judges that are on the court that came to the court through Democratic Governors have expressed publicly what a fine judge he is." This letter is particularly meaningful because not only was he appointed by Governor Carnehan, but he had served in Governor Carnehan's administration. He wrote this letter, referring to Judge Limbaugh, "He is a magnificent judge. He is civil, he is polite, he is extremely conscientious and hardworking. Most of all, he truly cares about the law. He is the kind of judge with whom you can disagree and the matter is never disagreeable."

There have been many kind words said about Judge Stephen Limbaugh in terms of his work, his collegiality, but once again, he is a former trial judge. He came to the Supreme Court, the highest appellate court in our State, from a courtroom. I think it's wonderful that he wants to return to a courtroom, because I think the essence of a trial judge is one who understands that the battle before him is one that it is an honor to be in a position to make decisions as to the law and to try to make sure that law is applied fairly, regardless of who comes to the courtroom.

So I think these are two outstanding nominees and I'm proud of the bipartisan manner in which my colleague, the senior Senator from Missouri—

Senator BOND. Thank you.

Senator MCCASKILL.—has worked with me on these nominations. I recommend them to the Committee, I recommend them to the Senate, and I appreciate your time today.

Thank you very much.

Senator KOHL. Well, we thank both the senior and the junior Senator from Missouri. We appreciate your being here.

At this point we'd like to call all five nominees to come forward and to remain standing. If you'll raise your right hand, I'll administer the oath.

[Whereupon, the nominees were duly sworn.]

Senator KOHL. You may be seated.

Starting with Ms. Cook, we will ask each nominee to introduce themselves, make any brief comments you'd like to make, and introduce members of your family as you may see fit.

Ms. Cook.

**STATEMENT OF ELISEBETH C. COOK, NOMINATED TO BE ASSISTANT ATTORNEY GENERAL FOR THE OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE**

Ms. COOK. Thank you, sir. First, I wanted to take you for taking the time to chair this hearing today, and Senator Specter, for being here today. I also wanted to thank the Chairman for scheduling this hearing. I wanted to thank the President for this nomination and the Attorney General for the faith that he has placed in me.

I also wanted to take the opportunity to introduce my family members who are here. My parents, Tom and Martha Collins, and

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my husband, Jim Cook. Jim's parents, Ron and Maryann, were hoping to come today, but Maryann's mother is not well so they were unable to make it.

Senator SPECTER. Would you ask your relatives to stand so we can greet them?

Ms. COOK. Please stand.

Senator SPECTER. Nice to have you all here.

Ms. COOK. And I also wanted to thank my friends and colleagues who have taken time out of their busy schedules to be here today.

Senator KOHL. Thank you, Ms. Cook.

Mr. Davis.

[The biographical information follows.]

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR NON-JUDICIAL NOMINEES**

**PUBLIC**

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

   Elisebeth Collins Cook
   Elisebeth Bridget Collins

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

   Assistant Attorney General (Legal Policy)

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

   Office: United States Department of Justice
   950 Pennsylvania Avenue, NW
   Room 4238
   Washington, DC 20530

   Residence: Arlington, VA

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

   1975; Edina, Minnesota

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

   I am married to James Andrew Cook.
   He is employed as a Police Officer, Mobile Tactical Unit, Amtrak
   50 Massachusetts Avenue, NE
   Washington, DC 20002.

   We do not have children.

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



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Harvard Law School, 1997-2000; J.D. awarded June, 2000

University of Chicago, 1993-1997; B.A. awarded June, 1997

While at University of Chicago, I attended classes at Université de Paris, Sorbonne and Université de Paris, Nanterre, through a study abroad program (June, 1995 - March, 1996).

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

March, 2005-present
United States Department of Justice
Office of Legal Policy
950 Pennsylvania Avenue, NW
Washington, DC 20530
Acting Assistant Attorney General, January, 2008-present
Deputy Assistant Attorney General, October, 2006-January, 2008
Counselor, Spring, 2006-October, 2006
Senior Counsel, March, 2005-Spring, 2006

November, 2002-March, 2005
Cooper & Kirk, PLLC
1500 K Street, NW
Washington, DC 20005
Associate

August, 2001-August, 2002
United States Court of Appeals for the District of Columbia Circuit
Honorable Laurence H. Silberman
333 Constitution Avenue, NW
Washington, DC 20001
Judicial Law Clerk

August, 2000-August, 2001
United States District Court for the Southern District of Texas
Honorable Lee H. Rosenthal
515 Rusk Street
Houston, TX 77002
Judicial Law Clerk



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Summer 2000
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, NW
Washington, DC 20036
Summer Associate

October, 1998-April, 2000
Harvard Law School Professors Hal Scott and Charles Fried
1563 Massachusetts Avenue
Cambridge, MA 02138
Research Assistant

Summer 1999
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20007
Summer Associate

Summer 1998
Salès, Vincent & Associés
43 Rue de Faubourg St. Honoré
Paris, France 75008
Summer Associate

Summer 1997
Century Pool Management
5020 Nicholson Ct., Suite 201
Lifeguard/Pool Manager

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

I have not served in the military.

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.

Attorney General Award (2)
Phi Beta Kappa
Graduate with Honors in History, French and the College
Theodore Neff Prize for Excellence in French Language and Literature
Jane Morton Scholar (extracurricular and academic achievement)
Cum Laude graduate from Harvard Law School
Community Service Award (Harvard Law School)



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

American Bar Association

11. **Bar and Court Admission**:

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

Virginia, October 28, 2002
District of Columbia, November 2002

There have been no lapses in membership.

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

District of Columbia courts, 11/02
Supreme Court of Virginia, 10/28/02
United States Court of Appeals for the Second Circuit, 5/1/07
United States Court of Appeals for the Third Circuit, 2/03/04
United States Court of Appeals for the Fourth Circuit, 10/28/02
United States Court of Appeals for the Ninth Circuit, 4/18/06
United States Court of Appeals for the District of Columbia Circuit, 6/03/03
United States Court of Appeals for the Federal Circuit, 5/03/03
United States District Court for the District of Columbia, 6/02/03
United States District Court for the Eastern District of Virginia, 1/28/04
United States Court of Federal Claims, 12/09/02

There have been no lapses in membership.

12. **Memberships**:

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

Harvard Law School Alumni Association (2000-present)
McLean Baptist Church (app. 1983-present)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01084 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Terrorist Screening Center Board of Governance (July 2006-present)
University of Chicago Alumni Association (1997-present)
Federalist Society
Co-Chair, Administrative Law (Judicial Review) Practice Group (app. 2004)

b. Please indicate whether any of these organizations listed in response to 12(a) above currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

None of the organizations listed above discriminate or have discriminated to the best of my knowledge.

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

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

None.

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

None.

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

None.

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



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01085 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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speech, and a summary of its subject matter. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke.

NAPABA (National Asian Pacific American Bar Association) Southeast Regional Conference, National Press Club, March 18, 2006
PATRIOT Act and civil liberties after 9/11

Houston Federalist Society, Houston, TX, February 23, 2007
Goals and Priorities of the Department of Justice and Office of Legal Policy

Federal Bar Association Panel, Crystal City, VA, March 24, 2007
Courts-specific legislative agenda; I have no notes or outline of this discussion which included court security, judicial pay raises, and judicial nominations.

Fairfax County sponsored panel on Identity Theft, Fairfax, VA, April 12, 2007
Identity Theft, President's Task Force

National Youth Leadership Forum, Washington, DC, November 20, 2007
The Department of Justice and the Office of Legal Policy

I do not speak from prepared texts.

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

I have not given any interviews.

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

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

United States Department of Justice
Office of Legal Policy
Acting Assistant Attorney General, January, 2008-present
Deputy Assistant Attorney General, October, 2006-January, 2008
Counselor, Spring, 2006-October, 2006
Senior Counsel, March, 2005-Spring, 2006
Appointed



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01086 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

It is possible that I have been a member of the Republican National Committee by virtue of having paid to attend a function in January, 2005.
I also contributed legal services in 2004 to Lawyers for Bush/Cheney 2004.

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

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

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

I served as a clerk to the Honorable Laurence H. Silberman
United States Court of Appeals for the District of Columbia Circuit
August, 2001-August, 2002

I also served as a clerk to the Honorable Lee H. Rosenthal
United States District Court for the Southern District of Texas
August, 2000-August, 2001

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

I have never practiced law alone.

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

March, 2005-present
United States Department of Justice
Office of Legal Policy
950 Pennsylvania Avenue, NW
Washington, DC 20530
Acting Assistant Attorney General, January, 2008-present
Deputy Assistant Attorney General, October, 2006-January, 2008
Counselor, Spring, 2006-October, 2006
Senior Counsel, March, 2005-Spring, 2006



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November, 2002-March, 2005
Cooper & Kirk, PLLC
1500 K Street, NW
Washington, DC 20005
Associate

Summer 2000
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, NW
Washington, DC 20036
Summer Associate

b. Describe:

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

After law school, I joined Gibson, Dunn & Crutcher, as a Summer Associate. I worked on a variety of commercial litigation projects—both trial and appellate.

I then clerked for two years—one year at the District Court level, one year at a Court of Appeals. During that time, I performed typical law clerk duties, including observing court proceedings and assisting my judges as they required.

Upon completion of my second clerkship, I joined Cooper & Kirk, PLLC as an associate. While at Cooper & Kirk, I had the opportunity to work on a broad range of litigation, from trial to appellate to Supreme Court. A significant percentage of my practice focused on *Winstar* litigation—litigation that resulted from the Savings and Loan crisis of the 1980s. With respect to the *Winstar* litigation, I performed a wide range of duties, including serving as the sole associate on one trial, second chair in another trial, taking and defending depositions, drafting and arguing motions, and drafting appellate briefs.

Since joining the Department of Justice, my work has been primarily policy focused, although I have done significant work with respect to judicial nominations over the past year. The Office of Legal Policy is charged with developing, coordinating, and effectuating major policy initiatives of the Department of Justice. While at the office, I have worked on a range of policy issues from national security to the President's Identity Theft Task Force. My work has included drafting legislation, commenting on proposed legislation, briefing Administration officials and congressional staff, and developing policy initiatives.



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

In addition to the *Winstar* work described above, at Cooper & Kirk, I spent significant time on a school desegregation case, assisting in the representation of a school district seeking unitary status. Other types of litigation included representation of attorneys who had been called before a grand jury investigating their clients, and counseling of a former Member of Congress concerned about a possible ethics investigation. Typical clients included Ford Motor Company, Bank of America, and Marion County School District.

While at the Department of Justice, I have also had the opportunity to represent the United States in several immigration cases, including serving as counsel of record on briefs in the courts of appeals and arguing two cases in the courts of appeals.

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

While in private practice, my practice was almost exclusively litigation. I appeared in court frequently, particularly toward the end of my time in private practice. While in government service I have appeared in court infrequently.

i. Indicate the percentage of your practice in:
   1. federal courts: 98%
   2. state courts of record: 2%
   3. other courts.

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 98%
   2. criminal proceedings: 2%

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

I have tried two non-jury cases to verdict. In the first trial, I was the sole associate counsel, on the second trial I was second chair.

i. What percentage of these trials were:
   1. jury;
   2. non-jury: 100%

e. Describe your practice, if any, before the Supreme Court of the United States. Please supply four (4) copies of any briefs, amicus or otherwise, and, if



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01089 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have not argued a case before the Supreme Court. I have assisted in briefing two amicus briefs—one as a summer associate in *Board of Regents of the University of Wisconsin System v. Southworth*, 98-1189, the other as an Associate at Cooper & Kirk in *Silveria v. Lockyear, cert. denied*, 124 S. Ct. 803 (2003). It is possible that I contributed to other oppositions to or petitions for certiorari, but I do not recall.

16. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    a. the date of representation;

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

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

1. *Citizens Federal Bank v. United States*, 92-656; App. April 2004-March 2005 United States Court of Federal Claims; Judge George Miller

    Citizens Savings Bank sued the United States for money damages arising out of a breach of contract that was entered into as part of the Savings & Loan crisis of the 1980s. This case is a *Winstar* case. Citizens prevailed in the Court of Federal Claims and was awarded almost $19 million in damages. I served as second chair during the trial and was heavily involved in all aspects of pre-and post-trial briefing. After I left the firm, Citizens prevailed on appeal, and the damages have been awarded.

    Co-Counsel:
    David Thompson
    Cooper & Kirk, PLLC
    1523 New Hampshire Avenue, NW
    Washington, DC 20036
    202-220-9600

    Opposing Counsel:
    Delisa Sanchez
    United States Department of Justice
    1100 L Street, NW



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01090 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Opposing Counsel:
Kyle Chadwick
United States Department of Justice
1100 L Street, NW
Washington, DC 20530
202-616-0476

6. *Granite Management Company v. United States*, 04-5065; App. February 2004-March 2005; United States Court of Appeals for the Federal Circuit; Judges Mayer, Friedman, and Clevenger

In this *Winstar* case, Granite Management brought a suit for money damages against the United States arising out of the Savings & Loan crisis of the 1980s. The Court of Federal Claims entered summary judgment for the company on the issue of liability but granted summary judgment for the United States as to damages. After I left the firm, the Federal Circuit largely affirmed as to damages, but remanded for consideration of one theory of recovery. I am unaware of the current status of the claims, and Cooper & Kirk no longer represents Granite Management. I was the sole associate on the case and assisted in the briefing before the trial and appellate courts.

Co-Counsel:
Charles J. Cooper
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Opposing Counsel:
Tarek Sawi
United States Department of Justice
1100 L Street, NW
Washington, DC 20530
202-616-0320

7. *United States v. Marion Country School District*, 5:78-cv-22-OC-20; United States District Court for the Middle District of Florida; Judge Schlesinger

The United States originally sued Marion Country School District for civil rights violations, and the parties entered into a Consent Decree. Cooper & Kirk was engaged in 2004 to seek unitary status and release of Marion Country from the



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01091 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Consent Decree. I assisted in preparing the school district for a Unitary Status hearing, which was held after I left the firm. Marion County's Motion for Unitary Status was granted in January, 2007, and the case was dismissed.

Co-Counsel:
Michael W. Kirk
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Opposing Counsel:
Tamara Kassabian
United States Department of Justice
601 D Street, NW
Washington, DC 20004
202-616-3899

8. *Rozhelyuk v. Gonzales*, 05-75480; App. May 2006-February 2007; United States Court of Appeals for the Ninth Circuit; Judges Beezer, Fernandez, and McKeown

Lidiya Rozhelyuk and her 14-year-old daughter, Nataliya Sorokhan, natives and citizens of the Ukraine, petitioned for review of the Board of Immigration Appeals' decision that affirmed the Immigration Judge's denial of their applications for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). The Ninth Circuit denied the petition for review. I served as counsel of record on behalf of the government in the Ninth Circuit and briefed the petition for review.

Co-Counsel:
Jonathan Cohn
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
202-353-7958

Opposing Counsel:
Leah W. Hurwitz, Esq.
2727 Camino del Rio South, Suite 110
San Diego, CA 92108
(619) 239-7855

9. *Vasquez-Arellanes v. United States*, 05-76399; App. April 2006-present; United States Court of Appeals for the Ninth Circuit; No Panel Identified



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01092 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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In this immigration case, the petitioner seeks review of an Immigration Judge's decision to deny her cancellation of removal for nonpermanent residents, and the Board of Immigration Appeals' affirmance of that decision. The petitioner contends that the Immigration Judge erroneously concluded that she lacked the requisite good moral character. I serve as counsel of record for the government and briefed the petition for review in the Ninth Circuit.

Co Counsel:
Jonathan Cohn
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
202-353-7958

Opposing Counsel:
Daphna Mendelson
295 89th Street, Suite 201
Daly City, California 94015
650-757-8500

10. *AmBase Corporation v. United States*, 93-531C; App. November 2002-March 2005; United States Court of Federal Claims; Judge Loren Smith

In this *Winstar* suit, a holding company which owned defunct thrift and corporation which owned all of holding company's stock brought suit for money damages against the United States alleging that enactment of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) breached a contract. The Federal Deposit Insurance Corporation (FDIC) intervened as successor to rights of thrift. AmBase filed a motion to dismiss the FDIC, and a motion to define the measure of damages. Judge Smith held that there was jurisdiction to review the FDIC's administration of the thrift receivership when determining the value of damages to be awarded to thrift shareholders. I assisted in the briefing before the Court of Federal Claims. This suit is currently set for trial.

Co-Counsel:
Charles J. Cooper
Cooper & Kirk, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
202-220-9600

Opposing Counsel:
David Levitt
United States Department of Justice



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1100 L Street, NW
Washington, DC 20530
202-307-0309

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 fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

    In my current position, very little of my work involves litigation; instead, I work primarily on development of legal policy. This work includes drafting legislation, analyzing legislative proposals, and implementing statutory requirements.

    While in private practice, I was involved in some legal activities that did not involve litigation; for example, I assisted in the representation of a former Member of Congress who was concerned that he could be the subject of an ethics investigation. I also assisted in counseling a client as to the potential ramifications of a legislative proposal for that client's organization.

    I have not performed any lobbying.

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

    I have not taught any courses.

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

    Pursuant to agreement, Cooper & Kirk, PLLC holds my 401(k). I also participate in the Thrift Savings Plan through my employment with the Department of Justice.

20. **Outside Commitments During Service**: 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.

    I do not.



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

    Please see attached financial disclosure report.

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

    Please see attached Net Worth Statement

23. **Potential Conflicts of Interest**:

    a. Identify any affiliations, pending litigation, financial arrangements, or other factors that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

       The only potential conflicts of interest that could arise would involve matters that I handled in private practice (which did include suits against the United States), and any legislation or proposal that could provide a financial benefit to me and/or my husband.

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

       In the event of a potential conflict of interest, I will consult with the ethics officials for the Department of Justice.

24. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each. If you are not an attorney, please use this opportunity to report significant charitable and volunteer work you may have done.

    While in private practice, I assisted in multiple representations undertaken for reduced fees or pro bono. For example, I assisted in the drafting and filing of a brief on behalf of a public interest organization seeking to protect its First Amendment rights. In addition, I assisted in the representation of an individual challenging a federal regulation that had been construed to prohibit him from sending a bible, political magazines, and other material to his son, who was then serving in Kuwait or Saudi Arabia.



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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 | | 10 | 307 | Notes payable to banks-secured | | | |
| U.S. Government securities-add schedule | | 5 | 688 | Notes payable to banks-unsecured | | | |
| Listed securities-add schedule | | 68 | 338 | Notes payable to relatives | | | |
| Unlisted securities--add schedule | | | | Notes payable to others | | | |
| Accounts and notes receivable: | | | | Accounts and bills due | | 22 | 131 |
| Due from relatives and friends | | | | Unpaid income tax | | | |
| Due from others | | | | Other unpaid income and interest | | | |
| Doubtful | | | | Real estate mortgages payable-add schedule | | 301 | 330 |
| Real estate owned-add schedule | | 450 | 000 | Chattel mortgages and other liens payable | | | |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 12 | 000 | Student Loans | | 26 | 479 |
| Cash value-life insurance | | | | | | | |
| Other assets itemize: | | | | | | | |
| IRA | | 2 | 335 | | | | |
| TSP Account | | 45 | 074 | | | | |
| | | | | Total liabilities | | 349 | 940 |
| | | | | Net Worth | | 243 | 802 |
| Total Assets | | 593 | 742 | Total liabilities and net worth | | 593 | 742 |
| CONTINGENT LIABILITIES | | | | GENERAL INFORMATION | | | |
| As endorser, comaker or guarantor | No | | | Are any assets pledged? (Add schedule) | NO | | |
| On leases or contracts | No | | | Are you defendant in any suits or legal actions? | NO | | |
| Legal Claims | No | | | Have you ever taken bankruptcy? | NO | | |
| Provision for Federal Income Tax | No | | | | | | |
| Other special debt | NO | | | | | | |

**FINANCIAL STATEMENT**

NET WORTH SCHEDULES

| | |
|---|---|
| U.S. Government Securities | |
| Series EE and I Bonds | $ 5,688 |
| | |
| Listed Securities | |
| Evergreen | $ 20,786 |
| Fidelity | 587 |
| Wachovia 401(K) | 46,965 |
| Total Listed Securities | 68,338 |
| | |
| Real Estate Owned | |
| Personal residence | $ 450,000 |
| | |
| Real Estate Mortgages Payable | |
| Personal residence | $ 301,330 |

**U.S. Department of Justice**

Justice Management Division

*Departmental Ethics Office*

*Washington, D.C. 20530*

JAN 3 1 2008

Mr. Robert I. Cusick
Director
Office of Government Ethics
Suite 500
1201 New York Avenue, NW
Washington, DC 20005-3919

Dear Mr. Cusick:

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 Elisebeth C. Cook, who has been nominated by the President to serve as Assistant Attorney General, Office of Legal Policy, 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 Ms. Cook recuse herself from participating personally and substantially in a particular matter that has a direct and predictable effect on her financial interests or the financial interests of any other person whose interests are imputed to her, unless she first obtains a written waiver, pursuant to Section 208(b)(1), or qualifies for a regulatory exemption, pursuant to Section 208 (b)(2). In determining whether a particular matter has a direct and predictable effect on her financial interests or on those of any other person whose interests are imputed to her, Ms. Cook will consult with Department of Justice ethics officials. Ms. Cook 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.

We have advised Ms. Cook that because of the standard of conduct on impartiality at 5 CFR 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.

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,

Lee J. Lofthus
Assistant Attorney General
for Administration and
Designated Agency Ethics Official

Enclosure

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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) |
|---|---|---|---|---|---|---|
| | | | | | | |

| | Last Name | First Name and Middle Initial |
|---|---|---|
| Reporting Individual's Name | Cook | Elisebeth C |
| | **Title of Position** | **Department or Agency (If Applicable)** |
| Position for Which Filing | Assistant Attorney General | Department of Justice, Office of Legal Policy |
| | **Address (Number, Street, City, State, and ZIP Code)** | **Telephone No. (Include Area Code)** |
| Location of Present Office (or forwarding address) | 950 Pennsylvania Avenue, NW, Washington, DC 20530 | 202-514-6131 |
| 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<br>Senior Counsel, 3/05-3/06; Counselor to the Assistant Attorney General, 3/06-11/06; Deputy Assistant Attorney General, 11/06-present. | |
| Presidential Nominees Subject to Senate Confirmation | Name of Congressional Committee Considering Nomination<br>Committee on Judiciary | Do You Intend to Create a Qualified Diversified Trust?<br>☐ 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. | Elisebeth C. Cook | 1/10/08 |
| Other Review (If desired by agency) | Signature of Other Reviewer | Date (Month, Day, Year) |
| | [signature] M. Brodin | 1/31/08 |
| 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). | [signature] | 1/31/08 |
| 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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5 C.F.R. Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | SCHEDULE A | Page Number |
|---|---|---|
| Cook, Elisebeth C | | 2 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 (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 | Over $25,000,000 | Over $50,000,000 | Excepted Trust | Dividends | Rent | 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 |
| 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.<br>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).<br>None ☐ | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Examples: Central Airlines Common | | | | x | | | | | | | | | | x | | | | | x | | | | | | | | |
| Examples: Doe Jones & Smith, Hometown, State | | | | | | | | | | | | | | | | | | | | | | | | | | Law Partnership Income $130,000 | |
| Examples: Kempstone Equity Fund | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Examples: IRA: Heartland 500 Index Fund | | | | * | | | | | | | | | | | | | | | | | x | | | | | | |
| 1 Amtrak | | | | | | | | | | | | | | | | | | | | | | | | | | (spouse income) | |
| 2 Fidelity Roth IRA--Fidelity Cash Reserve | | X | | | | | | | | | | | X | | | | X | | | | | | | | | | |
| 3 Wachovia Checking Account | | X | | | | | | | | | | | | | | | X | | | | | | | | | | |
| 4 U.S. Savings Bonds | | X | | | | | | | | | | | X | | | X | | | X | | | | | | | | |
| 5 Evergreen Equity TR Asset Allocation FD CL B (through Wachovia Securities) | | | X | | | | | | | | | | X | | | | X | | | | | | | | | | |
| 6 Blackrock Funds Large Cap Value FD CL A (also Merrill Lynch Large Cap Value FD CL A) COOPER + KIRK 401K | | 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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SF 278 (Rev. 03/2000)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | SCHEDULE A continued (Use only if needed) | Page Number |
|---|---|---|
| Cook, Elisebeth C | | 3 of 7 |

| 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* | $5,000,001 - $25,000,000 | Over $50,000,000 | Excepted Trust | Dividends | Interest | None (or less than $201) | $201 - $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 COOPER KIRK 401K (CONT.): Calamos Growth Fund Class A | | X | | | | | | | | | X | | | X | | | | | | | | | | |
| 2 Cambiar Conquistador Investor Class | X | | | | | | | | | | X | | | X | | | | | | | | | | |
| 3 Cambiar Opportunity Fund | | X | | | | | | | | | X | | | X | | | | | | | | | | |
| 4 FMI FDS Focus Fund | | X | | | | | | | | | X | | | X | | | | | | | | | | |
| 5 Harbor Small Cap Value Institutional | | X | | | | | | | | | X | | | X | | | | | | | | | | |
| 6 Janus INVT FD Mid Cap Value FD INSTL SHS | | X | | | | | | | | | X | | | X | | | | | | | | | | |
| 7 Julius Baer INVT FDS INTL Equity FD CL 1 | | X | | | | | | | | | X | | | | X | | | | | | | | | |
| 8 Kinetics Paradigm Fund-INST | | X | | | | | | | | | X | | | X | | | | | | | | | | |
| 9 Legg Mason Value Trust TR INC Nav Value Trust | | 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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5 C.F.R. Part 2634
U.S. Office of Government Ethics

Reporting Individual's Name: Cook, Elisabeth C.

# SCHEDULE A continued
(Use only if needed)

Page Number: 4 of 7

**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 | $1,001 - $15,000 | $15,001 - $50,000 | $50,001 - $100,000 | $100,001 - $250,000 | $250,001 - $500,000 | Over $1,000,000* | $5,000,001 - $25,000,000 | Over $50,000,000 | Excepted Trust | Dividends | Interest | None (or less than $201) | $1,001 - $2,500 | $2,501 - $15,000 | $15,001 - $50,000 | $50,001 - $100,000 | Over $1,000,000* | Over $5,000,000 | Other Income (Specify Type & Actual Amount) | Date (Mo., Day, Yr.) Only If Honoraria |
| 1 COOPER KIRK (CONT'D) Pimco FDS PAC INVT MGMT SER Total Return FD INSTL CL | | X | | | | | | | | | X | | | X | | | | | | |
| 2 TCW Galileo FDS INC Select Equities FD CL 1 | | X | | | | | | | | X | | | X | | | | | | | |
| 3 CRM Mid Cap Value FD INSTL | | X | | | | | | | | X | | | X | | | | | | | |
| 4 Western Asset Core Bond FD Cl-I | | X | | | | | | | | X | X | | | X | | | | | | |
| 5 Columbia Funds TR Marsico 21st Century FD Class A | | X | | | | | | | | X | | | X | | | | | | | |
| 6 Forward FDS Inc Hover Mini Cap FD INSTL CL | X | | | | | | | | | X | | | X | | | | | | | |
| 7 Goldman Sachs TR Fin Square MMKT FD CL I | X | | | | | | | | | X | | | X | | | | | | | |
| 8 Ivy FD Global Nat Res Fd Cl A | | X | | | | | | | | X | | | X | | | | | | | |
| 9 Quantitative Group FDS Foreign Value FD Ord SHS | | X | | | | | | | | X | | | X | | | | | | | |

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SF 278 (Rev. 03/2000)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | SCHEDULE A continued (Use only if needed) | Page Number |
|---|---|---|
| Cook, Elisebeth C. | | 5 of 7 |

| 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* | $5,000,001 - $25,000,000 | Over $50,000,000 | Excepted Trust | Excepted Trust | Dividends | 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 | Over $100,000* | Over $1,000,000* | Over $5,000,000 | Other Income (Specify Type & Actual Amount) | Date (Mo., Day, Yr.) Only if Honoraria |
| 1 COOPER + KIRK 401K (CONT.): Royce Value Plus Fund CL-INV | X | | | | | | | | | | X | | | | X | | | | | | | | | | | |
| 2 SSGA Fds International Stock Sel | | X | | | | | | | | | X | | | | X | | | | | | | | | | | |
| 3 | | | | | | | | | | | | | | | | | | | | | | | | | | |
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| 9 | | | | | | | | | | | | | | | | | | | | | | | | | | |

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SF 278 (Rev. 03/2000)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | SCHEDULE C | Page Number |
|---|---|---|
| Cook, Elisebeth C | | 6 of 7 |

## 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): $10,000 or less | $15,001 - $50,000 | $50,001 - $100,000 | $100,001 - $250,000 | $250,001 - $500,000 | $500,001 - $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 J St., Washington, DC | Promissory note | 1999 | 10% | on demand | | | | | | | | | | |
| 1 | U.S Department of Education | Student Loans (incurred 1997-2000) | 1997 | 6% | 30 yrs | | 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 | Pursuant to agreement, former employer holds 401(k)—no further contributions by firm or filer | Cooper & Kirk, PLLC | 03/05 |
| 2 | | | |
| 3 | | | |
| 4 | | | |
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SF 278 (Rev. 03/2000)
5 C.F.R. Part 2634
U.S. Office of Government Ethics

| Reporting Individual's Name | SCHEDULE D | Page Number |
|---|---|---|
| Cook, Elisebeth C | | 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 ☒

| | 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

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 | | |
| 2 | | |
| 3 | | |
| 4 | | |
| 5 | | |
| 6 | | |

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**STATEMENT OF MARK S. DAVIS, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA**

Mr. DAVIS. Thank you, Mr. Chairman. Thank you for scheduling this hearing. I want to thank the President, and also thank Senator Warner and Senator Webb for recommending me to the President.

I am honored to have here today my parents, Barbara and Ralph Davis. I'd ask them to stand. I also have my brother, Mike Davis, and his wife Donna. I'd ask them to stand. And my nephew, Dustin Davis. I'm honored to also have, as you heard Senator Warner introduce, one of my fellow colleagues from the Circuit Court where I sit, Judge Morrison. I have numerous friends here and I won't burden you with all the names, but I'm very appreciative of all of them being here.

Thank you.

Senator KOHL. Thank you, Mr. Davis and the other members of your family and friends who are here.

[The biographical information follows.]

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

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

   Mark Steven Davis

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

   United States District Judge for the Eastern District of Virginia

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

   Portsmouth Circuit Court
   601 Crawford Street
   Portsmouth, Virginia 23704-3807

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

   1962; Portsmouth, Virginia

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

   Not married

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

   Washington & Lee University School of Law; 08/85 – 05/88; Juris Doctor, May 1988

   University of Virginia; 08/82 – 05/84; Bachelor of Arts, May 1984

   Longwood University; 08/80 – 05/82; no degree

7. **Employment Record**: List in reverse chronological order, listing most recent first, all governmental agencies, business or professional corporations, companies, firms, or other



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enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

Employment:

04/03 to present
Supreme Court of Virginia, Judge of the Third Judicial Circuit of Virginia (Portsmouth Circuit Court)
100 North Ninth Street
Richmond, Virginia, 23219
Judge, 2003 – 2006; I have served as Chief Judge since July 1, 2006

09/98 – 04/03
Law Firm of Carr & Porter LLC
This firm was located in Portsmouth, Virginia, but is no longer is existence
I was a partner at the firm handling general civil litigation matters

09/89 – 09/98
Law Firm of McGuire Woods LLP
9000 World Trade Center
101 W. Main Street
Norfolk, Virginia 23510
associate from 1989 –1996, partner from 1996 – 1998

08/88 – 08/89
United States District Court for the Eastern District of Virginia
600 Granby Street
Norfolk, Virginia 23510
law clerk to the Honorable John A. MacKenzie

05/88 – 08/88
Law Firm of McGuire Woods LLP
9000 World Trade Center
101 W. Main Street
Norfolk, Virginia 23510
summer associate

5/87 – 8/87
Law Firm of Jett, Berkley, Furr & Padgett
firm was located in Norfolk, but merged with McGuire Woods LLP around 1994
summer associate



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05/86 – 08/86
Virginia Power Company
120 Tredegar Street
Richmond, Virginia 23219
summer lobbying intern in the Washington (now-closed) office of the company lobbyist

05/84 – 08/85
United States Senator John W. Warner
Russell Senate Office Building
Washington, D.C. 20510
staff assistant

Other Affiliations:

Westminster-Canterbury on the Chesapeake Bay, a non-profit continuing care retirement community operated by the Episcopal and Presbyterian Churches, 3100 Shore Drive, Virginia Beach, Virginia 23451; Board of Trustees, 2001 – 2007; Resident Relations Committee, Chairman, 2004-2006; Marketing Committee, 2001-2004; I served as a volunteer member of the Board of Trustees that oversaw the operation of the retirement community and I received no payment for such service

Virginia International Terminals, Inc., operator of port facilities owned by the Commonwealth of Virginia's Virginia Port authority (VPA); 600 World Trade Center, Norfolk, Virginia 23510; Board of Directors, 2000 – 2003; Secretary and Executive Committee, 2002 – 2003; Audit Committee, 2000 – 2003; I was appointed by the Virginia Port Authority, owner of the port facilities, to serve as a member of the Board of Directors for this operating company and also served on the listed committees and was paid a per meeting stipend of $200 for my attendance at such meetings

Chesapeake Bay Bridge and Tunnel Commission, a political subdivision of the Commonwealth of Virginia that owns and operates the Chesapeake Bay Bridge and Tunnel, 32386 Lankford Highway, P.O. Box 111, Cape Charles, Virginia 23310; Commissioner, 1999-2003; Secretary/Treasurer, 2000-2003; I was a gubernatorial appointment to the commission and was paid a per meeting stipend of $50 plus mileage reimbursement for my attendance

The National Conference for Community and Justice (NCCJ) (formerly National Conference of Christians and Jews), Virginia Region, a private human relations organization. The Virginia Region of the NCCJ has now become the Virginia Center for Inclusive Communities, 5511 Staples Mill Road, Suite 202, Richmond, Virginia 23228, but has essentially maintained the same employees and board. I served on the Tidewater Region Board of Directors from 1995-2003 and as President from 2000-2002. I also served on the State Board of Directors from 2000-2002. This was a non-profit organization and I received no payment for my service



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01110 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Regent University School of Law Board of Visitors, an advisory board (with no policy-making authority) to the Dean of this private law school, 1000 Regent University Drive, Virginia Beach, Virginia 23464; 2004 – present; the Chief Justice of the Virginia Supreme Court (among others) serves on this advisory board and I was invited to join the advisory board in 2004, shortly after I became a Virginia circuit court judge. I have not received payment for my service on this advisory board

The Norfolk Marine Institute, a non-profit youth rehabilitation school for youthful offenders and at-risk youth, 315 Avory Avenue, Norfolk, Virginia 23523; Board of Directors, 1995-2003; Chairman of Board, 1999-2001; President, 2001-2003; I was appointed by the other members of the Board and did not receive payment for my service

Galilee Episcopal Church, 3928 Pacific Avenue, Virginia Beach, Virginia 23451; member of Vestry 2002-2005, 1996-1999; Senior Warden, 2002-2004; Missions Committee, 1996-2002, Chairman, 1998-2002; Finance Committee, 1996-2002; Strategic Planning Committee, 2006-2007; I was a lay member of these entities and did not receive payment for my activities

Episcopal Diocese of Southern Virginia, 600 Talbot Hall Road, Norfolk, Virginia 23505; Committee for Department of Mission, 1997-2000; worked to establish and assist new churches within the diocese; I was a lay member of this committee and did not receive payment for my activities

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

   I did not serve in the military.

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.

   2003 AV rating from Martindale-Hubbell
   2002 Legal Elite listing in Virginia Business Magazine
   2001 Top 40 Under 40 in Dolan's Virginia Business Observer Newspaper
   1998 BV rating from Martindale-Hubbell
   1993-4 Hampton Roads Chamber of Commerce, Leadership Hampton Roads Class

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.

    Maritime Law Association of the United States
    Member, 1994-present; Salvage Committee, 1996-2003, Vice Chair, 2002-2003; Fisheries Committee, 1998-2003



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01111 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Virginia State Bar, 1988 to present
Litigation Section Young Lawyers Committee 1992-1996, Secretary 1994

American Bar Association, approx. 1989-1993

Federal Bar Association, approx. 1990-1998

James Kent American Inn of Court; 2005-present
Pupilage Team Leader, 2007

I'Anson Hoffman American Inn of Court; 1997-2000

Virginia Bar Association; 1989 to present

Portsmouth Bar Association; 1998-present
Secretary, 2002-2003

Norfolk-Portsmouth Bar Association; 1989-present
Judicial Endorsements Committee, 1996-2001

Virginia Association of Defense Attorneys, approx. 1989-2003

Inter-American Bar Association, approx. 1992-1998

Christian Legal Society, approx. 1990-1994

National Council of School Attorneys, approx. 1992-1998

11. **Bar and Court Admission**:

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

Virginia – 1988; no lapses in membership

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

Bar of the Virginia Supreme Court, admitted in 1988
Supreme Court of the United States, admitted in 1999
United States Court of Appeals for the Fourth Circuit, admitted in 1989
United States District Court for the Eastern District of Virginia, admitted in 1989



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01112 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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United States Bankruptcy Court for the Eastern District of Virginia, admitted 1989;

There have been no lapses in membership for any of these courts.

12. **Memberships**:

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

In addition to those organizations listed above in response to questions 7, 10 & 11, I have belonged to the following organizations:

University of Virginia Alumni Association, member since approximately 1985

Washington & Lee University School of Law Alumni Association, member since approximately 1989

Hampton Roads Maritime Association; Legislative Committee, 1994-1998

United Way; Norfolk Professional Campaign, Chairman, 1995; Keel Club Campaign, legal Campaign Co-Chair, 1994

National Society Sons of the American Revolution (SAR), Norfolk, Chapter.

Order of First Families of Virginia (OFFV).

World Affairs Council of Greater Hampton Roads, approx. 1992-1998

Virginia Historical Society, approx. 1995-2007

United States Tennis Association, approx. 2002-2007

Town Point Club at the Town Point Center in Norfolk, Virginia, a non-discriminatory dining club, approx. 1992-2000

Virginia Fellowship - I participated last year with the group that puts on the Leadership Prayer Breakfast on the first day of the Virginia General Assembly legislative session, where all three branches of Virginia government come together – similar to the National Prayer Breakfast.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01113 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

Other than as listed here, the other listed organizations do not discriminate on the basis of race, sex or religion in any way of which I am aware.

National Society Sons of the American Revolution (SAR), Norfolk, Chapter. This organization is for male descendants of those involved in the American Revolution, while its sister organization, Daughters of the American Revolution (DAR), is for such female descendants. SAR does not discriminate on the basis of race, color, religion, age, handicap, or national origin. SAR engages in charitable work such as providing student scholarships and promoting historical education about the American Revolution.

Galilee Episcopal Church and the Episcopal Diocese of Southern Virginia are obviously organizations for those professing the Christian faith. Similarly, while it is not necessary to profess the Christian faith in order to enroll at Regent University School of Law (and there are students there who do not profess the Christian faith), all students acknowledge upon enrolling that they understand that the principles underlying the Christian faith will be integrated into their legal education. It also appears to me that all the members of the Virginia Fellowship (referenced above) profess the Christian faith, and I assume the leadership limits the group in that manner, though I have never specifically asked. These limitations appear to me to be consistent with Canon 2 (C) of the ABA's Code of Judicial Conduct.

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

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

"Protecting School Board Members from Unreasonable Discovery," an article published in the March 1995 issue of INQUIRY & ANALYSIS, the official journal of the National School Boards Association Council of School Attorneys

"A Practical Approach to Rule 5:11," an article published in the Summer 1995 issue of the Virginia State Bar LITIGATION NEWS magazine



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01114 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

None

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

None

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

In 1994 I spoke at a Virginia Bar Foundation Continuing Legal Education seminar on "Equity Practice in Virginia" held in Norfolk, Virginia; I do not have a copy of my remarks, but I basically summarized the law of equity in Virginia.

At the request of then-Virginia Port Authority General Counsel Robert Merhige, who taught the International Law Class at Regent University School of Law as an adjunct professor, I spoke as a guest lecturer to the class once each in 1995, 1997 and 1999 about the international law issues involving the salvage of the RMS Titanic; I did not retain copies of my remarks

At my 2003 investiture as a Virginia circuit court judge, I delivered prepared remarks from the bench thanking family, colleagues, and friends

Since becoming a judge, I have served on several panels with other judges and have simply answered questions without prepared remarks; Virginia Trial Lawyers Association (2004), Norfolk-Portsmouth Bar Association (2007), Virginia Circuit Court Clerk's Association (2005), Panel Member answering audience questions at Norfolk-Portsmouth Bar Foundation Seminar entitled "Law School For Journalists" (2007)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01115 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Guest speaker at the Green Acres Presbyterian Church (Portsmouth, Va.) Men's Group on the topic of "Why Norfolk Became Associated with Historic Shipwreck Salvage" (2007)

I have spoken twice (2004 and 2006) to the graduating class of a local drug treatment program run by Mount Carmel Baptist Church in Portsmouth, Virginia. I have spoken to numerous classes of school students coming to the Portsmouth Circuit Court during my tenure on the court. The students observe court and then ask questions. I have also spoken at local public schools. No prepared remarks

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

I have been interviewed on numerous occasions regarding cases I have handled, particularly the salvage case involving the RMS TITANIC, but I do not have audio/video clips or transcripts of such interviews. Many of these interviews resulted in short quotes in newspaper articles, but no extended interview.

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.

On April 16, 2003 I was sworn in as Circuit Court Judge for the Third Judicial Circuit of Virginia (Portsmouth Circuit Court). Pursuant to the provisions of Article VI, § 7 of the Constitution of Virginia, I was chosen by a vote of a majority of the members elected to each house of the Virginia General Assembly for an eight year term beginning in 2003. The circuit court is the trial court of general jurisdiction in Virginia. Pursuant to a vote of the five judges in the Third Circuit, I began a two-year term as Chief Judge in July 2006.

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

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

Below is a list of all the Opinions I have written. While there is no official Virginia Circuit Court reporter, the University of Richmond publishes circuit court opinions in the Virginia Circuit Court Reporter – a bound volume published regularly and picked up by LEXIS and WESTLAW. Therefore, where an opinion I authored is published in the Circuit Court Reporter, it is listed as ___ Cir. Ct. ___ (DATE). If the opinion is not in the Circuit Court Reporter, but is available on the LEXIS or WESTLAW databases, I have listed the citation to at least one of their databases. All of the opinions published in the Circuit Court Reporter are also available on LEXIS. If one of these opinions is not available in any of these locations, I have just listed the case number.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01116 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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1. Jay-Ton Construction Company v. Bowen Construction Services, Inc., 62 Va. Cir. 414 (2003)
2. Mary Lou Cooley v. Melinda L. Gaines – CL02-2041 (2003)
3. Commonwealth of Virginia v. James Osias Simone, Jr., 63 Va. Cir. 216 (2003) (2 opinions reported together)
4. Joann B. Adams v. Thomas Doughtie, 63 Va. Cir. 505 (2003)
5. Damon Arland Anderson v. T. S. Ray, Warden Augusta Correctional Center, 63 Va. Cir. 550 (2004)
6. Kimberly R. Askew v. John Doe I, John Doe II, and Tasha Williams – CL03-2753 (2004)
7. Commonwealth of Virginia v. Wallace D. Waddler, 65 Va. Cir. 418 (2004)
8. Carol Wright v. Eli Lilly and Company, et al, 65 Va. Cir. 485 (2004)
9. Commonwealth of Virginia v. Myra L. Stewart, 66 Va. Cir. 135 (2004)
10. Carol Wright v. Eli Lilly and Company, et al, 66 Va. Cir. 195 (2004)
11. Commonwealth of Virginia v. Wallace Waddler, 66 Va. Cir. 257 (2004)
12. PRHA v. Philip Ison, 66 Va. Cir. 336 (2005)
13. Randall E. Appleton v. Bondurant and Appleton, 67 Va. Cir. 95 (2005)
14. Randall E. Appleton v. Bondurant and Appleton, 68 Va. Cir. 208 (2005)
15. John Patrick McCarthy v. Chadwick W. Atwood, 67 Va. Cir. 237 (2005)
16. Donna L. Brooks v. Blueridge General, Inc., 67 Va. Cir. 274 (2005)
17. Jeffrey Fose v. Gwaltney of Smithfield, LTD., 67 Va. Cir. 347 (2005)
18. Michael C. Jarrett v. Lon Goldman, et al, 67 Va. Cir. 361 (2005)
19. Randall E. Appleton v. Bondurant and Appleton, 68 Va. Cir. 208 (2005)
20. Dr. David R. Denny v. C. Wayne Prince, et al, 68 Va. Cir. 339 (2005)
21. John R. Wilson v. Norfolk and Portsmouth Belt Line Railroad, 69 Va. Cir. 153 (2005)
22. Jamie Lee Ewers, et al v. Carey C. Parker and Patsy Parnell Parker, 69 Va. Cir. 464 (2006)
23. Nadina Young v. Food Lion, Store Number 622, 70 Va. Cir. 313 (2006)
24. Commonwealth of Virginia v. Sean J. Wallace , 70 Va. Cir. 341 (2006)
25. Abdul L. Aswad v. Norfolk Southern Railway Company, 2006 Va. Cir. LEXIS 43 (2006)
26. John R. Wilson v. Norfolk and Portsmouth Belt Line Railway, 70 Va. Cir. 383 (2006)
27. Ernestine A. Duncan v. Kermit L. Duncan, 2006 Va. Cir. LEXIS 74 (2006)
28. Bernadette E. Alexander v. Carl Alexander, Sr., 2006 Va. Cir. LEXIS 100 (2006)
29. Mark K. Bunch v. Rhodes M. Artz, Jr., 71 Va. Cir. 358 (2006)
30. Dwain W. Sharp v. Elijah Sharp, III, 2006 WL 3088067 (2006)
31. Commonwealth of Virginia v. Marlin T. Arrington, 2007 Va. Cir. LEXIS 8 (2007)
32. Bonnie Stevens v. Nho T. Miller, 2007 Va. Cir. LEXIS 28 (2007)
33. Janiece L. Cage v. William A. Cage, 2007 Va. Cir. LEXIS 30 (2007)
34. Theresa Askew v. Jerry R. Askew, CL06-1148 (2007)



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

As for the Virginia Supreme Court, I am not notified when a discretionary petition for appeal of one of my decisions is filed there, nor am I notified when a decision is made on such petition. I am only notified by way of a written opinion or order if the matter is accepted for appeal.

There is only one of my decisions, of which I am aware, where a petition for *certiorari* has been granted by the U.S. Supreme Court. That case is *Moore v. Commonwealth*, 272 Va. 717, 636 S.E.2d 395 (2006), *petition for cert. granted*, 2007 U.S. LEXIS 9069 (U.S. Sept. 25, 2007).

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

In *Goodman v. Commonwealth*, 2007 Va. App. LEXIS 383 (2007)(unpublished disposition), I denied a motion to suppress a firearm and statements taken from a defendant who was charged with possession of a firearm after having been convicted of a felony. The police had received information from a reliable confidential informant that the defendant had been trying to sell the gun in a high-crime, high-drug area and that he possibly had an outstanding warrant. When the police stopped and searched the defendant, they found a gun on him and discovered that he did have an outstanding warrant. Because there was nothing in the record that suggested the gun was *illegally* possessed by the defendant, and because the informant provided no explanation as to why the defendant might have a warrant, the Court of Appeals reversed and dismissed the indictment, finding there was no reasonable articulable suspicion necessary for a *Terry* stop.

In *Moore v. Commonwealth*, 272 Va. 717, 636 S.E.2d 395 (2006), *petition for cert. granted*, 2007 U.S. LEXIS 9069 (U.S. Sept. 25, 2007), I denied a motion to suppress evidence recovered in a search incident to an arrest of a defendant for having a suspended license. The defendant argued that because his underlying arrest for driving on a suspended license violated both Va. Code §19.2-74(A)(1) - which requires that only a summons be issued in certain circumstances - and the Fourth Amendment to the U.S. Constitution, the evidence uncovered during the search incident to that arrest must be suppressed. My trial court decision was initially overturned by a three judge panel of the Virginia Court of Appeals. *Moore v. Commonwealth*, 45 Va. App. 146, 609 S.E.2d 74 (2005). The Virginia Court of Appeals then granted a rehearing en banc. *Moore v. Commonwealth*, 45 Va. App. 279, 610 S.E.2d 326 (2005). On rehearing en banc, the full Virginia Court of Appeals reversed the three judge panel and affirmed the trial court ruling denying the motion to suppress. *Moore v. Commonwealth*, 47 Va. App. 55, 622 S.E.2d 253 (2005). The Virginia Supreme Court then agreed to hear the matter, and reversed the en banc Virginia Court of Appeals and found that the evidence uncovered in the search incident to arrest must be suppressed under the Fourth



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01118 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Amendment because a full custodial arrest of a motorist driving on a suspended license is unauthorized by Virginia law. *Moore v. Commonwealth*, 272 Va. 717, 636 S.E.2d 395 (2006). The United States Supreme Court recently granted *certiorari*. *Virginia v. Moore*, 2007 U.S. LEXIS 9069 (2007). At least one federal district court in Virginia has criticized and refused to follow the decision of the Virginia Supreme Court, noting that it stands in opposition to a majority of state supreme courts that have addressed the issue and is contrary to a majority of federal circuits that have addressed the issue. *United States v. Hudson*, 2007 U.S. Dist. LEXIS 53831, *8 (W.D.Va. July 25, 2007).

In *Lunceford v. Commonwealth*, 2006 Va. App. LEXIS 98 (2006)(unpublished disposition), I found the defendant guilty of possession with intent to distribute cocaine based on his presence and domicile at a residence where police found a digital scale with cocaine residue on it, along with a handgun, bullets, a razor blade and seven plastic baggies with the corners ripped off, and fifty other plastic baggies with corners cut off. The Virginia Court of Appeals found the evidence sufficient for a conviction of possession of cocaine, but insufficient for possession with intent to distribute cocaine.

In *Simone v. Commonwealth*, 2005 Va. App. LEXIS 99 (2005)(unpublished disposition), I found a defendant guilty of possession of child pornography on a computer. *Commonwealth v. Simone*, 63 Va. Cir. 216 (2003). The Virginia Court of Appeals reversed the conviction because the defendant, as a recently-departed tenant of the residence where the computer was found, did not have sufficient dominion and control over the computer left at the premises he alone occupied to permit the conclusion that (as of the date the computer was recovered) he possessed the images contained in such computer.

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

See discussion above regarding *Goodman v. Comm.*, 2007 Va. App. LEXIS 383 (2007), *Lunceford v. Comm.*, 2006 Va. App. LEXIS 98 (2006), and *Simone v. Comm.*, 2005 Va. App. LEXIS 99 (2005). These were all issued as unpublished opinions by the Virginia Court of Appeals, though they are available online.

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

I have listed above every opinion I have written since coming on the bench. I think I have submitted all of my written opinions to LEXIS and WESTLAW, though the above-listed opinions without a circuit court reporter citation, nor a LEXIS or WESTLAW citation, were not placed online by either entity. I have simply listed them above with their court case number. All opinions issued by me



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01119 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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are placed in the case file, and I also maintain a binder of all such opinions in chambers.

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

I have never sat on a trial or appellate panel.

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

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

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

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

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

Prior to becoming a judge, I was asked by the City of Portsmouth to represent one of its police officers in a civil suit pending against him. The case was settled approximately a year before I became a judge and never reached trial. After becoming a judge, I consulted the Virginia Judicial Inquiry and Review Commission (JIRC), our official state judicial review body, regarding the manner in which I should handle any cases involving this police officer, Steven Johnson. I was advised that whenever a case came before me involving this officer, I should advise the parties of the prior representation before the trial began, advise whether I believed I could be impartial in hearing the case, then leave the bench and give the attorneys an opportunity to discuss the matter with their clients. Pursuant to the advice of the JIRC, if any party objected to me hearing the matter, I then considered whether I should recuse and I have uniformly recused myself in such instances. Pursuant to the policy established by the Virginia Supreme Court, I have then referred the matter to the Chief Judge of our circuit for reassignment. The policy of the Virginia Supreme Court further provides that if the recusing judge is the Chief Judge (as I have been since July 1, 2006), then the matter is to be referred by the Chief Judge to another judge of the circuit who is then to decide whether to hear the case or refer it to another judge. I have followed that policy.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01120 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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We do not keep lists of these cases, but most of the time the defendant has made no objection to me hearing the case.

Other than those cases just referenced, I have only been asked to recuse myself one time. After I indicated that I was not inclined to recuse myself because I thought the motion amounted to judge-shopping, the attorney withdrew his motion. The case was *Philip Ison and High Street Galleries, LLC v. Portsmouth Redevelopment and Housing Authority*, CL05-731. The case arose out of a development agreement and lease entered into between the parties in 2000. In 2003, the defendant terminated the development agreement. In a detailed opinion, I entered judgment for the defendant on an unlawful detainer action against Philip Ison. Ison failed to perfect an appeal from that judgment. *PRHA v. Ison*, 66 Va. Cir. 336 (2005). Philip Ison then filed another action, with a new attorney, in which he added as a party plaintiff his company, High Street Galleries, and sought to re-litigate the same issues addressed in the first matter. After listening to arguments of counsel, there was no showing made that I was biased in any way against any party or that there would be an appearance of impropriety by me hearing the case. After counsel for plaintiffs listened to a recitation of the applicable case law on recusal, he indicated that he was withdrawing his motion because he did not allege any of the bases for recusal, only that it might be better for another judge to hear the case since I had already heard the earlier matter. As noted above, I saw it as nothing more than an effort to obtain a different result after the matter had already been decided.

I also recall having a motion assigned to me around 2005 involving the Virginia International Terminals, Inc. (VIT). I served on the Board of VIT from 2001-2003 and left the board when I became a judge. I do not recall the name of the case, but I remember having a conversation with the attorneys about my prior service on the VIT board and then, *sua sponte* and without any recusal motion having been made, requesting that another judge of the Portsmouth Circuit Court hear the case. At that point, the case was sent to another judge of the court.

Our court employs a docket clerk to assign all of our cases. Each judge has submitted a memorandum with names of those entities/individuals whose cases should not be assigned to the judge. I have listed my old law firm of Carr & Porter LLC (which is no longer in business), cases involving my good friend John Cooper, Esq. who practices before the court frequently, cases involving my good friend Bryan K. Meals, Esq. who practices before the court frequently, cases involving my father's former business here in Portsmouth (for which he still consults after having sold it) - G.R. Davis & Sons, Inc. General Contractors, and cases involving the marina owned in part by my brother and located here in Portsmouth where I sit – Portsmouth Boating Center. I listed those as the most anticipated recusals that I thought were likely to come before the court. However, in my memorandum I also stated that I reserved the right to recuse myself for other matters not listed and which might come up from time to time.



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Additionally, it is the practice of the Portsmouth Circuit Court judges to recuse as a whole when an attorney who practices before our court is involved in a case as a party or witness, or when court personnel, and such immediate family members, are involved. We have done that regularly (with all of us signing one recusal order) since I became a circuit court judge, but I do not keep such lists.

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

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

Chesapeake Bay Bridge and Tunnel Commission, a political subdivision of the Commonwealth of Virginia that owns and operates the Chesapeake Bay Bridge and Tunnel. I was appointed by Virginia Governor James Gilmore, and served as a commissioner on the governing board from 1999 until I resigned in 2003 to become a judge. I also served as Secretary/Treasurer of the commission from 2000-2003.

Virginia International Terminals, Inc. (VIT), a private corporation that is the operator of the public port facilities owned by the Virginia Port Authority (VPA). The governor appoints the members of the VPA Board, and they in turn appoint the directors of the privately-operated VIT. While serving as a director of VIT is service for a private corporation, not an official public office, I have listed it here because of the unique operating arrangement utilized by VPA, which some may see as quasi-public.

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

Until I became a judge in 2003, I served as the Finance Committee Chair of the Portsmouth Republican Party, beginning in 1998. The last official office I held with a political party before that was from 1985 to 1987 when I served as the representative of the Young Republican Federation of Virginia to the State Central Committee of the Republican Party of Virginia. Before that, I served as the Executive Director of the Young Republican Federation of Virginia in 1984, and the representative of the Young Republican Federation of Virginia on the Virginia Fourth Congressional District Republican Committee from 1983 to 1984. I believe I may have also represented the College Republican Federation of Virginia on the Virginia Fourth Congressional District Republican Committee in 1982. None of these were paid positions.



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The only paid position I have held involving a candidate was my work as a campaign worker in July and August 1983 for the George E. Talbot for Delegate campaign in Portsmouth, Virginia.

In 1992 and 1994, I served as a member of the finance committee of the James Chapman for Congress campaign in Virginia's Second Congressional District.

In addition to these, I have served on numerous host dinner committees for various Republican candidates from 1990 through my election to the bench in 2003, including events for George H.W. Bush, John W. Warner, Lamar Alexander, as well as various state candidates. I also served as a delegate to several Virginia Republican State Conventions from the 1980s through 2002.

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

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

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

I served as a law clerk for the Hon. John A. MacKenzie, a United States District Judge for the Eastern District of Virginia, Norfolk Division, from August 1988 through August 1989.

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

I never practiced alone.

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

04/03 to present
Third Judicial Circuit of Virginia (Portsmouth Circuit Court)
100 North Ninth Street
Richmond, Virginia, 23219
Judge, 2003 – 2006; I have served as Chief Judge since July 1, 2006

09/98 – 04/03
Law Firm of Carr & Porter LLC
firm was located in Portsmouth, Virginia, but is no longer is existence
I was a partner at the firm handling general civil litigation matters
09/89 – 09/98
Law Firm of McGuire Woods LLP



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9000 World Trade Center, 101 W. Main Street
Norfolk, Virginia 23510
Partner, 1996 – 1998; associate, 1989 –1996; summer associate, 5/88-8/88

08/88 – 08/89
United States District Court for the Eastern District of Virginia
600 Granby Street
Norfolk, Virginia 23510
law clerk to the Honorable John A. MacKenzie

b. Describe:

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

My practice was concentrated in the fields of trial and appellate litigation, in both the federal and state courts of Virginia. It remained generally the same during the entire course of my practice from 1989 to 2003.

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

Much of my litigation practice was in the areas of tort law, maritime law, fisheries law, municipal law and employment law. I also handled both state and federal (longshore) workers' compensation matters before the Virginia Workers' Compensation Commission and the Office of Administrative Law Judges of the U.S. Department of Labor, medical malpractice cases, school law cases, commercial litigation and pro bono uncontested divorces. Among others, I represented businesses, insurance companies, fishermen, school boards and cities/counties.

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

Approximately 95% of my practice was litigation-based. I appeared in court frequently.

i. Indicate the percentage of your practice in:
   1. federal courts: 45%
   2. state courts of record: 35%
   3. other courts. 20%

ii. Indicate the percentage of your practice in:
   1. civil proceedings; 100%
   2. criminal proceedings. 0%



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01124 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

I tried twenty-one cases to verdict or judgment prior to becoming a judge. I was chief counsel in thirteen of them, and associate counsel in eight of them.

i. What percentage of these trials were:
   1. jury; 14%
   2. non-jury. 86%

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

I filed briefs in two cases before the Supreme Court of the United States. There was no argument in either case.

*R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999), *cert. denied,* 528 U.S. 825, 120 S.Ct. 74, 145 L.Ed.2d 63 (1999).

*R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 286 F.3d 194 (4th Cir. 2002), *cert. denied,* 537 U.S. 885, 123 S.Ct. 118, 154 L.Ed.2d 144 (2002).

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

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

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

1) *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 286 F.3d 194 (4th Cir. 2002), *cert. denied*, 537 U.S. 885, 123 S.Ct. 118, 154 L.Ed.2d 144 (2002)

I represented R.M.S. Titanic, Inc. (RMST), the court-appointed salvor of the wreck of the RMS TITANIC, in its salvage litigation pending in the U.S. District Court for the Eastern District of Virginia. The salvor, RMST, wanted to sell artifacts it had recovered from the wreck. The District Court and the Court of



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01125 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Appeals found that the matter was not ripe for a salvage award. I represented the salvor in the District Court, Court of Appeals, and on the petition for *certiorari* to the U.S. Supreme Court. The case was heard at the District Court level jointly by Judges J. Calvitt Clarke, Jr. (now deceased) and Rebecca Beach Smith. The case was heard at the Fourth Circuit Court of Appeals by Judges Wilkins, Niemeyer and King.

My co-counsel were Robert C. Scaro, Jr., Esq., who I think can now be reached at GMAC Home Services, Inc., 100 Witmer Road, Horsham, PA 19044, (800) 627-0128, and Mark A. Stallings, Esq., who now can be reached at 320 London Street, Suite 1, Portsmouth, VA 23704, (757) 393-1110.

Because there was no opposing counsel in the case, the Court of Appeals appointed the Appellate Litigation Clinic at the University of Virginia School of Law. Neal L. Walters, Esq. represented the Clinic and can be reached at Scott & Kroner PC, 4188 East Water Street, Charlottesville, VA 22902, (434) 296-2161.

2) *North Carolina Fisheries Association, Inc. v. Evans, Secretary of Commerce*, 152 F.Supp.2d 870 (E.D.Va. 2001)

I represented the North Carolina Fisheries Association, a trade group of commercial fishermen, in a challenge filed in the U.S. District Court for the Eastern District of Virginia to the National Marine Fisheries Service (NMFS) 2000 commercial summer flounder quota. Based upon prior rulings of the District Court, it was alleged that the NMFS failed to properly determine the quota. The District Court concluded that NMFS violated a prior court order. The case was heard by District Court Judge Robert G. Doumar.

My co-counsel was Waverley Lee Berkley, III, Esq., and he can be reached at 101 S. Dogwood Drive, Virginia Beach, VA 23451, (757) 428-5853.

Opposing Counsel:
The State of North Carolina was represented through its Attorney General's office by Daniel F. McLawhorn, Esq., who can now be reached at the Raleigh City Attorney's Office, One Exchange Plaza, Suite 1020, Raleigh, NC 27602, (919) 831-6560. The Secretary of Commerce/NMFS was represented by George M. Kelley, III, Esq., Assistant U.S. Attorney, who can be reached at the U.S. Attorneys Office, 8000 World Trade Center, 101 W. Main Street, Norfolk, VA 23510, (757) 441-6331. The Natural Resources Defense Council was represented by Richard M. Slaney, Esq., who can now be reached at the Virginia State Bar, Eighth & Main Building, Suite 1500, 707 E. Main Street, Richmond, VA 23219, (804) 775-0500.



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3) *R.M.S Titanic, Inc. v. Haver*, 9 F.Supp.2d 624 (E.D.Va. 1998), *aff'd in part and reversed in part*, 171 F.3d 943 (4th Cir. 1999), *cert. denied*, 528 U.S. 825, 120 S.Ct. 74, 145 L.Ed.2d 63 (1999)

I represented R.M.S. Titanic, Inc. (RMST), the court-appointed salvor of the wreck of the RMS TITANIC, in its salvage litigation pending in the U.S. District Court for the Eastern District of Virginia. RMST sought an injunction to prevent others from interfering with RMST's salvage activities at the wreck site in international waters. The Fourth Circuit Court of Appeals affirmed the District Court's determination that it had some jurisdiction over the wreck site and prohibited others from salvaging at the site or interfering with RMST's salvage efforts – though they were permitted to photograph the wreck. The case was heard by District Court Judge J. Calvitt Clarke, Jr., and at the Court of Appeals by Judges Ervin, Wilkins, and Niemeyer.

My co-counsel was now-judge F. Bradford Stillman, U.S. Magistrate Judge, and he can be reached at the Walter E. Hoffman U.S. Courthouse, 600 Granby Street, Norfolk, VA 23510, (757) 222-7020; Douglas E. Miller, Esq., who can now be reached at 12350 Jefferson Avenue, Suite 300, Newport News, VA 23601, (757) 223-4585, and Lee A. Handford, Esq., who can now be reached at 208 E. Plume Street, Suite 302, Norfolk, VA 23510, (757) 626-1333.

Opposing Counsel:
Deep Ocean Expeditions and Christopher Haver were represented by Alex Blanton, Esq., who can be reached at Blank Rome LLP, Watergate, 600 New Hampshire Avenue, N.W., Washington, D.C. 20037, (202) 772-5909.

4) *North Carolina Fisheries Association v. Daley*, 27 F.Supp.2d 650 (E.D.Va. 1998)

I represented the North Carolina Fisheries Association, a trade group of commercial fishermen, in a challenge to the 1997 National Marine Fisheries Service (NMFS) summer flounder commercial fishery quota filed in the U.S. District Court for the Eastern District of Virginia. The District Court found that the NMFS had failed to comply with the Regulatory Flexibility Act and the Magnuson-Stevens Fishery Conservation and Management Act, and granted relief by modifying the quota. The case was heard by District Judge Robert G. Doumar.

My co-counsel was Waverley Lee Berkley, III, Esq., who can be reached at 101 S. Dogwood Drive, Virginia Beach, Virginia 23451, (757) 428-5853.

Opposing Counsel:
The State of North Carolina was represented by Daniel F. McLawhorn, Esq., who can be reached at the Raleigh City Attorney's Office, One Exchange Plaza, Suite 1020, Raleigh, NC 27602, (919) 831-6560. The Secretary of Commerce/NMFS was represented by George M. Kelley, III, Esq., Assistant U.S. Attorney with the U.S. Attorneys Office, 8000 World Trade Center, 101 W. Main Street, Norfolk, VA 23510, (757) 441-6331. The Natural Resources Defense Counsel was



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01127 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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represented by Richard M. Slaney, Esq., who can now be reached at the Virginia State Bar, Eighth & Main Building, Suite 1500, 707 E. Main Street, Richmond, VA 23219, (804) 775-0500.

5) *North Carolina Fisheries Association v. Daley*, 16 F.Supp.2d 647 (E.D.Va. 1997)

I represented the North Carolina Fisheries Association (NCFA), a trade group of commercial fishermen, in a challenge to the National Marine Fisheries Service (NMFS) adjustment of the 1996 summer flounder commercial fishery quota, and a challenge to the 1997 summer flounder commercial fishery quota. The NCFA alleged that the quota violated the Magnuson-Stevens Act because the quota was established in an arbitrary and capricious manner and violated the Regulatory Flexibility Act. The case was filed in the U. S. District Court for the Eastern District of Virginia. The District Court agreed with NCFA, finding that NMFS had failed to conduct the appropriate analysis before establishing the quota, and granted relief by remanding the quota to the NMFS. The case was heard by District Judge Robert G. Doumar.

My co-counsel was Waverley Lee Berkley, III, Esq., who can be reached at 101 S. Dogwood Drive, Virginia Beach, VA 23451, (757) 428-5853.

Opposing Counsel:
The State of North Carolina was represented by Daniel F. McLawhorn, Esq., who can now be reached at the Raleigh City Attorney's Office, One Exchange Plaza, Suite 1020, Raleigh, NC 27602, (919) 831-6560. The Secretary of Commerce/NMFS was represented by George M. Kelley, III, Esq., with the U.S. Attorneys Office, 8000 World Trade Center, 101 W. Main Street, Norfolk, VA 23510, (757) 441-6331. The Natural Resources Defense Council was represented by Richard E. Slaney, Esq., who can now be reached at the Virginia State Bar, Eighth & Main Building, Suite 1500, 707 E. Main Street, Richmond, VA 23219, (804) 775-0500.

6) *North Carolina Fisheries Assoc., Inc. v. Secretary of Commerce*, 917 F.Supp. 1108 (E.D.Va 1996)

I represented the North Carolina Fisheries Association (NCFA), a trade group of commercial fishermen, in a challenge to the decision of the Secretary of Commerce to impose a moratorium on the possession and harvesting of Atlantic coast weakfish. NCFA alleged that the Secretary exceeded the authority granted him by the Atlantic Coastal Act because the Atlantic States Marine Fisheries Commission had not requested that he regulate the fishery at issue. The case was filed in the U.S. District Court for the Eastern District of Virginia. The District Court concluded that the Secretary lacked authority to implement the regulation at issue. The case was heard by District Judge Robert G. Doumar.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01128 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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My co-counsel was Waverley Lee Berkley, III, Esq., and he can be reached at 101 S. Dogwood Drive, Virginia Beach, VA 23451, (757) 428-5853.

Opposing Counsel:
The State of North Carolina was represented by Daniel F. McLawhorn, Esq., who can now be reached at the Raleigh City Attorney's Office, One Exchange Plaza, Suite 1020, Raleigh, NC 23602, (919) 831-6560. The Secretary of Commerce was represented by George M. Kelley, III, Esq., Assistant U.S. Attorney, who can be reached at the U.S. Attorneys Office, 8000 World Trade Center, 101 W. Main Street, Norfolk, VA 23510, (757) 441-6331.

7) *In the Matter of the Complaint of Lon C. Hughes and Joann Hughes for Limitation or Exoneration from Liability*, 2:92-CV1098, U.S. District Court for the Eastern District of Virginia, 1994

I represented Mr. and Mrs. Hughes, owners of a pleasure craft involved in a boating accident, in their petition in admiralty seeking to limit liability under the Limitation of Shipowners' Liability Act, 46 U.S.C. §§181-189.

The Act provides a procedure in admiralty to enjoin all pending suits and to compel them to be filed in a special limitation proceeding so that liability may be determined and limited to the value of the shipowner's vessel, and freight pending, if the loss occurred without the owners' privity or knowledge. In this case, the operator of the vessel was the Hughes' son. The son's two passengers were injured, and he was killed, when the boat collided with a barge. The two injured passengers filed claims in the action. Additionally, claims were filed against the United States alleging that improper navigational lighting contributed to the nighttime accident. The Court granted my client's petition for limitation.

My co-counsel was now-Judge F. Bradford Stillman, U.S. Magistrate Judge, who can be reached at the Walter E. Hoffman U.S. Courthouse, 600 Granby Street, Norfolk, VA 23510, (757) 222-7020.

Opposing Counsel:
The two injured passengers were represented by Ann K. Sullivan, Esq., at Crenshaw, Ware & Martin, P.L.C., 1200 Bank of America Center, Norfolk, Virginia 23510, (757) 623-3000, and James C. Lewis, Esq., who is now at Hajek, Shapiro, Cooper, Lewis & Appleton, P.C., 1294 Diamond Springs Road, Virginia Beach, Virginia 23455, (757) 460-7776. James A. Gorry, III, Esq., represented the son's estate, and he can be reached at 999 Waterside Drive, Norfolk, Virginia 23510, (757) 622-3366. The United States was represented by Anita K. Henry, Esq., United States Attorney's Office, 8000 World Trade Center, 101 W. Main Street, Norfolk, Virginia 23510, (757) 441-6331, and David Howe, Esq., who I am unable to locate.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01129 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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8) *In re Complaint of Christiansen*, 1996 A.M.C. 2353, 1996 U.S. Dist. LEXIS 10920 (E.D.Va. 1996)

I represented Christiansen Marine, Inc., the operator and bare-boat charterer of the Tug Nickie B, in its efforts for exoneration from or limitation of liability. The trial took place in the U.S. District Court for the Eastern District of Virginia. The case began after steel bridge girders had fallen off a barge and the tug operator, cargo owner, dock owner, and stevedore all claimed the loss was due to the other parties' negligence. The Court determined that the tug operator was entitled to exoneration and found the stevedore responsible for the loss. The case was heard by District Judge Rebecca Beach Smith.

For some unknown reason, my name is not listed as counsel in the opinion reported in the American Maritime Cases reporter, but I was co-counsel from the beginning along with R. Arthur Jett, Jr., Esq. He can now be reached at Davey & Brogan, P.C., 101 Granby Street, Suite 300, P.O. Box 3188, Norfolk, VA 23514, (757) 622-0100.

Opposing Counsel:
Lambert's Point Dockets was represented by Daniel R. Warman, Esq., now at Ventker & Warman, 810 World Trade Center, 101 W. Main Street, Norfolk, VA 23510, (757) 625-1192. Stevedore Ryan-Walsh, Inc. was represented by Henry P. Bouffard, Esq., at Vandeventer Black, 500 World Trade Center, Norfolk, VA 23510, (757) 446-8698. Trinity Industries, Inc. was represented by Peter L. Hilbert, Esq., at Sher Garner Cahill Richter Klein & Hilbert, LLC, 909 Poydras Street, Suite 2800, New Orleans, LA 70112, (504) 299-2100.

9) *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122 (4th Cir. 1994)

I represented Pittman Mechanical Contractors, Inc. in a federal longshore workers compensation case arising from a claim filed by their employee seeking disability benefits under the federal Longshore and Harbor Workers' Compensation Act. The issue was whether the employee was engaged in "maritime employment" and was thus a covered employee. The Administrative Law Judge, and the Department of Labor Benefits Review Board, concluded that the employee was engaged in maritime employment and was therefore covered by the longshore act. The trial judge was ALJ Richard K. Malamphy. The appeal to the Benefits Review Board was heard by Administrative Appeals Judges Smith, Brown and Dolder, and it resulted in a published opinion at 27 B.R.B.S. 120 (1993). The appeal to the Fourth Circuit Court of Appeals was heard by Judges Russell, Williams and Butzner.

My co-counsel was Robert W. McFarland, Esq., with McGuire Woods LLP, 9000 World Trade Center, 101 W. Main Street, Norfolk, VA 23510, (757) 640-3716.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01130 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Opposing Counsel:
The employee, Michael T. Simonds, was represented by Robert E. Walsh, Esq., at Rutter Mills LLP, 160 W. Brambleton Avenue, Norfolk, VA 23510, (757) 622-5000. The Department of Labor was represented by the Associate Solicitor of Labor, Carol A. DeDeo, Esq, 200 Constitution Avenue, N.W., Washington, D.C. 20210, (202) 693-5261.

10) *Marex Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 2 F.3d 544 (4th Cir. 1993)

I represented Titanic Ventures, L.P. (TVLP), the predecessor-in-interest to R.M.S. Titanic, Inc., in its efforts to be named salvor-in-possession of the wreck of the RMS TITANIC. The case took place in the U.S. District Court for the Eastern District of Virginia. The trial at the District Court dealt with all facets of the question of whether TVLP was the salvor-in-possession, but at the appellate level the hearing focused on whether the District Court could vacate the plaintiff's notice of voluntary dismissal on the last day of the trial. The Fourth Circuit Court of Appeals found that the District Court should not have done so. The case was tried by District Court Judge J. Calvitt Clarke, Jr. (now deceased), and was heard in the Fourth Circuit Court of Appeals by Judges Hall, Sprouse, and Michael.

My co-counsel was now-Judge F. Bradford Stillman, U.S. Magistrate Judge, at the Walter E. Hoffman U.S. Courthouse, 600 Granby Street, Norfolk, VA 23510, (757) 222-7020.

Opposing Counsel:
Marex Titanic was represented at the trial court level primarily by Philip N. Davey, Esq., who is at Davey & Brogan, P.C., 101 Granby Street, Suite 300, P. O. Box 3188, Norfolk, VA23514, (757) 622-0100. During the appeal, Marex Titanic was represented by George A. Somerville, Esq., at Troutman Sanders, Troutman Sanders Building, 1001 Haxall Point, Richmond, VA 23219, (804) 697-1291.

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

My practice was a litigation practice, and I only rarely handled non-litigation matters

In addition to my law practice, I was active on the Young Lawyers Committee of the Virginia State Bar's Litigation Section, where we organized continuing legal education seminars and published a regular journal. After leaving that committee, I joined the



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01131 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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I'Anson Hoffman American Inn of Court for a three year term, where attorneys and judges of all ages and levels of experience come together to discuss law and ethics. Once I became a judge, I was invited to join another Inn of Court, the James Kent American Inn of Court, where attorneys and judges came together regularly to discuss law and ethics, and to mentor less experienced attorneys. I led a pupilage team in making a presentation to this Inn of Court. I also served on the Judicial Endorsements Committee of the Norfolk-Portsmouth Bar Association for several years, and assisted in interviewing and evaluating candidates for judicial vacancies. Later, I served as the Secretary of the Portsmouth Bar Association, where I maintained the meeting minutes and records of membership of the bar, and served on the bar's executive committee.

During my service on the Chesapeake Bay Bridge and Tunnel Commission, I worked with the commission's outside counsel to monitor a large piece of litigation involving the construction of the second span of the bridge-tunnel. This involved a significant amount of time. As with service by attorneys on most boards, during my service on the boards of the Virginia International Terminals, Westminster-Canterbury on the Chesapeake Bay, the Norfolk Marine Institute, my church Vestry, and the National Conference for Community and Justice, I was called on to help evaluate legal issues that came before such boards.

Since becoming a judge, much of my prior outside involvement has been limited by applicable ethical rules. However, I have regularly accepted invitations to judge moot court competitions and trial advocacy classes at local law schools. For the past several years, I have also judged the Model Judiciary Program for local high school students. The program is jointly sponsored by the Virginia Bar Association and the Virginia YMCA. On several occasions, I have assisted in the training of the classes of Sexual Assault Nurse Examiners (SANE) by conducting mock trials for their group of local trainees.

Last year, I worked with the local public school system to begin implementation of a Court Docent Program to bring eighth grade students to the courts to observe proceedings, tour the court with the assistance of volunteer docents, and then have a question and answer session with a judge. We will soon begin our second year of this program.

Around 1999-2000 the Congress was considering legislation that could affect the salvage activities at the wreck of the RMS TITANIC. The salvor, R.M.S. Titanic, Inc., hired a Washington lobbyist to follow the matter in Congress. At one point during that process, the Washington lobbyist asked me to meet with Senator John Breaux in case there were any questions asked about the salvage litigation involving the RMS TITANIC, which litigation I was handling. The lobbyist was Charles A. Hunnicutt, Esq., who can be reached at Troutman Sanders, 401 9th Street, N.W., Suite 1000, Washington, D.C. 20004-2134, (202) 274-2957.

21. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01132 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, please provide four (4) copies to the committee.

Other than the guest lectures referenced in response to question 13(d), I have taught no other classes.

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

I have no such arrangements. All of the 401(K) and IRA funds amassed during my service at McGuire Woods and Carr & Porter were placed in an IRA and remain there. I do have credit toward a judicial pension in the Virginia Retirement System based upon my judicial service since 2003. Under that system, circuit court judges receive two and one half years of credit for each year served toward retirement in the state retirement system. I also have a defined benefit plan through the Virginia Supreme Court benefit package for circuit court judges whereby the Commonwealth of Virginia matches my contributions up to a specified amount.

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

No.

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

See attached Financial Disclosure Report

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

See attached Net Worth Statement

26. **Potential Conflicts of Interest**:

    a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01133 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

The parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during my might include my father's former small construction company, my brother's marina in Portsmouth, former clients, local friends or family. I would not anticipate seeing any of these in my court, however, if any of them came before me I would follow the Code of Conduct for United States Judges.

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

I will follow the dictates of Canon 3(C) of the Code of Conduct for United States Judges and related statutes, policies and procedures. As an initial matter I will seek to weed out potential recusal issues before the case is assigned to me or placed on my docket. Short of that, I will raise *sua sponte* any recusal issue I identify, and would expect parties and/or attorneys involved in such matter to call any potential recusal issue to my attention for full consideration.

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

While practicing law at McGuire Woods LLP from 1989-1998, I from time to time handled uncontested pro bono divorces referred to McGuire Woods LLP by Tidewater Legal Aid. These matters would normally involve meeting with the client, preparing, filing and having the divorce pleadings served, and then attending the hearing before a divorce commissioner with the client and their witness. I do not know how many of these I handled, but I would estimate no more than three or four, and the amount of time for each would be no more than 20 hours each. Furthermore, during two years of my practice at McGuire Woods LLP, I represented a client in a 42 U.S.C. § 1983 claim against a local jail for prisoner abuse. The request to represent the client was made by federal judge Robert G. Doumar, before whom the pro se case was then pending. After a settlement was reached on behalf of the client, the prisoner agreed to reimburse the firm for a portion of the representation costs and fees. I would estimate that I invested at least one hundred and fifty hours on this matter and that less than half of them were covered by the reimbursement. Additionally, while at McGuire Woods LLP, I helped coordinate the firm's efforts to support the local food bank with donations through the local Legal Food Frenzy. I also chaired the Professional Campaign for the Norfolk United Way Campaign, after having performed volunteer fundraising for the Norfolk United Way for several prior years.



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After leaving McGuire Woods LLP in 1998 and going to Carr & Porter LLC, and prior to leaving that firm for the bench in 2003, I focused my efforts on civic volunteer efforts, such as serving as President of the Tidewater Chapter of the National Conference for Community and Justice (formerly the National Conference of Christians and Jews)(NCCJ) from 2000-2002, and on the board from 1995-2003; and serving as Chairman of the Board of the juvenile rehabilitation school known as the Norfolk Marine Institute from 1999-2001, President from 2001 to 2003, and on the board from 1995-2003. While I served on other boards at the same time as these, these were organizations providing significant benefit to the underprivileged and marginalized and I made a conscious decision to focus my efforts there rather than on providing individualized pro bono assistance during that time. I would estimate that from 1995 to 2003, on average I volunteered about 100 hours per year to each of these two organizations (for a total of 200 hours per year on average for the two combined).

28. **Selection Process**:

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

I saw an article in the Virginia Lawyers Weekly in February 2007 indicating that two judges on the United States District Court for the Eastern District of Virginia had announced they were taking Senior Status, and that Virginia's Senators had asked state-wide and relevant local bar associations to make recommendations of persons to fill the resulting vacancies. I then submitted materials to the bar associations that were making recommendations and accepting application materials. I also interviewed with those bar associations that were conducting interviews in addition to reviewing written submissions. As a result of those submissions and interviews, I received the highest possible rating from the Virginia State Bar and the Virginia Trial Lawyers Association, being found highly qualified. I was endorsed by the Virginia Association of Defense Attorneys, and was recommended by the Virginia Bar Association, the Northern Virginia Black Attorneys Association, the Virginia Women Attorneys Association, the Alexandria Bar Association, the Old Dominion Bar Association, the Hispanic Bar Association of Virginia, and the Asian American Bar Association of Virginia.

Once those recommendations were submitted to Senators Warner and Webb, I was invited to a joint interview to occur with the two Senators on April 11, 2007. On May 3, 2007, Senators Warner and Webb submitted a joint list of seven names to the White House indicating that they were recommending each of the names to



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fill the two vacancies. I was interviewed at the White House on May 21, 2007. The White House Counsel's Office contacted me on August 14, 2007 to indicate that they were going to conduct a background investigation. I then spoke with representatives of the Justice Department Office of Legal Policy on several occasions in the following weeks in an effort to prepare the appropriate forms. The President sent my nomination to the Senate on November 15, 2007.

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

No.



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Rev. 1/2006

# FINANCIAL DISCLOSURE REPORT
## NOMINATION FILING

*Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)*

| 1. Person Reporting (last name, first, middle initial) | 2. Court or Organization | 3. Date of Report |
|---|---|---|
| Davis, Mark S | U.S. District Court, E.D. Va. | 11/19/2007 |
| **4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)** | **5a. Report Type (check appropriate type)** | **6. Reporting Period** |
| U.S. District Judge - Nominee | ☒ Nomination, Date 11/15/2007<br>☐ Initial ☐ Annual ☐ Final<br>5b. ☐ Amended Report | 01/01/2006 to 11/19/2007 |
| **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.** | |
| Portsmouth Circuit Court<br>601 Crawford Street<br>Portsmouth, VA 23704-3807 | 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.)*

☐ NONE *(No reportable positions.)*

| POSITION | NAME OF ORGANIZATION/ENTITY |
|---|---|
| 1. Circuit Court Judge | Third Judicial Circuit of Virginia (Portsmouth Circuit Court) |
| 2. Trustee | Board of Trustees of Westminster-Canterbury on the Chesapeake Bay in Virginia Beach, Virginia |
| 3. Visitor | Regent University School of Law Board of Visitors, an advisory board (without policy-making authority) to the law school dean |
| 4. | |
| 5. | |

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

☐ NONE *(No reportable agreements.)*

| DATE | PARTIES AND TERMS |
|---|---|
| 1. 2003 | Virginia Retirement System |
| 2. | |
| 3. | |

| FINANCIAL DISCLOSURE REPORT<br>Page 2 of 7 | Name of Person Reporting<br>Davis, Mark S | Date of Report<br>11/19/2007 |
|---|---|---|

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

**A. Filer's Non-Investment Income**

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

| | DATE | SOURCE AND TYPE | INCOME (yours, not spouse's) |
|---|---|---|---|
| 1. | 2005 | Commonwealth of Virginia | $ 134,195 |
| 2. | 2006 | Commonwealth of Virginia | $ 139,988 |
| 3. | 2007 | Commonwealth of Virginia | $ 125,605 |
| 4. | | | |
| 5. | | | |

**B. Spouse's Non-Investment Income** – *If you were married during any portion of the reporting year, complete this section.*
*(Dollar amount not required except for honoraria.)*

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

| | DATE | SOURCE AND TYPE |
|---|---|---|
| 1. | | |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |

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

☐ NONE *(No reportable reimbursements.)*

| | SOURCE | DESCRIPTION |
|---|---|---|
| 1. | | Exempt |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |



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| FINANCIAL DISCLOSURE REPORT<br>Page 3 of 7 | Name of Person Reporting<br>Davis, Mark S | Date of Report<br>11/19/2007 |
|---|---|---|

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

☐ NONE *(No reportable gifts.)*

| | SOURCE | DESCRIPTION | VALUE |
|---|---|---|---|
| 1. | | Exempt | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

**VI. LIABILITIES.** *(Includes those of spouse and dependent children. See pp. 32-34 of instructions.)*

☒ NONE *(No reportable liabilities.)*

| | CREDITOR | DESCRIPTION | VALUE CODE |
|---|---|---|---|
| 1. | | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

**FINANCIAL DISCLOSURE REPORT**
Page 4 of 7

| Name of Person Reporting | Date of Report |
|---|---|
| Davis, Mark S | 11/19/2007 |

## VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period: (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) |
|---|---|---|---|---|---|---|---|---|---|
| 1. Nationwide Life Insurance Whole Life Policy | | None | K | T | Exempt | | | | |
| 2. Lincoln National Annuity | | | | | | | | | |
| 3. Commonwealth of Virginia 457 Plan | A | Dividend | J | U | | | | | |
| 4. Commonwealth of Virginia 401(a) Plan | A | Dividend | J | U | | | | | |
| 5. Virginia Retirement System Pension | | | | | | | | | |
| 6. IRA #1 | E | Dividend | M | T | | | | | |
| 7. - UBS Pace Money Market Investment Fund Class P | | | | | | | | | |
| 8. - American Funds Growth Fund of America Class F | | | | | | | | | |
| 9. - ING International Value Fund Class A | | | | | | | | | |
| 10. - PIMCO Total Return Fund Class A | | | | | | | | | |
| 11. - Blackrock U.S. Opportunities A | | | | | | | | | |
| 12. - DWS Dreman High Return Equity Fund Class A | | | | | | | | | |
| 13. - First Eagle Overseas Fund Class A | | | | | | | | | |
| 14. - Royce Premier Fund | | | | | | | | | |
| 15. - UBS U.S. Large Cap Equity Fund Class A | | | | | | | | | |
| 16. - Loomis Sayles Strategic Income Fund Class A | | | | | | | | | |
| 17. - Oppenheimer International Bond Fund Class A | | | | | | | | | |

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

**FINANCIAL DISCLOSURE REPORT**
Page 5 of 7

| Name of Person Reporting | Date of Report |
|---|---|
| Davis, Mark S | 11/19/2007 |

**VII. INVESTMENTS and TRUSTS** – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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) |
|---|---|---|---|---|---|---|---|---|---|
| 18. - Blackrock Core Bond Portfolio Fund Class A | | | | | | | | | |
| 19. - Calamos Growth Fund Class A | | | | | | | | | |
| 20. - Lord Abbett Affiliated Fund Class A | | | | | | | | | |
| 21. - Pimco Foreign Bond Fund Class A | | | | | | | | | |
| 22. - Royce Opportunity Fund | | | | | | | | | |
| 23. - Scudder Dreman High Return Fund Class A | | | | | | | | | |
| 24. UBS Financial Services, Inc. - Cash Equivalent Account | A | Dividend | | | | | | | |
| 25. Phoenix Balanced Fund Class A | A | Dividend | | | | | | | |

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



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| FINANCIAL DISCLOSURE REPORT<br>Page 6 of 7 | Name of Person Reporting<br>Davis, Mark S | Date of Report<br>11/19/2007 |
|---|---|---|

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

* The following mutual funds, listed under IRA #1 in section VII, were sold during the reporting period and the proceeds were reinvested in the other assets of the IRA: Blackrock Core Bond Porfolio Fund Class A; Calamos Growth Fund Class A; Lord Abbett Affiliated Fund Class A; Pimco Foreign Bond Fund Class A; Royce Opportunity Fund; Scudder Dreman High Return Fund Class A.
* The Phoenix Balanced Fund Class A, and the UBS Financial Services Inc. Cash Equivalent Account (known as the UBS Cash Fund, Inc.), reported in section VII, were sold (in 2007) during the reporting period and the liquid assets were paid out to me.

| FINANCIAL DISCLOSURE REPORT<br>Page 7 of 7 | Name of Person Reporting<br>Davis, Mark S | Date of Report<br>11/19/2007 |
|---|---|---|

**IX. CERTIFICATION.**

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

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

Signature Mark S. Davis Date 11-19-07

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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



474501.057

## 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 | Notes payable to banks-secured | | | |
| U.S. Government securities-add schedule | | | | Notes payable to banks-unsecured | | 3 | 230 |
| Listed securities-add schedule | | | | Notes payable to relatives | | | |
| Unlisted securities--add schedule | | | | Notes payable to others | | | |
| Accounts and notes receivable: | | | | Accounts and bills due | | 3 | 000 |
| Due from relatives and friends | | | | Unpaid income tax | | | |
| Due from others | | | | Other unpaid income and interest | | | |
| Doubtful | | | | Real estate mortgages payable-add schedule | | 351 | 899 |
| Real estate owned-add schedule | | 544 | 080 | Chattel mortgages and other liens payable | | 8 | 475 |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 56 | 000 | VISA – TCM/Heritage Bank | | 3 | 753 |
| Cash value-life insurance | | 15 | 504 | | | | |
| Other assets itemize: | | | | | | | |
| UBS Managed IRA | | 150 | 019 | | | | |
| Lincoln National Annuity | | 4 | 944 | | | | |
| | | | | Total liabilities | | 370 | 357 |
| | | | | Net Worth | | 404 | 690 |
| Total Assets | | 775 | 047 | Total liabilities and net worth | | 775 | 047 |
| 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 | | | | | | | |

NET WORTH SCHEDULES:
Real estate owned ($544,080) and Real estate mortgages payable ($351,899) refer to personal residence.



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AFFIDAVIT

I, Mark S. Davis, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

12-12-2007
(DATE)

Mark S. Davis
(NAME)

CYNTHIA P. MORRISON
Notary Public
Commonwealth of Virginia
My Commission Expires September 30, 2010
Commission ID# 314344

Cynthia P Morrison
(NOTARY)

Mr. Kays.

**STATEMENT OF DAVID GREGORY KAYS, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI**

Mr. KAYS. Good afternoon. I'd like to take this opportunity to thank the Chairman for chairing this hearing today, and the Committee for scheduling the hearing. I'd like to express my gratitude to Senator Kit Bond and Senator Claire McCaskill for their support, and the President for his support and his nomination.

At this time I would like to introduce my family. My wife, Julie Kays, my 11-year-old daughter, Slone Kays, who's missing the sixth grade today. My mother, Nancy Kays, my father, Darrell Kays, my sister, Terri Griffith, my brother-in-law, Greg Griffith, and my nephew, Corey Renken, who is a senior in high school. I have a laundry list of friends who traveled all the way from the great State of Missouri to be here. There are about 16 of us.

Thank you, sir.

Senator KOHL. Thank you, Mr. Kays. We appreciate your family and friends who are here with you today.

[The biographical information follows.]

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**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

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

   David Gregory Kays (Greg)

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

   United States District Judge for the Western District of Missouri

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

   Office: 1 Court Circle, Suite 9
   Camdenton, MO 65020

   Residence: Lebanon, Missouri

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

   1962; Kansas City, Missouri

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

   I am married to Julie Ann Kays (prior name, Julie Ann Best; Maiden name, Julie Ann Roper.) She is employed as an Administrative Assistant at Holman Howe Funeral Home, 320 South Adams, Lebanon, MO 65536. We have one dependent child.

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

   University of Arkansas School of Law, 1985 – 1987; Juris Doctor, January 1988

   Southwest Missouri State University, 1980 – 1985; Bachelor of Science, May 1985

   Drury University, 1981 – 1982; no degree



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

Employment:

01/2005 through present
State of Missouri, Twenty-Sixth Judicial Circuit
1 Court Circle, Suite 9
Camdenton, Missouri 65020
Presiding Circuit Court Judge

01/1995 through 01/2005
State of Missouri, Laclede County Circuit Court
200 N. Adams
Lebanon, Missouri 65536
Associate Circuit Judge

01/1991 through 01/1995
Laclede County Prosecuting Attorney's Office
200 N. Adams
Lebanon, Missouri 65536
Prosecuting Attorney

12/1989 through 01/1991
Laclede County Prosecuting Attorney's Office
200 N. Adams
Lebanon, Missouri 65536
Chief Assistant Prosecuting Attorney

08/1989 through 12/1989
Office of the Special Public Defender
333 Park Central East, Suite 313
Springfield, Missouri 65806
Assistant Public Defender

05/1988 through 08/1989
Laclede County Prosecuting Attorney's Office
200 N. Adams
Lebanon, Missouri 65536
Assistant Prosecuting Attorney



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01147 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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05/1988 through 08/1989
Miller and Hutson Law Firm
211 E. Commercial
Lebanon, Missouri
Attorney

06/1986 through 03/1988
Laclede County Prosecuting Attorney's Office
200 N. Adams
Lebanon, Missouri 65536
Investigator

June – August, 1985
Loren Cook Co.
2015 East Dale Street
Springfield, Missouri
laborer

08/1992 through 12/2004
Drury University
531 Bland Road
Lebanon, Missouri 65536
Adjunct Instructor

Other affiliations:
First Christian Church
500 S. Madison
Lebanon, Missouri 65536
Board Chairman, 1/2007 through present; Served as Vice Chairman in 2006

Lebanon Park Board
400 S. Madison
Lebanon, Missouri 65536
Board of Directors, 1992-1994

Laclede County Bar Association
301 N. Adams
Lebanon, Missouri 65536
President, 1992; Vice-President, 1991

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

None



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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.

   National Judicial College, Certificate, 2007

   National College of District Attorneys, Certificate, 1991

   Carnegie Medal

   Missouri Judicial Conference Award

   Red Cross Hometown Hero

   Missouri State Highway Patrol Honorary Trooper Award

   Supreme Court of Missouri Permancy Awards –2006 & 2007

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.

    Missouri Bar Association

    Laclede County Bar Association
    1992- President, 1991- Vice President

    26th Judicial Circuit Bar Association

    Missouri Juvenile Justice Association

    National Council of Juvenile and Family Court Judges

    American Judicature Society

    Circuit Judge Section of Missouri Judicial Conference
    Executive Committee (2006 –present)

    Clerical Weighted Work Load Task Team (2007 –present)

11. **Bar and Court Admission**:

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



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Admitted to the Missouri Bar on May 7, 1988. There has been no lapse in membership.

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

Missouri state courts, 1988

United States District Court for the Western District of Missouri; 1988; Lapsed: I became a judge in January 1995.

12. **Memberships**:

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

First Christian Church (1994 – Present); Chairman of the Board, Vice Chairman of the Board, Elder, Deacon, Youth Sunday School Teacher, Youth Group Leader

Strategic Planning Committee of Lebanon School System (2003-2005)

Lebanon Park Board (1992-1994); Board of Directors

St. Johns Breech Ethics Committee (2002)

St. Johns Hospital, Heritage Foundation, Builders Club (2004-Present)

Camden County Republican Club (2004–Present)

Masonic Lodge (1990-Present)

Scottish Rite (1998-Present)

Abou Ben Adhem Shrine (1998-Present)

Lebanon Country Club (1993-Present)

Kiwanis Club (1989-1994)

Phi Alpha Delta Legal Fraternity (1986-Present)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01150 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Missouri Task Force on Alternative Sentencing (2006-2007)

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

I am not aware that any of the organizations listed above engage in discriminatory practices.

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

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

Breast Cancer Wellness Magazine - "A Little Perspective" - published in Spring 2007.

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

None

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

None

d. Please supply four (4) copies, transcripts or tape recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Please include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01151 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke.

I speak occasionally to local civic groups to inform and to promote the court. There are no copies of written speeches as it is my practice to speak from outlines, which are discarded after the event. What follows is an approximate listing:

DARE Graduations, 1995-2002, Drug Resistance

Optimist Club, 1991-1996, Judicial System

Lions Club, 1996, Judicial System

Kiwanis Club, 1998, Judicial System

Rotary Club, 1996-2002, Judicial System

Joel E. Barber School, 1997, Commencement Speech - "Making Good Choices"

Camden County Republican Club, 2004, "The Campaign Trail"

Cope Domestic Violence Workshops, 1996-1998, "Understanding Orders of Protection"

Campaign Speeches; 2004, 1994 and 1990

26th Judicial Circuit Bench Bar Meetings, 2005-2007, "A View from the Bench"

Library Garden Memorial Dedication, 2006, Vision and Leadership

Springfield Public Schools, 1998, "Safe Schools"

Eulogies, 1999-2006

Wall of Fame Induction Ceremony, 2007, "Judge Dean Whipple"

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

My contact with the media was more frequent before I took the bench. That was almost thirteen years ago. As a judge I have little contact with the media at present. I do not possess any prior interviews. But I can state that almost all of



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01152 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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my interviews were related to the function and duties of the prosecutor's office or the court system.

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.

In 2004, I was elected Circuit Judge of the 26th Judicial Circuit of Missouri. The Circuit Court in Missouri is an elected court of general jurisdiction. All felonies as well as juvenile cases and major civil cases fall within the jurisdiction of the Circuit Court. My peers have elected me to serve as Presiding Circuit Judge. That position requires the usual caseload of the court with additional responsibilities of the administrative duties related to the court operations of five county courthouses and one juvenile detention facility. I also serve as appointing authority and personnel head for the 42 employees of the Juvenile Court and the Mary Dickerson Juvenile Detention Center.

In 1994 I was elected Associate Circuit Judge of Laclede County. I was re-elected in 1998 and 2002. The Associate Circuit Court in Missouri is an elected court of limited jurisdiction. All criminal cases begin in this division. This court handles domestic relations, probate and civil cases less than $25,000.00. During the course of my duties as an Associate Judge I was appointed and responsible for a significant circuit court docket as well.

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

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

As a state trial judge I do not write published opinions.

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

None

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

i. State ex rel York v. Kays, 916 S.W.2d 859 (Mo. App. 1996)
Probate case. In this case, the Relator sought to disqualify me after a hearing where evidence was adduced regarding her inappropriate use of estate funds. I immediately suspended her powers and advised her attorney that a show cause order would be forthcoming. A few days later she filed a "Petition to Disqualify." I denied this motion and the appellate court reversed.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01153 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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ii. Chastain v. Chastain, 932 S.W.2d 396 (Mo. 1996)
Child Support case. This case involved a statute, which required a judicial review of administrative orders within a 45-day period. If no review was conducted in that time period there was a default statutory provision, which stated that the Court was deemed to have approved the administrative order. I found the statute to be in violation of the Missouri Constitution. The Supreme Court agreed with this determination but reversed in part and found that the remaining portions of the statute could be severable.

iii. State ex rel Reedcraft Man. v. Kays, 967 S.W.2d 703 (Mo. App. 1998)
Contract case. In this case, the Plaintiff brought suit against Defendant in Laclede County. Defendant filed a motion to transfer venue. I denied this motion. The Defendant sought a writ of prohibition. The writ was granted and case was transferred accordingly.

iv. In re Estate of Mounts, 39 S.W. 3d 499 (Mo. App. 2000)
Contract case. This was a case where the Thortons were prospective purchasers and filed an action against the personal representative of decedent's estate seeking to specifically enforce decedent's contract to sell real property. I was affirmed on the main issues related to enforceability of the contract, but the case was remanded and the appellate court directed me to enter a new judgment and address the issue of warranties of title.

v. Eul v. Beard, 47 S.W. 3d 424 (Mo. App. 2001)
Real Estate case. In this case Plaintiff Eul purchased land owned soley by Mr. Beard. When the real estate contract was entered, Plaintiff required Mrs. Beard to sign the contract. The evidence indicated that the only purpose for her signature was to release dower rights or marital interest. Mr. Beard subsequently died and the contract was terminated. Plaintiff brought suit against Mrs. Beard individually for earnest money. I entered judgment for Mrs. Beard. The appellate court reversed.

vi. Downing v. Howe, 60 S.W.3d 646 (Mo. App. 2001)
Divorce case. In this case I set aside a judgment after Respondent filed a motion alleging among other things allegations of abuse or neglect. The case was reversed because of lack of record.

vii. Vernon v. Director of Revenue, 142 S.W.3d 905 (Mo. App. 2004)
Administrative Review case. This case involves a breath test administered subsequent to a DWI stop. The procedure requires three steps. The first step is a pre-test of the machine, secondly the breath test of the individual, and finally, a post test of the machine. During the testing of the Appellant, there was every indication the breath test machine was working properly until the post test of the machine. The machine indicated a ". 001" result when the post test was conducted. The breath test results were admitted



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01154 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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into evidence. The appellate court reversed because the machine did not "zero out" at .000 the found that the machine malfunctioned.

viii. State ex rel Nixon v. Summit Inv., 186 S.W.3d 428 (Mo. App. 2006)
Civil case. This was a case where another judge entered an interlocutory order dismissing the action for failure to prosecute. The parties brought the case before me and I entered a judgment of dismissal. The court of appeals reversed.

ix. Chad v. City of Lake Ozark, 223 S.W.3d 208 (Mo. App. 2007)
Civil case. This was a case related to interpreting municipal ordinances and reconciling their language with state statute. I granted a summary judgment to the Defendant. In doing so I relied on recent Missouri law, cases from both the Southern and Eastern Districts of the Missouri Courts of Appeals. This case was appealed to the Western District of the Missouri Court of Appeals who had not previously dealt with this issue. This court entered a reversal and went on to express criticism of the other two courts of appeals.

x. Kelly v. Nelson, 226 S.W.3d 882 (Mo. App. 2007)
Tax Case. This case involves a question of whether a redemption payment on past due real estate taxes was timely made when the payment was priority mailed prior to the statutory deadline, but not actually received by the collector until after the deadline. I construed the payment under the "mailbox rule" which is applicable in the payment of taxes. The case was reversed and the Court found these payments should be treated differently.

xi. State ex rel Johns v. Kays, 181 S.W.3d 565 (Mo. 2006)
This was a case involving collateral estoppel. The Defendant sought to prohibit the state from seeking the death penalty in criminal prosecution. He relied on a prior finding in another jurisdiction where a judge in a civil post conviction motion found that he is mentally retarded. I denied their motion and was reversed.

xii. Brungard v. Risky's Inc, WD67217 and SC88654
This is a slip and fall case where the Plaintiff was awarded a default judgment in the amount of $629,000.00. Approximately twenty days after the judgment was entered, Defendant filed a "Motion to Set Aside" with affidavit. I sustained the motion after considering the motion, arguments and applicable law. The Western District Court of Appeals reversed my decision. The Missouri Supreme Court then granted transfer. On December 18, 2007 the Supreme Court in a unanimous decision affirmed my earlier ruling.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01155 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

None

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

None

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

None

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

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

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

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

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

Motions for recusal because of an asserted conflict of interest are rare in my experience. I can only recall two cases where I believe there was an issue regarding a disqualification. The first case is cited at York v. Kays, 916 S.W.2d 859.

This was a probate estate. The estate in question had two co-conservators. They were Boatman's Bank and Peggy York. Boatman's Bank had filed a "Petition to Resign" based upon the actions of Peggy York. A hearing was held on that



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01156 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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petition and evidence was presented during this hearing to indicate that the other co-conservator, Peggy York, was mismanaging the estate, and the Bank was concerned about their liability. The court after hearing this evidence suspended Peggy York's authority and power as co-conservator and then advised Peggy York and her attorney that there would be an "Order to Show Cause" filed against her for the mismanagement. A few days afterwards the Court received the "Petition for Disqualification of Judge."

After I reviewed the rules, applicable statutes and considered the facts of the case, I did not believe recusal was appropriate. My response and actions subsequent to the hearing were a reasonable, logical and necessary consequence related to the evidence produced at the hearing. I further considered my actions consistent with my judicial responsibilities to preserve and protect estates within the jurisdiction of the probate court.

The next case involved a situation where I was obligated under the judicial canons to report an attorney to disciplinary counsel for misappropriation of funds. Upon learning that I had made this report he complained to a judicial commission that I had among other things, failed to report him in a timely fashion. While the complaints were pending, his firm entered in a case before the court I serve. His firm asked that I recuse from that case. I immediately contacted the judicial commission, consulted with them and reviewed the canons. I then recused from that case. All complaints lodged against me were dismissed.

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

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

2006 – 2007, Missouri Task Force on Alternative Sentencing. I was appointed by Governor Matt Blunt

2006, Missouri Court of Appeals, Southern District. I was unsuccessful in receiving the nomination for appointed office.

1992 – 1994, Lebanon City Attorney. I was appointed by then Mayor Kenneth Cowan to fill an unexpired term then elected to a two-year term.

1991 – 1994, Laclede County Prosecuting Attorney. I was elected

1988 – 1990, Laclede County Assistant Prosecutor. I was appointed by then Prosecuting Attorney Jack Miller



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01157 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

I am a member of the Camden County Republican Club. I have never served in any capacity for any campaign other than my own as a candidate.

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

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

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

I did not serve as a clerk to a judge.

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

I have never practice alone.

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

01/2005 through present
State of Missouri, Twenty-Sixth Judicial Circuit
1 Court Circle, Suite 9
Camdenton, Missouri 65020
Presiding Circuit Court Judge

01/1995 through 01/2005
State of Missouri, Laclede County Circuit Court
200 N. Adams
Lebanon, Missouri 65536
Associate Circuit Judge

01/1991 through 01/1995
Laclede County Prosecuting Attorney's Office
200 N. Adams
Lebanon, Missouri 65536
Prosecuting Attorney



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01158 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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12/1989 through 01/1991
Laclede County Prosecuting Attorney's Office
200 N. Adams
Lebanon, Missouri 65536
Chief Assistant Prosecuting Attorney

08/1989 through 12/1989
Office of the Special Public Defender
333 Park Central East, Suite 313
Springfield, Missouri 65806
Assistant Public Defender

05/1988 through 08/1989
Laclede County Prosecuting Attorney's Office
200 N. Adams
Lebanon, Missouri 65536
Assistant Prosecuting Attorney

05/1988 through 08/1989
Miller and Hutson Law Firm
211 E. Commercial
Lebanon, Missouri
Attorney

b. Describe:

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

In May 1988 I began the practice of law and was hired as a part-time prosecutor and part-time private attorney. In August of 1989 I left that position and began work at the Office of Public Defender. In December of 1989 I returned to the Laclede County Prosecutor's Office as the Chief Assistant Prosecuting Attorney. I was subsequently elected Prosecuting Attorney and took office in January 1991. During this period I also served as City Attorney in the City of Lebanon, Missouri from 1992 to 1994. I was then elected and began serving as an Associate Circuit Judge in January 1995. I worked in this capacity for ten years. In 2004 I was elected as a Circuit Judge in the Twenty-Sixth Judicial Circuit of Missouri and was elected by my fellow judges to serve a presiding judge shortly thereafter.

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

I have primarily been a public servant. As a prosecutor, I represented the People of the State of Missouri. In that capacity I also served Laclede



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01159 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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County Missouri as their legal adviser and representative in all civil matters. During the time I served as a private attorney I represented plaintiffs and defendants in general civil cases, family law cases as well as a lending institution.

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

i. Indicate the percentage of your practice in:
   1. federal courts; 0%
   2. state courts of record; 98%
   3. other courts. 2%

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

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

I would estimate that for the years I was a practicing lawyer that number would be approximately 150 cases. In about 60% of these cases I was sole counsel, 35% I served as chief counsel and in 5% of these cases I was associate counsel.

i. What percentage of these trials were:
   1. jury; 5%
   2. non-jury. 95%

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

I have not practiced before the Supreme Court of the United States.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01160 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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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. State of Missouri v. Robert Bransford, CR491-893FX, 920 S.W.2d 937; Circuit Court of Camden County, Missouri. The Honorable Mary Dickerson presided. This case was filed in 1991 and tried to a jury from March 1, 1993 to March 4, 1993.

In this case the Defendant was charged with "Murder in the Second Degree" and "Armed Criminal Action." The evidence presented showed that the Defendant had spent the evening drinking with the victim and others. Sometime in the morning hours the Defendant shot the victim in the chest with a rifle. The victim's body was dumped in a wooded area and was discovered weeks later. The jury found the Defendant guilty of both charges. The Defendant was sentenced as a prior, persistent and class X offender and received sentences of life imprisonment and 30 years respectively. My participation in this case involved all of the pre-trial work and all of the trial. I served as lead counsel for the State of Missouri.

Co-Counsel:
Mr. Jon Morris
200 N. Adams
Lebanon, MO 65536
(417) 532-5401
Opposing Counsel:
Mr. T.D. Pawley
Unknown address

Mr. Don Catlett
3402 Buttonwood Drive
Columbia, MO 65201
573/ 882-9855

2. State of Missouri v. Lonny Hofman, CR593-1FX; Circuit Court of Miller County, Missouri. The Honorable James A. Franklin, Jr. presided. This case was filed in 1991 and tried to a jury from June 1, 1993 to June 2, 1993.

In this case the Defendant was charged with "Possession of a Controlled Substance with Intent to Distribute." The Defendant was stopped on an interstate highway for a traffic violation; subsequent to the stop law enforcement searched his vehicle and discovered a large quantity of marijuana. The jury found the Defendant guilty and recommended fifteen years in prison, which was the maximum sentence allowed by law. My participation in this case involved most



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01161 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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of the pre-trial work, including two suppression hearings and all of the trial with the exception of one witness examination. I served as lead counsel for the State of Missouri.

Co-Counsel:
Mr. Jon Morris
200 N. Adams
Lebanon, MO 65536
(417) 532-5401

Opposing Counsel:
Mr. F. Randall Waltz, III
Waltz & Associates
Suite 302, 308 High St.
Jefferson City, MO 65101
(573) 634-4334

3. State of Missouri v. Sean Myers, CR192-2FX, 997 S.W.2d 26; Circuit Court of Camden County, Missouri. The Honorable James A. Franklin, Jr. presided. This case was filed in 1991 and tried to a jury from July 28, 1993 to July 30, 1993.

In this case the Defendant was charged with shooting a rifle from an interstate overpass down into oncoming traffic intending to hit law enforcement personnel. While the Defendant did not manage to hit a law enforcement officer, he did shoot a private citizen. The victim was injured when a bullet hit his windshield and struck him in the face. The jury found the Defendant guilty of "Assault in the First Degree" and "Armed Criminal Action." The Defendant was sentenced as a prior offender to fifteen years and fifty years respectively. My participation in this case included almost all of the pre-trial work. My participation in this case involved most, if not all of the pre-trial work and all of the trial, with the exception of examination of one witness. I served as lead counsel for the State of Missouri.

Co-Counsel:
Honorable G. Stanley Moore
Circuit Judge
1 Court Circle, Suite 9
Camdenton, MO 65020
(573) 346-5160

Opposing Counsel:
Mr. Chase Higinbotham
117 Bradford Lane
Belton, MO 64012
(816) 322-5297



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01162 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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4. State of Missouri v. Charles Tuebner, CR591-3F; Circuit Court of Miller County, Missouri. The Honorable James A. Franklin, Jr. presided. a. This case was filed in 1990 and tried to a jury during November 1992. The Defendant was then sentenced January 25, 1993.

In this case the Defendant was charged with "Murder in the First Degree" and "Armed Criminal Action." The evidence showed that he lured his ex-wife to a wooded area. When they arrived to this area he stabbed her many times with a knife causing her death. The jury found the Defendant guilty of both charges and for the charge of "Murder in the First Degree" he was sentenced to life in prison without possibility of parole and then fifty years in prison for the charge of "Armed Criminal Action." My participation in this case included about 50% of the pre-trial and trial work. I served as lead counsel for the State of Missouri.

Co-Counsel:
Mr. Robert Ahsens
Assistant Attorney General
207 W. High Street
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321

Opposing Counsel:
Mr. J. Marty Robinson
231 E. Capital Avenue
Jefferson City, MO 65101
(573) 526-5210

5. State of Missouri v. Lyle Rogers, CR492-157FX; Circuit Court of Laclede County, Missouri. The Honorable Mary Dickerson presided. This case was filed in January 29, 1992 and tried to a jury on November 3, 1993.

This was a child molestation case. The Defendant was the natural father of the female child victim. The jury found the Defendant guilty of sodomy, and recommended five years in prison. In my experience these are some of the most difficult cases to try before a jury. My participation in this case involved most of the pre-trial work and all of the trial with the exception of one witness examination. I served as lead counsel for the State of Missouri.

Co-Counsel:
Mr. Jon Morris
200 N. Adams
Lebanon, MO 65536
(417) 532-5401



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01163 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Opposing Counsel:
Ms. Donna Holden
Smith & Turley
266 Marshall Drive
P.O. Box 494
St. Robert, MO 65584
(573) 336-5222

6. State of Missouri v. Louis Warren, CR492-155FX; Circuit Court of Laclede County, Missouri. The Honorable Mary Dickerson presided. This case was filed in January 26, 1992 and disposed of on October 13, 1993.

In this case the Defendant was charged with "Murder in the Second Degree" in two counts. The evidence indicated that the Defendant set a trailer house on fire while he was aware that two people were sleeping inside. Both victims died in the fire. The Defendant entered a plea of guilty before trial and was sentenced to life imprisonment. My participation in this case involved most, if not all of the pre-trial work and all of the trial preparation. I served as lead counsel for the State of Missouri.

Opposing Counsel:
Mr. Darrell Deputy, Jr.
Deputy & Mizzell
120 E. 2nd Street
P.O. Box 689
Lebanon, MO 65536
(417) 532-2191

7. State of Missouri v. Jeffery Klein, CR490-785FX; Circuit Court of Laclede County, Missouri. The Honorable Mary Dickerson presided. This case was filed in August 17, 1990 and disposed of on January 20, 1993.

In this case the Defendant entered a plea of guilty on the day of trial. The evidence presented showed that the Defendant was a deputy sheriff. While working the road in the evening hours, he pulled over a vehicle containing young girls. He took one in his official vehicle, went to a remote place and had sexual relations with her. He received a twenty-year sentence to the charge of "Kidnapping." My participation in this case involved most, if not all of the pre-trial work and all of the trial preparation. I served as lead counsel for the State of Missouri.

Opposing Counsel:
Mr. Darrell Deputy, Jr.
Deputy & Mizzell
120 E. 2nd Street



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01164 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Lebanon, MO 65536
(417) 532-2191

8. State of Missouri v. Toby Viles, Circuit Court of Johnson County, Missouri. The Honorable Carl Gum presided. This case was filed in 1992 and disposed of on September 13, 1994.

In this case the Defendant entered a plea of guilty before trial. Because of the publicity in this case the venue was changed and the case was heard in the Circuit Court of Johnson County. This was a tragic case where the Defendant, a sixteen year old, used a high power rifle to kill his three younger siblings in the family living room. The Defendant on the eve of trial entered a plea of guilty to three counts of "Murder in the First Degree" and received life in prison without the possibility of parole on all three counts. My participation in this case involved about 50% of the pre-trial work and trial preparation. I served as lead counsel for the State of Missouri.

Co-Counsel:
Mr. Robert Ahsens
Assistant Attorney General
207 W. High Street
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321

Opposing Counsel:
Mr. Charles Moreland
3402 Buttonwood Drive
Columbia, MO 65201
(573) 882-9855

Mr. Daniel Gralike
3402 Buttonwood Drive
Columbia, MO 65201
(573) 882-9855

9. State of Missouri v. Sharon Kerns, CR491-939FX; Circuit Court of Laclede County, Missouri. The Honorable James A. Franklin, Jr. presided. This case was filed October 18, 1991 and disposed of on September 24, 1993.

In this case the Defendant entered a plea of guilty before trial. The evidence in this case showed that the Defendant and her male victim were severe alcoholics who were living together. They began to argue about the availability of alcohol



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and the Defendant stabbed the victim in the carotid artery. Within a matter of minutes he bleed to death. The Defendant entered a plea of guilty to "Murder in the Second Degree." This was an "open" plea, which means that there was no negotiation as to punishment with the State. The Defendant was in effect throwing herself on the mercy of the Court. The judge sentenced the Defendant to twenty years in prison. My participation in this case involved most, if not all of the pre-trial work and all of the trial preparation. I served as lead counsel for the State of Missouri.

Opposing Counsel:
Mr. Bret Strand
Address Unknown

10. State of Missouri v. Paul Tuebner, CR191-00005FX; Camden County, Missouri. The Honorable James A. Franklin, Jr. presided. This case was filed 1990 and disposed of on June 30, 1992.

In this case the Defendant entered a plea of guilty before trial. This was a companion case to State v. Charles Tuebner. This Defendant's responsibility was to drive his brother, Charles Tuebner, to and from the crime scene. While at the scene he waited patiently in the car while his brother stabbed a young female victim to death. After the murder the Defendant assisted in disposing of the weapon and blood soaked clothing. My participation in this case included about 50% of the pre-trial and trial preparation. I served as lead counsel for the State of Missouri.

Co-Counsel:
Mr. Robert Ahsens
Assistant Attorney General
207 W. High Street
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321

Opposing Counsel:
Mr. Joseph Green
566 1st Capital Drive
St. Charles, MO 63301
Phone number unknown

Mr. Christopher McGraugh
Suite 2001
One City Centre
St. Louis, MO 63101
(314) 231-9600



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

Laclede County Prosecutors Office

Missouri law establishes that the position of Prosecuting Attorney in a third class county is a part time position. The compensation is set to match the part time commitment. In Missouri, at the time I took office, most counties had the third class designation. Every county with this designation had an elected prosecutor who maintained a private law practice. This had been the custom in Laclede County and everywhere else in our state. When elected in 1990 I pledged to make this office the first full-time prosecutor's office in Missouri for a county of the third class. I felt strongly that this was a necessary response to the increasing caseload handled by the office as well as the serious nature of the cases that were being presented for filing. We had serveral murder cases in the office and it made sense that full time prosecutors should handle them. Our goal was to put in place an aggressive, full-time, professional prosecutor's office. It worked well. During my term as prosecutor we accomplished many things. All felony jury trials resulted in conviction. The office became computerized. A bad check program was implemented which helped merchants get their restitution more expeditiously. The office was part of a pilot program in the state to give child support collection a greater priority through the use of a specially assigned prosecutor. Approximately one year into my term, I was asked to take over prosecution duties at Lebanon Municipal Court. Lebanon has the busiest municipal court in the jurisdiction. The fact that the same person was the prosecutor in both places created efficiencies within the offices and added more coordination within the law enforcement community. I note that since I left this office in 1994, the elected prosecutors who followed have not maintained a private law practice.

Associate Circuit Judge

Initially when I took the bench there was somewhat of a case backlog. Within a few months I began to see and understand how a growing court docket had challenged the court infrastructure. Among the challenges we faced, were problems related to docketing, case management and trial settings. Soon I became sensitive to the issues related to "court accessibility." I believe strongly that if judges are not diligent in moving their dockets today, when a new case is filed, it will take longer to accommodate litigants with a trial date. My goal was to eliminate any complaints by the bar, or the public, related to the time it takes to get a case to trial. With the help of clerks we created a new docketing system. This new system encouraged case movement. Our goal was simple. Each time a case was called, the judge would attempt to accomplish something meaningful in the case. No case was ever just set over; all cases would have a specific court date and a purpose cited. After so many appearances, depending on case type, the case was set for trial, absent extraordinary circumstances. Most weeks we had court every day of the week.



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Each day and each part of the day was designated for a specific type of case. At first this process did meet with some resistance. Within one year into this program, everyone began to realize and appreciate the benefits of an organized and orderly docket. Litigants could get their day in court quicker. Ultimately the bar had more access to the courts. After six years as the lone judge in this position, based upon the census results of 2000, we were granted an additional judge. This allowed greater flexibility in the system.

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

I enjoyed teaching evening classes, as described below, at Drury University from 1992 through 2004. The school's location is 531 W. Bland, Nelson Education Center, Lebanon, Missouri 65536.

Law & Society 1998, 2000, 2001, 2002, 2003 & 2004
In this class we considered social, cultural, and political forces, which influence the formation of laws and legislative processes. Theories of the origins of law are discussed and then applied to historical legal cases.

Government & Politics in the United States 1999 only
This class was an introduction to theories, organization, functions and government structures of the U.S. political system.

Justice and Punishment 1999
In this class we conducted a philosophical and pragmatic examination of justice and punishment. The course also provided the student with an understanding of the conceptual foundations of justice.

Victimology 2001
This class was an analysis of major perspectives on victimization. There was emphasis on the role of the victim in the generation of crime, experience of the victim in the criminal justice system and on patterns of victimization.

Judicial Process 2002
This class was an in-depth look at the judicial branch of government, emphasizing the state and federal judicial systems. The role of prosecution, defense, judge, and jury were examined, as well as judicial procedure.

Wills, Estates and Trusts 2003
This class was an introduction to wills, trusts, future interests, and estate and trust administration. It was also a study of the historical basis of each.



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Introduction to Criminology 1992-2004 (approx.)
This class provided a general theoretical understanding of crime problems in the U.S. The basic sources of crime, the justice machinery, and society's reaction to crime are examined.

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

    I have earned retirement benefits from the State of Missouri during my tenure as judge. It is my understanding I will not receive any benefits until age 62. I also have a deferred compensation package in which I have contributed. I do not anticipate accessing these funds until I am of retirement age.

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

    No

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

    See attached Financial Disclosure Report.

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

    See attached Net Worth Statement

26. **Potential Conflicts of Interest**:

    a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

        I know of none. As a state court judge and elected public servant for almost thirteen years, I have learned to avoid activities that would create potential conflicts of interest.



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

In any circumstance where an actual or potential conflict of interest comes to light, I will follow and rely on the Code of Conduct for United States Judges and any other requirements of law.

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

During the time period I practiced law before becoming a full time public servant, I handled some pro bono work. These cases involved landlord tenant disputes and small civil cases. While I have been unable to give legal advice during my tenure on the bench, my family and I have been active in supporting the less fortunate in our community. During the last twenty years I have volunteered in different capacities, some examples include: a laborer for Habitat for Humanity, taken a child to the Shriner's Hospital, worked to remove storm damage for the elderly, and delivered meals during Thanksgiving. My family and I have financially supported the mission efforts of our church, the American Cancer Society, indigent wards of the court, Crosslines ministry, Cope Domestic Violence Inc. and other various charities throughout the year.

28. **Selection Process**:

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

There was not a selection commission used in my nomination. The initial interview took place October 19, 2006 in Kansas City, Missouri at Senator Kit Bond's office. At that time I was interviewed by two of Senator Bond's staff. Subsequent to this, I interviewed with Senator Bond on December 20, 2006. The following day I was contacted by the White House and was given an interview date. I first interviewed at the White House on December 29, 2006. On July 3, 2007 I was contacted again by the Whitehouse and given a second interview date. On July 9, 2007 I had my second interview at the White House. I was next contacted by the White House on August 10, 2007 and advised that the President



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intended to send my name to the Senate pending a background investigation. On August 15, 2007, I was contacted by the Department of Justice and given nomination paperwork to complete. I have had subsequent conversations with staff from the Department of Justice regarding that paperwork. My nomination was submitted to the Senate on November 15, 2007.

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

No



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Rev. 1/2006

# FINANCIAL DISCLOSURE REPORT
## NOMINATION FILING

*Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)*

| 1. Person Reporting (last name, first, middle initial) | 2. Court or Organization | 3. Date of Report |
|---|---|---|
| Kays, David G | Western District of Missouri | 11/17/2007 |
| **4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time)** | **5a. Report Type (check appropriate type)** | **6. Reporting Period** |
| U.S. District Judge - Nominee | ☒ Nomination, Date 11/15/2007<br>☐ Initial ☐ Annual ☐ Final<br>5b. ☐ Amended Report | 01/01/2006 to 10/31/2007 |
| **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.** | |
| 1 Court Circle, Suite 9<br>Camdenton, MO 65020 | 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.)*

☐ NONE *(No reportable positions.)*

| POSITION | NAME OF ORGANIZATION/ENTITY |
|---|---|
| 1. Circuit Judge | State of Missouri |
| 2. | |
| 3. | |
| 4. | |
| 5. | |

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

☒ NONE *(No reportable agreements.)*

| DATE | PARTIES AND TERMS |
|---|---|
| 1. | |
| 2. | |
| 3. | |

| FINANCIAL DISCLOSURE REPORT<br>Page 2 of 6 | Name of Person Reporting<br>Kays, David G | Date of Report<br>11/17/2007 |
|---|---|---|

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

**A. Filer's Non-Investment Income**

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

| | DATE | SOURCE AND TYPE | INCOME (yours, not spouse's) |
|---|---|---|---|
| 1. | 2005 | State of Missouri, Salary | $ 108,000.00 |
| 2. | 2006 | State of Missouri, Salary | $ 108,000.00 |
| 3. | 2006 | Carnegie Commission, Award | $ 4,000.00 |
| 4. | 2007 | State of Missouri, Salary | $ 92,617.62 |
| 5. | | | |

**B. Spouse's Non-Investment Income** - *If you were married during any portion of the reporting year, complete this section.*
*(Dollar amount not required except for honoraria.)*

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

| | DATE | SOURCE AND TYPE |
|---|---|---|
| 1. | 2006 | Holman Howe Funeral Home, Salary |
| 2. | 2007 | Holman Howe Funeral Home, Salary |
| 3. | | |
| 4. | | |
| 5. | | |

## IV. REIMBURSEMENTS – *transportation, lodging, food, entertainment.*

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

☐ NONE *(No reportable reimbursements.)*

| | SOURCE | DESCRIPTION |
|---|---|---|
| 1. | Exempt | |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |

| FINANCIAL DISCLOSURE REPORT<br>Page 3 of 6 | Name of Person Reporting<br>Kays, David G | Date of Report<br>11/17/2007 |
|---|---|---|

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

☐ NONE *(No reportable gifts.)*

| | SOURCE | DESCRIPTION | VALUE |
|---|---|---|---|
| 1. | Exempt | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

**VI. LIABILITIES.** *(Includes those of spouse and dependent children. See pp. 32-34 of instructions.)*

☒ NONE *(No reportable liabilities.)*

| | CREDITOR | DESCRIPTION | VALUE CODE |
|---|---|---|---|
| 1. | | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5 | | | |

**FINANCIAL DISCLOSURE REPORT**
Page 4 of 6

| Name of Person Reporting | Date of Report |
|---|---|
| Kays, David G | 11/17/2007 |

## VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period | | C. Gross value at end of reporting period | | D. Transactions during reporting period | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | If not exempt from disclosure | | | |
| | (1) Amount Code 1 (A-H) | (2) Type (e.g. div., rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, merger, redemption) | (2) Date Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
| 1. AIM Dynamics Fund Fund Inv Class | B | Dividend | J | T | Exempt | | | | |
| 2. American Century Ultra Inv Class | C | Dividend | J | T | | | | | |
| 3. Fidelity Contrafund | D | Dividend | K | T | | | | | |
| 4. TA IDEX Transamerica Equity-A | A | Dividend | J | T | | | | | |
| 5. A.G. Edwards -Triangle Investment Partnership | B | Dividend | J | T | | | | | |
| 6. | | | | | | | | | |
| 7. | | | | | | | | | |
| 8. | | | | | | | | | |
| 9. | | | | | | | | | |
| 10. | | | | | | | | | |
| 11. | | | | | | | | | |
| 12. | | | | | | | | | |
| 13. | | | | | | | | | |
| 14. | | | | | | | | | |
| 15. | | | | | | | | | |
| 16. | | | | | | | | | |
| 17. | | | | | | | | | |

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



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| FINANCIAL DISCLOSURE REPORT<br>Page 5 of 6 | Name of Person Reporting<br>Kays, David G | Date of Report<br>11/17/2007 |
|---|---|---|

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

| FINANCIAL DISCLOSURE REPORT<br>Page 6 of 6 | Name of Person Reporting<br>Kays, David G | Date of Report<br>11/17/2007 |
|---|---|---|

**IX. CERTIFICATION.**

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

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

**Signature** David G. Kays **Date** 11-17-07

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

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

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

## FINANCIAL STATEMENT

NET WORTH

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

| ASSETS | | | | LIABILITIES | | | |
|---|---|---|---|---|---|---|---|
| Cash on hand and in banks | | 5 | 000 | Notes payable to banks-secured | | | |
| U.S. Government securities-add schedule | | | | Notes payable to banks-unsecured | | 9 | 844 |
| Listed securities-add schedule | | 12 | 924 | 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 | | 194 | 603 |
| Real estate owned-add schedule | | 335 | 000 | Chattel mortgages and other liens payable | | | |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 46 | 000 | Auto loans | | 27 | 796 |
| Cash value-life insurance | | | | | | | |
| Other assets itemize: | | | | | | | |
| Deferred compensation | | 37 | 580 | | | | |
| Trust | | 10 | 000 | | | | |
| Universal Life Insurance | | 27 | 970 | Total liabilities | | 232 | 243 |
| | | | | Net Worth | | 242 | 231 |
| Total Assets | | 474 | 474 | Total liabilities and net worth | | 474 | 474 |
| 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 | | | | | | | |



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# FINANCIAL STATEMENT

## NET WORTH SCHEDULES

| | |
|---|---|
| Listed Securities | |
| IRA - TA IDEX Transamerica Equity-A | $ 12,924 |
| Total Listed Securities | 12,924 |
| | |
| Real Estate Owned | |
| Personal residence | $ 325,000 |
| Undeveloped lot | 10,000 |
| Total Real Estate Owned | $335,000 |
| | |
| Real Estate Mortgages Payable | |
| Personal residence | $ 173,481 |
| Home Equity | 21,122 |
| Total Real Estate Mortgages Payable | $ 194,603 |



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AFFIDAVIT

I, David Gregory Kays, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

12-19-07
(DATE)

(NAME)

(NOTARY)

JACKIE JO MILLER
NOTARY PUBLIC-NOTARY SEAL
CAMDEN COUNTY, STATE OF MISSOURI
My Commission Expires: 02-02-09
Commission #00512660

Mr. Novak.

**STATEMENT OF DAVID J. NOVAK, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA**

Mr. NOVAK. Thank you, Senator. I'd like to thank you and Senator Specter for holding this hearing today. I'd also like to thank the President for nominating me, and also thank Senator Warner and Senator Webb for their support throughout this process.

With me today is my wife Martha, who's in the front row. I'm going to ask her to stand. And my two young daughters, Nicole and Katie, who are also missing school today. I think they're pretty happy about that. Also, Chief Judge James Spencer from the Eastern District of Virginia. I'd ask them to rise. As well as a number of friends. Again, I'm not going to burden you as well with their names.

Senator KOHL. Thank you, Mr. Novak. We appreciate your family and friends who are here.

[The biographical information follows.]

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

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

   David John Novak

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

   United States District Judge for the Eastern District of Virginia

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

   600 East Main Street
   Suite 1800
   Richmond, Virginia 23219

   Residence: Montpelier, Virginia

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

   1961; Greensburg, Pennsylvania

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

   I am married to Martha Lilia Novak. She is employed as a Teacher's Aide at St. Mary's Catholic School; 9501 Gayton Road; Richmond, VA 23229 and as a Part-time Spanish teacher at St. Christopher's School; 711 St. Christopher's Road; Richmond, VA 23226. We have two dependent children.

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

   Villanova University Law School, Sept. 1983 to May 1986; Juris Doctor, May 1986

   St. Vincent College, Aug. 1980 to May 1983; B.S. *Magna Cum Laude,* May 1983



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01181 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Univ. of Pittsburgh at Johnstown, Sept. 1979 to May 1980, no degree

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

Assistant United States Attorney (Senior Litigation Counsel)
United States Attorney's Office
Eastern District of Virginia
600 East Main Street
Suite 1800
Richmond, Virginia 23219
December 1994 to Present

Assistant United States Attorney
United States Attorney's Office for the Southern District of Texas
Worked in both Houston and McAllen:
919 Milam Street, Houston, Texas 77208
1701 West Highway 83, Suite 600, Houston, Texas 73341
December 1991 to December 1994

Trial Attorney
United States Department of Justice
Criminal Division, Money Laundering Section
1400 New York Avenue, N.W.
Washington, D.C. 20530
June 1991 to November 1991

Assistant District Attorney
Philadelphia District Attorney's Office
1421 Arch Street
Philadelphia, Pennsylvania 19102
September 1986 to May 1991
(also student intern summer 1985)

Pretrial Services Interviewer
Court of Common Pleas
City of Philadelphia
219 North Broad Street
Philadelphia, Pennsylvania 19103
May 1984 to June 1986 (excluding summer 1985)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01182 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

474501.095

Student Law Clerk
Hon. Eugene E.J. Maier
Judge, Court of Common Pleas
Room 390, City Hall
Philadelphia, Pennsylvania 19102
Summer 1984

Student Law Clerk
Law Offices of Daniel-Paul Alva
1601 Market Street, Suite 690
Philadelphia, Pennsylvania 19103
Irregular contract work during 1985

Student Law Clerk
Carroll & Carroll Law firm
150 S. Independence Mall West
Philadelphia, Pennsylvania 19106
Irregular contract work during 1984

Greensburg Tribune Review
Greensburg, Pennsylvania
Maintenance worker/student intern
June to September, 1983

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

None

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

Attorney General's Award for Excellence in Furthering Interests of United States National Security (one of DOJ's highest awards) (2006)

CIA Seal Medallion for contributions to war on terrorism (2006)

Appellate Advocacy Award from the Association of Government Attorneys in Capital Litigation (2005)

Director's Award for Superior Performance (2001, 1998)

DEA Administrator's Award of Honor (1998)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01183 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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International Narcotic Enforcement Officer's Association Special Award of Honor (1998)

U.S. Commissioner of Customs Commendation Award (1996)

U.S. Deputy Commissioner of Customs Commendation Award (1994)

Outstanding Prosecutor from the Philadelphia Fraternal Order of Police (1991)

*Magna Cum Laude* graduate, St. Vincent College (1983)

Excellence Award for Political Science, St. Vincent College (1983)

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.

John Marshall Inn of Court (current member, no offices)

National Association of Assistant U.S. Attorneys (current member, no offices)

Pennsylvania Bar Association (past member, no offices)

Amerian Bar Association (past member, no offices)

11. **Bar and Court Admission**:

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

Commonwealth of Virginia since September 14, 1995
Commonwealth of Pennsylvania since November 5, 1986

There have been no lapses in membership.

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

Commonwealth of Virginia since September 14, 1995
Commonwealth of Pennsylvania since November 5, 1986
Eastern District of Virginia since February 13, 1996
Fourth Circuit Court of Appeals since March 10, 1995

There have been no lapses in membership.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01184 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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12. **Memberships**:

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

St. Mary's Catholic Church, parishioner since 2000 (no offices held).

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

None

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

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

David J. Novak, *Anatomy of a Federal Death Penalty Prosecution: A Primer for Prosecutors*, 50 S. C. L. Rev. 645 (1999) (authored at the request of the Department of Justice for a special edition of the University of South Carolina Law Review to commemorate the opening of the National Advocacy Center in Columbia, South Carolina).

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

None

c. Please supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01185 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

None

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

Speeches: I have talked about the prosecution of Zacarias Moussaoui to the following groups:

John Marshall Inn of Court, Oct. 10, 2006
U.S. Attorney's Office for District of Columbia, Nov. 14, 2006
Virginia Commonwealth University Forensic Evidence class, Nov. 27, 2006
Univ. of Richmond Law School Forensic Evidence class, Apr. 26, 2007
Virginia Women Judge's Association, May 19, 2007
U.S. Attorney's Office for the Eastern District of Pennsylvania, June 1, 2007
International Trial Lawyer's Association, July 21, 2007
Connecticut Federal Bar Association, September 6, 2007

The speeches were not recorded (to my knowledge) and no transcript exists. For all of the talks, I followed an outline based on the materials provided to the John Marshall Inn of Court.

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

None

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

None



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01186 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

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

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

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

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

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

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

    I have never been a judge.

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

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

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

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

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

    I have not served as a judge.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01187 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

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

None

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

None

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

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

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

I did not serve as a clerk to a judge.

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

I have never practiced alone.

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

December 1994 to Present
United States Attorney's Office, Eastern District of Virginia
600 East Main Street, Suite 1800
Richmond, Virginia 23219
Assistant United States Attorney (Senior Litigation Counsel)

December 1991 to December 1994
United States Attorney's Office for the Southern District of Texas
919 Milam Street, Houston, Texas 77208
Assistant United States Attorney



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01188 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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May 1991 to November 1991
United States Department of Justice
Washington, D.C. 20530
Trial Attorney; Criminal Division, Money Laundering Section

September 1986 to May 1991
Philadelphia District Attorney's Office
1421 Arch Street
Philadelphia, Pennsylvania 19102
Assistant District Attorney

b. Describe:

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

For the first five years of my career, 1986 to 1991, I served as a state prosecutor in Philadelphia. I practiced criminal law exclusively in Pennsylvania state courts. For the past 16 years, I have served as a federal prosecutor, practicing criminal law exclusively in federal courts.

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

My client is the United States of America. My practice consists of federal criminal litigation with particular focus on federal capital cases.

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

My entire practice consists of litigation and I am often in court. The frequency of my appearances has depended on the nature of the litigation, i.e., as a state prosecutor, I was normally in court every day. As a federal prosecutor, I regularly appear in court but less frequently because the cases are more significant.

i. Indicate the percentage of your practice in:
   1. federal courts: 75%
   2. state courts of record: 25%
   3. other courts:

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 0% (but occasional ancillary issues)
   2. criminal proceedings: 100%



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01189 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

I have tried approximately 35 jury trials and hundreds of bench trials. For the vast majority of the cases, I served as either sole counsel or lead counsel. I have also personally argued a number of appeals to the Fourth Circuit.

i. What percentage of these trials were:
   1. Jury: 80%
   2. non-jury: 20%

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

I have not practiced before the Supreme Court of the United States.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

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

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

1. *United States v. Zacarias Moussaoui*, criminal case number 01CR455; United States District Court for the Eastern District of Virginia; Hon. Leonie Brinkema

I was co-counsel for the prosecution team for the only person charged with offenses pertaining to the September 11, 2001 attacks. Moussaoui was convicted and sentenced to life imprisonment on May 4, 2006, after one juror refused to impose a death sentence. The case involved extensive litigation including the following Fourth Circuit opinions:

*United States v. Moussaoui*, 483 F.3d 220 (4th Cir. 2007)
*In re Associated Press*, 172 Fed. Appx. 1 (4th Cir. 2006)
*United States v. Moussaoui*, 382 F.3d 292 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01190 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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*United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004)
*United States v. Moussaoui*, 333 F.3d 509 (4th Cir. 2003)
*United States v. Moussaoui*, 65 Fed. Appx. 881 (4th Cir. 2003)
*United States v. Moussaoui*, 43 Fed. Appx. 612 (4th Cir. 2002)
*In re Moussaoui*, 41 Fed. Appx. 686 (4th Cir. 2002)

Co-counsel:
Robert Spencer
Associate General Counsel
Lockheed Martin Corporation
6801 Rockledge Drive
Bethesda, Maryland 20817
(301) 897-6362

David Raskin
Assistant U.S. Attorney
Chief, Terrorism Unit
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007
(212) 637-2635

Kenneth Karas
United States District Judge
Southern District of New York
300 Quarropas Street
Chambers 533
White Plains, New York 10601-4150
(914) 390-4145

Opposing counsel:
Edward B. MacMahon, Jr., Esquire
107 East Washington Street
P.O. Box 903
Middleburg, Virginia 20118
(540) 687-3902

Gerald Zerkin, Esquire
Assistant Public Defender
One Capital Square
Eleventh Floor
830 East Main Street
Richmond, Virginia 23219
(804) 565-0880



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01191 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC
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Alan H. Yamamoto, Esquire
643 S. Washington Street
Alexandria, Virginia 22314
(703) 684-4700

Kenneth P. Troccoli, Esquire
Anne Chapman, Esquire
Public Defender's Office, Eastern District of Virginia
1650 King Street
Alexandria, Virginia 22314
(703) 600-0800

2. *United States v. Jordan, et al.*, criminal case 3:04CR58; United States District Court for the Eastern District of Virginia; Hon. Henry E. Hudson

I served as lead counsel throughout all pretrial litigation of this capital prosecution that charged two defendants with a drug-related murder. Due to a conflict with *United States v. Moussaoui*, I had to turn over trial of the case to my co-counsel. The district court published the following opinions:

*United States v. Jordan*, 399 F. Supp. 2d 706 (E.D. Va. 2005)
*United States v. Jordan*, 357 F. Supp. 889 (E.D. Va. 2005)
*United States v. Gordon*, 343 F. Supp. 2d 889 (E.D. Va. 2004)

I argued the appeal for the Government on September 28, 2007. On December 4, 2007, the Fourth Circuit issued its opinion, affirming in part and reversing in part, which resulted in one defendant's conviction being vacated due to a prior plea agreement. *United States v. Jordan*, __ F.3d __, 2007 WL 4234735 (4th Cir. Dec. 4, 2007).

Co-counsel:
Roderick C. Young
Assistant United States Attorney, Eastern District of Virginia
600 East Main Street, Suite 1800
Richmond, Virginia 23219
(804) 819-5400

Opposing counsel:

Gerald Zerkin, Esquire
Assistant Public Defender
One Capital Square
Eleventh Floor
830 East Main Street
Richmond, Virginia 23219
(804) 565-0880



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Cary Bowen, Esquire
Bowen, Champlin, Carr & Rockecharlie
1919 Huguenot Road
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(804) 379-1900, ext. 306

Claire Cardwell, Esquire
Stone & Cardwell
101 Shockoe Slip
Suite K
Richmond, Virginia 23219
(804) 359-0000

Michael Herring, Esquire
Commonwealth's Attorney
City of Richmond
900 East Broad Street
Richmond, Virginia 23219
(804) 646-3532

3. *United States v, Friend, et al.*, criminal case no. 3:99CR201; United States District Court for the Eastern District of Virginia; Hon. Robert E. Payne

I served as lead prosecutor of a family (a mother and three sons as well as their associates) of truck hijackers who hijacked trucks and trailers from independent truckers traveling on Interstate 95 in Virginia. Two truckers were brutally murdered and a third was rendered permanently disabled. Two of the sons faced the death penalty but pled guilty to life imprisonment. The youngest son, a juvenile, was transferred to adult status and then pled guilty to life imprisonment. The mother was tried to a jury in July of 2000, convicted of all offenses and sentenced to life imprisonment. Five of their associates also pled guilty to various offenses. There was one reported case arising from this prosecution. *See United States v. Friend*, 92 F. Supp. 2d 534 (E.D. Va. 2000).

Co-counsel:
Brian Hood
Assistant United States Attorney
Eastern District of Virginia
600 East Main Street
Suite 1800
Richmond, Virginia 23219
(804) 819-5400



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01193 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Opposing counsel:
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Richmond, Virginia 23219
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Jeffrey Everhart, Esquire
Rice, Everhart & Baber
4100 East Parham Road
Suite C
Richmond, Virginia 23228
(804) 672-1087

Thomas P. Collins, Esquire
16 South Second Street
Richmond, Virginia 23219-3723
(804) 788-4457

Matthew P. Geary, Esquire
Deputy Commonwealth's Attorney
City of Richmond
900 East Broad Street
Richmond, Virginia 23219
(804) 646-3534

4. *In re Morrissey*, case number 3:97MS16, United States District Court for the Eastern District of Virginia; Hon. Robert E. Payne

I served as the sole trial attorney for the prosecution of a criminal defense attorney (who previously served as the Commonwealth's Attorney for the City of Richmond) for violation of the local rules of the Eastern District of Virginia regarding pretrial publicity. The defendant was convicted of two counts of criminal contempt by United States District Judge Robert E. Payne after a bench trial and sentenced to 3 months imprisonment and 3 years probation, which included 300 hours of community service. Upon release from custody, he attempted to bribe a representative of Habitat for Humanity to indicate falsely that the defendant had performed his community service when he had not. His probation was revoked and he was sentenced to another 3 months imprisonment after another bench trial. My former colleague, Andrew McBride, handled the first appeal to the Fourth Circuit. His contact information is supplied below. Another former colleague, James Comey (later Deputy Attorney General),



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01194 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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handled the second appeal. His information is also set forth below. The following opinions were generated as a result of this case:

*In re Morrissey*, 2000 WL 1868978 (4th Cir. 12/22/2000) (unpublished)
*In re: Morrissey*, 168 F.3d 134 (4th Cir. 1999)
*United States v. Morrissey*, 996 F. Supp. 530 (E.D. Va. 1998)

Co-counsel for appeal:

James B. Comey
General Counsel
Lockheed Martin Corporation
6801 Rockledge Drive
Bethesda, Maryland 20817
(301) 897-6217

Andrew G. McBride
Wiley & Rein, LLP
1776 K Street, N.W., 12th Floor
Washington, D.C. 20006
(202) 719-7135

Opposing counsel:

Murray J. Janus, Esquire
Bremner, Janus & Cook
Seventh and Franklin Building
Suite 1500
701 East Franklin Street
Post Office Box 826
Richmond, Virginia 23218-0826
(804) 643-1400

Everette G. Allen, Jr., Esquire
LeClair Ryan, P.C.
701 East Byrd Street, 16th Floor
Richmond, Virginia 23219
(804) 545-1515

5. *United States v. Beckford, et al.*, criminal case no. 3:96CR66; United States District Court for the Eastern District of Virginia, Hon. Robert E. Payne.

I served as lead prosecutor of this capital prosecution of 40 members of a Jamaican drug organization known as the "Poison Clan" that distributed "crack" cocaine throughout the eastern United States and committed eight murders in the



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01195 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Eastern District of Virginia (and ultimately determined to have committed approximately 20 homicides nationally). Ultimately, five defendants went to trial of which four faced the death penalty. The jury convicted all defendants but declined to impose the death penalty. In addition to being lead trial counsel, I also wrote the appellate brief and argued the case to the Fourth Circuit, which affirmed the convictions. *See United States v. Beckford*, 211 F.3d 1266, 2000 WL 376155 (4th Cir. 2000) (unpublished). This case was also subject to extensive litigation in the district court which produced the following reported decisions (among many other memorandum opinions that were not reported):

*United States v. Beckford*, 962 F. Supp. 748 (E.D. Va. 1997)
*United States v. Beckford*, 962 F. Supp. 767 (E.D. Va. 1997);
*United States v. Beckford*, 962 F. Supp. 780 (E.D. Va. 1997);
*United States v. Beckford*, 962 F. Supp. 804 (E.D. Va. 1997);
*United States v. Beckford*, 964 F. Supp. 993 (E.D. Va. 1997);
*United States v. Beckford*, 964 F. Supp. 1010 (E.D. Va. 1997);
*United States v. Beckford*, 966 F. Supp. 1415 (E.D. Va. 1997).

Co-counsel:
Stephen Miller
Assistant United States Attorney, Eastern District of Virginia
600 East Main Street, Suite 1800
Richmond, Virginia 23219
(804) 819-5400

Andrew G. McBride
Wiley & Rein, LLP
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Washington, D.C. 20006
(202) 719-7135

Opposing counsel:

Gerald Zerkin, Esquire
Assistant Public Defender
One Capital Square
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830 East Main Street
Richmond, Virginia 23219
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Jeffrey Everhart, Esquire
Rice, Everhart & Baber
4100 East Parham Road, Suite C
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(804) 672-1087



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Robert J. Wagner, Esquire
Assistant Public Defender
One Capital Square, Eleventh Floor
830 East Main Street
Richmond, Virginia 23219
(804) 343-0800

John C. Jones, Jr., Esquire
Post Office Box 206
Providence Forge, Virginia 23140
(804) 966-5602

Scott Brettschneider, Esquire
125-10 Queens Boulevard
Penthouse 2701
Kew Gardens, New York 11415
(718) 575-2929

Reginald Barley, Esquire
Suite 210
The 21 Center
2025 East Main Street
Richmond, Virginia 23223
(804) 783-8468

Cary Bowen, Esquire
Bowen, Bryant, Champlin & Carr
1919 Huguenot Road
Suite 300
Richmond, Virginia 23235-4321
(804) 379-1900

David P. Baugh, Esquire
223 South Cherry Street
Post Office Box 12137
Richmond, Virginia 23241
(804) 643-8111

6. *United States v. Spencer Bowens*, criminal case number 3:98CR110; United States District Court for the Eastern District of Virginia; Hon. Robert E. Payne.

I served as sole prosecutor during a one week jury trial of Spencer Bowens aka "Scooter" for his role as the head of the "Poison Clan's" drug activities in North and South Carolina. The jury convicted the defendant and he was sentenced to life imprisonment. I then served as appellate counsel and argued the case to the Fourth Circuit. The Fourth Circuit affirmed his drug conspiracy charge (and his



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01197 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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life sentence) but vacated his convictions for Harboring a Fugitive on venue grounds. *See United States v. Bowens*, 224 F.3d 302 (4th Cir. 2000).

Opposing Counsel:
Craig S. Cooley, Esquire
3000 Idlewood Avenue
Richmond, Virginia 23221
(804) 358-2328

7. *United States v. Giraldi, et al.*, criminal case number B-93-028; United States District Court for the Southern District of Texas; Hon. Filemon Vela.

I served as lead prosecutor for the prosecution of the money laundering operation of the Mexican drug cartel headed by Juan Garcia-Abrego and two Vice-Presidents (Antonio Giraldi and Lourdes Reategui) of American Express Bank International for their role in laundering $33 million of Abrego's personal drug profits. The Mexican money launderers, who were captured, pled guilty. The two American Express bankers went to trial before United States District Judge Filemon Vela and a jury in Brownsville, Texas. The jury convicted the bankers after a trial that lasted approximately 5 weeks. The convictions were affirmed by the Fifth Circuit in *United States v. Giraldi*, 86 F.3d 1368 (5th Cir. 1996). After Giraldi and Reategui were convicted, we filed a civil money laundering action against the corporation pursuant to 18 U.S.C. § 1956(b), which resulted in a settlement approved by United States District Judge Filemon Vela. As a result of the Giraldi prosecution and the settlement with AEBI, the Government received $47 million. *United States v. American Express Bank International*, civil case number B-94-311 (Southern District of Texas --- Brownsville Division). I was also the lead prosecutor for the civil action against AEBI.

Co-counsel (trial):
Charles Dause
Assistant United States Attorney (retired)
9730 FM 462 North
Hondo, Texas 78861
(830) 741-8345

Co-counsel (civil action against AEBI):
Greg Surovic
Assistant United States Attorney, Western District of Texas
601 N.W. Loop 410
Suite 600
San Antonio, Texas 78216
(210) 384-7020



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Co-counsel (appeal):
Kathy Snyder
Assistant United States Attorney, Southern District of Texas
910 Travis Street, Suite 1500
Houston, Texas 77002
(713) 567-9368

Opposing counsel:
Christopher Lee Milner, Esquire
(now) Assistant District Attorney
Collin County District Attorney's Office
210 S. McDonald, Suite 324
McKinney, Texas 75069
(972) 548-4323, ext. 4345

Robert Turner, Esquire
3714 Audubon Place
Houston, Texas 770066
(713) 526-9575

8. *Commonwealth v. Ronald Mason*, criminal case number 586-590-9007; Court of Common Pleas for the City of Philadelphia; Hon. Albert Sabo.

I served as the sole prosecutor of a hit man for a gang known as the "Junior Black Mafia" or "JBM" for the murder of a drug rival. Mason was convicted of first degree murder by a jury and sentenced to life imprisonment. The Pennsylvania appellate courts affirmed the convictions. *See Commonwealth v. Mason*, 423 Pa. Super. 636, 616 A.2d 717 (Pa. Super. 1992) (table); 533 Pa. 643, 622 A.2d 1375 (Pa. 1993) (table).

Opposing counsel:
F. Emmett Fitzpatrick (retired)
Fitzpatrick & Caravasos, P.C.
Suite 926, Public Ledger Building
620 Chestnut Street
Philadelphia, Pennsylvania 19106
(215) 925-5200

9. *Commonwealth v. Aaron Jones*, Court of Common Pleas for the City of Philadelphia; Hon. John Herron.

I served as the sole prosecutor of the leader of a gang known as the "Junior Black Mafia" or "JBM" for the stabbing of a fellow prisoner. Jones was convicted by a jury and sentenced to twenty years imprisonment. The conviction led to the



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01199 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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downfall of the JBM. To my knowledge, no reported decisions exist for this case.

Opposing counsel:
Gerald Stein
Centre Square West
1500 Market Street
Suite 2727
Philadelphia, Pennsylvania 19102
(215) 665-1130

10. *Commonwealth v. Brian Smith*, criminal case number 87-03-534-37; Court of Common Pleas, City of Philadelphia; Hon. Angelo Guarino.

I served as the sole prosecutor of a defendant for knocking out the eye of a Temple law student with a weapon known as nunchaku. After a lengthy trial, a jury convicted the defendant and he was ultimately sentenced to 6 ½ years to 15 years imprisonment. The Pennsylvania appellate courts affirmed. *See Commonwealth v. Smith*, 413 Pa. Super. 643, 595 A.2d 194, *alloc. denied*, 529 Pa. 619, 600 A.2d 536 (1991); *see also Shaffer v. Smith*, 543 Pa. 526, 673 A.2d 872 (1996) (appeal of related civil case).

Opposing counsel:
Louis T. Savino, Jr.
1500 John F. Kennedy Blvd.
Suite 1516
Philadelphia, Pennsylvania 19102
(215) 568-1300

Note:
The District Attorney of Philadelphia during my tenure in that office was Ronald D. Castille. He is now Chief Justice of the Pennsylvania Supreme Court. He can be reached at:

Hon. Ronald D. Castille
Chief Justice, Supreme Court of Pennsylvania
1818 Market Street
Philadelphia, Pennsylvania 19103
(215) 560-5663

20. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01200 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

As a career prosecutor, all of my legal activities have resulted in trials or guilty pleas.

As a senior trial lawyer who has tried a large number of cases, I frequently mentor younger attorneys and speak to bar associations and other groups as detailed above.

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

I have not served as a professor (full-time or as an adjunct); however, I have served as a guest speaker for the Department of Justice at the National Advocacy Center, in-house training for the U.S. Attorney's Office for the Eastern District of Virginia, and at local law schools. I have spoken on a variety of issues pertaining to criminal prosecutions, including courses on money laundering, capital prosecutions, and national security issues that arose from the trial of *United States v. Moussaoui*.

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

None

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

None

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

See attached Financial Disclosure Report.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01201 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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

    See attached Net Worth Statement.

26. **Potential Conflicts of Interest**:

    a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

    Potential conflicts of issue could arise from any criminal prosecution initiated during my tenure in the United States Attorney's Office for the Eastern District of Virginia. When confronted by any potential conflict of issue, I will comply with 28 U.S.C. § 455, and I will be guided by Fourth Circuit precedent and Rule 2.11 of the ABA Model Code of Judicial Conduct (2007).

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

    When confronted by any potential conflict of issue, I will comply with the Code of Conduct for United States Judges and applicable statues, including 28 U.S.C. § 455. I will be guided by Fourth Circuit precedent, procedures and policies.

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

    As a career prosecutor, I have dedicated my career to public service. I have not engaged in any pro bono work beyond my work as a prosecutor.

    Also, our family participates in church activities that assist in feeding the homeless. I have also donated time to support school functions and my children's activities, such as the Girl Scouts.

28. **Selection Process**:

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



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01202 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Please do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

I was interviewed by U.S. Senators John Warner and Jim Webb, along with members of their staff, in Senator Warner's office on April 16, 2007. Senators Warner and Webb then forwarded my name, along with six others, to the White House as part of their bipartisan process for selecting candidates for two openings for the United States District Court for the Eastern District of Virginia.

While there is no selection commission, I was screened and rated by the following bar associations: Virginia State Bar Association, highly qualified; Virginia Women Attorney Association, recommended; Richmond Bar Association, recommended; Metro Richmond Women's Bar Association, highly qualified; Richmond Criminal Bar Association, recommended; Old Dominion Bar Association, qualified; Virginia Bar Association, recommended; Virginia Trial Lawyers Association, recommended.

I was interviewed by members of the White House Counsel's Office and the Department of Justice at the White House on May 17, 2007. I have had subsequent conversations with Justice Department staff regarding the nomination paperwork. My nomination was submitted to the Senate on November 15, 2007.

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

No.



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AO-10 (WP)
Rev. 1/2004

# FINANCIAL DISCLOSURE REPORT

## Nomination Report

*Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App. §§101-111)*

| 1. Person Reporting *(Last name, first, middle initial)* | 2. Court or Organization | 3. Date of Report |
|---|---|---|
| Novak, David J. | Eastern District Virginia | 11/19/07 |
| **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** |
| United States District Judge — Nominee | _x__ Nomination, Date _11/15/07_____<br>___ Initial ___ Annual ___ Final | January 1, 2006, to October 31, 2007 |
| **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.** | |
| 600 East Main Street<br>Suite 1800<br>Richmond, VA 23219 | 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 |
|---|---|---|
| X | **NONE** (No reportable positions.) | |
| 1 | | |
| 2 | | |
| 3 | | |

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

| | DATE | PARTIES AND TERMS |
|---|---|---|
| X | **NONE** (No reportable agreements.) | |
| 1 | | |
| 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** | | | |
| X | **NONE** (No reportable non-investment income.) | | |
| 1 | | | $ |
| | | | $ |
| 3 | | | $ |

**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 | 2006-07 | St. Mary's Catholic School (salary as employee) | |

| | | |
|---|---|---|
| 2 | 2006-07 | St. Christopher's School (salary as part-time employee) |

**FINANCIAL DISCLOSURE REPORT**

| Name of Person Reporting | Date of Report |
|---|---|
| David J. Novak | 11/19/07 |

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

| | SOURCE | DESCRIPTION |
|---|---|---|
| ☐ | **NONE** (No such reportable reimbursements.) | |
| 1 | Exempt | |
| 2 | | |
| 3 | | |
| 4 | | |
| 5 | | |
| 6 | | |
| 7 | | |

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

| | SOURCE | DESCRIPTION | VALUE |
|---|---|---|---|
| ☐ | **NONE** (No such reportable gifts.) | | |
| 1 | Exempt | | $ |
| 2 | | | $ |
| 3 | | | $ |
| 4 | | | $ |

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

| | CREDITOR | DESCRIPTION | VALUE CODE* |
|---|---|---|---|
| ☐ | **NONE** (No reportable liabilities.) | | |
| | Kubota Credit Corp., USA | Loan for lawn tractor | J |
| | Bank of America VISA | credit card | J |
| | Thrift Savings Plan | Loan from retirement fund | K |
| | | | |
| | | | |



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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 |
|---|---|
| | 11/19/07 |

**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) *Please SAVE this as an Excel spreadsheet before completing this report* | B Income during reporting period (1) Amount 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) | D (2) Date Month Day | D (3) Value Code2 (J-P) | D (4) Gain Code1 (A-H) | D (5) Identity of buyer/seller (if private transaction) |
|---|---|---|---|---|---|---|---|---|---|---|
| ☐ | **NONE** (No reportable income, | | | | | | | | | |
| 1 | Virginia Prepaid College Fund Richmond, VA | none | none | K | T | Exempt | | | | |
| 2 | College America Investment Fund | A | interest | J | T | Exempt | | | | |
| 3 | | | | | | | | | | |
| 4 | | | | | | | | | | |
| 5 | | | | | | | | | | |
| 6 | | | | | | | | | | |
| 7 | | | | | | | | | | |
| 8 | | | | | | | | | | |
| 9 | | | | | | | | | | |
| 10 | | | | | | | | | | |
| 11 | | | | | | | | | | |
| 12 | | | | | | | | | | |
| 13 | | | | | | | | | | |
| 14 | | | | | | | | | | |
| 15 | | | | | | | | | | |

| FINANCIAL DISCLOSURE REPORT | Name of Person Reporting | Date of Report |
|---|---|---|
| | David J. Novak | 11/19/07 |

**VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)**

Part IIIA. — Non-Investment Income was received as salary from the U.S. Government for services as an Assistant United States Attorney.

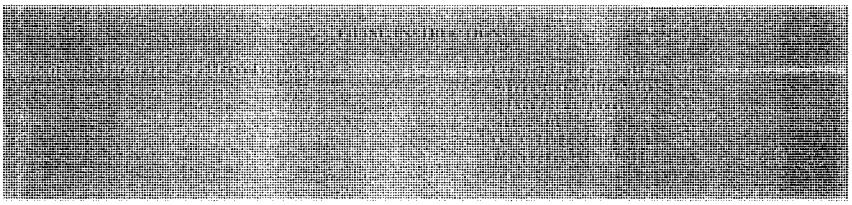
**IX. CERTIFICATION.**

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature _____ Date 11/19/07

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)



## 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 | | 2 | 000 | Notes payable to banks-secured | | 153 | 660 |
| U.S. Government securities-add schedule | | | | Notes payable to banks-unsecured | | | |
| Listed securities-add schedule | | | | Notes payable to relatives | | | |
| Unlisted securities--add schedule | | | | Notes payable to others | | | |
| Accounts and notes receivable: | | | | Accounts and bills due | | 46 | 000 |
| Due from relatives and friends | | | | Unpaid income tax | | | |
| Due from others | | | | Other unpaid income and interest | | | |
| Doubtful | | | | Real estate mortgages payable-add schedule | | 250 | 000 |
| Real estate owned-add schedule | | 575 | 000 | Chattel mortgages and other liens payable | | | |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 55 | 000 | Tuition owed | | 3 | 500 |
| Cash value-life insurance | | | | TSP Loan | | 16 | 000 |
| Other assets itemize: | | | | | | | |
| TSP account | | 310 | 485 | | | | |
| Virginia prepaid tuition | | 37 | 000 | | | | |
| College Funds | | 4 | 000 | Total liabilities | | 469 | 160 |
| | | | | Net Worth | | 514 | 325 |
| Total Assets | | 983 | 485 | Total liabilities and net worth | | 983 | 485 |
| 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 | | | | | | | |

SCHEDULE:
Real Estate owned and Real Estate Mortgages payable refer to personal residence.



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AFFIDAVIT

I, DAVID JOHN NOVAK, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

12/11/07
(DATE)

(NAME)

Robert B. Zehmer
(NOTARY)

Commonwealth of Virginia
Robert B. Zehmer - Notary Public
Commission No. 7038335
My Commission Expires 09/30/2010



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01209 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Mr. Limbaugh.

**STATEMENT OF STEPHEN N. LIMBAUGH, JR., NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MISSOURI**

Mr. LIMBAUGH. I, too, am grateful to the President for the nomination and for this Committee's consideration of the nomination. I am especially grateful to Senator Bond and Senator McCaskill for their support and friendship.

I have my wife, the love of my life, with me here, Marsha. And also my parents are in the back, my mother and father. My father is a senior U.S. District Judge in St. Louis. Even though he's been senior status for a number of years now, he keeps a full caseload. Twenty-five years ago when he was before this body for his own confirmation hearing, the Honorable Strom Thurmond presiding, he had his own father in tow with him. His father was, at the time, 91 years old, still a practicing lawyer.

Thank you.

Senator KOHL. Thank you, Mr. Limbaugh. We appreciate your family and friends who are with you here today.

[The biographical information follows.]

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

1. **Name**: Full name (include any former names used).

   Stephen Nathaniel Limbaugh, Jr.

2. **Position**: State the position for which you have been nominated.

   United States District Judge for the Eastern District of Missouri

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Office: Supreme Court of Missouri, P.O. Box 150, Jefferson City, MO 65102.

   Residence: Cape Girardeau, Missouri

4. **Birthplace**: State year and place of birth.

   1952; Cape Girardeau, Missouri

5. **Marital Status**: (include name of spouse, and names of spouse pre-marriage, if different). List spouse's occupation, employer's name and business address(es). Please, also indicate the number of dependent children.

   I am married to Marsha Moore Limbaugh (nee Marsha Dee Moore). She is employed as a stockbroker and branch manager, Wachovia Securities (formerly A.G. Edwards & Sons, Inc.), 97 N. Kingshighway, Cape Girardeau, MO 63701. We have no dependent children

6. **Education**: List in reverse chronological order, listing most recent first, each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   University of Virginia School of Law; Summer 1996, Summer 1997;
   Master of Laws in the Judicial Process, May 1998

   Southern Methodist University School of Law, 1973 – 1976; J.D., December 1976

   Southern Methodist University; 1970 – 1973; B.A., December 1973



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7. **Employment Record**: List in reverse chronological order, listing most recent first, all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

Employment:

8/92 to date
Supreme Court of Missouri
207 West High St.
Jefferson City, MO 65101
Supreme Court judge

9/87 to 8/92
32nd Judicial Circuit of Missouri
Courthouse Park
Cape Girardeau, MO 63701
Circuit Judge

1/83 to 8/87
Limbaugh, Limbaugh, Russell & Syler, P.C.
2027 Broadway
Cape Girardeau, MO 63701
shareholder/partner

12/78 to 12/82
Office of Prosecuting Attorney
County Courthouse,
Jackson, MO 63755
Prosecuting Attorney, 1/79 to 12/82
Assistant Prosecuting Attorney, 12/78

5/77 to 11/78
Limbaugh, Limbaugh & Russell
2021 Broadway
Cape Girardeau, MO 63701
associate

1/74 to 7/74
Preston Books/Taylor Books (now defunct)
Preston Center East, Dallas, TX 75205
sales clerk



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01212 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Current Non-Profit Affiliations:
12/06 to date
Southeast Missouri State University Friends of the Arts Advisory Board
One University Plaza, MS 7895
Cape Girardeau, MO 63701
Director

4/06 to date
Rainbow Network
3834 South Avenue
Springfield, MO 65807
Director

11/05 to date
State Historical Society of Missouri
1020 Lowry Street
Columbia, MO 65201
Trustee and First Vice President

12/01 to date
Southeast Missouri Symphony Advisory Board
Southeast Missouri State University
One University Plaza
Cape Girardeau, MO 63701
Director

6/01 to date
Friends of the Missouri State Archives
P.O. Box 242
Jefferson City, MO 65102-0242
Director and Vice President

10/97 to date
William Woods University
One University Avenue
Fulton, MO 65251
Trustee

1996 to date
Great Rivers Council, Boy Scouts of America
1203 Fay Street
Columbia, MO 65201
Director

(those non-profit organizations in which I formerly served as an officer, director or trustee in past years are listed in response to question 12, Memberships.)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01213 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Other Affiliations:
4/05 to date
River Bend Investments, LLC
P.O. Box 1364
Cape Girardeau, MO 63702-1364
member

8. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received.

   I did not serve in the military.

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.

   Distinguished Alumnus Award for Judicial Service, SMU Dedman School of Law, 2007

   The Lawdragon 500 Leading Judges in America, 2006

   Adler-Rosecan Jurist-in-Residence, St. Louis University School of Law (with Stephen N. Limbaugh, Sr.), 2006

   "Star Award," Missouri Court Reporters Association, 2003

   Merit of Recognition Award, American College of Trial Lawyers (Missouri Fellows), 2002

   Political Advocacy and Legislative Achievement Award, Adoption and Foster Care Coalition of Missouri, 2001

   Distinguished Eagle Scout Award, National Eagle Scout Association, 1998

   Life Regent, National Eagle Scout Association, 1998

   Special Service Award, Legal Services of Eastern Missouri, Inc., 1997

   Distinguished Non-Alumnus Award, University of Missouri-Columbia School of Law, 1997

   Honorary degree – Legum Doctorem, William Woods University, 1996

   Class Sponsor, "Stephen N. Limbaugh, Jr. Eagle Scout Class," St. Louis Area Council, Boy Scouts of America, 1996



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01214 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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"Part of the Solution" Award, Professional Blackmen's Club of Southeast Missouri, 1991

Paul Harris Fellow, Rotary International, 1990

"Boss of the Year" Award, Southeast Missouri Legal Secretaries Association, 1986

Outstanding Young Missourian Award, Missouri State Jaycees, 1984

Distinguished Service Award, Cape Girardeau Jaycees, 1984

U.S. Jaycees Outstanding Young Men of America Award; 1979, 1980 and 1984.

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

State Bar of Texas – May 1977 to date (non-practicing member since 1987)

The Missouri Bar – October 1977 to date
- Fellow – The Missouri Bar Foundation
  - Board of Directors (ex officio) – 2001 to 2003
- Committees:
  - Criminal Law – 1979 to 1992; council member 1981 to 1982
  - Bar Center Expansion – 1980 to1983
  - Property Law – 1988 to 1992
    - Chair, Private Roads Subcommittee – 1988 to 1991
  - Judicial Administration – 1988 to 1992; council member – 1988 to 1992
  - Juvenile Law – 1989 to 1992
  - Foresight Committee – 1992 to 1994
  - Commission on Legal Services – 1996

American Bar Association – 1977 to date
- Litigation Section – 1985 to date
- Judicial Administration Division – 1987 to date
- Life Fellow – American Bar Foundation

Cape Girardeau County Bar Association – 1977 to 1992

National District Attorneys Association – 1979 to 1982

Missouri Association of Trial Attorneys – 1985 to 1988

Bar Association of Metropolitan St. Louis – 1986 to date



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Judicial Conference of Missouri – 1987 to date
Legislative Steering Committee – 1989 to 1991
Executive Council – 1999 to 2003
Presiding Officer – 2001 to 2003

The Federalist Society – 1993 to date
Board of Advisors, St. Louis Chapter, Lawyers Division – 1993 to 1996

American Judicature Society – 2001 to date

National Conference of Chief Justices – 2001 to 2003

Supreme Court of Missouri Committees
Ad hoc committee that drafted new Supreme Court Rule for facsimile transmissions – 1989
Judicial Records Committee – 1990 to 1992
Ad hoc committee that promulgated Supreme Court standards on jury use and management – 1992
Judicial Education Committee – 1992 to 1999
Family Court Implementation Committee – 1993 to 1995
Co-chair, Supreme Court Task Force on Children and Families – 1994 to 1996
Chair, Commission on Judicial Department Education – 1999 to 2001, 2005 to date
Court Automation Committee – 2001 to 2003

Chair, Appellate Judicial Commission for the Missouri Nonpartisan Court Plan – 2001 to 2003

11. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

State Bar of Texas – May 1977 (non-practicing member since 1987)
The Missouri Bar – September 1977; no lapses

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States District Court for the Eastern District of Missouri – Oct. 1977

United States Court of Appeals for the Eighth Circuit – Aug. 1985



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01216 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC
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I allowed both of my federal court admissions to lapse after I became a state court judge in 1987.

12. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 or 11 to which you belong, or to which you have belonged, or in which you have significantly participated, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

State Historical Society of Missouri
Board of Trustees, November 2005 to date
First Vice President, November 2007 to date

William Woods University
Board of Trustees, October 1997 to date

Rainbow Network
Board of Directors, April 2006 to date

Friends of the Missouri State Archives
Board member, June 2001 to date
Vice-President, December 2006 to date

Boy Scouts of America
Southeast Missouri Council Executive Board, 1990 to 1992
Great Rivers Council Executive Board, 1996 to date
Life regent of the National Eagle Scout Association (NESA)

Rotary Club
Cape Girardeau Rotary Club, 1978 to date
Board of Directors, 1984 to 1992
President, 1992
Jefferson City Rotary Club, 1992 to 2004
Paul Harris Fellow of Rotary International.

Southeast Missouri State University Friends of the Arts Advisory Board
Board of Directors, December 2005 to date

Southeast Missouri Symphony Advisory Board, December 2001 to date

Cape Girardeau Community Concert Association
Board of Directors 1982 to 1992; President, 1985 to 1987.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01217 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Jefferson City Community Concert Association
Board of Directors, 1997 to 2000.

Southern Methodist University Law Alumni Association
Association Council, 1996 to 1999.

Division of Youth Services State Advisory Board, 1989 to 1992
Jobs for Missouri's Future Committee, 1990 to 1991

Area Wide United Way
Board of Directors, 1983 to 1986

Cape Girardeau Civic Center
Board of Directors, 1979 to 1991;
President, 1981 to 1982

Cape Girardeau Jaycees, 1978 to 1992
Board of Directors, 1979 to 1980

Crime Victims Assistance for the Elderly, Inc.
Board of Directors, 1985

Move Cape Forward Committee, 1986
Committee Chairman

Southeast Missouri Hospital
Board of Trustees, 1987 to 1992
(From April 1988 to August 1992, I was a member of the executive committee of the board of trustees. During this period I also served as secretary treasurer, 2nd vice-president, and 1st vice-president.)
I have been a member of the Southeast Missouri Hospital Association since the early 1980s.

Greater Cape Girardeau Development Corporation
Board of Directors, 1986 to 1992

"Southeast Missouri; the Arts and the Future" Task Force
(sponsored by Southeast Missouri State University), 1989 to 1990

Cape Girardeau Community Caring Council
Board of Directors, 1990

Cape Girardeau Country Club – member since 1977

Jefferson City Country Club – member since 1993



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01218 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Jefferson City YMCA – member since 1993

Dalhousie Golf Club, Cape Girardeau – member since 2001

Confrerie des Chevaliers du Tastevin, Sous-Commanderie de St. Louis, member since 1995

Centenary United Methodist Church, Cape Girardeau, MO, 1963 to date
Administrative Board, 1988 to 1992
Chair, 1966 – 2006 Centennial Committee

I have been involved to a lesser extent in several other civic and charitable organizations. In 1978 and 1979, I was director of summer tennis tournaments for the Cape County Tennis Association. In 1985, I was chairman of the annual "Pacesetters Blood Drive" sponsored by the Cape Girardeau County Chapter of the American Red Cross. During the 1980s, I was an active member and volunteer worker for the Cape Girardeau Chamber of Commerce, the Cape Girardeau Family Learning Center, the American Cancer Society, and the Friends of Old St. Vincent's, Inc. (the fundraising arm for St. Vincent's Cathedral in Cape Girardeau). In addition, I served on the Southeast Missouri State University Major Gifts Committee from 1984 to 1987.

In addition, I hold "membership" in the following civic and charitable organizations based on a monetary contribution or payment of dues:
Friends Foundation of the Cape Girardeau Public Library – member since 1980s
Historical Association of Greater Cape Girardeau, Inc. – member since 1980s
Arts Council of Southeast Missouri – member since 1990s
Cape River Heritage Museum – member since 1990s
KRCU-Southeast Public Radio Circle – member since 1980s
Southeast Missouri State University Boosters Club – member since 2004
Southeast Missouri State University Copper Dome Society – member since 1980s
Cape Girardeau Chapter NAACP – member approx. 1986-1991

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Please indicate whether any of these organizations listed in response to 12a above currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

I have been a member of the Cape Girardeau Country Club since 1977. As a board member in the early 1980s, I personally prepared and circulated a petition to members to eliminate the practice of tabling membership applications from



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01219 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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African-Americans. The effort was successful. I know of no other discriminatory practice of organizations to which I have belonged.

13. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Please supply four (4) copies of all published material to the Committee.

*Jury Call and Management,* 1 BENCH BOOK FOR MISSOURI TRIAL JUDGES 32-1 (Supreme Court Judicial Education Committee, 1998)

*Gifts of Grace, and the Art of Signaling,* SCOUTER MAGAZINE, Winter 1997/1998

*The Case of Ex Parte Lange (or How the Double Jeopardy Clause Lost Its "Life or Limb"),* 36 AM. CRIM. L. REV. 53 (1999)

Chief Justice's Address to Members of The Missouri Bar (Sept. 13, 2001), J. MO. B., Sept.-Oct. 2001, at 222-25

State of the Judiciary Address (Jan. 15, 2002), J. MO. B., Jan.-Feb. 2002, at 14-17

*Striving to Provide Exceptional Service and Access to Missouri Courts* (co-author Michael L. Buenger), *St. Louis Daily Record,* May 2002

Chief Justice's Address to Members of The Missouri Bar (Sept. 12, 2002), J. MO. B., Sept.-Oct. 2001, at 260-63

State of the Judiciary Address (Jan. 22, 2003), J. MO. B., Jan.-Feb. 2003, at 12-15

*A Missouri Plan For Texas? St. Louis Daily Record,* May 2003

b. Please supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, please give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

Because the Supreme Court has general supervisory responsibility over the Missouri judicial system and the practice of law, the Court necessarily issues reports, memoranda and policy statements from time to time to judges, lawyers, and court personnel, not to mention the issuance of rules of civil and criminal procedure, rules of professional responsibility, and administrative rules for operation of the courts. On any number of occasions, I, like my colleagues, have



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01220 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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assisted in the editing or redrafting of such reports, memoranda and policy statements. The Court's consideration of these matters, in general, is by the Court en banc in closed session, no votes are recorded, and the Chief Justice speaks for all seven judges.

I have contributed as a Supreme Court Committee member in the drafting of reports for the following:

new rule for facsimile transmissions
standards for jury use and management
Family Court Planning and Implementation Committee
Task Force on Children and Families
Judicial Education Committee

During the period 1988 to 1991, I prepared several Missouri Bar committee reports that led to the enactment of revisions to Missouri's private roads statutes

In addition, the many organizations with which I have been affiliated have issued innumerable reports, memoranda and policy statements for dissemination to the public or otherwise outside the organization proper. My involvement in such of reports, memoranda or statements was limited, and my obligation to the organization was simply to consider the matter and vote to approve or disapprove.

c. Please supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

During my two year term as Chief Justice (2001-2003), I testified before the Missouri House and Senate budget committees on behalf of the judiciary's budget requests.

In 2003 and 2005, I testified before the Texas House and Senate judiciary committees in support of proposed referendum to adopt a version of the Missouri Non-Partisan Court Plan for the selection of judges.

In 2003, I also testified before a committee of the Mississippi House of Representatives in support of a bill to create a juvenile justice system similar to that in Missouri. I do not know whether any of the testimony was recorded or transcribed, and I have no copy of any of my remarks.

d. Please supply four (4) copies, transcripts or tape recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Please include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01221 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke.

During the course of my career, I have given scores of public speeches to a wide variety of organizations including service clubs, civic groups, high schools, universities, churches and charities. Many of my speeches have been variations of a "stock" speech that I wrote on "Open-mindedness, Empathy and Altruism." I also use a stock speech on "Appellate Brief Writing." As Chief Justice, I used a short speech on professionalism in more than 30 bar enrollment ceremonies for some 1500 new lawyers.

During my 15 years on the Supreme Court, I have given many informal, routine, and often unscheduled talks to tour groups, legislators and other dignitaries, and visitors of all kinds to the Court. In that regard, there are approximately 24,000 visitors to the Court each year, and I simply have no record of most of those talks, though they invariably pertained to the history, organization, and function of the Missouri court system and the work of the Supreme Court in particular.

A list of speeches, for which I have a record, is provided as an attachment to this questionnaire. Copies of the speech, notes, or press accounts will be provided to the committee as requested, if available.

e. Please list all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I have been interviewed for newspaper articles on numerous occasions. The clippings of those articles that are readily available to me, as well as a clipping of an interview in the SMU Law School alumni magazine, will be provided to the Committee.

Over the years, I also have given a number of TV interviews, though, with few exceptions, I have no record of the dates. To my recollection, I have given approximately 20 interviews for KFVS-TV in Cape Girardeau, several for TV stations in Jefferson City and Columbia, two or three for St. Louis stations, two or three for the public access channel in Cape, and one for the Canadian Broadcasting Corporation. These interviews pertained to my official duties as prosecuting attorney, circuit judge and Supreme Court judge, except that a few of the Cape Girardeau interviews pertained to my civic, charitable and church activities.

In addition, I have given several dozen radio interviews for stations throughout the state, including, to my recollection, those in St. Louis, Kansas City, Springfield, Jefferson City, Columbia, Moberly, Farmington, Poplar Bluff,



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01222 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Jackson, and many in Cape Girardeau. But again, I have few records of the dates, and the recordings are unavailable. And again, these interviews pertained to my official duties as a public officeholder, except that a few of the Cape Girardeau interviews pertained to my civic and charitable activities.

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.

Circuit Court:
The circuit court is a trial court of general jurisdiction, and circuit judges are assigned felony criminal cases and civil cases in which more than $25,000 is in controversy.

Appointed Circuit Judge, 32nd Judicial Circuit of Missouri, for portion of unexpired term beginning September 1, 1987

Elected Circuit Judge, 32nd Judicial Circuit of Missouri, without opposition for balance of unexpired term, November 1988

Elected Circuit Judge, 32nd Judicial Circuit of Missouri, without opposition for six-year term, November 1990

Missouri Supreme Court:
The Supreme Court is a court of limited jurisdiction. Approximately one-half of the Court's caseload is derived from its mandatory jurisdiction – death penalty cases, challenges to the constitutionality of statutes, construction of state revenue laws, lawyer and judge disciplinary actions, and even the 1994 impeachment trial of the Missouri Secretary of State. The balance of the Court's cases is taken on a discretionary, certiorari-like basis according to the general interest and importance of the issues presented.

I was appointed to the Supreme Court of Missouri under the Missouri Non-Partisan Court Plan, August 1992.

I was retained in office at the November 1994 general election for a twelve-year term expiring December 31, 2006.

I was retained in office at the November 2006 general election for a twelve-year term expiring December 31, 2018.

15. **Citations**: If you are or have been a judge, please provide:

a. citations for all opinions you have written (including concurrences and dissents);

A list of the citations for all opinions I have written, is provided as an attachment to this Questionnaire.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01223 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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b. a list of cases in which certiorari has been requested or granted;

*State v. Erwin*, 848 S.W.2d 476 (Mo. banc 1993) (Limbaugh, J., dissenting), *cert. denied*, 62 USLW 3222, 62 U.S.L.W. 3245 (U.S. Oct. 4, 1993)
*State v. Cobb*, 875 S.W.2d 533 (Mo. banc 1994) (J. Limbaugh concurring in part and dissenting in part), *cert. denied*, 63 U.S.L.W. 3265 (U.S. Oct. 3, 1994)

*State v. Mayo*, 915 S.W.2d 758 (Mo. banc 1996), *cert. denied*, 65 U.S.L.W. 3232, 65 U.S.L.W. 3256 (U.S. Oct. 7, 1996)

*Call v. Heard*, 925 S.W.2d 840 (Mo. banc 1996), *cert. denied*, 65 U.S.L.W. 3501, 65 U.S.L.W. 3505 (U.S. Jan. 21, 1997)

*State v. Smulls*, 935 S.W.2d 9 (Mo. banc 1996) (J. Limbaugh concurring in part and dissenting in part), *cert. denied*, 65 U.S.L.W. 3798 (U.S. Jun. 2, 1997)

*State v. Whitfield*, 939 S.W.2d 361 (Mo. banc 1997), *cert. denied*, 66 U.S.L.W. 3256 (U.S. Oct. 6, 1997)

*State v. Kinder*, 942 S.W.2d 313 (Mo. banc 1996), *cert. denied*, 66 U.S.L.W. 3258 (U.S. Oct. 6, 1997)

*State v. Simmons*, 955 S.W.2d 729 (Mo. banc 1997), *cert. denied*, 66 U.S.L.W. 3556 (U.S. Feb. 23, 1998)

*State v. Simmons*, 955 S.W.2d 752 (Mo. banc 1997), *cert. denied*, 66 U.S.L.W. 3556 (U.S. Feb. 23, 1998)

*In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997), *cert. denied*, 66 U.S.L.W. 3783, 66 U.S.L.W. 3794, 66 U.S.L.W. 3799 (U.S. Jun. 22, 1998)

*State v. Owsley*, 959 S.W.2d 789 (Mo. banc 1997), *cert. denied*, 67 U.S.L.W. 3235 (U.S. Oct. 5, 1998)

*State v. (James) Johnson*, 968 S.W.2d 123 (Mo. banc 1998), *cert. denied*, 67 U.S.L.W. 3257 (U.S. Oct. 13, 1998)

*State v. Barnett*, 980 S.W.2d 297 (Mo. banc 1998), *cert. denied*, 67 U.S.L.W. 3526 (U.S. Feb. 22, 1999)

*Reynolds v. State*, 994 S.W.2d 944 (Mo. banc 1999), *cert. denied*, 68 U.S.L.W. 3459 (U.S. Jan. 18, 2000)

*State v. Deck*, 994 S.W.2d 527 (Mo. banc 1999), *cert. denied*, 68 U.S.L.W. 3326 (U.S. Nov. 15, 1999)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01224 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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*State v. Armentrout*, 8 S.W.3d 99 (Mo. banc 1999), *cert. denied*, 68 U.S.L.W. 3712 (U.S. May 15, 2000)
*Production Credit Ass'n v. Director of Revenue*, 10 S.W.3d 142 (Mo. banc 2000), *cert. granted*, 68 U.S.L.W. 3784 (U.S. June 26, 2000), *reversing*, 531 U.S. 316 (2001)

*Smulls v. State*, 10 S.W.3d 497 (Mo. banc 2000) (Limbaugh, J., dissenting), *cert. denied*, 71 U.S.L.W. 3318 (U.S. Nov. 4, 2002)

*State v. Ferguson*, 20 S.W.3d 485 (Mo. banc 2000), *cert. denied*, 69 U.S.L.W. 3364 (U.S. Nov. 27 2000)

*State v. Link*, 25 S.W.3d 136 (Mo. banc 2000), *cert. denied*, 69 U.S.L.W. 3381 (U.S. Dec. 4, 2000)

*Clay v. Dormire*, 37 S.W.3d 214 (Mo. banc 2000), *cert. denied*, 69 U.S.L.W. 3739 (U.S. May 21, 2001)

*State v. Christeson*, 50 S.W.3d 251 (Mo. banc 2001), *cert. denied*, 70 U.S.L.W. 3279 (U.S. Oct. 15, 2001)

*Smulls v. State*, 71 S.W.3d 138 (Mo. banc 2002), *cert. denied*, 71 U.S.L.W. 3318 (U.S. Nov. 4, 2002)

*John Doe, a/k/a Tony Twist v. TCI Cablevision*, 110 S.W.3d 363 (Mo. banc 2003), *cert. denied*, 72 U.S.L.W. 3446 (U.S. Jan. 12, 2004)

*In the Interest of: P.L.O. and S.K.O.*, 131 S.W.3d 782 (Mo. banc 2004), *cert. denied*, 73 U.S.L.W. 3213 (U.S. Oct. 4, 2004)

*Hutchison v. State*, 150 S.W.3d 292 (Mo. banc 2004) (Limbaugh, J., concurring in part and dissenting in part), *cert. denied*, 74 U.S.L.W. 3203 (U.S. Oct. 3, 2005)

*State v. Jaco*, 156 S.W.3d 775 (Mo. banc 2005), *cert. denied*, 73 U.S.L.W. 3710 (U.S. Oct. 3, 2005)

*State v. Gill*, 167 S.W.3d 184 (Mo. banc 2005), *cert. denied*, 74 U.S.L.W. 3406 (U.S. Jan. 17, 2006)

*State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006) (Limbaugh, J., dissenting), *cert. denied*, 75 U.S.L.W. 3121, 75 U.S.L.W. 3277, 75 U.S.L.W. 3284 (U.S. Nov. 27, 2006)

*Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339 (Mo. banc 2006), *cert. denied*, 75 U.S.L.W. 3197, 75 U.S.L.W. 3291, 75 U.S.L.W. 3294 (U.S. Dec. 4, 2006)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01225 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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*Netco, Inc. v. Dunn*, 194 S.W.3d 353 (Mo. banc 2006), *cert. denied*, 75 U.S.L.W. 3197, 75 U.S.L.W. 3291, 75 U.S.L.W. 3294 (U.S. Dec. 4, 2006)

*State v. McFadden*, 216 S.W.3d 673 (Mo. banc 2007) (Limbaugh, J., concurring in part and dissenting in part), *cert. denied*, 76 U.S.L.W. 3001, 76 U.S.L.W. 3084, 76 U.S.L.W. 3167 (U.S. Oct. 1, 2007)

c. a short summary of and citations for all appellate opinions or orders where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

As a Supreme Court judge, the only case in which I wrote the court's opinion that has been reversed by a higher court is *Production Credit Ass'n v. Director of Revenue*, 10 S.W.3d 142 (Mo. banc 2000), *cert. granted*, 68 U.S.L.W. 3784 (U.S. June 26, 2000), *reversing*, 531 U.S. 316 (2001) (holding that credit institutions organized under the federal Farm Credit Act were not exempt from Missouri corporate income tax).

As a circuit judge, the only cases in which a judgment was reversed were:

*State v. Ward*, 776 S.W.2d 906 (Mo. App. 1989) (reversing judgment of trial court and remanding, finding information deficient)

*Mays v. Penzel Constr. Co.*, 801 S.W.2d 350 (Mo. App. 1990) (reversing and holding remand was required because court could not determine on appeal whether case was impermissibly decided on inherently dangerous activity doctrine)

*Reason v. Payne*, 793 S.W.2d 471 (Mo. App. 1990) (affirming award of actual and punitive damages against wife but reversing award of actual and punitive damages against husband)

*State v. Berry*, 801 S.W.2d 64 (Mo. App. 1990) (reversing and remanding, holding that "a neutral magistrate could find probable cause under these circumstances and that the trial court erred in suppressing the evidence")

*Union Elec. Co. v. City of Jackson*, 791 S.W.2d 890 (Mo. App. 1990) (reversing order enjoining City from providing electrical service to two defendants)

*Seabaugh v. Milde Farms, Inc.*, 1990 WL 175721 (Mo. App. 1990) (reversing and holding trial court erred in refusing to consider the merits of the motion for continuance filed during trial pursuant to Rule 65), *rev'd*, 816 S.W.2d 202 (Mo. banc 1991)

*State v. Ferguson*, 822 S.W.2d 466 (Mo. App. 1991) (affirming judgment of conviction, but remanding for re-sentencing)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01226 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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*Parkway Motors, Inc. v. Thompson*, 825 S.W.2d 302 (Mo. banc 1992) (modifying judgment to eliminate the finding that "gross receipts" include sales taxes required to be remitted to the state and remanding)

*State v. Geiler*, 866 S.W.2d 863 (Mo. App. 1993) (affirming judgment of conviction, but reversing and remanding order dismissing Rule 29.15 motion)
*Schreiner v. Omaha Indemnity Co.*, 854 S.W.2d 542 (Mo. App. 1993) (reversing judgment dismissing plaintiff's petition and third-party petition and remanding)

*Erb Indus. Equip. Co., Inc. v. City of Cape Girardeau*, 845 S.W.2d 551 (Mo. App. 1993) (reversing and holding that statute authorizing municipalities to impose license tax on "merchants of all kinds" covered taxpayer's line of business, which included sales and service of farm, construction and forestry equipment, though not specifically referenced in statute)

d. a list of and copies of any of your unpublished opinions that were reversed on appeal or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

None

e. a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored; and

As a circuit judge, I entered a written judgment (though sometimes only a docket entry) in every case, but none were published. As a Missouri Supreme Court judge, all opinions have been published.

f. citations to all cases in which you were a panel member in which you did not issue an opinion.

The seven-member Supreme Court sits en banc in all cases. The only instances in which the Court does not issue an opinion are: 1) cases that have been transferred from the Court of Appeals to the Supreme Court but that are retransferred to the Court of Appeals; 2) most cases in which the Court quashed a preliminary writ; and 3) attorney discipline cases in which the Court simply issues an order. There are several dozen of these cases each year, the votes of the judges are not recorded, and there are no citations, only case numbers.

16. **Recusal:** If you are or have been a judge, please provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest, or for any other apparent reason, or in which you recused yourself sua sponte. (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01227 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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description of that system.) Please identify each such case, and for each provide the following information:

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

As a circuit judge, I cannot recall any case in which a litigant requested that I recuse, although there may have been a very few such cases, perhaps three or four.

Whenever my former law firm, Limbaugh, Limbaugh, Russell & Syler, represented a litigant, I automatically recused sua sponte. I also automatically recused in cases involving entities or institutions with which my wife and I were affiliated, in particular, Southeast Missouri Hospital and Southeast Missouri State University, though I am sure that there were others that I cannot recall. A precise list of all cases in which I recused would require a review of the docket sheet in every one of the thousands of cases filled during the five years from 1987 to 1992 that I served as circuit judge.

As a Supreme Court judge, I have been requested to recuse in only three cases. The first was *Ferguson v. Dormire*, SC80216, a habeas corpus action that was summarily denied. I recused because I was the trial judge, and otherwise I would have been shown as "not participating." The second and third cases were both styled *Smulls v. State*, SC81205 and SC83179. These were successive appeals in a death penalty case involving the same defendant, and defense counsel moved to recuse Judge Price and me for having dissented in an earlier appeal in which the majority granted a new trial. We refused to recuse.

All other cases in which I have recused I have done so sua sponte based, in general, on my friendship or other connection with a litigant or lawyer. Most of the recusals were from the many hundreds of applications for transfer from the Court of Appeals and writ petitions that the Court denies without briefing and argument. I do not include cases in which I simply did not participate because of the fact that I was a judge in the case on the trial court level or the fact that the case had already been submitted to the Supreme Court (though not handed down) before my appointment to the Court. The list of recusals, with Supreme Court case numbers, is as follows:

*State ex rel. McGinty v. Koehr,* SC75020 – personal friend of relator



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*In re*: *The Matter of Estate of Potashnick v. Harrison*, SC75439 – personal friend of parties
*Scism v. Scism*, SC75524 – family was former client
*Willis E. Byrd v. Board of Curators of Lincoln Univ.*, SC75632 – defendant represented by my former law firm
*State ex rel. Tiller v. Calvin*, SC76498 – relator personally contacted me about the case
*Griffin Contracting Co. v. Hawkeye-Security Ins.*, SC76500 – I do not recall
*MacDonald v. Sheets*, SC76551 – personal friend of defendant
*Stephen R. Sharp/Estate of Roger F. Rhodes v. Boatmen's Trust*, SC76562 – personal friend of plaintiff
*State v. Roll*, SC76570 – personal friend of defendant
*Stauffer v. Myles*, SC76655 – personal friend of defendant
*Thompson v. Taylor*, SC77085 – personal friend of defendant
*State v. Basile*, SC77123 – my father was presiding over a companion case against defendant at the time
*State ex rel. Security Pacific Housing v. Schaeperkoetter*, SC77343 – plaintiff represented by former law firm
*Southest Missouri Hospital Association v. Mo. Dept. of Soc. Services*, SC77411 – affiliated with hospital
*Cottonhill Investment Co. v. Boatmens National Bank*, SC77543 – brother was bank president
*Pankey v. Camden, et al.*, SC77629 – I was a named party
*Concord Publishing v. Dept. of Revenue*, SC77894 – personal friend of Concord owners
*Hollis v. Brewer*, SC78456 – plaintiff was client of my wife
*Glidewell v. S.C. Management, et al.*, SC78638 – defendant represented by my former law firm
*State ex rel. Jones v. Syler*, SC78732 – respondent represented by client of my wife
*Brandon v. Southeast Missouri Hospital*, SC79111 – affiliated with hospital
*Pinkerton v. Southeast Missouri Hospital Assoc.*, SC79134 – affiliated with hospital
*Board of Education of Cape Girardeau v. Thomas*, SC79162 – plaintiff represented by my former law firm
*Williams v. Kimes*, SC79362 – plaintiff represented by my former law firm
*Missouri Electric v. USF&G*, SC79406 – plaintiff was a client of my former law firm
*Gage v. Morse,* SC79420 – plaintiff represented by client of my wife
*Pankey v. Cook*, SC79552 – I was a named defendant in an earlier suit brought by plaintiff
*State ex rel. Franke v. Dierker*, SC80201 – personal friend of plaintiff
*State v. Ferguson,* SC80216 – request for recusal sustained – I was a trial judge
*Schott v. Beussink*, SC80247 – plaintiff was client of former law firm
*Patricia Boyzett, Mother of Joseph Rutherford v. TWA, Inc.*, SC80295 – I was a TWA stockholder
*Hodges v. Southeast Missouri Hospital Assn.*, SC80645 – affiliated with hospital
*Geisner v. Budget Rent A Car*, SC80789 – plaintiff represented by client of my wife



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*State ex rel. Maharishi Vedic Univ. v. David*, SC80796 – personal friend of Maharishi employees
*Unsel v. Meier*, SC80865 – defendant represented by my former law firm
*Drewes v. TWA, et al.*, SC80989 – stockholder in TWA
*A.G. Edwards v. Drew*, SC81188 – Edwards is my wife's employer
*Williams v. Kimes*, SC 81278 – plaintiff represented by my former law firm
*State ex rel. Nixon v. The American Tobacco Co.*, SC81621 – plaintiff represented by former colleague, Judge Robertson
*Cooper v. Homesteaders Life, et al.*, SC81657 – personal friend with owners of co-defendant bank
*Niswonger v. Farm Bureau*, SC81676 - personal friend of plaintiff
*Hefner v. Dausmann*, SC81712 – I do not recall
*In re Healey*, SC81796 – personal friend of respondent
*Washburn International, Inc. v. Capital Music Supply, et al.*, SC82015 – defendant was a former client
*State ex rel. Kimes v. Mann*, SC82095 –respondent represented by my former law firm
*Williams v. Kimes*, SC82151 – plaintiff represented by my former law firm
*Alcorn v. Union Pacific RR*, SC82325 – plaintiff represented by my former colleague, Judge Robertson
*State ex rel. Central Bank v. Belt*, SC82388 – personal friend of bank owners.
*State ex rel. Nixon v. American Tobacco Co., Inc.*, SC82392 – plaintiff represented by my former colleague, Judge Robertson
*Multilist Service of Cape Girardeau v. Wilson*, SC82468 – personal friend of defendant
*Midwest Energy, Inc., et al. v. Orion Food Systems*, SC82474 – personal friend of plaintiff
*Washington University Medical Center v. Maharishi Vedic Univ.*, SC82506 – personal friend of Maharishi employees
*Parrish v. Kinder, et al.*, SC82714 – defendant represented by my former law firm
*Kinder v. Nixon*, SC82898 – companion case to SC82392 above
*In re: Taliaferro*, SC83060 – personal friend of respondent
*Hoskins v. Federal-Mogul Corp.*, SC83727 – plaintiff represented by former colleague, Judge Robertson
*Drury v. City of Cape Girardeau*, SC83901 – plaintiff was client of my wife
*Bland v. Imco Recycling, Inc.*, SC83939 – plaintiff represented by client of my wife
*State ex rel. Reeves v. Syler*, SC84048 – personal friend of relator
*In re: Taliaferro*, SC84054 – personal friend of respondent
*In re: Edwards*, SC84114 – personal friend of respondent
*State ex rel. Rex Temple v. Drumm*, SC84286 – counsel for relator was my law clerk's brother
*In re: Moon*, SC84474 – I was a participant in the disciplinary referral
*Holden v. Holden*, SC84605 – personal friend of plaintiff
*State ex rel. Gaydos v. Blaeuer*, SC84607 – personal friend of relator
*State ex rel. American Family Mutual Insurance Co v. Messina*, SC84610 – I had a claim pending with American Family at the time.



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*Thruston v. Jefferson City School District*, SC84624 – plaintiff represented by client of my wife
*State ex rel. Proctor & Gamble v. Dolan*, SC84688 – relator was former client of my law firm
*In re Buchli*, SC84764 – this was the attorney discipline against Buchli for murdering his law partner, a personal friend of mine
*In re*: *Healey*, SC84894 – personal friend of respondent
*State ex rel. Budd Co. v. O'Malley*, SC85116 – relator was former client
*In re*: *Taliaferro,* SC85151 – personal friend of respondent
*State ex rel. Finestead v. Sweeney*, SC85196 – defendant was the United Methodist Church of which I am a member
*In re*: *Richey*, SC85338 – personal friend of respondent
*Neel, et al. v. Strong, et al.*, SC85369 – former colleague, Judge Robertson, was a named defendant
*In re Healey*, SC85476 – personal friend of respondent
*Moore v. Moore*, SC85480 – personal friend of defendant
*McCormack v. Capital Electric*, SC85504 – plaintiff was represented by former colleague, Judge Robertson
*In re*: *Koehler*, SC85511 – respondent was father of my law clerk
*State ex rel. Heart of America Council v. Clark*, SC85515 – relator is a Boy Scout organization and I am affiliated with the Scouts
*In re*: *Taliaferro*, SC85705 – personal friend of respondent
*R.E.J., Inc. v. City of Sikeston*, SC85711 – personal friend of party
*Huffy Corp. v. Custom Warehouse*, SC85828 – owner of defendant was former client
*State ex rel. Puls v. Thomsen*, SC85859 – personal friend of relator
*Board of Education of the City of St. Louis v. State of Missouri*, SC 86029 – my father was the judge in an underlying case
*In re*: *Hahn*, SC86034 – personal friend of respondent
*In re*: *Edwards*, SC86160 – personal friend of respondent
*In re*: *Richey*, SC86275 – personal friend of respondent
*State ex rel. Secured Party* (*Vincent Lomax*) *v. Burrell*, SC86311 – relator was charged with writing bad checks to my wife's employer
*Host Enterprises, et al. v. Lehman Brothers*, SC86336 – personal friend of plaintiff
*Glass v. First National Bank,* SC86408 – personal friend of bank owners
*In re*: *Williams*, SC86450 – personal friend of respondent
*State v. Buchli*, SC86471 – this was a murder case, and I was a personal friend of the victim
*Hobbs v. Boy Scouts,* SC86521 – affiliated with Boy Scouts
*In re*: *Tackett*, SC86522 – personal friend of respondent
*In re*: *Shain*, SC86540 – personal friend of respondent
*Larose v. Washington University*, SC86552 – plaintiff represented by client of my wife
*Pirisky v. Meyer*, SC86594 – defendant represented by my former law firm
*Olvera v. Fritts*, SC86699 – I do not recall
*In re*: *Utterback*, SC86822 – personal friend of respondent



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*State ex rel. American Family Mutual Insurance Co. v. Messina*, SC86864 – this was a class action against a mutual insurance company of which I was a policyholder
*In re*: *Hahn*, SC86940 – personal friend of respondent
*State ex rel. United Methodist v. Sweeney*, SC86991 – member of Methodist church
*State ex rel. Woodworth v. Griffin*, SC87011 – a state representative discussed the merits of this case with me
*Glass v. First National Bank*, SC87244 – personal friend with the bank's owners
*State ex rel. City of St. Louis, et al. v. Riley*, SC87245 – affiliated with relator Southeast Missouri Hospital
*CBD Enterprises v. Braco Manufacturing*, SC87296 – plaintiff was represented by my former law firm
*In re*: *Hahn*, SC87389 – personal friend of respondent
*State ex rel. Asher v. Syler*, SC87619 – personal friend of relator
*In re*: *Utterback*, SC88228 – personal friend of respondent
*Nixon, et al. v. Whitson*, SC88257 – one of the respondents was represented by my former law firm
*State ex rel. Shirshekan v. Czamanske*, SC88402 – relator represented by client of my wife
*Saigh v. A.G. Edwards*, SC88419 – Edwards was my wife's employer
*In re*: *Utterback*, SC88545 – personal friend of respondent
*Bohac v. Walsh, et al.*, SC88567 – my brother was officer of respondent bank
*Betty G. Weldon Revocable Trust, et al. v. Betty G. Weldon, et al.*, SC88726 – personal friend of Weldon family
*In re*: *Nathan Demille Cooper*, SC88729 – personal friend of respondent
*State ex rel. A.G. Edwards, Inc., et al. v. Quigless*, SC88748 – Edwards was my wife's employer

17. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I was elected Prosecuting Attorney of Cape Girardeau County, MO, Nov. 1978 for a four-year term Jan. 1979 through Dec. 1982.

I was elected Republican Committeeman, Cape Girardeau Ward 3, Nov. 1982, Nov. 1984, Nov. 1986, for two-year terms.
I served on the Division of Youth Services State Advisory Board, a statutorily mandated board, by appointment from the Director of the Department of Social Services from October 1989 to August 1992.

I was appointed to the Jobs for Missouri's Future Committee by Governor Ashcroft in 1990 and served as the sole representative from southeast Missouri.



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I was elected to the Board of Trustees of the State Historical Society of Missouri Society in Nov. 2005 and elected First Vice President in November 2007.

I have never been an unsuccessful candidate for elective office nor an unsuccessful nominee for appointed office.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Prior to taking the bench, I was actively involved in Republican Party politics on the state and local levels. I was elected as the Republican candidate for Prosecuting Attorney of Cape Girardeau County and twice elected as the Republican candidate for Circuit Judge of the 32nd Circuit. In addition, I was a three-time Republican ward committeeman in Cape Girardeau, a delegate to the 1984 state convention, and an alternate delegate to the 1984 national convention in Dallas, Texas. I also served on the campaign committees of Congressman Bill Emerson in 1982, 1984 and 1986, and the campaign committees of Attorney General John Ashcroft in 1980 and Governor Ashcroft in 1984. I was a member of Governor Ashcroft's inaugural committee in January 1985.

18. **Legal Career:** Please answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I did not serve as a clerk to a judge.

ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

Supreme Court of Missouri
207 West High St.
Jefferson City, MO 65101
Supreme Court judge, 8/92 to date



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32nd Judicial Circuit of Missouri
Courthouse Park
Cape Girardeau, MO 63701
Circuit Judge, 9/87 to 8/92

Limbaugh, Limbaugh, Russell & Syler, P.C.
2027 Broadway
Cape Girardeau, MO 63701
shareholder/partner,1/83 to 8/87
associate, 5/77 to 11/78

Office of Prosecuting Attorney
County Courthouse,
Jackson, MO 63755
Prosecuting Attorney, 1/79 to 12/82
Assistant Prosecuting Attorney, 12/78

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

In May 1977, I began my legal career as an associate in the family firm of Limbaugh, Limbaugh & Russell in Cape Girardeau, MO, engaging in general practice. In November 1978, I was elected Prosecuting Attorney of Cape Girardeau County, and I spent the month of December that year as an assistant prosecutor, learning the criminal practice. At the end of my four-year term (1979-1982), I decided not to run for reelection, and in January of 1983, I returned to the family firm. I engaged in general practice until September 1987 when I was appointed Circuit Judge of the 32nd Judicial Circuit of Missouri. I served in that office five years until August 1992 when I was appointed to the Supreme Court. I have served on the Court continuously since that time, including a two-year term as Chief Justice from 2001-2003.

Both as an associate (1977-1978) and as a partner (1983-1987) in the Limbaugh firm, I engaged in the general practice of law including civil litigation in both state and federal courts. I have personally tried before both judges and juries cases from many areas of the law, including election contests, discrimination suits, breach of contract actions, condemnation cases, and personal injury and products liability lawsuits for both plaintiffs and defendants. In addition, I maintained a significant and active practice in areas of corporation and business law, estate planning and probate and trust law.



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As Prosecuting Attorney of Cape Girardeau County (1979-1982), I prosecuted hundreds of felony and misdemeanor cases and thousands of traffic violations. I personally and successfully tried before juries a full range of criminal cases, including burglary, stealing, DWI, arson, child abuse, narcotics offenses, rape, robbery and murder. I was also attorney for the Cape Girardeau County Court and county officeholders.

ii. your typical clients and the areas, if any, in which you have specialized.

As a private practitioner, I handled cases for a wide variety of firm clients, including institutional clients such as Southeast Missouri State University and Colonial Federal Savings & Loan. My practice was truly a general practice. As a prosecutor, I represented the People of the State of Missouri and had special expertise in the trial of cases.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

About half of my practice with the Limbaugh firm was litigation in trial courts throughout Southeast Missouri, but particularly in Cape Girardeau, and I appeared in those courts frequently. Of course, during my time as prosecutor, nearly all my practice was in the state trial courts.

i. Indicate the percentage of your practice in:
   1. federal courts: approx. 50%
   2. state courts of record: approx. 50%
   3. other courts.

ii. Indicate the percentage of your practice in:
   1. civil proceedings: approx. 80%
   2. criminal proceedings. approx. 20%

d. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

During my 10 years as a prosecutor and private practitioner, I tried approximately 44 cases to verdict or judgment. Approximately 40 cases were as sole or chief counsel, and three or four trials as assistant counsel.

i. What percentage of these trials were:
   1. jury: 65%
   2. non-jury: 35%



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01235 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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e. Describe your practice, if any, before the Supreme Court of the United States. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have not practiced before the Supreme Court of the United States.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *Barks v. Turnbeau*, 573 S.W.2d 677 (Mo. App. 1978). This case, an election contest, was my first trial and first appellate matter. My client, the contestant, won at trial, and a new election was ordered. The Court of Appeals, issuing the first opinion to interpret new election statutes enacted in 1977, upheld the order for a new election. This was a bench trial in Madison County Circuit Court before Hon. Stanley J. Murphy. I was lead counsel, co-counsel was Joseph J. Russell (now deceased). Opposing counsel was Robert J. Blackwell, Anzalone & Fiser, Ste. 200, 7912 Bonhomme Ave., Clayton, MO 63105, 314-721-7980.

2. *State v. Walsh*, 624 S.W.2d 526 (Mo. App. 1981). This case was a high-profile prosecution for arson against the owner of a downtown Cape Girardeau clothing store that was destroyed in a fire. It was my first jury trial. Although the evidence was wholly circumstantial, the jury convicted the defendant, and he was sentenced to two years in prison. The case was tried in 1979 in the Circuit Court of Cape Girardeau County before Hon. A. J. Seier. Co-counsel was my then-assistant prosecuting attorney, John L. Cook, Cook, Barkett, Maguire and Ponder, 715 N. Clark, Cape Girardeau, MO 63701, 573-335-6651. Opposing counsel was Edward L. Downs, P.O. Box 1873, Cape Girardeau, MO 63702, 573-334-1221.

3. *County Court of Cape Girardeau County v. Below*, No. 27334 (Circuit Court of St. Francois County, Dec. 16, 1980). This case, originally filed by my predecessor in the prosecutor's office, was brought by the County Court to recover damages for the destruction of a small traffie bridge in the village of Allenville in rural Cape Girardeau County. The case received enormous publicity because of the unusual circumstances of the case. The accident occurred when an employee of



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defendant drove a tractor on to the bridge and hit one of the support beams, at which point the bridge collapsed into the creek below. The defendant employee counterclaimed for personal injuries. After jury trial on a change of venue in St. Francois County, judgment was rendered against the County and for the defendant and his employee. The case was tried before Hon. Stanley J. Murphy. Opposing counsel was Donald L. Dickerson, 102 N. Main, Cape Girardeau, MO 63701, 573-332-0306.

4. *State v. Dees*, 639 S.W.2d 149 (Mo. App. 1982). I prosecuted this highly-publicized burglary and rape case based solely on circumstantial evidence involving, most significantly, a shoeprint match. The jury convicted defendant and the judge imposed a sentence of 45 years. The case was tried on a change of venue in Dunklin County before Hon. Eugene Reeves. Defense counsel were Robert Dempster (now deceased) and Phillip J. Barkett, Cook, Barkett, Maguire and Ponder, 715 N. Clark, Cape Girardeau, MO 63701, 573-335-6651.

5. *State v. Abbott*, 654 S.W.2d 260 (Mo. App. 1983). This was a prosecution for the sexually sadistic murder of an elderly, retired, female university professor, whose decomposed body was found in a ditch six months after the incident. Needless to say, it was a sensational case. I won a jury verdict based solely on circumstantial evidence, and the defendant, who was a minor at the time of the offense, was sentenced to 37 years in prison. The case was tried on a change of venue in Dent County before Hon. William Seay. Opposing counsel were Albert M. Spradling, III, 1838 Broadway, Cape Girardeau, MO 63701, 573-335-8296 and Kenneth McManaman, 1028 N. Kingshighway, Cape Girardeau, MO 63701, 573-335-8522.

6. *State v. Esker*, 658 S.W.2d 49 (Mo. App. 1983). I prosecuted this case on charges of felony child abuse. The case was publicized nationally because it involved the unusual circumstance of an abandoned child being saved from a burning house. I won a conviction before a jury, and the judge imposed the maximum sentence. The case was tried on a change of venue in Boone County before Hon. Frank Conley. Defense counsel was Hale W. Brown (deceased).

7. *Earl Thomure v. Bucyrus-Erie Corp.*, No. S82-186C (E.D. Mo. Oct. 21, 1983). This was a products liability case in which a construction worker sued for injuries suffered while working on a crane manufactured by defendant Bucyrus-Erie. I represented defendant before a jury in the U.S. District Court for the Eastern District of Missouri in Cape Girardeau. Although the plaintiff claimed more than $1million in damages, the jury returned a verdict in favor of defendants. The case was tried before Hon. Kenneth Wangelin. Plaintiff's counsel was James R. Robison, 521 Greer St., Sikeston, MO 63801, 573-471-5583.

8. *Tosco Corp. v. Leafco. Co., Inc.*, No. S84-131C (E.D. Mo. July 9, 1985). This was a complex breach of contract action pertaining to wholesale gasoline deliveries. I represented defendant Leafco before a jury in the U.S. District Court



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for the Eastern District of Missouri in Cape Girardeau. The jury rendered a verdict in favor of plaintiffs and assessed damages, which were not in dispute, in the amount of $233,966. The case was settled while on appeal to the 8th Circuit. Hon. Kenneth Wangelin presided at trial. Plaintiff's counsel was John L. Oliver, Jr. (now deceased).

9. *Novella Noland-Clevenger v. Southeast Missouri State University*, No. S82-69C (E.D. Mo. Aug. 15, 1985). This was a bench-tried Title VII employment discrimination case filed against Southeast Missouri State University in Cape Girardeau. Representing the University, I tried the case over several days in the U.S. District Court for the Eastern District of Missouri in Cape Girardeau. On completion of the trial, the court found no liability and entered judgment for the University. Hon. Kenneth Wangelin presided. Plaintiff's counsel was Ronald Wessel, Judge, Marlborough Mun. Ct., 7826 Wimbledon Dr., St. Louis, MO 63119, 314-962-5055.

10. *Missouri Highway and Transportation Commission v. Lipps*, No. CV685-1625CC (Cape Girardeau County Circuit Court, July 18, 1986). This was a condemnation case in which I represented the landowner, the owner of a trucking company whose frontage on Highway 177 in Cape Girardeau County was being taken for highway improvements. The commissioners' award was $66,500. I tried the case before a Cape Girardeau County jury, which awarded my client $180,000. Hon. Stanley Grimm presided. Co-counsel was Albert C. Lowes, 2913 Independence, Cape Girardeau, MO 63701, 573-335-7200. Opposing counsel was John W. Koenig, Jr., Missouri Highway and Transportation Commission, 2675 N. Main, Sikeston, MO 63801, 573-472-5330.

20. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

As a judge on the 32nd Judicial Circuit, which is comprised of Cape Girardeau, Bollinger and Perry Counties, I presided over hundreds of cases, including 50 jury trials to completion. About 40 percent of my caseload involved felony criminal cases. Approximately 45 percent of the caseload was a general civil docket that included suits at law and in equity, domestic relations cases and a few probate matters. The remaining 15 percent or so of my cases were juvenile court cases, and during my last two years in office, I served as the sole juvenile court judge for the circuit. I also handled the administrative duties of the circuit as presiding judge in 1989 and 1990. In addition, the Supreme Court assigned me as special judge to hear dozens of cases in other circuits throughout southeast Missouri and the St. Louis metropolitan area. I also served under Supreme Court appointment as master over three attorney disciplinary proceedings. In



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01238 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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early 1992, I sat as a special judge with the Missouri Court of Appeals, Eastern District, heard six cases, and wrote three opinions.

In 1991, as Juvenile Judge of the 32nd Judicial Circuit, I helped organize and implement Court Appointed Special Advocates (CASA) of Southeast Missouri, Inc., a not-for-profit corporation designed to recruit and train lay guardians ad litem to promote the interests of child victims of abuse and neglect.

My most significant legal activities in private practice, in addition to the cases listed in question 19, have involved litigation. In 1980, as Prosecuting Attorney, I was instrumental in the calling and formation of the first grand jury in Cape Girardeau County in more than ten years. Based on grand jury indictments, I successfully prosecuted the Sheriff of Cape Girardeau County on several felony and misdemeanor changes, and he resigned his office.

In private practice, I was local counsel for The Budd Company, a manufacturer of truck wheels, in three products liability cases that were eventually settled. I also represented the City of St. Mary, Missouri, in the successful defense of a massive suit to enforce mechanics liens filed by a contractor on every parcel of property in the City. Additionally, I successfully defended Southeast Missouri State University in federal court on two discrimination suits other than that reported in question 19. I also successfully prosecuted the University's claim of several hundred thousand dollars for breach of contract against a contractor that built the University Center building. Over a four-year period, I also represented the Estate of Robert McElrath on numerous claims against the estate in several lawsuits throughout southeast Missouri.

In the criminal arena, I was appointed to represent a Cuban national who, with others, was charged in federal court with trafficking cocaine. Defendant spoke no English, and I represented him with the aid of an interpreter. After a lengthy suppression hearing that also was facilitated through the use of interpreters, defendant pled guilty. I was also hired by the U.S. Attorney's office in St. Louis to represent a defendant protected under the federal witness protection act who was charged with fraud in state court and a probation violation in federal court. Both matters were disposed of with pleas.

To my recollection, I have never lobbied a public body or official on a matter of public policy or legal interpretation, except, if at all, on behalf of one of the civic groups or charities to which I belong.

21. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, please provide four (4) copies to the committee.

I have never taught a "course," as such. During the course of my career, I have lectured frequently at law schools and at continuing legal education programs sponsored by the annual Missouri Judicial College, The Missouri Bar and other bar organizations.



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22. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

    I am fully vested in a Missouri state retirement plan for judges that will pay on retirement one-half of my highest annual salary as a judge which is $133,000. also have a State of Missouri Deferred Compensation Plan (457 plan and 401A state match plan) in the approximate amount of $430,000.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

    I have no outside commitments other than that my wife and I are members in River Bend Investment, LLC, which owns a neighborhood apartment building in Cape Girardeau.

24. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

    See attached Financial Disclosure Report.

25. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

    See attached Net Worth Statement

26. **Potential Conflicts of Interest**:

    a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

        Parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during my initial service in the position to which I have been nominated would include wife's employer, A.G. Edwards & Sons or one of her clients, a church or civic or charitable organization to which we belong appearing as a party, or where a close personal friend would be a party. In these instances I would recuse sua sponte.



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b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I now screen the litigants and lawyers in every case to determine whether I have a conflict (see response to question 16), and if so, I recuse. I would continue that practice. In all circumstances I will comply with the Code of Conduct for United States Judges and all applicable statues, policies and procedures.

27. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

While in private practice, I never turned down a client who could not pay, and I performed a good deal of legal work without pay for civic and charitable non-profit organizations, such as preparation of by-laws and other corporate documents and review of contracts.

During my time as Chief Justice, I preached at every opportunity in support of the pro bono obligation of lawyers, and that obligation and the other ethical obligations of lawyers was the primary focus of my tenure.

Because I have been on the bench for 20 years, I have been unable to render pro bono services for clients. However, I have devoted a good part of my career to "serving the disadvantaged" by my active participation in many civic, charitable and church activities.

Since the spring of 2006, I have served on the board of directors of the Rainbow Network based in Springfield, Missouri. The Rainbow Network was founded in 1996 as a Christian-based mission organization serving the impoverished people of rural Nicaragua. My wife and I, ourselves, have taken two mission trips to Nicaragua, assisting the Rainbow Network in providing food, housing, healthcare, education and economic opportunities for the poor.

I also served on the Board of Directors of the Cape Girardeau United Way and its successor organization, Area Wide United Way, from January 1983 through December 1986. In 1978, 1979 and 1980, I served as a captain in the annual fund drive. In 1989, I was associate chairman of the fund drive, and in 1982, served as general chairman. I have also been chairman of the professional division for the 1983 and 1986 fund drives.

In addition, from 1979 to 1991, I was a member of the Board of Directors of the Cape Girardeau Civic Center, which served the socio-economically deprived youth of the community in a YMCA-like facility. I was president of the Civic Center Board from 1981 to 1982. I also chaired a fund drive for the purchase and renovation of a new



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physical plant and personally raised more than $200,000 in charitable donations for that purpose.

28. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Please do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

When I learned of the vacancy on the U.S. District Court, I contacted Senator Bond's office to express my interest. There is no selection commission for that court. On Feb. 7, 2007 I interviewed with Sen. Bond's legal counsel, and on Feb. 28, 2007 I was informed by Sen. Bond's office that my name was one of three he submitted to the White House for consideration. The White House Counsel's Office called me the next day to set up an interview, and on March 5, I was interviewed in the White House Counsel's office. Later in March and in April (I do not have the exact dates) I communicated with the Counsel's office several times regarding the potential nomination. On May 14, 2007 I was notified by the White House that I was being considered for a preliminary nomination. I had subsequent conversations with staff from the Department of Justice and the White House Counsel's Office regarding nomination paperwork. My nomination was submitted to the United States Senate by the President on December 6, 2007.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

No.



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Rev. 1/2006

# FINANCIAL DISCLOSURE REPORT
## NOMINATION FILING

*Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)*

| 1. Person Reporting (last name, first, middle initial) | 2. Court or Organization | 3. Date of Report |
|---|---|---|
| Limbaugh, Jr., Stephen N | Eastern District of Missouri | 12/11/2007 |
| **4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)** | **5a. Report Type (check appropriate type)** | **6. Reporting Period** |
| District Judge - Nominee | ☒ Nomination, Date 12/06/2007<br>☐ Initial ☐ Annual ☐ Final<br>5b. ☐ Amended Report | 1/1/2006 to 12/11/2007 |
| **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.** | |
| Supreme Court of Missouri<br>P. O. Box 150<br>Jefferson City, MO 65102 | 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.)*

☐ NONE *(No reportable positions.)*

| POSITION | NAME OF ORGANIZATION/ENTITY |
|---|---|
| 1. Judge | Supreme Court of Missouri |
| 2. Trustee and first vice president | State Historical Society of Missouri |
| 3. Trustee | William Woods University |
| 4. Director | Rainbow Network, Springfield, MO |
| 5. Director | Great Rivers Council, Boy Scouts of America |
| 6. Director | Friends of the Missouri State Archives |
| 7. Director | Southeast Missouri Symphony Advisory Board |
| 8. Director | Southeast Missouri State University Friends of the Arts Advisory Board |

## II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of instructions.)*

☐ NONE *(No reportable agreements.)*

| DATE | PARTIES AND TERMS |
|---|---|
| 1. 1987-date | State of Missouri Deferred Compensation Plan |
| 2. | |
| 3. | |

| FINANCIAL DISCLOSURE REPORT<br>Page 2 of 11 | Name of Person Reporting | Date of Report |
|---|---|---|
| | Limbaugh, Jr., Stephen N | 12/11/2007 |

## III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of instructions.)*

**A. Filer's Non-Investment Income**

☐ NONE *(No reportable non-investment income.)*

| | DATE | SOURCE AND TYPE | INCOME (yours, not spouse's) |
|---|---|---|---|
| 1. | 2005 | State of Missouri, salary | $ 123,000 |
| 2. | 2006 | State of Missouri, salary | $ 123,000 |
| 3. | 2007 | State of Missouri, salary | $ 121,917 |
| 4. | | | |
| 5. | | | |

**B. Spouse's Non-Investment Income** - *If you were married during any portion of the reporting year, complete this section.*
*(Dollar amount not required except for honoraria.)*

☐ NONE *(No reportable non-investment income.)*

| | DATE | SOURCE AND TYPE |
|---|---|---|
| 1. | 2006 | A.G. Edwards & Sons, Inc., salary |
| 2. | 2007 | A.G. Edwards & Sons, Inc., salary |
| 3. | | |
| 4. | | |
| 5. | | |

## IV. REIMBURSEMENTS -- *transportation, lodging, food, entertainment.*
*(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)*

☐ NONE *(No reportable reimbursements.)*

| | SOURCE | DESCRIPTION |
|---|---|---|
| 1. | Exempt | |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |

| FINANCIAL DISCLOSURE REPORT<br>Page 3 of 11 | Name of Person Reporting<br>Limbaugh, Jr., Stephen N | Date of Report<br>12/11/2007 |
|---|---|---|

**V. GIFTS.** *(Includes those to spouse and dependent children. See pp. 28-31 of instructions.)*

☐ NONE *(No reportable gifts.)*

| SOURCE | DESCRIPTION | VALUE |
|---|---|---|
| 1. Exempt | | |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |

**VI. LIABILITIES.** *(Includes those of spouse and dependent children. See pp. 32-34 of instructions.)*

☐ NONE *(No reportable liabilities.)*

| CREDITOR | DESCRIPTION | VALUE CODE |
|---|---|---|
| 1. Central Bank, Jefferson City, MO | line of credit loan | None |
| 2. Montgomery Bank, Cape Girardeau, MO | line of credit loan | None |
| 3. American Express | credit card | None |
| 4. Citibank | credit card | None |
| 5. Bank of America (formerlhy MBNA) | credit card | None |
| 6. Neiman Marcus | credit card | None |



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**FINANCIAL DISCLOSURE REPORT**
Page 4 of 12

| Name of Person Reporting | Date of Report |
|---|---|
| Limbaugh, Jr., Stephen N | 12/11/2007 |

## VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of the spouse and dependent children. See pp. 14-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period: (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) |
|---|---|---|---|---|---|---|---|---|---|
| 1. State of Mo Deferred Comp. Plan 457 & 401A State Match - SNL | | | | | Exempt | | | | |
| 2. -American Century Growth Fund | none | | L | T | | | | | |
| 3. -American Century Ultra Fund | none | | K | T | | | | | |
| 4. -Fidelity Contra Fund | none | | L | T | | | | | |
| 5. -SEI Index Fund | C | Dividend | L | T | | | | | |
| 6. -ING Stable Income Fund | C | Dividend | M | T | | | | | |
| 7. IRA Account - SNL | | | | | | | | | |
| 8. -AGE Bank Deposit Program (money market) | A | Interest | | | | | | | |
| 9. -U.S. Treasury Zero Coupon Bonds | A | Interest | J | T | | | | | |
| 10. -Align Technolog, Inc. | none | | J | T | | | | | |
| 11. -American Express Co. | A | Dividend | J | T | | | | | |
| 12. -Amgen, Inc. | none | | J | T | | | | | |
| 13. -Canadian Natural Resources LTD | A | Dividend | J | T | | | | | |
| 14. -Clear Channel Communications | A | Dividend | J | T | | | | | |
| 15. -Walt Disney Co. | A | Dividend | J | T | | | | | |
| 16. -State Street Corp. | A | Dividend | J | T | | | | | |
| 17. -Suncor Energy, Inc. | 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 =$250,001 - $500,000 | O =$500,001 - $1,000,000 | P1 =$1,000,001 - $5,000,000 | P2 =$5,000,001 - $25,000,000 | |
| 3. Value Method Codes (See Column C2) | P3 =$25,000,001 - $50,000,000 | R =Cost (Real Estate Only) | P4 =More than $50,000,000 | T =Cash Market | |
| | Q =Appraisal | V =Other | S =Assessment | | |
| | U =Book Value | | W =Estimated | | |

**FINANCIAL DISCLOSURE REPORT**
Page 5 of 11

| Name of Person Reporting | Date of Report |
|---|---|
| Limbaugh, Jr., Stephen N | 12/11/2007 |

**VII. INVESTMENTS and TRUSTS** – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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. -Capital World Growth & Income Fund | B | Dividend | K | T | | | | | |
| 19. -Euro Pacific Growth Fund | B | Dividend | K | T | | | | | |
| 20. -Investment Co. of America | B | Dividend | J | T | | | | | |
| 21. -Smallcap World Fund, Inc. | A | Dividend | J | T | | | | | |
| 22. -Fidelity Hanover STR | A | Dividend | | | | | | | |
| 23. -Aim Constellation Fund | A | Dividend | | | | | | | |
| 24. -Aim Premier Equity Fund | A | Dividend | | | | | | | |
| 25. -Alliance Mgr. Series RCM | A | Dividend | | | | | | | |
| 26. -Ameriprice Financial Common | A | Dividend | | | | | | | |
| 27. Brokerage Account #1 MML | | | | | | | | | |
| 28. - AXP | A | Dividend | K | T | | | | | |
| 29. - AMP | A | Dividend | J | T | | | | | |
| 30. - AMGN | A | Dividend | J | T | | | | | |
| 31. - GE | A | Dividend | K | T | | | | | |
| 32. - MHS | A | Dividend | J | T | | | | | |
| 33. - MRK | A | Dividend | K | T | | | | | |
| 34. - WB (formerly AGE) | A | Dividend | L | T | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1. Income Gain Codes: (See Columns B1 and D4) | A =$1,000 or less | B =$1,001 - $2,500 | C =$2,501 - $5,000 | D =$5,001 - $15,000 | E =$15,001 - $50,000 |
| | F =$50,001 - $100,000 | G =$100,001 - $1,000,000 | H1 =$1,000,001 - $5,000,000 | H2 =More than $5,000,000 | |
| 2. Value Codes (See Columns C1 and D3) | J =$15,000 or less | K =$15,001 - $50,000 | L =$50,001 - $100,000 | M =$100,001 - $250,000 | |
| | N =$250,001 - $500,000 | O =$500,001 - $1,000,000 | P1 =$1,000,001 - $5,000,000 | P2 =$5,000,001 - $25,000,000 | |
| 3. Value Method Codes (See Column C2) | P3 =$25,000,001 - $50,000,000 | R =Cost (Real Estate Only) | P4 =More than $50,000,000 | T =Cash Market | |
| | Q =Appraisal | V =Other | S =Assessment | | |
| | U =Book Value | | W =Estimated | | |

**FINANCIAL DISCLOSURE REPORT**
Page 6 of 11

| Name of Person Reporting | Date of Report |
|---|---|
| Limbaugh, Jr., Stephen N | 12/11/2007 |

## VII. INVESTMENTS and TRUSTS -- *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period: (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) |
|---|---|---|---|---|---|---|---|---|---|
| 35. - Bank Deposit Program | A | Interest | N | T | | | | | |
| 36. - AGE (now WB) | B | Dividend | | | | | | | |
| 37. Brokerage IRA - MML | | | | | | | | | |
| 38. - Alliance Bernstein Int'l Value | A | Dividend | J | T | | | | | |
| 39. - Allianz NFJ Small Cap Value | A | Dividend | J | T | | | | | |
| 40. - American Century Vista Adv. | A | Dividend | J | T | | | | | |
| 41. - Blackrock Mid Cap Value A | A | Dividend | J | T | | | | | |
| 42. - Columbia Marsico Focused Fd A | A | Dividend | J | T | | | | | |
| 43. -American Funds Euro Pacific Growth F | A | Distribution | J | T | | | | | |
| 44. -American Funds Fundamental Investors F | A | Dividend | J | T | | | | | |
| 45. -Growth Fd Amer Fd F | A | Dividend | J | T | | | | | |
| 46. -Hartford Mut. Fund Mid Cap A | A | Dividend | J | T | | | | | |
| 47. -Hotchkis & Wiley Mid Cap Value A | A | Dividend | J | T | | | | | |
| 48. -American Funds New Economy F | A | Dividend | J | T | | | | | |
| 49. -American Funds New World Fd F | A | Dividend | J | T | | | | | |
| 50. -American Funds Small Cap World F | A | Dividend | J | T | | | | | |
| 51. -Van Kampen Comstock A | 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
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E =$15,001 - $50,000
F =$50,001 - $100,000
G =$100,001 - $1,000,000
H1 =$1,000,001 - $5,000,000
H2 =More than $5,000,000
2. Value Codes (See Columns C1 and D3)
J =$15,000 or less
K =$15,001 - $50,000
L =$50,001 - $100,000
M =$100,001 - $250,000
N =$250,001 - $500,000
O =$500,001 - $1,000,000
P1 =$1,000,001 - $5,000,000
P2 =$5,000,001 - $25,000,000
P3 =$25,000,001 - $50,000,000
R =Cost (Real Estate Only)
P4 =More than $50,000,000
T =Cash Market
3. Value Method Codes (See Column C2)
Q =Appraisal
S =Assessment
U =Book Value
V =Other
W =Estimated



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**FINANCIAL DISCLOSURE REPORT**
Page 7 of 11

| Name of Person Reporting * | Date of Report |
|---|---|
| Limbaugh, Jr., Stephen N | 12/11/2007 |

## VII. INVESTMENTS and TRUSTS – *Income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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) |
|---|---|---|---|---|---|---|---|---|---|
| 52. -American Funds Washington Mutual F | A | Dividend | J | T | | | | | |
| 53. -Centennial Money Market Funds | B | Dividend | | | | | | | |
| 54. -Citigroup, Inc. common stock | A | Dividend | | | | | | | |
| 55. -CBH | A | Dividend | | | | | | | |
| 56. -DIS | A | Dividend | | | | | | | |
| 57. -FAST | A | Dividend | | | | | | | |
| 58. -DX | A | Dividend | | | | | | | |
| 59. -GE | A | Dividend | | | | | | | |
| 60. -ITW | A | Dividend | | | | | | | |
| 61. -LOW | A | Dividend | | | | | | | |
| 62. -MXIM | A | Dividend | | | | | | | |
| 63. -MSFT | A | Dividend | | | | | | | |
| 64. -MS | A | Dividend | | | | | | | |
| 65. -NKE | A | Dividend | | | | | | | |
| 66. -PAYX | A | Dividend | | | | | | | |
| 67. -PG | A | Dividend | | | | | | | |
| 68. -QCOM | A | Dividend | | | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1. Income Gain Codes: (See Columns B1 and D4) | A =$1,000 or less | B =$1,001 - $2,500 | C =$2,501 - $5,000 | D =$5,001 - $15,000 | E =$15,001 - $50,000 |
| | F =$50,001 - $100,000 | G =$100,001 - $1,000,000 | H1 =$1,000,001 - $5,000,000 | H2 =More than $5,000,000 | |
| 2. Value Codes (See Columns C1 and D3) | J =$15,000 or less | K =$15,001 - $50,000 | L =$50,001 - $100,000 | M =$100,001 - $250,000 | |
| | N =$250,001 - $500,000 | O =$500,001 - $1,000,000 | P1 =$1,000,001 - $5,000,000 | P2 =$5,000,001 - $25,000,000 | |
| 3. Value Method Codes (See Column C2) | P3 =$25,000,001 - $50,000,000 | R =Cost (Real Estate Only) | P4 =More than $50,000,000 | T =Cash Market | |
| | Q =Appraisal | V =Other | S =Assessment | | |
| | U =Book Value | | W =Estimated | | |



47450.161

**FINANCIAL DISCLOSURE REPORT**
Page 8 of 11

| Name of Person Reporting | Date of Report |
|---|---|
| Limbaugh, Jr., Stephen N | 12/11/2007 |

## VII. INVESTMENTS and TRUSTS – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period: (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) |
|---|---|---|---|---|---|---|---|---|---|
| 69. -SLM Corp. common stock | A | Dividend | | | | | | | |
| 70. -SAP Aktiengesellschaft common stock | A | Dividend | | | | | | | |
| 71. -TGT | A | Dividend | | | | | | | |
| 72. -UPS | A | Dividend | | | | | | | |
| 73. -UNH | A | Dividend | | | | | | | |
| 74. -WAG | A | Dividend | | | | | | | |
| 75. -WFMI | A | Dividend | | | | | | | |
| 76. -XLNX | A | Dividend | | | | | | | |
| 77. -INTC | A | Dividend | | | | | | | |
| 78. -MDT | A | Dividend | | | | | | | |
| 79. -PEP | A | Dividend | | | | | | | |
| 80. -SPLS | A | Dividend | | | | | | | |
| 81. -TEVA | A | Dividend | | | | | | | |
| 82. 401K / PSP - MML | | | | | | | | | |
| 83. -American Funds - Euro Pacific Growth Fund | D | Dividend | M | T | | | | | |
| 84. -American Funds - Investment Co. America | F | Dividend | N | T | | | | | |
| 85. -American Funds - New Economy Fund | A | Dividend | | | | | | | |

1. Income Gain Codes: (See Columns B1 and D4)
A =$1,000 or less
B =$1,001 - $2,500
C =$2,501 - $5,000
D =$5,001 - $15,000
E =$15,001 - $50,000
F =$50,001 - $100,000
G =$100,001 - $1,000,000
H1 =$1,000,001 - $5,000,000
H2 =More than $5,000,000
2. Value Codes (See Columns C1 and D3)
J =$15,000 or less
K =$15,001 - $50,000
L =$50,001 - $100,000
M =$100,001 - $250,000
N =$250,001 - $500,000
O =$500,001 - $1,000,000
P1 =$1,000,001 - $5,000,000
P2 =$5,000,001 - $25,000,000
3. Value Method Codes (See Column C2)
P3 =$25,000,001 - $50,000,000
P4 =More than $50,000,000
Q =Appraisal
R =Cost (Real Estate Only)
S =Assessment
T =Cash Market
U =Book Value
V =Other
W =Estimated



474501.162

**FINANCIAL DISCLOSURE REPORT**
Page 9 of 11

| Name of Person Reporting | Date of Report |
|---|---|
| Limbaugh, Jr., Stephen N | 12/11/2007 |

**VII. INVESTMENTS and TRUSTS** – *income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period: (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) |
|---|---|---|---|---|---|---|---|---|---|
| 86. -American Funds - Small Cap World Fund | A | Dividend | L | T | | | | | |
| 87. -American Funds - Washington Mutual | C | Dividend | L | T | | | | | |
| 88. -American Funds - Growth Fund America | C | Dividend | L | T | | | | | |
| 89. -Centennial Money Market Fund | B | Dividend | O | T | | | | | |
| 90. -American Funds - New World Fund | A | Dividend | K | T | | | | | |
| 91. -Wachovia common stock | C | Dividend | M | T | | | | | |
| 92. -Treasury Zero Coupon Bond | C | Interest | K | T | | | | | |
| 93. Met Life Group Variable Universal Life | A | Interest | J | T | | | | | |
| 94. N.Y. Life Whole Life | A | Interest | | | | | | | |
| 95. 1/7 Interest in River Bend Inv., LLC (see note 2-Part VIII) | none | | M | Q | | | | | |
| 96. Limbaugh Lands, Inc. (see note 3 - Part VIII) | none | | J | U | | | | | |
| 97. Bank of America checking | A | Interest | J | T | | | | | |
| 98. Excess Profit Sharing deferred comp. plan | | | | | | | | | |
| 99. -Oppenheimer Centennial Money Market Trust | E | Dividend | M | T | | | | | |
| 100. Wachovia stock options | none | | L | T | | | | | |
| 101. Restricted Wachovia common stock | none | | L | T | | | | | |
| 102. Wachovia common stock | none | | L | T | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1. Income Gain Codes: (See Columns B1 and D4) | A =$1,000 or less | B =$1,001 - $2,500 | C =$2,501 - $5,000 | D =$5,001 - $15,000 | E =$15,001 - $50,000 |
| | F =$50,001 - $100,000 | G =$100,001 - $1,000,000 | H1 =$1,000,001 - $5,000,000 | H2 =More than $5,000,000 | |
| 2. Value Codes (See Columns C1 and D3) | J =$15,000 or less | K =$15,001 - $50,000 | L =$50,001 - $100,000 | M =$100,001 - $250,000 | |
| | N =$250,001 - $500,000 | O =$500,001 - $1,000,000 | P1 =$1,000,001 - $5,000,000 | P2 =$5,000,001 - $25,000,000 | |
| 3. Value Method Codes (See Column C2) | P3 =$25,000,001 - $50,000,000 | R =Cost (Real Estate Only) | P4 =More than $50,000,000 | T =Cash Market | |
| | Q =Appraisal | V =Other | S =Assessment | | |
| | U =Book Value | | W =Estimated | | |



474501.163

| FINANCIAL DISCLOSURE REPORT<br>Page 10 of 11 | Name of Person Reporting<br>Limbaugh, Jr., Stephen N | Date of Report<br>12/11/2007 |
|---|---|---|

## VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

Part VII - lines 1-6:
Only income from 6-1-07 to date is reported for the five Plan investments. The institutional manager for the State of Missouri Deferred Compensation Plan changed 6-1-07, and income reports for the period 1-1-06 through 5-31-07 are currently inavailable. They will be provided later.

Part VII, line 95:
The sole asset of River Bend Investment LLC i s a rehabbed 11-unit neighborhood apartment building in Cape Girardeau, Mo.

Part VII, line 96:
I own a small part - forty shares - of Limbaugh Lands, Inc., the Limbaugh Family homestead farm in Bollinger County, Mo.

Part VII, lines 100-102:
Wachovia Bank recently acquired my wife's employer, A.G. Edwards, and she now holds stock options and vested and non-vested restricted Wachovia stock. The non-vested restricted stock is not reported.

| FINANCIAL DISCLOSURE REPORT<br>Page 11 of 11 | Name of Person Reporting<br>Limbaugh, Jr., Stephen N | Date of Report<br>12/11/2007 |
|---|---|---|

## IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature Stephen N. Limbaugh Jr. Date 12-11-07

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544



474501.164

## 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 | | 287 | 000 | Notes payable to banks-secured | | | |
| U.S. Government securities-add schedule | | | | Notes payable to banks-unsecured | | | |
| Listed securities-add schedule | | 237 | 000 | Notes payable to relatives | | | |
| Unlisted securities--add schedule | | 4 | 000 | 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 | | | |
| Real estate owned-add schedule | | 500 | 000 | Chattel mortgages and other liens payable | | | |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 600 | 000 | | | | |
| Cash value-life insurance | | | | | | | |
| Other assets itemize: | | | | | | | |
| Retirement accounts | 2 | 645 | 000 | | | | |
| | | | | | | | |
| | | | | Total liabilities | | | 0 |
| | | | | Net Worth | 4 | 273 | 000 |
| Total Assets | 4 | 273 | 000 | Total liabilities and net worth | 4 | 273 | 000 |
| CONTINGENT LIABILITIES | | | | GENERAL INFORMATION | | | |
| As endorser, comaker or guarantor | | 350 | 000 | 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 | | | | | | | |



47450.165

# FINANCIAL STATEMENT

## NET WORTH SCHEDULES

| | |
|---|---|
| Listed Securities | |
| American Express Co. | $ 32,000 |
| Ameriprise Financial Inc. | 7,000 |
| Amgen Inc. | 11,000 |
| General Electric Co. | 21,000 |
| Medco Health Solutions Inc. | 6,000 |
| Merck & Company Inc. | 18,000 |
| Wachovia Corp. | 67,000 |
| Wachovia exercisable stock options | 75,000 |
| Total Listed Securities | $ 237,000 |
| | |
| Unlisted Securities | |
| Limbaugh Lands Inc. | $ 4,000 |
| | |
| Real Estate Owned | |
| Personal residence | $ 500,000 |



47450.166

AFFIDAVIT

I, Stephen N. Limbaugh, Jr., do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

12/14/07
(DATE)

(NAME)

(NOTARY)
Clerk, Supreme Court of Missouri



47450.167

Senator Leahy has a statement to be entered into the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator KOHL. At this time I'd like to call on the Ranking Member, Senator Specter, to begin the questioning.

Senator SPECTER. Well, thank you very much, Mr. Chairman. Welcome, all. I'm not going to be able to be here very long. We're scheduled to start a vote at 2:45, which is just in another couple of minutes. Another Republican is scheduled to come here.

I wanted to take a few moments, Mr. Novak, to go to an issue which has been raised with respect to your handling of the prosecution of the *Massaoui* case. Would you tell us about the issue and what happened?

Mr. NOVAK. Yes, Senator. To the best of my ability, I certainly would be glad to. You know I prosecuted Zacarias Massaoui, one of the 9/11—

Senator SPECTER. Senator Warner has raised the matter with me and it is a matter under inquiry. It will doubtless be a matter discussed when your nomination is considered by the Committee. So it would be very helpful for me to hear it so that I can comment about it when the issue arises at that time.

Mr. NOVAK. Thank you, Senator. Again, I had the honor of being selected to be one of the prosecutors of Zacarias Massaoui after the 9/11 attacks, and at that time I am quite proud of my work that I did during the prosecution of Mr. Massaoui. I'm also proud of the fact that, at the end of the trial our esteemed trial judge, Judge Brinkema, was quite kind in saying some very nice things about the work that I did, as well as my fellow prosecutors, and particularly talked about our integrity.

One of the issues that came up, as I think, frankly, the world knows at this point, is there was a violation of a sequestration order by a TSA attorney by the name of Carla Martin, and I'm the person that reported that to the court. After the trial was over, her parent organization, DHS, did an investigation of her and she was fired. After she was fired she made a complaint to—

Senator SPECTER. She was taken off the case?

Mr. NOVAK. Yes.

Senator SPECTER. And what caused the controversy? There was a violation of a sequestration order?

Mr. NOVAK. Yes.

Senator SPECTER. And what did that sequestration order provide?

Mr. NOVAK. That there was to be no communication of trial transcripts with witnesses, sir.

Senator SPECTER. And there was a communication with one of the witnesses?

Mr. NOVAK. A number of witnesses. She had sent e-mails to a number of the witnesses, Senator.

Senator SPECTER. How many?

Mr. NOVAK. I believe, six.

Senator SPECTER. Anything besides e-mails?

Mr. NOVAK. She might have had some oral communications, I believe.

Senator SPECTER. Might have?

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Mr. NOVAK. What I recall was, we had an evidentiary and I think some of the witnesses said she had spoken to them as well.

Senator SPECTER. How did you find out about that?

Mr. NOVAK. I found out from a witness and I disclosed it to the court, sir.

Senator SPECTER. You disclosed it to the court. And what action did the court take?

Mr. NOVAK. The court had an evidentiary hearing, found that she'd engaged in egregious misconduct, took action against the United States, which we then had to reconsider, and the court was effusive in explaining that my colleagues and I had done the right thing by learning of misconduct and disclosing it right away. She was then removed from the case. Thereafter, her parent organization did a thorough internal background and determined to remove her, and then thereafter she decided to file a complaint against me which has yet to be resolved.

Senator SPECTER. And later she filed a complaint?

Mr. NOVAK. Against me. Yes, sir.

Senator SPECTER. And tell us about that.

Mr. NOVAK. Sir, the complaint remains—a person can file a complaint against a prosecutor in the Office of Professional Responsibility, and that complaint is pending. It's been pending for a year.

Senator SPECTER. And what was the essence of her complaint?

Mr. NOVAK. Her complaint—well, Senator, I will tell you, because the matter is pending within the Office of Professional Responsibility, I'm under the understanding that I don't have the ability to talk about it because it's a confidential—it's a confidential complaint, in fairness to Ms. Martin. I mean, I'm obviously not happy with the fact that she filed a complaint against me, but she has rights and I don't think it would be appropriate for me to say anything disparaging against her in terms of that—that complaint. It remains pending. I'm sure the Department of Justice will notify you as soon as it's—

Senator SPECTER. Well, how is the Committee and the Senate to evaluate the matter?

Mr. NOVAK. Senator, I would tell you, I am glad to answer any questions about this. But my problem is, I'm in a situation where it is a confidential matter in the Department of Justice. I'm still a Department of Justice attorney with responsibilities to protect the confidentiality of the OPR process. I have selfish interests. I would like to sit here and talk all about it. But at the same time, I have responsibilities. I have responsibilities to Ms. Martin and I have to protect her.

Senator SPECTER. For the time being, we will respect your position on it. We may need to revisit it at a later time, and if we do, we shall. Anything else you wish to tell us about the matter?

Mr. NOVAK. No, sir. I would look forward to answering your questions as soon as the investigation is concluded. I'm quite proud of my conduct. I'm proud of what Judge Brinkema said about our conduct throughout. I had a responsibility to make the disclosures to the court, and I did.

Senator SPECTER. OK. Thank you, Mr. Chairman, for permitting me to go out of sequence and discuss this with Mr. Novak. I note your record. I note your Pennsylvania connection. I note you were

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01257 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

an Assistant D.A. in a very good District Attorney's Office. Not as good as when I was District Attorney, but very good.

[Laughter.]

The vote has started. I'm going to excuse myself, Mr. Chairman.

Senator KOHL. Thank you.

Senator SPECTER. I expect to have a replacement Republican Senator arriving shortly.

Senator KOHL. Thank you, Senator Specter.

There is a vote, as he said, so we'll recess for perhaps 10 minutes. I'll get back here as soon as I can and then we'll proceed with questions.

[Whereupon, at 2:49 p.m. the hearing was recessed.]

AFTER RECESS [3:07 p.m.]

Senator KOHL. The hearing will resume. We will commence questioning for Ms. Cook.

Ms. Cook, one of your primary responsibilities at the Office of Legal Policy is the selection of judicial nominees. With time is very short before the next election, what has your office done to encourage the White House to identify consensus nominees like the ones who are before us today who can be confirmed? Do you believe that it is important to consult and get the approval of home State Senators before nominations are made?

Ms. COOK. Thank you for that question. The Office of Legal Policy within the Department of Justice does play a supporting role in the selection process for judicial nominees. Ultimately the decision of whether or not to nominate an individual is the President's decision, but the Department, and my office in particular, does play a supporting role in that process.

You had asked specifically about consultation. The consultation process is one out of the White House council's office. It is not one of the areas where the Department of Justice would play a role.

Senator KOHL. Ms. Cook, during the tenure of Attorney General Gonzales there was a perception that politics played a significant role in the decisions made at the Department. Was there a similar problem at OLP? What will you do to ensure that this does not become a problem, should you be confirmed?

Ms. COOK. Let me explain a little bit about how the Office of Legal Policy is currently staffed. I am the Acting Assistant Attorney General right now, there are three Deputy Attorney Generals, and a Chief of Staff on the senior staff. They are all career attorneys. They have all been at the Department longer than I have. One of my goals, if confirmed, would be to make the Office of Legal Policy a place where they will want to stay long after I am gone. If confirmed, in any of my decisions, I would hope to have their input and their experience in that decision-making process.

Senator KOHL. Thank you.

Ms. Cook, while OLP is known primarily for its role in filling judicial vacancies, it also plays a role at the Justice Department in conducting policy reviews of legislation implementing Department initiatives, among other things. Can you tell us what your priorities will be in that area for the rest of this administration?

Ms. COOK. If confirmed, my priorities would be to institutionalize the gains that we have made in areas such as combatting violent crime, combatting child exploitation, combatting identity theft, and

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combatting human trafficking. These are areas where my office has been very involved in the past in the development of initiatives, in assessing legislation, and I would hope to continue to prioritize those, if confirmed.

Senator KOHL. What will be your biggest challenge, do you imagine, over the next several months?

Ms. COOK. I think the biggest challenge that we will face is the fact that the administration is ending. But from my perspective, now is the time to institutionalize the gains that we have made in numerous areas and to make sure that the Department continues to be a place where great professionals want to work.

Senator KOHL. Where do you think you may have some problems that you will have to deal with, that you might warn us?

Ms. COOK. I'm not aware of any specific areas, but I can tell you that, should areas arise where we feel we could use, for example, additional authorities, we would welcome the opportunity to work with this committee.

Senator KOHL. Thank you, Ms. Cook.

Ms. COOK. Thank you.

Senator KOHL. Judge Davis and others, during Chief Justice Roberts' nomination hearing, much was made of his suggestion that his job as a judge was little more than that of an umpire calling balls and strikes. I'm sure you recollect that. Some of us, in response, suggested that this analogy might be a little too simple, because all umpires, after all, have different zones with respect to balls and strikes. That is because they bring their own unique life experiences to the bench. No two people are exactly similar.

So would you comment on the Chief Justice's comparison to the role of a judge being like that of an umpire?

Mr. DAVIS. Well, Senator—

Senator KOHL. Would you agree with him or do you think the Chief Justice was wrong?

[Laughter.]

I dare you to answer that question, yes or no.

[Laughter.]

Mr. DAVIS. Senator, it is a metaphor, I guess, that he chose to use. I would say that I see the role of a judge as to uphold the rule of law. That's what I've tried to do in the past 5 years while I've served, and to look to the Constitution, to look to the statutes that are passed by this body, and to try to do the best job possible to make sure that everybody in the court is heard, they're heard in a fair manner, and that the process plays out in an open and fair manner.

I think that's the way that I see the role of the judge, to make sure that in the courtroom that happens, that everyone in the adversarial process has the opportunity to be heard and to make sure that the rule of law is what governs the outcome.

Senator KOHL. All right.

Judge Kays.

Mr. KAYS. Thank you, Senator. I agree with much of what Judge Davis has stated. You know, one of the challenges that I think people on the bench—judges have is to ensure that when people leave the courtroom they have a sense that they were treated fairly and

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there was a, pardon my metaphor, level playing field for everyone who comes before the court, no matter their station in life.

Thank you.

Senator KOHL. Mr. Novak.

Mr. NOVAK. Thank you, Senator. I would also agree that one of the key aspects is to ensure a level playing field, and that playing field will exist solely by a judge applying the laws that he is given, either through statute or by previous precedent. If I were confirmed, that's what I would do.

Senator KOHL. Judge Limbaugh?

Mr. LIMBAUGH. I got out of the use of Chief Justice Roberts' metaphor that he was simply using an example of an umpire as someone who is, by the very office that the umpire holds, someone who is impartial and even-handed, and that he is someone who should not try to inject his personal policy preferences into the game, so to speak.

Senator KOHL. Thank you.

For the judicial nominees, the following question: the debate around judges in the Senate can often get quite heated become some believe that nominees are brought forward because of a specific set of beliefs which conform to one political ideology or another. We can all agree that the overriding belief for any judge should be that he or she is independent and eager to apply the law in an even and fair way.

Could you respond to the thought that judges are brought forward because of a specific set of ideological beliefs? Mr. Davis?

Mr. DAVIS. Yes, sir, Senator. Senator, once you—it's almost 5 years that I've served on the bench and I've been honored to do that. It was amazing to me, once I started that process, the seriousness of it. When you know that people are coming before you, it's their day in court. They've been preparing for it for a long time. It may be the most important day in their life. When that seriousness hits, I've found it, frankly, easy to be very objective about what I was doing to take it seriously.

When I say "easy", it was just the seriousness of it that made me step back and say, it's not my personal views, it's nothing that I've done in the past. What governs here is the Constitution, to the extent that that's an issue, any statutes, any laws that we're dealing with, and any precedent, binding precedent that I have to follow, and then treat everyone fairly. I think, for me at least, I found that a fairly easy transition from private practice to doing that because it was such a serious thing.

Senator KOHL. OK. Judge Kays, why is it that there is this controversy when it comes to nominees, that they're either ideologically to the left or to the right, and so Republicans might support one, Democrats might support another? Do you think there's merit in that or do you think that it is much over-blown?

Mr. KAYS. Thank you, Senator. I understand that different people have different ideas on backgrounds of the judiciary. Senator, we're called to check our personal views at the door once we put on our robe, sir. Only then can we ensure uniformity, predictability, and stability in our court system. To do less does undermine the confidence of the entire judicial branch, in my opinion.

Senator KOHL. All right.

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For the other two, there really is a difference, isn't there, between the Federal court that you are up for and, for example, the Supreme Court in terms of your responsibilities and duties as you see it versus what a Supreme Court justice might be called upon to do in interpreting the Constitution. Is that correct or incorrect? Mr. Novak, then Judge Limbaugh.

Mr. NOVAK. Well, I can't speak for others, but I can speak for the process here in Virginia. As you heard from Senators Warner and Webb, Mark Davis and I were selected from a bipartisan interview process with both Senators. I think that was guided by recommendations from the local Bar organizations as to who they believed the people that are best qualified, those that are committed to applying the rule of law regardless of any type of political connection whatsoever. And again, I can't speak to others, but I can tell you, Senator, if I am fortunate enough to be confirmed I'm going to apply the rule of law, end of story. It doesn't matter what anybody's political connections are.

Senator KOHL. Thank you.

Judge Limbaugh.

Mr. LIMBAUGH. Senator, I'm not sure I understand the question exactly. As an appellate court judge, I'm bound by the precedents of our cases, the statutes, and Constitution, and on Federal matters, of course, the pronouncements of the U.S. Supreme Court. As a trial judge, I'm still bound by those same things.

Senator KOHL. Right.

Mr. LIMBAUGH. It is a different role, though, altogether as an appellate judge.

Senator KOHL. Thank you.

Judge Limbaugh, some people have criticized this President for the excessive use of signing statements. As you know, signing statements are the President's contemporaneous interpretations of the legislation that he signs into law. This administration has issued many more of these statements than any administration in the past. Would you discuss the appropriate deference that a Federal judge should give to a signing statement when you are interpreting the statute?

Mr. LIMBAUGH. Well, as a trial judge I would hope that I would have some guidance at some point from the Federal circuits and from the U.S. Supreme Court on just how we are to use those matters, if at all. I hope that's the situation, in the event I am confirmed, that we'll have some guidance. Frankly, I had not considered that issue, myself. I don't know the answer.

Senator KOHL. Well, you three are familiar with signing statements and what they are and how the President uses them. I'd like to hear a word or two from the three of you on that whole issue, starting with you, Mr. Davis.

Mr. DAVIS. Mr. Chairman, obviously I think the obligation from me, if I were to be confirmed, would be to look to the precedent from the Supreme Court. Obviously there is case law out there on legislative history and the degree to which legislative history is to be consulted by the court in reaching an outcome. To the extent that there are similar statements either from the Supreme Court or from, in my case, the Fourth Circuit Court of Appeals, that would be the binding precedent in Virginia and I would follow that.

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I have a healthy respect for the separation of powers and for the constitutional role of the Congress. So, I think that is an over-arching principle that I would also keep in mind in any such situation.

Senator KOHL. Thank you.

Mr. Kays.

Mr. KAYS. Thank you, Mr. Chairman. The beginning point for a trial judge is with the text of the statute and the expression of the legislative branch. As a State trial judge for the last 14 years, I'm not familiar with any precedents that would require me to review the signing statements. I, frankly, am unable to give you an answer because I don't know of any precedent or legal authority related to that at this time.

Senator KOHL. All right.

Mr. Novak.

Mr. NOVAK. Senator, like my colleagues, I would first look to precedent as well. My understanding, particularly under the separation of powers, my limited knowledge of signing statements, is that a signing statement really applies to the execution of the law, which is an executive branch function, as opposed to rewriting the law, which is a legislative function.

Obviously the people speak through the Congress when the statutes are drafted, and the statutes speak for themselves. My understanding—my limited understanding—of a signing statement really—my view is that it really applies to how the executive decides to carry out the law.

Senator KOHL. All right.

Comments from each of you, please. In the past few years there's been a growth in the use of so-called protective orders in product liability cases. We saw this, for example, in the settlements arising from the Bridgestone/Firestone lawsuits. Critics argue that these protective orders sometimes prevent the public from learning about the health and safety hazards in the products that they use.

Now, I ask you, should a judge be required to balance the public's right to know against the litigant's right to privacy when the information sought to be sealed could keep secret a public health and safety hazard? Who wants to speak first on that? I will ask all four. Should a judge be required to balance public health and safety with a litigant's right to privacy when considering a protective order? You will be sitting and you will have the judgment to make. You can decide then. When these cases come up, will you use that balancing test? If so, to what extent? It's an issue that I've been pushing for several years, so you can also balance your response to the fact that I'm sitting before you.

[Laughter.]

Who'd like to speak first? Mr. Davis, why don't you try that one?

Mr. DAVIS. OK. Senator, I will tell you, I don't—I don't know—I've never had that issue during my practice in the Federal court—

Senator KOHL. OK. All right.

Mr. DAVIS [CONTINUING].—before I went on the State court bench. In the State court system, we have a case, for example, that prevents us from sealing wrongful death settlements, a State Supreme Court case that emphasizes the importance of the public being able to know what the terms are. So I have had the opportunity, when attorneys have tried to present me with those kind of

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documents, to remind them that that is not something that we can do in Virginia, and I've refused to do it.

So, I can only tell you that I would look to the precedent, any statutory framework that is provided, and precedent. And to the extent that anyone raised a constitutional issue about it, I would certainly look to the text of the Constitution and any precedent that governed. But I would certainly be—it would be my role to look for that precedent to determine how to handle those issues, and I would do that.

Senator KOHL. Mr. Kays.

Mr. KAYS. Thank you, Mr. Chairman. I have not dealt with an issue of that nature. I will tell you, in Missouri, we generally lean toward openness in everything we do in our court system and we don't have, that I'm aware of, any secret judgments or anything like that. Our judgments are all open to the public.

I will tell you that this sounds like an issue that is addressed in the legislative branch, perhaps, about whether or not we should be making things secret, or unknown, or undisclosed to the public. I would review the statute, the applicable precedent, and the rules and follow those.

Senator KOHL. Thank you.

Well, as it now stands, if you're a sitting judge in your court, if you will be a sitting judge in your court, you would have the opportunity to make that decision and you could go either way on that with respect to allowing protective orders to be sealed, even though we may be talking about public health and safety. So when you say you look at the precedent, you can, but you will have the opportunity to make that judgment.

There are some Federal judges who very strongly believe that protective orders should not be sealed when there's public health and safety involved. They believe that as a principle and they conduct their court that way. Others go in the opposite direction.

I guess what I'm interested in is what your inclination would be when you are in a situation where you can go either way with respect to protective orders, keeping them secret, or if you believe that there are many people that might be injured by keeping them secret, not to allow that.

Now, Mr. Novak, what would be your inclination?

Mr. NOVAK. Well, Senator, I also have not been confronted with such a situation. Of course, if I were fortunate enough to be confirmed, I would turn to the precedent. I do know that in a criminal context, which I'm much more familiar since I've been a prosecutor for a number of years, that the Fourth Circuit case law creates quite a presumption in terms of openness of documents and access to the public, and I think that I would start with a view of what the Fourth Circuit case law is.

Senator KOHL. Judge Limbaugh.

Mr. LIMBAUGH. Of all the many hundreds of cases that I've addressed, I don't remember having this issue head on. It's a fascinating issue. I would hope, as a U.S. District Judge, that I would have some guidance from the courts by the time that I would have to address it. Perhaps, too, it is more appropriate a matter for legislation. But in Missouri, our court system is very open, like Judge Kays suggested. I know of very few examples where the parties

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have been successful in closing the records of a case, other than in juvenile court cases, and once in a while in a domestic case.

Senator KOHL. Well, we have had, and I'm sure you remember, situations like the *Bridgestone/Firestone* case where the protective order was granted in terms of a defective product that then continued to be sold and wound up killing many, many people, as well as others. There were breast implant cases where a protective order was granted and the product was defective and the protective order prevented people from knowing, and the manufacturer continued to sell their product protected by the order.

Now, to me this is a matter of common sense. If I were a judge, I'd have a hard time allowing that to occur if, in granting that protective order, I knew that many people were going to continue to be injured. I'm not sure what I've heard from you all today, but I'll try once more.

Mr. DAVIS. Senator, if I could.

Senator KOHL. Judge Davis.

Mr. DAVIS. I'm sorry. Thank you. You have laid it out for me so that I think I have a better understanding of what the issue really is. To the extent that, as you say, there is discretion in the judge to make that decision, and as I said, I honestly don't know what the law is on that in the Fourth Circuit, but to the extent that there's discretion, I think when there's a danger, an issue of danger to the public, that has to be a factor that you weigh heavily. So, I guess I can pledge to you that I would look very carefully at any such situation.

There's certainly an interest in trying to resolve litigation. To the extent that—it was the situation that I had before me in the State court, as I recall, in a wrongful death case. The parties said, we're not going to—we may not be able to resolve this case if we can't seal the result. It was a much easier case for me there because the Supreme Court of Virginia had said you can't do it. You can't do it because there are public health and public policy interests that encourage those orders to be open. But I think the wisdom of that decision speaks for itself. There's great wisdom in that.

Senator KOHL. Thank you.

Mr. Kays.

Mr. KAYS. Mr. Chairman, since—if the court does have the ability to balance the harm, certainly I'm reminded quite often that I am a public servant, and certainly I would have an interest in protecting the public from harms which they may be exposed to. I think each case would probably be different absent some legislative expression, but I can see where, if it would be in the public's best interests to protect the public from some known evil, that that would be appropriate not to issue a protective order in that case, sir.

Senator KOHL. Thank you.

Mr. Novak.

Mr. NOVAK. Senator, as somebody who has spent their entire career in public service, as I have, I certainly would not want to do anything that would harm the public, in fact, quite the opposite. You can begin with the presumption in that favor, as I think all of us would do. We'd just be in a position where we don't know

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what the law is at this point, at least I do not, having not been confronted with that.

But assuming that there is the relevant law in the Fourth Circuit that affords you discretion, I think you're going to obviously want to lean toward protecting the public. Everyone wants to do that because I don't want to be harmed. I don't want my beautiful young daughters being harmed, nor my wife harmed from somebody else's misconduct.

Senator KOHL. Thank you so much.

Judge Limbaugh.

Mr. LIMBAUGH. I understand well your concern. I have a concern of my own, and that is, so many settlements—most settlements are entered into without any admission of liability by one party or the other. So I'm trying to figure out what kind of mechanism could be used to address your concern and still protect the legitimate interests of the other side. It is something that needs to be addressed. Perhaps legislation is the right way.

Senator KOHL. Yes. Thank you.

If there are no other comments, I think you have all done a very good job.

Senator Kyl, before we end the hearing, we'll come to the most interesting part, which is Senator Kyl and his comments and questions.

[Laughter.]

Senator Kyl.

Senator KYL. Thank you, Senator Kohl.

I was sent here by Senator Specter, who indicated that he had to leave.

Senator KOHL. Right.

Senator Kyl. He did not want the hearing to be concluded without a Republican member present.

Senator KOHL. Good.

Senator Kyl. So, we have certainly guaranteed that. What I can do, Mr. Chairman, is if there are any other questions that either Senator Specter or other members on my side have, we'll obviously be submitting them to you. We appreciate your being here. I apologize for being here late, Mr. Chairman. Thank you.

Senator KOHL. Thank you very much for being here for the moment, Senator Kyl. We appreciate it.

Folks, we'll keep the record open for 1 week for Senators who may want to submit written questions or make statements. But again, we thank you for being here. You've done an excellent job and we look forward to, hopefully, your confirmation. Thank you.

[Whereupon, at 3:34 p.m. the hearing was adjourned.]

[Questions and answers and submissions follows.]

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# QUESTIONS AND ANSWERS

David J. Novak
600 East Main Street
Suite 1800
Richmond, Virginia 23219

April 23, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Attached are my responses to written questions from Senator Specter. Also, I would like to clarify an answer that I gave in response to a question from Senator Specter during the hearing on April 3, 2008. I stated that the complaint filed against me by former TSA attorney Carla Martin remains pending within the Office of Professional Responsibility (OPR) at the Department of Justice. In fact, as I understand it, OPR completed its report on March 27, 2008. The Department's findings on this matter will not be final, however, until an expedited review process is completed. I apologize for any confusion caused by my answer during the hearing.

Sincerely,

David J. Novak

cc: The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510



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**Responses of David J. Novak**
**Nominee to the U.S. District Court for the Eastern District of Virginia**
**to the Written Questions of Senator Arlen Specter**

**Mr. Novak, during the Judiciary Committee's hearing on your nomination, you alluded to remarks that the judge in the trial of Zacarias Moussaoui trial, Judge Leonie Brinkema, made about you and your work with the families of the victims of the 9/11 attacks.**

**1. Can you elaborate on what exactly the judge said on the trial record?**

At the conclusion of the case on April 24, 2006, United States District Judge Leonie Brinkema said the following:

> I think the record should reflect, regardless of what the decision of this jury is, that all the attorneys in this room, plus many of their predecessors, have done an extraordinary job in marshaling a quantity of evidence and a quality of evidence that is unprecedented.
>
> The prosecution team gets particular credit for being absolutely fastidious in bringing many problematic issues to the Court's attention. Lesser prosecutors might not have been as vigilant and as diligent as you-all were. Many times it cut against your case, but you did so as true officers of the Court. And did you extremely well in that respect.

April 24 Transcript ("Tr.") at 4821. After the jury returned their verdict on May 3, 2006, Judge Brinkema stated:

> And as I've said before, in particular, given the difficulties we've had in this case, the way in which the prosecutors were completely forthcoming with any potential problems really is a credit to their professionalism.

May 3 Tr. at 4863.

On May 4, 2006, Judge Brinkema said the following during Moussaoui's sentencing:

> Nobody will probably ever truly know how incredibly complicated it was to put this prosecution together. These prosecutors and their investigators, who started working this case from September 11 of 2001, have spent untold hours slaving over minute details and, based on some of the evidence you-all saw in this courtroom today, some details of some graphic and horrendous nature.
>
> *These prosecutors met with nearly every family member of a victim whom* they could met. Mr. Novak in particular spent years talking to victims.



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* * *

> And a lot of the evidence in this case was classified, and both the prosecutors and the defense attorneys had to work around classification issues that were at one point, we all thought, insurmountable, and yet because we were dealing with extraordinarily professional attorneys for both sides, this evidence was able to be brought together in a format and presented openly in a public court of law.
>
> The prosecutors on this case from the beginning . . . have been outstanding, as I said yesterday . . . . Mr. Novak has been on this case almost from the beginning and had to leave his home to be up here, as has Mr. Raskin.

* * *

> What was extraordinary about this case as well as the amount of evidence to which the parties were able to stipulate. If there ever was a difficult case, this was it, and yet the lawyers on both sides, as vigorously as they advocated for their positions, were able to come together and work out stipulations so that the evidence could be presented publicly and be evaluated in that respect.

May 4 Tr. at 15-17.

**2. Can you describe your involvement with some of the families of the victims of the 9/11 attacks?**

Like every other American after the September 11 attacks, I wanted to do anything that I could to help the victims of the attacks. I was honored to be selected to serve as one of the three prosecutors of Zacarias Moussaoui, the only person convicted for his role in the attacks. In addition to my legal work, I assumed the responsibility to meet the needs of the victims. I quickly realized that the enormity of the crime should not be measured by the quantity of those murdered, but the quality of the lives lost that day — that each person who died that infamous day was loved and cherished by many different people for many different reasons. I decided, therefore, to treat the case in the same fashion as if it involved a single victim.

For these reasons, we interviewed every family member of a September 11 victim, who wanted to meet with us, about who their loved one was and what their loss meant to them. These interviews happened in New York City, Boston, Princeton, and Arlington. Moreover, we repeatedly briefed family members about what we knew about the attacks and how their loved ones died. After one such session in Boston, the Director of the Massachusetts 9/11 Fund wrote a letter to me, which I have attached. We also arranged for counseling for those who sought our help and I personally spoke to any family member who wanted to understand our prosecution.



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Furthermore, on behalf of the prosecution team, I ensured that Closed-Circuit Television broadcast of the trial was implemented in Boston, New York City, Long Island, Newark, Philadelphia and Alexandria, pursuant to the bill passed by Congress.

I would like to think that I offered a shoulder for the victims to lean upon as they dealt with their grief. After the Moussaoui trial was over, a local Richmond lawyer, who lost his firefighter brother-in-law at the World Trade Center, graciously wrote an unsolicited letter to the editor of the *Richmond Times-Dispatch* on May 14, 2006, that described my work with September 11 victim family members. A copy of that editorial is also attached. (Please note that the editorial refers to me as the lead prosecutor when, instead, I was one of three members of the prosecution team). I respectfully submit that this editorial best describes my support of the victims of the September 11 attacks.



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# The Massachusetts 9/11 Fund



David J. Novak
Assistant United States Attorney
Senior Trial Counsel
United States Attorney's Office Eastern District of Virginia
2100 Jamieson Avenue
Third Floor
Alexandria, Virginia 22314

Dear Dave,

I wanted to take a moment to thank you formally for bringing the Department of Justice briefing to Boston.

It is clear that you and your team are committed to the pursuit of justice for our nation and for the families of the victims of the tragic events of September 11th. It is evident that you are more than up to that daunting task as a prosecutor, and for that we are grateful.

However, we are equally as grateful for the compassion you bring to the process personally. Given the magnitude of this crime, one could easily overlook the individual victims and focus on the enormity of the act itself. Instead, you capably balance the needs of the victims with your responsibilities to the court and our nation. No easy feat.

You may have the intellect of a prosecutor, but you have a social worker's soul. This was never more evident than in your flexibility and focus on the families and their needs. For this, I personally thank you.

I have long believed that, for victims of crime, the path to healing runs parallel to the path for justice. At those points where the paths might intersect, as they ideally should, the burden can be eased somewhat for the survivor, allowing a true opportunity to heal. Thank you for allowing the families to meet you at this crossroads. I know that, in time, we will all benefit from it.

I'll look forward to seeing you on CCTV in Boston this spring.

With best regards,

Linda Plazonja
Executive Director

One International Place, Boston, Massachusetts 02110 617-310-6061 www.massfund.org

## Moussaoui Prosecutor Served Nation Well

EDITOR, TIMES-DISPATCH:

Thank you to David Novak, the lead federal prosecutor of Zacarias Moussaoui. Let us speak no more of this evil one whose transgressions against man and God have earned him *mortal oblivion and eternal* damnation. Instead, let us rejoice in this neighbor's return to Richmond from Northern Virginia.

For four years, Novak, an assistant United States Attorney, has been largely absent from his family and community. Selflessly serving us all as head of this Alexandria-based prosecution, Novak has borne the inconsolable loss of family members and the immeasurable pain of 3,000 victims who perished that tragic September day.




He has endured the privations of family and friends, shared the searing despair of victims here and gone, and accepted the burden of a nation's expectations because — as with the dedicated men and women on his team — he would not blink in the face of Islamist terror.

And he did not blink.

I know this because my family and I have walked with Novak these past four years. We sat with him in April, 2002, in Manhattan and described what the loss of our Daniel — our firefighter hero — meant to his wife, infant daughter, parents, siblings, and friends.


Novak

I sat with Novak in Alexandria, in the shadow of the Pentagon, honoring one heart-rending account after another of the loss of a patriot father, mother, or child. While my wife and I attended school functions for our children, Novak's wife attended those same functions alone, her husband 100 miles away tirelessly preparing for a case unprecedented in its complexity and demands.

We sat in the courtroom and watched Novak compassionately elicit the testimony of survivors whose haunting expressions of horror and loss indelibly marked our souls.

And yet, through it all, at the epicenter of this national tragedy, Novak stood, comforting hand on our shoulder, calmly resolved to see justice done. And justice has been done.

Some surely would have preferred a sentence of death. For others, it is enough that dreams of martyrdom have met the reality of isolation in a living hell. Either way, an evil man will menace us no more.

Thank you, David Novak — and welcome home.

MIKE KLEIN.

RICHMOND.

# SUBMISSIONS FOR THE RECORD

**Statement of Senator Patrick Leahy**
**Chairman, Senate Judiciary Committee,**
**On Judicial and Executive Nominations Hearing**
**April 3, 2008**

The Senate has just returned this week from its Easter recess, yet already the Judiciary Committee is holding its fifth confirmation hearing of the year. I thank Senator Kohl for agreeing to chair this hearing.

Today, the Committee will hear from four more nominees for lifetime appointments to the Federal bench — Mark S. Davis and David J. Novak for the Eastern District of Virginia, David Gregory Kays for the Western District of Missouri, and Stephen N. Limbaugh, Jr. for the Eastern District of Missouri. Each of these nominations has the support of their home-state Senators. Last month, Senator Warner spoke to me about holding a hearing for the two nominees from Virginia and I am happy to honor his request today. Likewise, Senator Bond approached me about the two nominees from his state, and they are both included at this hearing today.

We will also hear from Elisebeth C. Cook, nominated to be Assistant Attorney General for the Office of Legal Policy at the Department of Justice. Consideration of this nomination continues the work we have done to rebuild the Department, which was decimated last year by resignations in the wake of the U.S. Attorneys scandal.

Two of the nominees today are from Virginia, and were nominated with the support of Senator Warner, a Republican, and Senator Webb, a Democrat. I am glad the President chose in this instance to heed their recommendations, rather than follow the path he opted for when he nominated Duncan Getchell to the Fourth Circuit over their objections. That decision caused months of delay, before the Getchell nomination was finally withdrawn after the Virginia Senators objected publicly. In fact, the delay in filling that vacancy has lasted years because this President insisted on sending forward highly controversial nominations like William Haynes, Claude Allen, and Duncan Getchell.

The recent nomination of Justice Agee, who was recommended by Senators Warner and Webb, is an overdue development that should allow us to make progress in fixing some of the problems that have long plagued the Fourth Circuit. Indeed, the history of filling vacancies on the Fourth Circuit has been a difficult one since the years when 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.

As I wrote to the President over the last recess, I expect the Judiciary Committee and the Senate will proceed promptly to consider and confirm Justice Agee's nomination with the support of Senator Warner and Senator Webb, just as we proceeded last year to confirm the nomination of Judge Randy Smith to the Ninth Circuit, once the President had withdrawn his nomination for a California seat and resubmitted it for a vacancy from Idaho. I urged the President to use the Agee nomination as a model for working with home-state Senators and Senators from both sides of the aisle. Time is running short.



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Of course, the Republicans never mention the President's role in making provocative picks when engaging in their tired political rhetoric on nominations. They also never talk about the progress we have made. Last year, the Senate confirmed 40 judicial nominees. That topped the total achieved in any of the three preceding years under Republican leadership. It was also more judges than were confirmed in 1996, 1997, 1999, or 2000, when a Republican-led Senate was considering President Clinton's nominations. Indeed, in the almost three years that I have chaired the Committee, the Senate has confirmed 140 of President Bush's lifetime appointments to our Federal courts. That compares favorably to the total of 158 confirmations during the more than four years that Republicans led the Committee during this presidency.

Although Senate Republicans suggest otherwise, we continue to make progress on judicial nominations. I was here in 1999 when the Republican Chairman of the Judiciary Committee would not hold a hearing for a single judicial nominee until June. In contrast, under my leadership, we have now held three hearings on 11 nominees so far this year.

We are poised to make even more progress. We reported out the nomination of Catharina Haynes to the last seat on the Fifth Circuit at our business meeting this morning. And, as I mentioned earlier, I expect us to move expeditiously to consider the Agee nomination to the Fourth Circuit now that the President has nominated someone for a Virginia vacancy who is supported by Senator Warner and Senator Webb.

We also continue to make progress on executive nominations. In the past months, I have made rebuilding the leadership at the Department of Justice a priority. Indeed, this is our eighth hearing since September on nominations to restock the leadership ranks at the Department of Justice after they were depleted during the scandals of the Gonzales era. We have already confirmed the Attorney General, the Deputy Attorney General, and the Associate Attorney General, the top three spots at the Department. We would have done so sooner but for Republican delays in refusing to cooperate and make a quorum in February, and an anonymous Republican hold before the Easter recess.

Despite this progress, the heated partisan rhetoric from the other side of the aisle might lead one to believe that judicial nominations are the most pressing problem facing the country. It is not. With a massive subprime mortgage crisis that has left so many Americans in dire straights, fearful of losing their homes, the Republican efforts to create an issue over judicial nominees is misplaced. In fact, I have worked hard to make progress and have treated this President's nominees more fairly than Republicans treated those of President Clinton. We have worked hard to lower vacancies to the lowest levels in decades, even reducing circuit vacancies to half what they were when President Bush took office.

This administration is apparently more worried about the jobs of a handful of controversial nominees, many without the necessary support of their home-state Senators, than increasing unemployment rates, rising gas prices, and escalating national debt. It would seem one of the few numbers going down as the President winds down his tenure is that of judicial vacancies. I would rather see us work with the President on the selection of nominees the Senate can proceed to confirm than waste precious time fighting about controversial nominees he selects to score



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political points. I would also rather see the Senate focus on addressing the real priorities of the country rather than catering only to an extreme wing of the Republican base with controversial nominees.

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SENATOR JOHN WARNER STATEMENT
TO THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF ELISEBETH COLLINS COOK
TO BE ASSISTANT ATTORNEY GENERAL FOR LEGAL POLICY,
DEPARTMENT OF JUSTICE
April 3, 2008

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**Chairman Leahy, Senator Specter, and my distinguished colleagues on the Judiciary Committee, I am pleased to introduce to the Committee a long-time Virginian, Mrs. Elisebeth Collins Cook, who has been nominated to serve as Assistant Attorney General for Legal Policy at the United States Department of Justice.**

**She is joined here today by members of her family:**

**her husband, James Cook, and**

**her parents, Tom and Martha Collins.**



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**On January 29, 2008, President Bush nominated Mrs. Cook to serve as the Assistant Attorney General responsible for leading the Office of Legal Policy, or OLP. As you know, OLP serves as the principal office for the planning, development, and coordination of high priority policy initiatives for the Department of Justice and works closely with the President on the selection process for Article III judges.**



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**Mrs. Cook's academic credentials and professional experience certainly appear to make her a well qualified nominee for this position. A former litigator at the Washington, D. C., law firm of Cooper & Kirk, PLLC, Mrs. Cook has worked in a broad range of civil litigation matters at the trial and appellate levels. Before entering private practice, she served in two federal clerkships: first for the Honorable Lee H. Rosenthal of the United States District Court for the Southern District of Texas, and later for Senior Judge Laurence H. Silberman of the United States Court of Appeals for the District of Columbia Circuit.**



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**Mrs. Cook was a Phi Beta Kappa graduate of the University of Chicago with degrees in both History and French. She pursued her study of law at Harvard, serving as the Deputy Editor-in-Chief of the *Harvard Journal of Law and Public Policy*, and graduated with *cum laude* honors.**

**Certainly, I look forward to the Committee's review of Mrs. Cook and to the full Senate's consideration of her nomination. I thank the members of the Committee for their time and courtesy with respect to today's hearing.**



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SENATOR WARNER'S STATEMENT TO THE SENATE JUDICIARY COMMITTEE ON THE NOMINATION OF THE HONORABLE MARK DAVIS
April 3, 2008

**Chairman Leahy, Senator Specter, 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 an outstanding Virginian, the Honorable Mark Davis, who has been nominated by our President to serve as a federal judge on the United States District Court for the Eastern District of Virginia.**



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**Judge Davis is supported here today by his family and friends, including: his parents, Barbara and George Davis; his brother and his brother's wife, Michael and Donna Davis; his nephew, Justin Davis; and Judge Johnny Morrison, the most senior judge on the Third Judicial Circuit of Virginia.**

**I believe one of a Senator's most important responsibilities is set out in Article II, Section 2, the advice and consent clause of the U.S. Constitution. It reads, "The President . . . shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint . . . Judges . . ."**



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**For the last 30 years, I have participated in the advice and consent process for every single active federal judge sitting on the bench in Virginia and every active federal court of appeals judge sitting on the Fourth Circuit. In fact, in the case of Judge Davis and David Novak, I am now on my second round as I also recommended their predecessors to Presidents Ronald Reagan and George H.W. Bush.**



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**With the help of the Virginia State Bar Association, Senator Webb and I - just like I did with Senators Harry Byrd, Jr., Trible, Robb, and Allen - have worked closely together to provide advice to the White House. After interviewing more than a dozen candidates out of a very strong field of applicants, Senator Webb and I were honored to recommend both Judge Davis and David Novak for these federal judgeships.**



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**I also note that Senator Webb and I have worked closely together to provide the White House with recommendations of outstanding nominees to serve on the United States Court of Appeals for the Fourth Circuit. I am pleased that the White House recently nominated Virginia Supreme Court Justice Steve Agee for one of the "Virginia" vacancies on the court, and I hope the Committee will soon schedule a confirmation hearing for Justice Agee.**



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**With respect to Judge Davis, I have had the privilege of knowing Mark for several years. In fact, he worked as an intern in my office while attending the University of Virginia, and then later, in 1984, he began his professional career as a Staff Assistant in my office before he went to law school.**

**After earning his JD from the Washington & Lee University School of Law in 1988, Judge Davis served as a Law Clerk for the Honorable John MacKenzie on the United States District Court for the Eastern District of Virginia.**



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**Subsequent to his clerkship, he entered the private legal practice, first at McGuire Woods and then at Carr & Porter. He worked as a litigation attorney on cases before both federal and state courts in several areas, including tort, maritime, and municipal and employment law.**

**In 2003, the Virginia General Assembly unanimously confirmed him to serve as a judge on the Third Judicial Circuit of Virginia in Portsmouth, Virginia. Today, he serves as Chief Judge of this five-judge circuit.**



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**Mr. Chairman, Judge Davis is one of Virginia's best and brightest, and clearly he is eminently qualified to serve on this prestigious court. In addition to having the support of his home state Senators, Judge Davis received the highest recommendation of the Virginia State Bar Association and the American Bar Association.**

**I urge my colleagues on the Committee to support his nomination.**



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SENATOR WARNER'S STATEMENT TO THE SENATE JUDICIARY
COMMITTEE ON THE NOMINATION OF DAVID NOVAK
April 3, 2008

**The nomination of David Novak also stems from the same bipartisan collaborative process that Senator Webb and I conducted.**

**He is an eminently skilled prosecutor and will make an outstanding federal judge. Mr. Novak is supported here today by his family, including his wife Martha and his two daughters, Nicole and Katie.**



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**Simply put, David Novak is a highly impressive nominee. In 1983, he graduated from St. Vincent College with a Bachelor of Science degree. He then attended the Villanova University Law School and earned his JD in 1986. Subsequent to earning his law degree, Mr. Novak began his career in the Philadelphia District Attorney's Office and worked there for five years.**



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**In 1991, he served in the United States Department of Justice's Criminal Division, Money Laundering Section. Later that year, he served as an Assistant United States Attorney in the Southern District of Texas, where he successfully prosecuted members of the Cali and Mexican drug cartels and oversaw an international money laundering task force.**



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**In 1994, Mr. Novak moved to Richmond, Virginia, to serve as an Assistant US Attorney in the Richmond Division of the Eastern District of Virginia. Shortly after the September 11 attacks, he successfully prosecuted Zacarias Moussaoui for his role in the attacks. The investigation and trial lasted over four years and was one of the most complex criminal prosecutions this country has ever seen.**



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**Mr. Chairman, it is clear to me that David Novak is eminently qualified to serve on this prestigious court. Based on Mr. Novak's 20 year record as a prosecutor, his dedication to public service, and the fact that he earned the highest recommendations from both the American and Virginia State Bar Associations, Senator Webb and I jointly recommended him for this position.**



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**Before I conclude my remarks in support of Mr. Novak, I do want to note for the record that, prior to this hearing, I did bring to the attention of the Chairman, the Ranking Member, and their staffs an additional matter that may be explored in questions of the nominee. I have also consulted with the Administration on this matter.**

**I thank the Chairman for holding today's hearing on this highly qualified nominee, and I urge my colleagues on the Committee to support his nomination.**



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**Statement of Senator Jim Webb**
**On the Confirmation of David J. Novak and Mark Davis to be Judges on the U.S. District Court for the Eastern District of Virginia**
**And**
**Elisebeth Cook Collins to be Assistant Attorney General for Legal Policy at the U.S. Department of Justice**

**Before the Senate Judiciary Committee**
April 3, 2008

Mr. Chairman, today it is my distinct pleasure to offer my support—along with my colleague Senator Warner—for the nominations of Judge Mark Davis and Mr. David J. Novak to be Judges on the United States District Court for the Eastern District of Virginia.

Chairman Leahy and Ranking Member Specter, I am also pleased to introduce to you Elisebeth Cook Collins, a Virginian who has been nominated to be Assistant Attorney General for Legal Policy at the Department of Justice.

The Constitution assigns a pivotal role to the United States Senate in the advice and consent process related to Federal judges. These judgeships are lifetime appointments, and Virginians expect me and Senator Warner to take very seriously our constitutional duties. It matters not whether a nominee is a Republican or a Democrat, but rather whether the nominee will be respectful

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of the Constitution, impartial, balanced, and fair-minded to those appearing before him or her.

In light of these criteria, Senator Warner and I undertook a careful and deliberative process to find the most qualified judicial nominees. Our collaborate process involved a thorough records review and rigorous interviews. We are of the opinion that both Judge Davis and Mr. Novak meet these high standards. These two men were on the joint list of recommended judge nominees that we submitted to President Bush last year. We are pleased that President Bush has chosen to respect our diligent bipartisan work.

Therefore, Senator Warner and I commend Judge Davis and Mr. Novak to this committee for prompt and fair consideration, with our endorsement of their nominations.

The careers of these nominees are impressive.

Judge Davis is regarded as a patient, thoughtful individual who exhibits the highest degree of ethics and professionalism. After graduating law school,



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Judge Davis began his legal career as a law clerk to Judge John A. MacKenzie who served as judge on the United States District Court for the Eastern District of Virginia (1988-1989). In 1989, Judge Davis joined McGuire Woods, LLP, where he worked as a partner from 1996 until 1998. Judge Davis has also worked as partner at Carr & Porter LLC (1998-2003). Since 2003, Judge Davis has served on the Third Judicial Circuit of Virginia, and has been the Chief Judge since 2006.

The Virginia Bar Association rated Judge Davis as highly qualified. Judge Davis's written opinions reflect his keen intellect, and the extent to which he values communicating his reasoning to counsel and litigants. Further, Judge Davis is active in myriad community and civic organizations. Judge Davis received his B.A. in Government from the University of Virginia in 1984, and his J.D. from Washington and Lee University School of Law in 1988.

Since graduating law school, Mr. Novak's career also has reflected his commitment to public service and to professional excellence. Mr. Novak began practicing law as an Assistant District Attorney in the Philadelphia District Attorney's Office (1986-19991). From 1991 until 1994, Mr. Novak investigated and prosecuted South American drug cartels' money-laundering



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operations, which resulted in the imposition of a $7 million civil penalty against American Express Bank, and the forfeiture of approximately $40 million of drug proceeds. Since 1994, Mr. Novak has been an Assistant U.S. Attorney (Senior Litigation Counsel) for the Eastern District of Virginia. In this capacity, Mr. Novak prosecuted Zacarias Moussaoui, the only person convicted of offenses related to the September 11, 2001 terrorists' attacks. I want to note for the record that I am aware of additional questions that this Committee may wish to explore with Mr. Novak.

Mr. Novak lives with is wife, Ms. Martha Lilia Novak, and two children in Richmond, Virginia. Mr. Novak received his B.S. from St. Vincent College (1983), and received his J.D. from Villanova University School of Law (1986).

Elisebeth Cook joined the Department of Justice in March 2005 as a Deputy Assistant Attorney General in the Office of Legal Policy. Since January of 2008 she has been Acting Assistant Attorney General where she manages the development of civil and criminal policy initiatives, the creation of departmental regulations, and the Department's role in the confirmation of the President's judicial nominees.



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Prior to joining the Department of Justice, Ms. Cook was a litigator with the Washington, D.C. law firm of Cooper & Kirk, PLLC. She clerked for the Honorable Laurence H. Silberman of the United States Court of the Appeals for the District of Columbia Circuit and the Honorable Lee H. Rosenthal of the United States District Court for the Southern District of Texas. Ms. Cook received her J.D. with honors from Harvard Law School, where she was Deputy Editor-in-Chief of the Harvard Journal of Law & Public Policy, and received her B.A. with honors from the University of Chicago.

Ms. Cook has lived in Virginia since 1979 and is a proud product of Fairfax County schools, having attended and graduated from Haycock Elementary, Longfellow Intermediate, and McLean High School.

In 2003, Ms. Cook married her husband, James Andrew Cook and they currently reside in Northern Virginia.

I want to thank you Mr. Chairman for the opportunity to make these remarks about this outstanding Virginians. In particular, Mr. Chairman, I want to express my gratitude for the expeditious way the Senate has moved the nominations of Judge Davis and Mr. Novak through the process during the 110th Congress. Again, it is with pride that I join Senator Warner in



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recommending Judge Mark Davis and Mr. David Novak to each of my colleagues on this committee and the entire United States Senate.

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# NOMINATIONS OF G. STEVEN AGEE, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT; WILLIAM T. LAWRENCE, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA; AND G. MURRAY SNOW, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA

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**THURSDAY, MAY 1, 2008**

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC*

The Committee met, Pursuant to notice, at 2:15 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Benjamin L. Cardin, presiding.

Present: Senators Specter, Kyl, and Brownback.

First, let me thank Senator Leahy for allowing me to chair today's hearing. In today's hearing, we will consider for U.S. Circuit Court Judge for the Fourth Circuit Justice George Steven Agee; for the U.S. District Court for the Southern District of Indiana, Judge William Thomas Lawrence; and for U.S. District Court for the District of Arizona, Judge Gene Murray Snow.

Before I give my opening statement, with the permission of Senator Specter, we're going to recognize Senator Kyl for an opening statement.

## PRESENTATION OF G. MURRAY SNOW, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA BY HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Mr. Chairman, I very much appreciate your courtesy, and apologize in advance to my colleagues, as well as to those nominees who are here. I am not feeling well and I'm going to be leaving immediately after I introduce Judge Snow. So, please forgive me.

But I did want to be here to commend Judge Snow to the members of the Committee. I strongly support his nomination to the U.S. District Court for the District of Arizona, and would note that Senator McCain joins me in this strong recommendation.

Judge Snow has served on the Arizona Court of Appeals since the year 2002. Prior to that, he was a partner at the firm of Osborn & Maladon in Phoenix. He received his bachelor's degree magna



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cum laude, and his law degree magna cum laude, both from Brigham Young University, and was Order of the Coif.

He clerked for the Tenth Circuit for Judge Steven Anderson after his graduation and was an Adjunct Professor of Political Science at Arizona State University for 7 years. He also served 4 years on the State Bar of Arizona Ethical Rules Review Group, and for 6 years on the Committee on Rules of Professional Conduct. The American Bar Association unanimously gave Judge Snow its highest rating of "Well Qualified".

As I say, Mr. Chairman, both Senator McCain and I offer our strongest recommendation for the confirmation of Judge Snow, and I appreciate, again, the courtesy of you and my colleagues.

Senator CARDIN. Thank you, Senator Kyl.

## STATEMENT OF HON. BENJAMIN L. CARDIN, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. Today the Senate Judiciary Committee meets to undertake one of its most serious duties, and that is the confirmation of Federal judges to a lifetime appointment.

Today, part of the hearing, of course, is the testimony that we'll hear from the nominees. We also have had submitted to our Committee detailed information, which is also available to all the members of the U.S. Senate.

I want to thank all three of our nominees for their commitment to public service, and particularly want to acknowledge their families for the sacrifices that they have made.

Let me just, if I might for the record, make a quick comment about the confirmation process, since there's been much stated about this. I really want to compliment our Chairman, Senator Leahy, and our Ranking Member, Senator Specter, because I think the record of this Congress has been a strong record on the confirmation process and I do compliment both the Chairman and Senator Specter.

At the end of the Clinton administration there were 32 vacancies that were unconfirmed for the Circuit Court of Appeals. Right now, we have 12 Circuit Court judges that have not been filled. We are acting on one today by hearing, and Senator Leahy has announced that there will be hearings on two additional Michigan Circuit Court of Appeals judges; on May 7, we're going to have a public hearing. So, we are moving forward on the Circuit Courts.

Including the District Court vacancies, there was an overall vacancy rate of 80 at the end of the Clinton administration, and we now have about 46. I mention that just so we can try to set the record straight and move forward on the hearings of three judges today, and I do look forward to their testimony.

With that, I would recognize Senator Specter.

## STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman. Let the record show that I begin with the observation that I do not object to these hearings. It would be foolhardy to object to any judicial confirmation hearings in this Congress under the prevailing facts.

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But I do think it important to express some concerns. We are now seeing the continued exacerbation of the balance between the two parties. In the last 2 years of a Presidential administration, where the White House is controlled by one party and the Senate by the other.

In my personal experience, going 20 years back, in the last 2 years of President Reagan's administration, inappropriate tactics were used by the Democrats, who controlled the Senate. The same prevailed in the last 2 years of President Bush the first. It got worst around Clinton. Let me agree with you, Mr. Chairman, when you said that there are fewer vacancies now than there were during the Clinton administration. The pattern has been to exacerbate: at one level during Reagan, higher in Bush, higher still in Clinton, and I said so at the time.

As the record shows, I voted for Clinton judges who were qualified, and I expressed myself on the Senate floor to that effect and I stood against the Republican caucus, which I thought was wrong. Now I think the Republican caucus is right and I am prepared to leave the caucus. That's my given position as Ranking Member on this Committee. It is fresh in our memories, what we went through in 2005 when we had the repeated filibusters—I shall not elaborate upon them. They're etched indelibly on the public record.

The confrontation with the so-called constitutional, or nuclear, option to upset a longstanding tradition of the Senate on filibuster, narrowly—to changing the procedures in the Senate, whose procedures have maintained the independence of the Federal judiciary and the impeachment proceeding of Justice Chase in 1805 and the power of the presidency and the impeachment proceeding in President Johnson in 1868. So we've been on the edge.

I do disagree, Mr. Chairman, with the characterization that the record is a good one. I will not burden the record with the lengthy statistics and long speeches and the extraordinary exchange of letters which have taken place, all of which prove nothing. You can manipulate the statistics any way a speaker likes.

We have, today, a commitment—perhaps it's a commitment of a sort—to confirm three Circuit judges by Memorial Day. Maybe it's only a best-efforts commitment, but there is some tenuousness as it's expressed by the Majority Leader and the Chairman of the Committee.

Now we're looking at three nominations, the nomination of Justice Agee, whom I saw briefly yesterday, and I greeted him in a rather unusual fashion. I said, "Justice Agee, I think you're in a pretty good position on the confirmation process because there are other nominees who I dislike more than you." That is sort of a strange way to put it, but that happens to be a fact. Justice Agee, and perhaps Justice White and Judge Kethledge—I'm not sure I have all the titles straight—are in preferred position because Peter Keisler, Judge Robert Conrad, and Mr. Matthews are more heartily rejected than any other Republican nominees.

There are some statistics which are worth noting very, very briefly. I will only use Helene White for illustrative purposes. She was nominated on April 15th. Let's see. This is May 1st. That's 16 days. She has a hearing scheduled for May the 7th. That's 22 days. Peter Keisler has been waiting for a Committee vote for over 670 days;

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Judge Conrad has been waiting for a hearing for over 285 days; Mr. Steve Matthews has been waiting for a hearing for over 235 days.

Now, a concern that I express, but I do not intend to dwell on it, is that the regular order of the Senate cannot be maintained on the hearing schedule, illustratively, for Helene White. Her nomination date was April 15th. Her questionnaire was received on April 25th. The FBI investigation started the same day, April 25th. Her ABA rating has not been received, and is not be expected prior to the hearing.

With the hearing on May 7th, the hearing record would be open, customarily, 7 days until May 14th. The earliest mark-up, if there were no questions for the record, which there customarily are, would be May 15. The earliest mark-up, if there are questions for the record, would be May 22nd. The earliest mark-up, if no questions and held over for 1 week, would be May 22nd. There is scant time to confirm before we adjourn for Memorial Day.

Now, that sequence I've gone into in a, believe it or not, abbreviated fashion to point up what the regular order is for this Committee to give due consideration to the qualification of a Circuit judge for a lifetime appointment. I don't have to emphasize the importance of that position.

Faced with not having confirmation or having a hurried confirmation, we Republicans will take a hurried confirmation. That's only because we don't have any realistic choice. But I don't think it should pass without having it known for the record, and noted emphatically, that regular order is not followed. When you don't follow regular order, there's enormous potential to get into trouble. But I repeat: I do not object to this schedule. I don't want to hear any reason to cancel this unsatisfactory schedule. Unsatisfactory as it is, it's better than no schedule.

I ask consent that a series of letters from Senator McConnell and me to the Leader and Chairman Leahy be made a part of the record, and I will only make a very brief reference to one.

Senator CARDIN. Without objection, they will be made part of the record.

[The letters appear as a submission for the record.]

Senator SPECTER. Dated yesterday from the Majority Leader to the Republican Leader and to me, where he notes that "No one presumed to instruct Senator Specter about the sequence of nominations during the years he served as Chairman of the Judiciary Committee." Well, that's true. No one did presume to instruct me because no one had any call to do so.

I refer to only two illustrations. We had two Supreme Court nominations and I consulted in great detail with the Chairman of the Committee, with the Ranking—now Chairman, Senator Leahy, then Ranking—and meetings involving Senator Reid and Senator McConnell as well. The White House was insistent on having the hearing for Chief Justice Roberts begin on August 24th, insistent—a meeting in the living quarters of the White House attended by the President, the Vice President, and all the Republican leadership, and that was what was to be done.

And I didn't think it was a good idea to start a hearing in August for the Supreme Court, consulted with Senator Leahy, and began

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in regular order after Labor Day. On the confirmation of Justice Aleto, the White House insisted on having it done before Christmas. Without getting into the number of opinions and the details and the timing, it didn't make sense. I consulted with Senator Leahy and it was scheduled after January. So, there's no need to instruct Arlen Specter, serving as Chairman, as to what to do. There was total consultation with the Minority.

On this schedule, there has been none, N-O-N-E. Just for the record, and let it be noted that the President personally told me after the confirmations of Chief Justice Roberts and Justice Aleto that the proper schedule was followed.

Mr. Chairman, I'm delighted to proceed.

Senator CARDIN. Thank you, Senator Specter.

Without objection, Chairman Leahy's statement will be made part of the record, with the opportunity to add some additional letters that would complete the letters that Senator Specter has entered into the record.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Senator CARDIN. Let me just briefly comment that it seems like the Democratic leadership is criticized when it moves too slow or when it moves too fast. Yes, we are moving quickly, thanks to the cooperation of the two Senators from Virginia and the two Senators from Michigan. We are trying to move as quickly as we possibly can without compromising the appropriate Senate responsibilities on the confirmation process of judges to the Circuit Court of Appeals. We will move as quickly as we can, knowing full well that any member has certain prerogatives on both sides of the aisle.

I just want to point out also, Senator Specter, for the record that we have confirmed, the U.S. Senate, three appointees to the appellate court that were objected to by Democrats. One was a very contested situation. The delay in the confirmation of that judge was as a result of the Republicans, who wanted additional time in order to try to get the necessary votes for confirmation. The strategy was successful. You were able to obtain the necessary support for an affirmative vote in the Committee and on the floor.

In two other cases, one in which I chaired the hearing, there were objections, but no efforts made at all to delay the process. I again repeat the numbers. I think those who are watching this can judge by the performance. But I will point this out: there have been over 60 filibusters led by the Republicans this year. The most recent was the FAA, Federal Aviation Administration, reauthorization bill that's on the floor of the U.S. Senate as we speak.

We're unable to bring it to a vote because the Republicans are using their prerogatives to require filibuster votes and the time to run on different procedural votes. This is not the first time, it's 60 times. I would say that the failure of us to act on the FAA reauthorization bill has real consequences on the safety of those who use our air traffic system.

There has not been one filibuster on the floor of a judicial appointment. Not one. So I just think you should look at the way this has been handled. I'm a new member of the U.S. Senate, but I deeply respect the manner in which Chairman Leahy has exercised his responsibilities as Chairman in handling judicial nominations

from this administration, and I think the record will speak for the fact that the Senate has carried out its responsibility.

With that, I'm going to recognize, first, Senator Lugar to introduce one of our nominees.

Oh. If I could just correct the record. I just want to correct one more thing in the record with Judge Agee. I just want to make it clear, I don't know of anybody on our side that thinks you're objectionable, so I just want to make sure—there's not a scale here. We very much respect your background. I just want to correct that from Senator Specter's point of view.

Thank you.

**PRESENTATION OF WILLIAM T. LAWRENCE, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF INDIANA BY HON. RICHARD LUGAR, A U.S. SENATOR FROM THE STATE OF INDIANA**

Senator LUGAR. Mr. Chairman, I bring good news to the Committee. My esteemed colleague, Senator Bayh from Indiana, and I have consulted about our nominee today, and we're privileged to be here together to introduce an outstanding District Court nominee for the Southern District of Indiana, namely, William Thomas Lawrence.

I would first like to thank the Senate Judiciary Chairman, Senator Pat Leahy, the Ranking Member, Senator Arlen Specter, and the presiding Chairman, Senator Ben Cardin, for holding this hearing today and for moving so promptly on this nomination.

I am pleased that Bill is joined here today by his wife Jeanie, his daughter Kate Simons, and his brother Tony, who are right beside us here.

Mr. Chairman, on December 18, 2007 the Senate voted to confirm the nomination of John Tinder to serve on the Seventh Circuit Court. John was a distinguished leader on the Indiana Southern District Court, and I know that his successor will need to possess the same degree of integrity and intelligence. Given this need for strong leadership, I was pleased to commend William Lawrence to President Bush for consideration.

This selection was the product of a bipartisan process and reflective of the importance of finding highly qualified Federal judges to carry forward the traditions of fair, principled, and collegial leadership.

I have known Bill for many years and I have always been impressed with his high energy, his resolute integrity, and his remarkable dedication to public service.

William Lawrence attended Indiana University, where he received both his undergraduate and law degrees. He then entered private practice, but also devoted time to serve as a public defender in the Marion County, Indiana courts. Subsequently, he served part-time as a master commissioner for the Marion County Circuit Court.

In 1996, Judge Lawrence was elected to the Marion County Circuit Court. In this position he built a reputation for fairness and efficiency. The Marion County Circuit is one of the busiest in the State of Indiana. In less than 3 years, Judge Lawrence reduced the number of pending cases by 20 percent. This impressive perform-

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01304 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

ance on the bench led to his appointment in 2002 to serve as a U.S. magistrate judge.

Throughout his year, his reputation for personal courtesy, fairness, decency and integrity was equally well-earned and widespread among colleagues and opposing counsel alike on both sides of the political aisle. I am also pleased that Bill's experience and professionalism were recognized by the American Bar Association, which rated him, by a substantial majority of the committee, "Well Qualified".

I would like to thank, again, the Chairman for this opportunity to present William Lawrence to the Committee. I believe he will demonstrate remarkable leadership and will appropriately uphold and defend our laws under the Constitution.

I thank you, Mr. Chairman.

Senator CARDIN. Thank you, Senator Lugar.

Senator Warner, if you don't mind, I think we'll hear from Senator Bayh next.

Senator WARNER. Absolutely.

Senator CARDIN. Senator Bayh?

**PRESENTATION OF WILLIAM T. LAWRENCE, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA BY HON. EVAN BAYH, A U.S. SENATOR FROM THE STATE OF INDIANA**

Senator BAYH. Thank you, Mr. Chairman. It is a privilege for me today to appear before this Committee, for several reasons. First, as Senator Specter will recall, my father served on this Committee for 18 years and loved the business of the Judiciary Committee, including the process of confirming judges. So, we have a great deal of respect in our family for the work you so ably do.

Second, I'm just happy to talk about something other than the Indiana primary coming up next Tuesday.

[Laughter.]

The reason for that, is that we in Indiana care about, frankly, a lot more important things than politics, and one of them is ensuring that justice is dispensed here in our State and across our country.

I regret, as both of you have outlined, the course of events over the last 30 or so years. Dick, I had the feeling we had wandered into the congressional equivalent of the "War of Roses" here today. But regardless of how all this started, we need to find a better path to get our way out of it.

I want to publicly thank my colleague and friend, Senator Lugar, for the respect and the comity with which he has conducted this process. He reached out to me, consulted with me, asked me to do my own due diligence, and not surprisingly, I ended up reaching the same conclusions about the nominee that he did.

Judge Lawrence has served our community in a variety of capacities, always intelligence, always with honor, and always with what we would call the highest standards of judicial temperament. He enjoys my full and unqualified support. I hope that perhaps the kind of cooperation that we have here and that our colleagues from Virginia apparently have can perhaps set a better example going forward.

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01305 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

The final thing I would say, Mr. Chairman, just on a personal note, my first job out of law school was to be a law clerk in the Southern District of Indiana, where I hope Judge Lawrence will soon serve. As a young lawyer, I looked up to those judges. They were men not only who were learned, but tried to do right by the people who came before them, people like Judge Nolan, Judge Steckler, Judge Dillon. I have no doubt in my mind whatsoever that Judge Lawrence will serve in a similar capacity for the people of Indiana, and I am proud to come before you and second the high regard of our colleague, Senator Lugar.

Senator CARDIN. We thank both of you for your introductions.

Senator Warner.

**PRESENTATION OF G. STEVEN AGEE, NOMINEE TO BE U.S. CIRCUIT COURT JUDGE FOR THE FOURTH CIRCUIT BY HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA**

Senator WARNER. Might I just say that I was very touched by the remarks of Senator Bayh on behalf of Senator Lugar. Senator Lugar is one of the great icons in this institution, and I, too, am privileged to enjoy his friendship and his confidence. To see the two Senators from the State of Indiana here joined on this, I think, is a clear indication of how this institution can, and often does, work in a truly bipartisan way.

I am privileged to be joined by my colleague, Senator Webb, and had it not been for his concurrence in certain views on this, we would not be here today on behalf of this distinguished individual, Mr. Agee.

I would also like to pay recognition to someone in the audience, Susan Magill. Susan was my administrative assistant for many years, but in total served in my office for almost 25 years of my 30. She grew up with the nominee, and he and her late brother were law partners. She was the one to bring to my attention this outstanding nominee for the bench.

Now, I want to ask unanimous consent to put my full statement in.

Senator CARDIN. Without objection, it will be.

[The prepared statement of Senator Warner appears as a submission for the record.]

Senator WARNER. I think that will cover the points, and I think that time is sliding by here.

I also indicate that in my years here I've enjoyed support of the Chairman of this Committee in the nominations that I've made. I've had a hand in working with every single Federal judge now sitting in Virginia, and I would not have been able to achieve that without the cooperation of both the Democrats and the Republicans in seeking to get those nominations through.

So, I thank Chairman Leahy, I thank my old friend, Chairman Specter, and indeed the presiding officer here today. I note that this is for the Fourth Circuit, and that the great State of Maryland is an integral part of the Fourth Circuit, so indirectly the Chair has a special interest in this nomination.

VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01306 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

I think we have come forth, Senator Webb and I, with an outstanding individual. He is joined by his lovely wife today. Nancy, would you stand? And their son, Zach. Thank you very much.

This fine man has had an extraordinary career in the academic world, and indeed, I think I'll get right to the point. He was a magna cum laude graduate from Bridgewater College in Virginia. He subsequently took his law degree at my school, the University of Virginia law school. His academic record at that school, I might add, was considerably better than mine, which indicates why he is there and I am here.

Since his graduation from law school, he has been engaged in the legal community for 30 years. He found time to serve in the U.S. Army Reserve as a Judge Advocate General, rising to the rank of major.

From 1982 to 1994, he was a member of the Virginia House of Delegates in the General Assembly. That's our State legislature. Then, of course, in 2000, the General Assembly unanimously confirmed him for the Virginia Court of Appeals, and subsequently 3 years later the General Assembly once again unanimously confirmed him to a seat on the Virginia Supreme Court.

Mr. Chairman and members of the Committee, this is a very eminently qualified individual to serve America on the Federal Circuit Court, Fourth Circuit.

Senator CARDIN. Senator Warner, thank you very much.

Senator Webb.

**PRESENTATION OF G. STEVEN AGEE, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE FOURTH CIRCUIT BY HON. JIM WEBB, A U.S. SENATOR FROM THE STATE OF VIRGINIA**

Senator WEBB. Thank you, Mr. Chairman and Senator Specter. It's my pleasure to join with our senior Senator from Virginia in offering our support for this nomination. All of us are acutely aware of the vitally important role that the Constitution assigns to the Senate in this process and I am very grateful for the guidance and the cooperation that Senator Warner has shown over the past year and a half on these issues. We undertook a very careful and deliberate joint process in order to find the most qualified nominees, and this process involved a thorough records review and rigorous interviews which we conducted jointly.

We, I think, are both of the opinion that Justice Agee not only met these standards, but exceeded them. He is on the joint list of recommended nominees that we submitted to the President last year and I am pleased that the President has chosen to respect all of the diligence and bipartisan work that went into this.

Justice Agee is regarded as a jurist of superior intellect and judicial temperament who exhibits the highest degree of integrity and professionalism. I won't repeat his qualifications. I would ask that my full statement be submitted as a part of the record.

Senator CARDIN. Without objection.

[The prepared statement of Senator Webb appears as a submission for the record.]

Senator WEBB. But I want to thank the Chairman and Senator Specter for this opportunity to come before you and for the expeditious way that you have moved, at least this nomination, through

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the process. I am very proud to be sitting with Senator Warner here, recommending this candidate.

Thank you.

Senator CARDIN. Well, let me thank all four of our colleagues. The way that you have handled these nominations, working together, putting partisan politics aside, makes it a lot easier for our committee and for the U.S. Senate. So, my applause to all four of you for what you've done for Indiana, for Virginia, and Senator Warner, you pointed out, it affects my State of Maryland. We very much appreciate the manner in which you have brought forward these nominations.

Thank you.

Senator SPECTER. Mr. Chairman, just a word of comment. Let me congratulate our four distinguished colleagues for their presentations. It is always a treat to hear Senator Lugar on any subject. Senator Lugar established a record in Indiana by being elected to a sixth term in 2006, but then he held the record which he'd established when being elected to a fifth term in the year 2000. So, it's just one record after another. I saw your father yesterday, former Senator Birch Bayh, in the corridor. He looks like he stepped right out of your age bracket, Evan, fit and ready to go. He would pass as a brother, and not necessarily a younger brother. But he could be a brother.

I compliment Senator Warner and Senator Webb for coming together. It's been contentious. You worked it out, and it ought to be a model. It ought to be a model for the Fourth Circuit, which is so desperately in need of judicial manpower. It's always a treat to hear Senator Warner. The problem is, we're not going to be treated to it much longer. Senator Webb has already established himself in this body. But when you have Senator Lugar and Senator Warner on the podium on the same day, it's a good day, notwithstanding one or two other problems which I've already mentioned.

[Laughter.]

Thank you.

Senator CARDIN. Thank you all very much for your testimony.

If I can now ask our nominees, Justice George Steven Agee, Judge William Thomas Lawrence, and Judge G. Murray Snow to come forward, and I will first administer an oath. If you would please remain standing, and we'll swear you in under an oath.

[Whereupon, the nominees were duly sworn.]

Senator CARDIN. Thank you. Please be seated.

We would welcome a brief opening statement in which we would hope that you would introduce your family that may be here today.

We'll start off with Judge Agee.

## STATEMENT OF G. STEVEN AGEE, NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE FOURTH CIRCUIT

Judge AGEE. Thank you, Mr. Chairman. I am privileged to have with me today my wife Nancy and my son Zach, who Senator Warner introduced just a few moments ago, a number of other friends, including Susan McGill, who Senator Warner introduced, and some of my former law clerks. I'd like to take this opportunity to thank you, Mr. Chairman, for the opportunity to appear before the Committee. I appreciate the nomination from President Bush, and in

particular I appreciate the confidence that's been expressed in my by Senator Warner and Senator Webb. Last, I'd like to thank my family for standing by me through this.

[The biographical information follows:]

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

1. **Name**: Full name (include any former names used).

   George Steven Agee

2. **Position**: State the position for which you have been nominated.

   United States Circuit Judge for the Fourth Circuit.

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Office: Supreme Court of Virginia
   100 N. Ninth Street
   Richmond, Virginia 23219

   Residence: Salem, Virginia

4. **Birthplace**: State year and place of birth.

   1952; Roanoke, Virginia

5. **Marital Status**: (include name of spouse, and names of spouse pre-marriage, if different). List spouse's occupation, employer's name and business address(es). Please, also indicate the number of dependent children.

   I am married to Nancy Howell Agee (maiden name Nancy Scott Howell).
   She is the Chief Operating Officer and Executive Vice President, Carilion Clinic, P. O. Box 13727, Roanoke, Virginia 24036. We have one dependent child.

6. **Education**: List in reverse chronological order, listing most recent first, each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   New York University School of Law, 1977-78; LL.M. (Taxation), 1978

   University of Virginia School of Law, 1974-1977; J.D., 1977

   Bridgewater College, 1970-1974; B.A., 1974



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7. **Employment Record**: List in reverse chronological order, listing most recent first, all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

Employment:

March 2003 to present
Supreme Court of Virginia
100 N. Ninth Street
Richmond, Virginia 23219
Justice

January 2001 to February 2003
Court of Appeals of Virginia
109 N. Eighth Street
Richmond, Virginia 23219
Judge

June 1980 to December 2000
Osterhoudt, Ferguson, Natt, Aheron and Agee, P.C.
3140 Chaparral Drive
Roanoke, Virginia 24018
Shareholder, Director

March 1979 to May 1980
Rocovich & Dechow, P.C.
4415 Electric Road
Roanoke, Virginia 24018
Associate

December 1975 to February 1979
Martin, Hopkins & Lemon, P.C.
10 S. Jefferson Street
Roanoke, Virginia 24011
Associate and law clerk

June to August, 1975
Hoover & Hoover
342 S. Main Street
Harrisonburg, Virginia 22801
Law clerk



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June to August, 1974
Tory Farm
Bridgewater, Virginia
Herdsman

Other paid positions:
2001 to present
Agee Mill, LLC
Salem, Virginia 24153
Member (Partial interest in family LLC that owns family timber property in Patrick County, Virginia.)

1982 – 1994
Virginia House of Delegates
Member

January1981 to present
SUWI, LLC
Salem, Virginia 24153
Member (Partial interest in LLC that now owns one duplex.)

January 1981 to December 2001
OFNAA Partners, LLC (LLC owned law office building).
Member

1997 to 2000
Virginia Criminal Sentencing Commission
100 N. Ninth Street
Richmond, Virginia 24219
Member (Paid for each of four yearly meetings.)

c. 1985 – 1990
Bank of Shawsville
Salem, Virginia 24153
Advisory Board Member (I may have received a small payment per meeting, but I am not sure.)

Other affiliations: (all unpaid)

1985 – present; Bridgewater College Board of Trustees

c. 1988 – present; Bradley Free Clinic, 1240 3rd Street, Roanoke, Virginia 24011; Board of Directors

1984 – present; Salem Rotary Club, Salem, Virginia; Member of the Board of Directors, c. 1995-96.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01312 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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1995 – present; St.Paul's Episcopal Church, 42 E. Main Street, Salem, Virginia; Member of Vestry, c. 1998-2000.

1995 – 2000; Western Virginia Foundation for the Arts and Sciences, 1 Market Square, Roanoke, Virginia 24011; member of the Board of Directors

8. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received.

   From February 15, 1986 to October 21, 1997 I served in the United States Army Reserves, Judge Advocate General's Corp. My last rank was that of Major. I received an Honorable Discharge.

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.

   New York University School of Law partial scholarship, 1977-78
   Outstanding Young Alumnus, Bridgewater College, 1986
   Outstanding Legislator, Virginia Chamber of Commerce, 1993

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.

    Virginia State Bar, 1977 – present
    Member, Board of Governors, Section Lawyer Education (2007 – present)

    District of Columbia Bar, 1979 – present

    Virginia Bar Association, c. 1980 – present.
    Committees on Taxation & Health Law

    Salem - Roanoke County Bar Association, 1981 – 2000; President, 1990 – 1991

    Roanoke Bar Association, 1977 - 1981

11. **Bar and Court Admission**:

    a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

       Virginia State Bar; May 31, 1977
       The District of Columbia Bar, 1979 – present (currently listed as judicial member)
       There have been no lapses in membership.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01313 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States; October 21, 1991
United States Court of Appeals for the Fourth Circuit; June 27, 1988
United States District Court for the Western District of Virginia; August 14, 1978
United States District Court for the Eastern District of Virginia; August 6, 1982
United States Tax Court; August 11, 1978
United States Court of Claims; 1979
Virginia Supreme Court; June 7, 1977
District of Columbia Court of Appeals, November 9, 1979

12. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 or 11 to which you belong, or to which you have belonged, or in which you have significantly participated, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Bridgewater College Board of Trustees; 1985 – present.

Bradley Free Clinic, Board of Trustees; c. 1988 – present

Salem Rotary Club, 1984 – present; Member of the Board of Directors, c. 1995-96.

St.Paul's Episcopal Church, c. 1995 – present; Member of Vestry, c. 1998-2000

Western Virginia Foundation for the Arts and Sciences, Board of Directors, Roanoke, Virginia (1995-2000)

Shawsville Ruritan Club, Shawsville, Virginia c. 1985 – 1994

Taylor Lodge #23 AF & AM, Salem, Virginia c. 1985 – 1994

Shenandoah Club, Roanoke, Virginia c. 1980 – 1987

Roanoke Country Club, Roanoke, Virginia 1995 – Present

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Please



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01314 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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indicate whether any of these organizations listed in response to 12a above currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

The Shenandoah Club probably discriminated in fact during the time I was a member. I subsequently resigned.

Roanoke Country Club may have discriminated prior to my membership, but has not since I've been a member.

During the 1990 session of the General Assembly of Virginia, I wrote the language amending Senate Bill 320 to require the Supreme Court of Virginia to provide in the canons of judicial conduct that a judge should not have membership in any organization which practices invidious discrimination.

13. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Please supply four (4) copies of all published material to the Committee.

I have not authored any books or articles. During the many years of my public service I authored numerous editorial pieces. I am providing to the Committee copies of editorial pieces which I could find.

b. Please supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, please give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

None

c. Please supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

During my tenure in the General Assembly of Virginia, I often made statements on matters of public policy from 1982 to 1993. I no longer have copies of my testimony.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01315 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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d. Please supply four (4) copies, transcripts or tape recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Please include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke.

During my tenure in the General Assembly of Virginia, I made numerous speeches or talks from 1982 to 1993 in the course of my duties. Other than those events, the following is my best recollection of other speeches or talks.

Virginia Trial Lawyer's Association meeting on March 28, 2008, appellate procedure

Chesapeake, Virginia Rotary Club's Citizen of the Year banquet on the Rotary 4-way test, 2006

Commencement address at the Patrick County Education Foundation, 2005

Virginia Association of Defense Attorneys, 2004 or 2005, appellate procedure

Commencement address at Bridgewater College, 2004

Roanoke, Virginia Bar Association on September 11, 2001, appellate procedure

Appalachian School of Law, Grundy, Virginia, 2001, appellate procedure

Bankruptcy Trustees for the Western District of Virginia, 1995, post Shumate v. Patterson proceedings

1993 Virginia Republican Convention when I sought the nomination for Attorney General.

e. Please list all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

During my tenure in the General Assembly of Virginia, I gave many interviews between 1982 and 1993. I do not have copies of those interviews.

Since that time I have given five interviews that I recollect. I gave interviews to the Roanoke Times prior to my investitures to the Court of Appeals and Supreme



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01316 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Court of Virginia. I also gave an interview to the Bridgewater Magazine regarding my election to the Supreme Court of Virginia and to the Salem Times Register. Lastly, I gave an interview to Michelle Dickerson which was a partial basis for her chapter in the book Bankruptcy Law Stories, 125 (Robert K. Rasmussen ed., Foundation Press 2007).

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.

Since March 1, 2003 I have served as a Justice on the Supreme Court of Virginia. I was elected by the General Assembly of Virginia for a 12-year term.

I served as a Judge on the Court of Appeals of Virginia from January 1, 2001 to February 28, 2003. I was elected by the General Assembly of Virginia.

15. **Citations**: If you are or have been a judge, please provide:

a. citations for all opinions you have written (including concurrences and dissents);

Please see the attached document for citations for opinions I have written, including Opinions of the Court, Opinions concurring in the judgment, Opinions concurring in part and dissenting in part, and Opinions dissenting from the judgment, for both the Supreme Court of Virginia and the Court of Appeals of Virginia.

b. a list of cases in which certiorari has been requested or granted;

Gray v. Commonwealth, 274 Va. 290, 645 S.E.2d 448 (2007), cert. denied Jan. 14, 2008
In re Moseley, 273 Va. 688, 643 S.E.2d 190 (2007), cert. denied Nov. 26, 2007
Juniper v. Commonwealth, 271 Va. 362, 626 S.E.2d 383 (2006), cert. denied Oct. 10, 2006
Townsend v. Commonwealth, 270 Va. 325, 619 S.E.2d 71 (2005), cert. denied Mar. 6, 2006

c. a short summary of and citations for all appellate opinions or orders where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

Sapp v. Commonwealth, 35 Va. App. 519, 546 S.E.2d 245 (2001)

Bower v. Commonwealth, 36 Va. App. 382, 551 S.E.2d 1 (2001)

Leal v. Commonwealth, 37 Va. App. 525, 559 S.E.2d 874 (2002)



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Murphy v. Commonwealth, 37 Va. App. 556, 559 S.E.2d 890 (2002)

Harris v. Commonwealth, 38 Va. App. 680, 568 S.E.2d 385 (2002)

d. a list of and copies of any of your unpublished opinions that were reversed on appeal or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

Hudson v. Commonwealth, Record No. 0917-01-4, 2002 Va. App. LEXIS 389 (Va. Ct. App. July 16, 2002) (unpublished)

e. a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored; and

For the Supreme Court of Virginia, all authored opinions are published. Unpublished, per curiam orders are on file with the Clerk of the Court.

For the Court of Appeals of Virginia, of 90 authored opinions and orders of the Court or panel, 58 (64.4%) are unpublished. Unpublished opinions and orders are available on Lexis-Nexis and the Court of Appeals website at http://www.courts.state.va.us/wpcau.htm, and are on filed with the Clerk of the Court.

This does not include unpublished orders or orders merely refusing or dismissing petitions for discretionary appeal.

f. citations to all cases in which you were a panel member in which you did not issue an opinion.

Please see the attached document for citations to all cases in which I was a panel member in which I did not issue an opinion.

16. **Recusal:** If you are or have been a judge, please provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest, or for any other apparent reason, or in which you recused yourself sua sponte. (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Please identify each such case, and for each provide the following information:

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;



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b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

To the best of my recollection, no request for recusal by a party has been made. To the best of my recollection, I have recused myself only on the following cases:

Banks v. Mario Indus. of Va., Inc., 274 Va. 438, 650 S.E.2d 687 (2007). The appellee was a former client.

Cimmering v. Wells Fargo Bank Minn. Nat'l Assn., Record No. 061788 (Va. S.Ct. Sept. 14, 2007) (per curiam) (unpublished). The parties were notified of a potential conflict of interest due to my ownership of a small amount of Wells Fargo stock and all parties waived any conflict claim.

Brizzolara v. Sherwood Mem'l Park, Inc., 274 Va. 164, 645 S.E.2d 508 (2007). I was personally acquainted with most of the parties.

Anthony v. Virginia State Bar, Record No. 050948 (Supreme Court of Virginia). January 25, 2006 (unpublished order). The appellant was counsel for a party in a case where I was an expert witness and his charged misconduct arose out of that case. I had also previously represented appellant's brother on charges of income tax evasion.

Plunkett v. Plunkett, 271 Va. 162, 624 S.E.2d (2006). The decedent in this case was a former client and one of my former law partners appeared as a witness.

I recuse myself on any case involving Carilion Clinic, Roanoke Gas Company or Radford University due to my wife's positions with those organizations. I am also recused on any case involving Wachovia Bank due to my direct or indirect stock control or ownership. I was recused on any case appealed from the Court of Appeals of Virginia to the Supreme Court upon which I sat as a judge of the Court of Appeals.

17. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.



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I served as a Member, Virginia House of Delegates, 1982 – 1994. I was elected in general elections.

I served as a Member, Virginia Criminal Sentencing Commission, 1997 – 2000. I was appointed by Governor George F. Allen.

In 1997, I unsuccessfully sought appointment by the Governor to a vacancy on Supreme Court of Virginia.

In 1993, I sought the Republican nomination for Attorney General of Virginia. I was not successful at the Republican State Convention.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Member, Roanoke County Republican Committee 1978 – 1982. Member Salem Republican Committee 1982 – 2000. From 1981 – 1993, I participated in many political campaigns while in the General Assembly of Virginia but, to the best of my recollection, I held no position of authority in any campaigns other than my own.

After leaving the General Assembly, I participated in fundraising for the following campaigns. There may have been others, but these are the campaigns I can identify:

1996 John Warner U.S. Senate Campaign
1999 George W. Bush Presidential Campaign
1995, 1999 Malfourd Trumbo State Senate Campaign
1996 Allen Dudley State Senate Campaign
1999 Morgan Griffith House of Delegates Campaign

18. **Legal Career:** Please answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I did not serve as a clerk to a judge.



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ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

March 2003 to present
Supreme Court of Virginia
100 N. Ninth Street
Richmond, Virginia 23219
Justice

January 2001 to February 2003
Court of Appeals of Virginia
109 N. Eighth Street
Richmond, Virginia 23219
Judge

June 1980 to December 2000
Osterhoudt, Ferguson, Natt, Aheron and Agee, P.C.
3140 Chaparral Drive
Roanoke, Virginia 24018
Shareholder, Director

March 1979 to May 1980
Rocovich & Dechow, P.C.
4415 Electric Road
Roanoke, Virginia 24018
Associate

December 1975 to February 1979
Martin, Hopkins & Lemon, P.C.
10 S. Jefferson Street
Roanoke, Virginia 24011
Associate and law clerk

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

My law practice primarily involved commercial transactions, commercial and general civil litigation, bankruptcy, estate planning and administration (including related chancery proceedings). I did some criminal work,



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mostly before 1995, and primarily court appointed cases in the U.S. District Court. I also served as a commissioner in chancery and escheator of the 23rd Judicial Circuit.

My trial experience included proceedings in Virginia trial courts, the United States Bankruptcy Court for the Western District of Virginia, the United States District Courts for the Eastern and Western Districts of Virginia, and the United States Tax Court. My appellate experience includes arguments in the Supreme Court of Virginia, the United States Fourth Circuit Court of Appeals and the United States Supreme Court.

As an associate I primarily did the corporate, tax and natural resources work requested by the partners, but also small claims civil practice. From about 1980 until 1992, I did some bankruptcy work as a Trustee as well as debtor and creditor counsel. From 1986 to 1992, I represented the bankruptcy trustee of Joseph Shumate in a number of litigated matters in the Bankruptcy Court, U.S. District Court, the Fourth Circuit Court of appeals and the U.S. Supreme Court.

Throughout my practice, I did general commercial transactions and financing. I represented a number of corporate, partnership and limited liability company entities in formation and the acquisition and disposition of property. I also did estate-planning work for my business clients.

My practice was limited from 1982 to 1993 because of the time constraints of the General Assembly.

Throughout my practice I did general chancery litigation involving cases such as creditor's bills to enforce judgments, removal or nomination of fiduciaries, interpretation of wills and trusts as well as real estate matters such as prescriptive easements, etc. From about 1995 to 2000, I represented the County of Roanoke, Virginia, in the collection of delinquent real estate taxes by subjecting the real property to sale. I also served as the Escheator for the 23rd judicial circuit during the same general period for the sale of real estate for delinquent taxes which included the convening of a jury for an inquest.

Periodically, I represented clients in administrative matters before the Internal Revenue Service and other administrative agencies.

After leaving the General Assembly, my practice concentrated on several commercial clients which probably took two-thirds of my time from about 1995 through 2000. Much of this work consisted of acquisition of plants, store locations, financing and the supervision of local counsel's work in other states.



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ii. your typical clients and the areas, if any, in which you have specialized.

My law practice primarily involved commercial transactions, commercial and general civil litigation, bankruptcy, estate planning and administration (including related chancery proceedings). I represented a number of corporate, partnership and limited liability company entities in formation and the acquisition and disposition of property. I also did estate-planning work for my business clients.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

Although the percentage would vary over time, my best guess is about 80% non-litigation and 20% litigation. I appeared in court more frequently during the earlier years of private practice and occasionally in the later part of my career.

i. Indicate the percentage of your practice in:
   1. federal courts: 40%
   2. state courts of record: 50%
   3. other courts. 10% (administrative agency)

ii. Indicate the percentage of your practice in:
   4. civil proceedings: 95%
   5. criminal proceedings. 5%

d. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

My best guess is about 75 cases, although I do not know the precise number because of the multitude of bankruptcy proceedings in the earlier part of my practice and the number of chancery proceedings in the later part.

i. What percentage of these trials were:
   6. jury: 5%
   7. non-jury: 95%

e. Describe your practice, if any, before the Supreme Court of the United States. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I argued one case before the United States Supreme Court, Patterson v. Shumate, 504 U.S. 753 (1992).



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19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    a. the date of representation;

    b. the name of the court and the name of the judge or judges before whom the case was litigated; and

    c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. Patterson v. Shumate, 504 U.S. 753 (1992)
Shumate v. Patterson, 943 F.2d 362 (4th Cir. 1991)
Creasy v. Coleman Furniture Corp., No. 7:86-cv-272
(W.D. Va. Sept. 20, 1989), Hon. Glen M. Williams, District Judge

I tried this case in the U.S. District Court in 1989 and briefed and argued the appeals in the Fourth Circuit Court of Appeals in 1991 and the United States Supreme Court in 1992. I represented John R. Patterson, trustee in bankruptcy for Joseph B. Shumate. On behalf of the trustee, I brought an Adversary Proceeding in the U.S. Bankruptcy Court which was consolidated with a U.S. District Court proceeding, to claim the interest of Mr. Shumate in the Coleman Furniture Corporation pension plan as an asset of the Shumate bankruptcy estate. The District Court ruled the pension assets were part of Shumate's bankruptcy estate, but the Fourth Circuit reversed. The U.S. Supreme Court granted certiorari as there was a split of authority among the courts of appeal. The U.S. Supreme Court affirmed the Fourth Circuit resolving the specific legal question as to whether ERISA is applicable non-bankruptcy law under 11 USC § 541(c)(2).

Opposing counsel and parties: (1) Robert A. Lefkowitz, Esq., MALONEY, YEATTS & BARR, P.C., 600 Ross Building, 801 East Main Street, Richmond, Virginia 23219-1906; (2) George Verner Hanna, III, Esq., MOORE & VAN ALLEN, 3000 NCNB Plaza, Charlotte, North Carolina 28280; (3) William M. Mercer-Meidinger, Esq., P. O. Box 27506, Richmond, Virginia 233261, and (4) Joseph B. Shumate, Jr., P. O. Box 2092, Pulaski, Virginia 24301.

2. Patterson, et al v. Shumate, et al, 912 F.2d 463 (4th Cir. 1990). Appeal from the United States District Court for the Western District of Virginia, Hon. Glen M. Williams, Judge. #86-432-R

In this case I represented John R. Patterson, trustee in bankruptcy for Joseph B. Shumate. I filed a motion to intervene under FRCP 24(a) in the Coleman



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Furniture, Inc. bankruptcy proceeding to have funds awarded to Shumate in that proceeding be paid to Shumate's bankruptcy estate due to defalcations and fraud by Shumate. The District Court denied the motion to intervene. Upon appeal, the Fourth Circuit Court of Appeals reversed the judgment of the District Court and ordered that Patterson be permitted to intervene and litigate the status of the contested funds.

Opposing counsel: George Hanna, III, MOORE & VAN ALLEN, Charlotte, NC; James F. Douthat, WOODS, ROGERS & HAZELGROVE, Roanoke, Virginia.

3. McNeil v. Kingery, 237 Va. 400, 377 S.E.2d 430 (1989)

This was a prescriptive easement case in which I represented the owners of the servient estate who sought to prevent the use of their road by others. In a bench trial, the Roanoke County Circuit Court, Hon. Kenneth Trabue, Judge, ruled in favor of the dominant estate and found a prescriptive easement. The Supreme Court of Virginia reversed the judgment of the circuit court, except for an agricultural easement for one party.

Opposing counsel: William C. Maxwell, Esq., 105 N. Colorado Street, Salem, Virginia 24153.

4. Hairston v. Coca Cola Bottling Co. Consolidated, No. 7:90-cv-496 (W.D. Va. May 1, 1992), Hon. James C. Turk, District Judge.

In a January, 1992 jury trial in the U.S. District Court for the Western District of Virginia, I represented the plaintiff in an age and race discrimination case against Coca Cola. The jury returned a verdict for the plaintiff including a finding of willfulness. The case was resolved by sealed settlement. Opposing counsel: James M. Powell, Esq. Haynesworth, Baldwin, Johnson & Greaves, P.A., 230 N. Elm Street, Suite 1650, Greensboro, North Carolina 27401. John Eure, Esq., Johnson, Ayers & Matthews, Roanoke, Virginia 24009.

5. L. D. Vinton, LLC v. Larjer Signs, Inc. and Lamar Advertising of Mobile, Inc. (#96-544) Roanoke County Circuit Court (1999) Hon. Roy Willett, Judge

In this bench trial, I represented the contract purchaser of commercial real estate in a declaratory judgment action to terminate a lease and require removal of a billboard. The circuit court entered judgment for my client and required removal of the billboard.

Opposing counsel: Ross Hart, Esq. 40 W. Main Street, Salem, Virginia 24153 (540)375-3281. Steven Higgs, Esq., 9 Franklin Road, Roanoke, Virginia 400-7990.



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6. United States v. Cowan, #90-80 USDC (W.D. Va. 1990). Hon. James C. Turk, District Judge

In this jury trial, I was court appointed counsel for this defendant who was charged with three counts of possession of cocaine with intent to distribute. The jury acquitted my client on all charges.

Opposing Counsel: Joseph Mott, Esq., was the assistant U.S. attorney, 105 Franklin Road, Roanoke, Virginia 24011. (540)857-2250.

7. Friendship Manor, Inc. v. County of Roanoke (1985). Case number not known. Circuit Court of Roanoke County. Hon. Lawrence Koontz, Judge.

In this bench proceeding, I represented an independent accounting firm, Brown, Edwards & Co., which was subject to a summons from the County to disclose confidential information regarding its client, Friendship Manor. The circuit court quashed the summons. An appeal was filed to the Virginia Supreme Court. I filed a brief in opposition. The appeal was denied.

Opposing counsel: M. Caldwell Butler, Esq., Woods, Rogers & Hazelgrove, 10 S. Jefferson Street, Roanoke, Virginia 24011. (540)983-7600.

8. In Re: Bruce Musgrove, 7 B.R. 892 (Bankr. W.D. Va. 1981). Hon. H. Clyde Pearson, Judge.

This was a case of first impression in Virginia concerning the scope of exemptions after the 1978 Bankruptcy Act for a debtor's claim for a personal injury claim as exempt from the debtor's bankruptcy estate. I represented the bankruptcy trustee.

Opposing counsel: Mark E. Feldmann, Esq., 210 1st Street, Roanoke, Virginia (540)224-8015.

9. In Re: Dummit, 2 B.R. 136 (Bankr. W.D. Va. 1980). Hon. H. Clyde Pearson, Judge.

This was a case of first impression in Virginia concerning the scope of the Virginia exemptions after the 1978 Bankruptcy Act for property used in a debtor's trade or business. I represented the debtor.

Opposing counsel: Ross Hart, Esq., 40 W. Main Street, Salem, Virginia (540)375-3281.



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10. United States v. Martino (1979) United States District Court for Western District of Virginia. Hon. James C. Turk, District Judge. Case number not known.

I represented the defendant in a two-day jury trial on charges of escape from federal custody. The defendant was convicted by the jury. Her appeal to the Fourth Circuit was denied without oral argument. I do not recall the name of the Assistant United States Attorney who prosecuted the case.

20. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I have performed no lobbying activities.

The most significant legal matters which I pursued, excluding matters involving litigation, included my representation of clients involved in complex business transactions. For example, from about 1995 to 2000, I represented Sewell Products, Inc. in its acquisition of facilities for the production of bleach, ammonia, and related products throughout the United States. By 2000, the company was the third largest bleach manufacturer in North America. That year I represented the company when it was acquired by a Canadian company, KIK, Inc. I represented other clients in a number of business sales or acquisitions on a lesser scale. In 1998 and 1999, I represented one of two shareholders in the dissolution of a large insurance brokerage company. The matter was resolved by lengthy arbitrations using the McGammon Group, with retired Judge Kenneth Trabue as the arbitrator. Opposing counsel was Nicholas Conte, Esq., Woods, Rogers & Hazelgrove, 10 S. Jefferson Street, Roanoke, Virginia 24011. (540) 983-7600.

21. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, please provide four (4) copies to the committee.

None

22. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

None



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23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

None

24. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached Financial Disclosure Report

25. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement

26. **Potential Conflicts of Interest**:

a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

The parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during my initial service in the position to which I have been nominated, include the reasons for recusal addressed in Question #16 above, would include Wachovia Bank, Carilion Clinic and its affiliates, Roanoke Gas Company and Radford University. Cases that involve former clients or members of my former firm could also be conflicts and require recusal. There could be federal habeas corpus proceedings involving criminal defendants whose cases I heard on direct appeal or state habeas proceedings which would be a conflict requiring recusal. Other conflicts would be on a case-by-case basis. I would apply the applicable federal rules of conduct to resolve any conflicts.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.



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In any situation creating a conflict or potential conflict of interest, I will refer to and follow the Code of Conduct for United States Judges and all applicable statutes, canons, policies and procedures.

27. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

During my years in private practice, I participated in the Roanoke, Virginia Bar Association's Legal Aid Assistance Program by providing free legal services for no fault divorces and low asset bankruptcies. My best guess is I represented a dozen clients in that program. I also did court appointed cases in the U.S. District Court for the Western District of Virginia which is not pure pro bono, but certainly services at a much reduced rate. I also provided legal services for a number of charitable organizations including churches and the Bradley Free Clinic.

Since I've been a member of the Supreme Court of Virginia, I've participated with the Judicial Clerkship program at the Washington and Lee University School of Law. Each year I supervise and mentor a third-year law student selected by the school who works a minimum of 80 hours per semester.

28. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Please do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

In early June, 2006, I interviewed with Senators John Warner and George Allen regarding the vacancy created by the retirement of Judge Michael Luttig. It is my understanding that Senators Warner and Allen recommended three persons, including me, for that vacancy. I interviewed with White House Counsel Harriett Miers on June 27, 2006, and Attorney General Alberto Gonzales on July 3, 2006.

Senators John Warner and James Webb interviewed me on June 4, 2007. After conducting other interviews, receiving input from bar groups, etc., Senators Warner and Webb submitted a list of five names, including mine, for the two pending vacancies on the Fourth Circuit Court of Appeals. I interviewed with White House



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counsel Fred Fielding on July 17, 2007, and Attorney General Alberto Gonzales on July 18, 2007.

The next contact was a telephone call from Senator Warner on February 20, 2008, indicating I would be contacted by the White House and Department of Justice regarding the background checks prior to a nomination decision. On February 22, 2008, I was notified that the President had approved my name for further review. I was then contacted by Department of Justice staff regarding nomination paperwork and have had subsequent conversations with them regarding that paperwork and the process. My nomination was submitted to the United States Senate on March 13, 2008.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

No.



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Rev. 1/2007

# FINANCIAL DISCLOSURE REPORT
## NOMINATION FILING

*Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)*

| 1. Person Reporting (last name, first, middle initial) | 2. Court or Organization | 3. Date of Report |
|---|---|---|
| Agee, George S | 4th Circuit | 03/18/2008 |
| **4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)** | **5a. Report Type (check appropriate type)** | **6. Reporting Period** |
| Circuit Judge - Nominee | ☒ Nomination. Date 03/13/2008<br>☐ Initial ☐ Annual ☐ Final<br>5b. ☐ Amended Report | 01/01/2007 to 02/29/2008 |
| **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.** | |
| Supreme Court of Virginia<br>100 North Ninth Street<br>Richmond, VA 23219 | 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.)*

☐ NONE *(No reportable positions.)*

| | POSITION | NAME OF ORGANIZATION/ENTITY |
|---|---|---|
| 1. | Trustee | Trust #3 |
| 2. | Trustee | Trust #2 |
| 3. | Trustee | Bridgewater College |
| 4. | Director | Bradley Free Clinic |
| 5. | Justice | Supreme Court of Virginia |

## II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of instructions.)*

☒ NONE *(No reportable agreements.)*

| | DATE | PARTIES AND TERMS |
|---|---|---|
| 1. | | |
| 2. | | |
| 3. | | |

| FINANCIAL DISCLOSURE REPORT<br>Page 2 of 12 | Name of Person Reporting | Date of Report |
|---|---|---|
| | Agee, George S | 03/18/2008 |

## III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of instructions.)*

**A. Filer's Non-Investment Income**

☐ NONE *(No reportable non-investment income.)*

| | DATE | SOURCE AND TYPE | INCOME (yours, not spouse's) |
|---|---|---|---|
| 1. | 2008 | Virginia Supreme Court | $ 14,000 |
| 2. | 2007 | Virginia Supreme Court | $ 169,000 |
| 3. | 2006 | Virginia Supreme Court | $ 159,000 |
| 4. | | | |
| 5. | | | |

**B. Spouse's Non-Investment Income** - *If you were married during any portion of the reporting year, complete this section.*
*(Dollar amount not required except for honoraria.)*

☐ NONE *(No reportable non-investment income.)*

| | DATE | SOURCE AND TYPE |
|---|---|---|
| 1. | 2008 | Carilion Clinic - Salary |
| 2. | 2008 | RGC Resources, Inc - Director Fees |
| 3. | 2007 | Carilion Clinic - Salary |
| 4. | 2007 | RGC Resources, Inc. - Director Fees |
| 5 | | |

## IV. REIMBURSEMENTS — *transportation, lodging, food, entertainment.*
*(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)*

☐ NONE *(No reportable reimbursements.)*

| | SOURCE | DESCRIPTION |
|---|---|---|
| 1. | Exempt | |
| 2. | | |
| 3. | | |
| 4. | | |
| 5. | | |



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| FINANCIAL DISCLOSURE REPORT<br>Page 3 of 12 | Name of Person Reporting<br>Agee, George S | Date of Report<br>03/18/2008 |
|---|---|---|

**V. GIFTS.** *(Includes those to spouse and dependent children. See pp. 28-31 of instructions.)*

☐ NONE *(No reportable gifts.)*

| | SOURCE | DESCRIPTION | VALUE |
|---|---|---|---|
| 1. | Exempt | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

**VI. LIABILITIES.** *(Includes those of spouse and dependent children. See pp. 32-33 of instructions.)*

☒ NONE *(No reportable liabilities.)*

| | CREDITOR | DESCRIPTION | VALUE CODE |
|---|---|---|---|
| 1. | | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |

**FINANCIAL DISCLOSURE REPORT**
Page 4 of 12

| Name of Person Reporting | Date of Report |
|---|---|
| Agee, George S | 03/18/2008 |

## VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of the spouse and dependent children. See pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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, redemption) | D (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) |
|---|---|---|---|---|---|---|---|---|---|
| 1. Mainstreet Bankshares | A | Dividend | J | U | Exempt | | | | |
| 2. WB | A | Dividend | | | | | | | |
| 3. SUWI, LLC | C | Distribution | L | S | | | | | |
| 4. Agee Mill, LLC | A | Distribution | K | S | | | | | |
| 5. RGC Resources, Inc. | A | Dividend | J | T | | | | | |
| 6. First Citizens Bank | | None | J | T | | | | | |
| 7. Hometown Bank | A | Interest | J | U | | | | | |
| 8. Citibank | A | Interest | K | T | | | | | |
| 9. Metro Wash DCA Airport Bond | A | Interest | J | T | | | | | |
| 10. BBT | A | Dividend | J | T | | | | | |
| 11. BMY | A | Dividend | J | T | | | | | |
| 12. GE | A | Dividend | J | T | | | | | |
| 13. INTC | A | Dividend | J | T | | | | | |
| 14. MCK | A | Dividend | J | T | | | | | |
| 15 MSFT | A | Dividend | J | T | | | | | |
| 16. NSC | A | Dividend | J | T | | | | | |
| 17. RHHBY | 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 =$250,001 - $500,000 | O =$500,001 - $1,000,000 | P1 =$1,000,001 - $5,000,000 | P2 =$5,000,001 - $25,000,000 | |
| 3. Value Method Codes (See Column C2) | P3 =$25,000,001 - $50,000,000 | R =Cost (Real Estate Only) | P4 =More than $50,000,000 | T =Cash Market | |
| | Q =Appraisal | V =Other | S =Assessment | | |
| | U =Book Value | | W =Estimated | | |

**FINANCIAL DISCLOSURE REPORT**
Page 5 of 12

| Name of Person Reporting | Date of Report |
|---|---|
| Agee, George S | 03/18/2008 |

## VII. INVESTMENTS and TRUSTS -- *income, value, transactions (Includes those of the spouse and dependent children. See pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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, redemption) | D (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) |
|---|---|---|---|---|---|---|---|---|---|
| 18. TWX | A | Dividend | J | T | | | | | |
| 19. WFC | A | Dividend | J | T | | | | | |
| 20. CAIBX | A | Dividend | J | T | | | | | |
| 21. CWGIX | A | Dividend | J | T | | | | | |
| 22. ANCPX | A | Dividend | J | T | | | | | |
| 23. AGTHX | A | Dividend | J | T | | | | | |
| 24. ANWPX | A | Dividend | J | T | | | | | |
| 25. AWSHX | A | Dividend | J | T | | | | | |
| 26 COF | A | Dividend | J | T | | | | | |
| 27. VYFC | A | Dividend | J | T | | | | | |
| 28. NYVCX | A | Dividend | J | T | | | | | |
| 29. KAUCX | A | Dividend | K | T | | | | | |
| 30 LMVTX | A | Dividend | J | T | | | | | |
| 31. ACERX | A | Dividend | K | T | | | | | |
| 32. RKE VA IDA BOND | A | Interest | J | T | | | | | |
| 33 BROADWAY VA IDA BOND | A | Interest | J | T | | | | | |
| 34. IRA #1 | | None | L | T | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1. Income Gain Codes (See Columns B1 and D4) | A =$1,000 or less | B =$1,001 - $2,500 | C =$2,501 - $5,000 | D =$5,001 - $15,000 | E =$15,001 - $50,000 |
| | F =$50,001 - $100,000 | G =$100,001 - $1,000,000 | H1 =$1,000,001 - $5,000,000 | H2 =More than $5 000 000 | |
| 2. Value Codes (See Columns C1 and D3) | J =$15,000 or less | K =$15,001 - $50,000 | L =$50,001 - $100,000 | M =$100,001 - $250,000 | |
| | N =$250,001 - $500,000 | O =$500,001 - $1,000,000 | P1 =$1,000,001 - $5,000,000 | P2 =$5,000,001 - $25,000,000 | |
| | P3 =$25,000,001 - $50,000,000 | R =Cost (Real Estate Only) | P4 =More than $50,000,000 | T =Cash Market | |
| 3. Value Method Codes (See Column C2) | Q =Appraisal | V =Other | S =Assessment | | |
| | U =Book Value | | W =Estimated | | |

**FINANCIAL DISCLOSURE REPORT**
Page 6 of 12

| Name of Person Reporting | Date of Report |
|---|---|
| Agee, George S | 03/18/2008 |

## VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of the spouse and dependent children. See pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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, redemption) | D. (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) |
|---|---|---|---|---|---|---|---|---|---|
| 35. - SENTINEL CAP GRO A | | | | | | | | | |
| 36. - SENTINEL SMALL CO A | | | | | | | | | |
| 37. - SENTINEL MDCpGrA | | | | | | | | | |
| 38. - SENTINEL BALANCED A | | | | | | | | | |
| 39 - SENTINEL COMSTK A | | | | | | | | | |
| 40 - SENTINEL INTL EQUITY | | | | | | | | | |
| 41. RETIREMENT ACCOUNT #1 | | None | M | T | | | | | |
| 42. - RUSSELL 1000 VALUE INDEX | | | | | | | | | |
| 43. - SMALL/MID CAP EQUITY INDEX | | | | | | | | | |
| 44. - INTERNATIONAL EQUITY INDEX | | | | | | | | | |
| 45. - REAL ESTATE INVEST - TRUST INDEX | | | | | | | | | |
| 46. - STABLE VALUE FUND | | | | | | | | | |
| 47. - BOND INDEX FUND | | | | | | | | | |
| 48. - SAND P 500 INDEX FUND | | | | | | | | | |
| 49. TRUST #1 | | None | M | T | | | | | |
| 50. - VALLEY BANK | | | | | | | | | |
| 51. - BANK OF AMERICA | | | | | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1 Income Gain Codes (See Columns B1 and D4) | A =$1,000 or less | B =$1,001 - $2,500 | C =$2,501 - $5,000 | D =$5,001 - $15,000 | E =$15,001 - $50,000 |
| | F =$50,001 - $100,000 | G =$100,001 - $1,000,000 | H1 =$1,000,001 - $5,000,000 | H2 =More than $5,000,000 | |
| 2 Value Codes (See Columns C1 and D3) | J =$15,000 or less | K =$15,001 - $50,000 | L =$50,001 - $100,000 | M =$100,001 - $250,000 | |
| | N =$250,001 - $500,000 | O =$500,001 - $1,000,000 | P1 =$1,000,001 - $5,000,000 | P2 =$5,000,001 - $25,000,000 | |
| 3 Value Method Codes (See Column C2) | P3 =$25,000,001 - $50,000,000 | R =Cost (Real Estate Only) | P4 =More than $50,000,000 | T =Cash Market | |
| | Q =Appraisal | V =Other | S =Assessment | | |
| | U =Book Value | | W =Estimated | | |



474501.227

**FINANCIAL DISCLOSURE REPORT**
Page 7 of 12

| Name of Person Reporting | Date of Report |
|---|---|
| Agee, George S | 03/18/2008 |

## VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of the spouse and dependent children. See pp. 34-60 of filing instructions.)*

☐ NONE *(No reportable income, assets, or transactions.)*

| A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure | B. Income during reporting period (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, redemption) | D (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) |
|---|---|---|---|---|---|---|---|---|---|
| 52 - CITIBANK | | | | | | | | | |
| 53. - MET | | | | | | | | | |
| 54. - WB | | | | | | | | | |
| 55. - ACERX | | | | | | | | | |
| 56. - CAPITAL ONE BOND | | | | | | | | | |
| 57. - FORD MOTOR CO BOND | | | | | | | | | |
| 58. - WELLS FARGO CO. BOND | | | | | | | | | |
| 59 TRUST #2 | | None | M | T | | | | | |
| 60 - CITIBANK | | | | | | | | | |
| 61 - GE | | | | | | | | | |
| 62. - HD | | | | | | | | | |
| 63. - WB | | | | | | | | | |
| 64. - VALLEY BANK | | | | | | | | | |
| 65. - HJG | | | | | | | | | |
| 66 - HYVCX | | | | | | | | | |
| 67 - LMVTX | | | | | | | | | |
| 68 - GENERAL DYNAMICS | | | | | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1. Income Gain Codes (See Columns B1 and D4) | A =$1,000 or less | B =$1,001 - $2,500 | C =$2,501 - $5,000 | D =$5,001 - $15,000 | E =$15,001 - $50,000 |
| | F =$50,001 - $100,000 | G =$100,001 - $1,000,000 | H1 =$1,000,001 - $5,000,000 | H2 =More than $5,000,000 | |
| 2. Value Codes (See Columns C1 and D3) | J =$15,000 or less | K =$15,001 - $50,000 | L =$50,001 - $100,000 | M =$100,001 - $250,000 | |
| | N =$250,001 - $500,000 | O =$500,001 - $1,000,000 | P1 =$1,000,001 - $5,000,000 | P2 =$5,000,001 - $25,000,000 | |
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**FINANCIAL DISCLOSURE REPORT**
Page 8 of 12

| Name of Person Reporting | Date of Report |
|---|---|
| Agee, George S | 03/18/2008 |

## VII. INVESTMENTS and TRUSTS – *income, value, transactions (Includes those of the spouse and dependent children. See pp. 34-60 of filing instructions.)*

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|---|---|---|---|---|---|---|---|---|---|
| 69. - FORD MOTOR CO. BOND | | | | | | | | | |
| 70. - CAPITAL ONE BOND | | | | | | | | | |
| 71. - WELLS FARGO BOND | | | | | | | | | |
| 72. - WEST BASIN MWD CALIF BOND | | | | | | | | | |
| 73. - ILLINOIS FIN AU REV REF BOND | | | | | | | | | |
| 74. IRA #2 | | None | K | T | | | | | |
| 75. - SENTINEL COM STK A | | | | | | | | | |
| 76. - SENTINEL MD Cp Gr A | | | | | | | | | |
| 77. RETIREMENT ACCOUNT #2 | | None | N | T | | | | | |
| 78. - PIMCO LOW DURATION | | | | | | | | | |
| 79. - VAN KAMPEN EQUITY & INC | | | | | | | | | |
| 80 - AIM MID CAP CORE EQUITY A | | | | | | | | | |
| 81. - FID SPARTAN USEq IDX | | | | | | | | | |
| 82. - FID LOW PRICED STOCK | | | | | | | | | |
| 83. - OAKMARK INTERNATIONAL | | | | | | | | | |
| 84. - ROYCE PREMIER | | | | | | | | | |
| 85. RETIREMENT ACCOUNT #3 | | None | L | T | | | | | |

| | | | | | |
|---|---|---|---|---|---|
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| FINANCIAL DISCLOSURE REPORT<br>Page 9 of 12 | Name of Person Reporting<br>Agee, George S | Date of Report<br>03/18/2008 |
|---|---|---|

**VII. INVESTMENTS and TRUSTS** – *income, value, transactions (Includes those of the spouse and dependent children. See pp. 34-60 of filing instructions.)*

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|---|---|---|---|---|---|---|---|---|---|
| | (1) Amount Code 1 (A-H) | (2) Type (e.g. div., rent, or int.) | (1) Value Code 2 (J-P) | (2) Value Method Code 3 (Q-W) | (1) Type (e.g. buy, sell, redemption) | (2) Date Month - Day | (3) Value Code 2 (J-P) | (4) Gain Code 1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
| 86. - VAN KAMPEN EQUITY & INC | | | | | | | | | |
| 87. - DODGE & COX STOCK FUND | | | | | | | | | |
| 88. RETIREMENT ACCOUNT #4 | | None | K | T | | | | | |
| 89. - EQ GUARANTEED INTEREST | | | | | | | | | |
| 90. - EQ ALLIANCE BERNSTEIN INTL | | | | | | | | | |
| 91. - EQ ALLIANCE BERNSTEIN Sm CpGR | | | | | | | | | |
| 92. - EQ MARKET PLUS MID CAP VALUE | | | | | | | | | |
| 93. - EQ BLACK ROCK BASIC | | | | | | | | | |
| 94. RETIREMENT ACCOUNT #5 | | None | M | T | | | | | |
| 95. - TWEAX | | | | | | | | | |
| 96. - CAAPX | | | | | | | | | |
| 97. - FEIRX | | | | | | | | | |
| 98. - FMCAX | | | | | | | | | |
| 99. - FAERX | | | | | | | | | |
| 100. - GABGY | | | | | | | | | |
| 101. - WEBAX | | | | | | | | | |
| 102. - GABAX | | | | | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1 Income Gain Codes<br>(See Columns B1 and D4) | A =$1,000 or less<br>F =$50,001 - $100,000 | B =$1,001 - $2,500<br>G =$100,001 - $1,000,000 | C =$2,501 - $5,000<br>H1 =$1,000,001 - $5,000,000 | D =$5,001 - $15,000<br>H2 =More than $5,000,000 | E =$15,001 - $50,000 |
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**FINANCIAL DISCLOSURE REPORT**
Page 10 of 12

| Name of Person Reporting | Date of Report |
|---|---|
| Agee, George S | 03/18/2008 |

## VII. INVESTMENTS and TRUSTS -- *income, value, transactions (Includes those of the spouse and dependent children. See pp. 34-60 of filing instructions.)*

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|---|---|---|---|---|---|---|---|---|---|
| 103. - GABEX | | | | | | | | | |
| 104. - PREIX | | | | | | | | | |
| 105. LIFE INSURANCE POLICY #1 | | None | L | T | | | | | |
| 106. LIFE INSURANCE POLICY #2 | | None | J | T | | | | | |
| 107. 529 PLAN | | None | 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 |
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| | U =Book Value | | W =Estimated | | |

| FINANCIAL DISCLOSURE REPORT<br>Page 11 of 12 | Name of Person Reporting<br>Agee, George S | Date of Report<br>03/18/2008 |
|---|---|---|

## VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

No income from Trusts 1 and 2 comes to me as I am a Trustee only for a third party and receive no compensation for performing my fiduciary duty.

| FINANCIAL DISCLOSURE REPORT<br>Page 12 of 12 | Name of Person Reporting<br>Agee, George S | Date of Report<br>03/18/2008 |
|---|---|---|

## 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 George Steven Agee Date March 18, 2008

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 | | 20 | 000 | Notes payable to banks-secured | | | |
| U.S. Government securities-add schedule | | | | Notes payable to banks-unsecured | | | |
| Listed securities-add schedule | | 220 | 020 | Notes payable to relatives | | | |
| Unlisted securities--add schedule | | 35 | 900 | 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 | | 165 | 000 |
| Real estate owned-add schedule | | 400 | 000 | Chattel mortgages and other liens payable | | | |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 100 | 000 | | | | |
| Cash value-life insurance | | 85 | 000 | | | | |
| Other assets itemize: | | | | | | | |
| See attached | 1 | 122 | 000 | | | | |
| | | | | | | | |
| | | | | Total liabilities | | 165 | 000 |
| | | | | Net Worth | 1 | 817 | 920 |
| Total Assets | 1 | 982 | 920 | Total liabilities and net worth | 1 | 982 | 920 |
| CONTINGENT LIABILITIES | | | | GENERAL INFORMATION | | | |
| As endorser, comaker or guarantor | | 14 | 000 | 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 | | | | | | | |



47450I.233

**FINANCIAL STATEMENT**

NET WORTH SCHEDULES

| | |
|---|---|
| Listed Securities | |
| BB&T Corp. | $ 7,137 |
| Bristol-Myers Squibb Company | 2,634 |
| Capital One | 4,603 |
| Capital Income Builder Fund | 2,542 |
| Capital World Growth & Income Fund Class A | 5,889 |
| Davis New York Venture Fund Class Company | 4,859 |
| Federated Kaufmann Fund Class C | 18,974 |
| Fundamental Investors Fund Class A | 6,730 |
| General Electric Company | 3,650 |
| Growth Fund of America Class A | 13,041 |
| Intel Corp | 3,114 |
| Legg Mason Value Trust | 4,141 |
| McKesson Corp | 5,982 |
| Microsoft Corp | 5,531 |
| New Perspective Fund Class A | 11,004 |
| Norfolk Southern Corp | 5,564 |
| RGC Resources, Inc. | 33,740 |
| Rocke Holding Ltd. | 9,815 |
| Time Warner, Inc. | 3,214 |
| Valley Financial Corporation of Virginia DIS | 13,103 |
| Van Kampen Equity and Income Fund Class C | 32,434 |
| Washington Mutual Investors Fund Class A | 12,512 |
| Wells Fargo & Co. | 9,807 |
| Total Listed Securities | $ 220,020 |

| | |
|---|---|
| Unlisted Securities | |
| Hometown Bank, Inc. | $ 5,000 |
| Mainstreet Bankshares, Inc. | 5,500 |
| Roanoke Country club, Inc. | 400 |
| Broadway, Virginia Industrial Dev. Authority | 10,000 |
| Metropolitan Washington DC Airport Authority | 5,000 |
| Roanoke, Virginia Industrial Dev. Authority | 10,000 |
| Total Unlisted Securities | $ 35,900 |

| | |
|---|---|
| Real Estate Owned | |
| Personal residence | $ 400,000 |

| | |
|---|---|
| Real Estate Mortgages Payable | |
| Personal residence | $ 165,000 |



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| Other Assets | |
|---|---|
| 50% SUWI, LLC | $ 60,000 |
| 18.75% AgeeMill, LLC | 50,000 |
| 401(k) Account | 46,000 |
| 403 (b) Deferred Compensation Plan #1 | 190,000 |
| 403 (b) Deferred Compensation Plan #2 | 290,000 |
| 457 (b) Deferred Compensation Plan | 73,000 |
| 529 College Savings Plan | 44,000 |
| Carilion ExecuFlex Benefit Plan | 238,000 |
| IRA Account #1 | 90,000 |
| IRA Account #2 | 41,000 |
| Total Other Assets | $ 1, 122,000 |



47450I.235

AFFIDAVIT

I, George Hartzog Gee, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

March 18, 2008
(DATE)

George Hartzog Gee
(NAME)

Betty Jean Powers
(NOTARY) 7096192

My Commission expires 4/30/11

Senator CARDIN. Thank you.
Judge Lawrence.

**STATEMENT OF WILLIAM T. LAWRENCE, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA**

Judge LAWRENCE. Mr. Chairman, thank you.

First of all, I'd like to thank you and the Committee for the invitation to appear at this hearing this afternoon. I'd like to thank the President for this nomination. I would certainly like to thank Senator Lugar and Senator Bayh for their support and stewardship through this process.

I would like to acknowledge and introduce, I guess, again, my family, who is here supporting me, including my wife Jeanie, my daughter Kate, and my brother Tony. I appreciate them being here this afternoon.

Thank you.

Senator CARDIN. Thank you.

[The biographical information follows:]

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

1. **Name**: Full name (include any former names used).

   William Thomas Lawrence

2. **Position**: State the position for which you have been nominated.

   United States District Judge for the Southern District of Indiana

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Office: Room 277
   Birch Bayh Federal Building and United States Courthouse
   46 East Ohio Street
   Indianapolis, Indiana 46204

4. **Birthplace**: State year and place of birth.

   1947; Indianapolis, Indiana

5. **Marital Status**: (include name of spouse, and names of spouse pre-marriage, if different). List spouse's occupation, employer's name and business address(es). Please, also indicate the number of dependent children.

   I am married to Jeanie M. Lawrence. My wife's maiden name was Jeanie M. Allen. She was also known during a prior marriage as Jeanie M. Fish. She is the Chief Bailiff in Marion County Superior Court 21, 200 East Washington Street, Room E-542, Indianapolis, Indiana 42604. We have no dependent children.

6. **Education**: List in reverse chronological order, listing most recent first, each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   Indiana University School of Law-Indianapolis, 1970-1973; J. D., 1973

   Indiana University, 1968-1970; B.S., 1970

   Louisiana State University, 1965-1968; no degree received



47450I.237

7. **Employment Record**: List in reverse chronological order, listing most recent first, all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

11/2002 to Present
U.S. District Court for the Southern District of Indiana
Birch Bayh Federal Building and United States Courthouse
46 East Ohio Street, Room 277
Indianapolis, Indiana 46204
Magistrate Judge

01/1997 to 11/2002
Marion County Circuit Court
200 East Washington Street, Room W-506
Indianapolis, Indiana 46204
Presiding Judge

08/1983 to 01/1997
Marion County Circuit Court
200 East Washington Street, Room W-506
Indianapolis, Indiana 46204
Master Commissioner (This was a part-time position.)

01/1989 to 01/1997
Johnson Smith Pence Densborn Wright & Heath
One Indiana Square, Suite 1800
Indianapolis, Indiana 46204
Attorney

08/1979 to 01/1989
Lawrence Carter Gresk Leerkamp & Walsh
151 North Delaware Street, Suite 1100
Indianapolis, Indiana 46204
Attorney

10/1974 to 08/1983
Marion County Superior Court, Criminal Division 4
200 East Washington Street, Room W-203
Indianapolis, Indiana 46204
Public Defender (This was a part-time position.)



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08/1976 to 08/1979
Popcheff Lawrence & Page
5023 West 16th Street
Speedway, Indiana 46224
Attorney

9/1970 to 08/1976
Poore Popcheff Wurster Sullivan & Burke
136 East Market Street, Suite 1101
Indianapolis, Indiana 46204
Attorney, 10/1973 to 8/1976
Law Clerk, 9/1970 to 10/1973

9/1970 to 5/1972
Marion County Court
200 East Washington Street
Indianapolis, Indiana 46204
Law Clerk

5/1970 to 9/1971
L.S. Ayres Department Stores
1 West Washington Street
Indianapolis, Indiana 46204
Credit clerk

8. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received.

   I have not served in the military.

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.

   1997 Indianapolis Bar Association Distinguished Fellow

   Upon leaving the state bench in November 2002, I received certificates of merit and tribute plaques from several of the County agencies with which I was associated during my tenure as Circuit Court Judge.

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.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01349 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Indianapolis Bar Association, 1973 to Present
Member, Task Force on Continuing Legal Education 1998-2000
Chairman of the Continuing Legal Education Commission 2002
Board of Managers 2005
Vice President of the Association 2005
Chairman of the Judicial Section of the Association 2004
Executive Committee of the Litigation Section 2004-2005
Chairman of the Bench Bar Conference 2002

Sagamore American Inn of Court, 1997 to Present (currently on inactive status)
Bencher 1997-Present

The Seventh Circuit Bar Association, 2002 to Present

Federal Bar Association, 2002 to Present

Indiana Judges Association, 1997-2002
Board of Managers 2000-2002

United States Magistrate Judge's Association, 2002 to Present

Indianapolis Lawyers Club, 2004 to Present

Judicial Conference of Indiana, 1997-2002
Board of Directors 1997-2002

Indiana Merit Selection Commission on Federal Judicial Appointments
Executive Director 1980-1986

11. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Indiana, October 10, 1973

There have been no lapses in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Indiana Supreme Court, October 10, 1973
U.S. District Court for the Southern District of Indiana, October 10, 1973
U.S. Court of Appeals for the Seventh Circuit, March 27, 1974



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01350 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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U.S. District Court for the Northern District of Indiana, October 10, 1975
U.S. Tax Court, April 3, 1974

There have been no lapses in membership.

12. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 or 11 to which you belong, or to which you have belonged, or in which you have significantly participated, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Indianapolis Fire Department Civilian Merit Board, 1983-1989
President 1988-1989

Indiana State Forensic Science Commission, 1984-1990

Indiana State Recount Commission, 1988-1990

Board of Directors of the Marion County Justice Agency, 1996-2002

Highland Golf and Country Club, 1987 to Present
Board of Directors, 1993-1997

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Please indicate whether any of these organizations listed in response to 12a above currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

None of the organizations listed above discriminate on the basis of race, sex, or religion.

In 1965, I became a member of a national college social fraternity, Lambda Chi Alpha, at Louisiana State University in Baton Rouge. This organization by definition restricts its membership to males. Lambda Chi Alpha does not discriminate on the basis of race or religion. I have taken no action to change the membership policies or practices of this organization. I have not been active in this college fraternity since my graduation from college in 1970.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01351 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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13. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Please supply four (4) copies of all published material to the Committee.

I have no published material.

b. Please supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, please give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

In 1998, I was co-author, along with four members of a steering committee that I chaired, of an instruction manual for the Indianapolis Bar Association entitled *Handbook 2000*. This 52- page manual, which is still in use today, provides the policies and procedures for the preparation of seminars for continuing legal education programs.

c. Please supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

I have given no such testimony or made any such official statement or other communications relating to such matters.

d. Please supply four (4) copies, transcripts or tape recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Please include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke.

June 15, 2007: Remarks given at the Indianapolis Bar Association's Bench Bar Conference in Cincinnati, Ohio. I also spoke at the Bench Bar Conferences held in 1998, 1999 and 2001, but I have no notes from those years.

March 22, 2006: Remarks given to the Alternate Resolution Section of the Indianapolis Bar Association.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01352 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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2006: Indianapolis Bar Association's Women in Law Division, Antoinette Dakin Leach Ceremony. I have no notes or text for this speech.

June 17, 2005: Indianapolis Bar Association's Bench Bar Conference.

June 9, 2005: Remarks to the National Employment Lawyers Association - Indiana Section on "Mediation Tips for Employment Lawyers."

November 17, 2004: American Inn of Court presentation by the Thomas Jefferson Team. I have been affiliated with the American Inn of Court since its inception in Indianapolis in 1997. I have given a presentation every year in conjunction with my group. I have no notes of any of the presentations except for the one cited above.

July 24, 2004: Remarks to the Indianapolis Bar Association's Labor and Employment Section on "Labor and Employment Cases in the 2003-04 U.S. Supreme Court Term."

February 24, 2004: Remarks at the Indiana University Law School - Indianapolis to third-year students regarding ethical issues in judicial mediation.

2004: Indianapolis Bar Association's Litigation Section, "Trial Techniques." I have no notes or text for this speech.

November 18, 2003: Remarks given at the Indianapolis Bar Association Bar Leaders Series. The topics were the judicial selection process and the duties of a U.S. Magistrate Judge. I also spoke at the same event in both 2004 and 2005. I have no notes or dates for these latter presentations, but the focus was the same.

2003: The Seventh Circuit Bar Association Young Lawyers Section Mediation Skills Workshop. I have no notes or text for this speech.

2003: The Seventh Circuit Bar Association Conference panel on issues in Indiana's Southern District. I have no notes or text for this speech.

2003: Indianapolis Bar Association's Litigation Section panel on ethical issues in judicial mediation. I have no notes or text for this speech.

2003: Indiana State Bar Association's Employment and Labor Law Section, "Employment Litigation: Ethical Issues Arising from Motions to Withdraw and Motions to Disqualify." I have no notes or text for this speech.

December 6, 2002: Remarks given at my Induction Ceremony as a U.S. Magistrate Judge.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01353 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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November 2002 to present: The judges in the Southern District of Indiana routinely rotate presiding over naturalization ceremonies. I have done approximately 3 or 4 per year and my remarks are essentially the same each time.

2002: "Business Litigation in Indiana - A Judicial Perspective" for Sterling Educational Services LLC. I have no notes or text for this speech.

2002: Indianapolis Bar Association's Seminar for Summer Associates. The topic was continuing legal education. I have no notes or text for this speech.

2001: Indianapolis Bar Association, "Outwit, Outplay, and Outlast: A Survival Guide for New Attorneys." I have no notes or text for this speech.

2001: Indianapolis Bar Association, "Non-Party Practice in Complex Litigation." I have no notes or text for this speech.

1999 and 2000: Bulen Symposium - Campaign School. I have no notes or text for this speech.

1999: Indiana Judicial Conference. I have no notes or text for this speech.

In addition, between the mid-1980's and ending upon my selection as a U.S. Magistrate Judge, I routinely offered remarks at small political gatherings in conjunction with my position as a Circuit Court Master Commissioner and then as Presiding Judge of the Circuit Court in Indianapolis. Judges were elected on a purely partisan basis in Indianapolis. I attended precinct and township meetings on a weekly basis and would be asked to offer brief remarks along with other public officials, judges and candidates. My remarks were brief (2-3 minutes), spontaneous, and non-controversial and covered such topics as events in the courthouse and my credentials. I took no notes and none of my remarks to my knowledge were recorded or reported.

e. Please list all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I have several times been a guest on WTLC, an Indianapolis radio station that is primarily targeted to an African-American audience, discussing topics such as minority representation on jury panels and the impact minorities could potentially have on the selection of state court judges. I have also been on panel discussions on WTLC with Rozelle Boyd, a prominent African-American businessman in Indianapolis and at the time the minority leader of the City-County Council. We were available to answer questions from the listening audience on topics chosen by the host. I have also been a guest on a radio show hosted by Dr. Esperanza Zendejas, the former superintendent of Indianapolis Public Schools, on WSYW,



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01354 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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an Indianapolis radio station that is primarily targeted to an Hispanic audience. I appeared with Dr. Zendejas answering questions from the listening audience regarding the impact of criminal convictions on naturalization status. I also appeared with her to answer call-in questions from listeners regarding issues relating to access to our American courts. I have no transcripts or recordings of any interviews given to print publications or radio or television entities. I have done an electronic search for news articles which include quotes from interviews given by me and have listed those below.

Vic Ryckaert, *New Court Will Handle Paternity Cases Only*, Indianapolis Star, Oct. 23, 2000, at A1.

Denise Callahan, *City-County Building Outdated*, Indiana Lawyer, December 20, 2000, at 1.

Denise Callahan, *Marion County Bench Welcomes 11 New Jurists*, Indiana Lawyer, January 3, 2001, at 1.

*Courts to Launch Paternity Docket*, Indiana Lawyer, March 14, 2001, at 18.

Doug Sword, *Officials Will Expand Searches at Complex*, Indianapolis Star, June 29, 2001, at B1.

Doug Sword, *Judges Await Verdict on New Security*, Indianapolis Star, July 31, 2001, at B1.

Doug Sword, *Security System Gets a PR Boost*, Indianapolis Star, August 23, 2001, at A1.

Rachel E. Faulkner, *Security Pilot Gains Support*, Indiana Lawyer, August 29, 2001, at 17.

Denise Callahan, *Batten Down the Hatches; County Courts Urge Officials to Install Stronger Security Measures*, Indiana Lawyer, September 12, 2001, at 1.

Vic Ryckaert, *It's Season to Pay Off Child Support, or Else*, Indianapolis Star, December 14, 2001, at A1.

Kelly Lucas, *Holiday Court Pressures Parents*, Indiana Lawyer, December 19, 2001, at 1.

Rich Reeve, *Crowding at Lockup, Jail Aids Deadbeat Parents*, Indianapolis Star, April 25, 2002, at B7.

Terry Horne, *Circuit Judge to Take Federal Judicial Post*, Indianapolis Star, June 5, 2002, at B1.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01355 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Denise Callahan, *U.S. District Courts in Flux in Indiana*, Indiana Lawyer, June 19, 2002, at 1.

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.

From August 1983 to January 1, 1997 I served as Marion County Circuit Court Master Commissioner. I was appointed to this position by the Honorable John M. Ryan, who was the Presiding Judge of the Marion County Circuit Court. The position of Master Commissioner is governed by statute; see Ind. Code 33-33-49-16(e) and Ind. Code 33-23-5-5 to -9. By local rule, the Circuit Court is vested with civil jurisdiction (see below). A Master Commissioner may not enter a final order, but must prepare findings and submit same to the presiding judge of the court for approval. Although this position was technically a part-time position, due to the health of Judge Ryan I took over more of the day-to-day operation of the court as time went on. During the last five to seven years of my tenure as Master Commissioner, I had essentially the same responsibilities as a judge. Judge Ryan would routinely designate me as a judge pro tempore, and as such I tried many cases to verdict and assumed additional administrative roles as needed.

In January 1997, following my election in 1996, I began service as Presiding Judge of the Marion County Circuit Court. The constitutional jurisdiction of Circuit Courts in Indiana includes civil, criminal, juvenile, probate, and small claims matters. However, throughout my tenure on the bench the court heard only civil matters, including exercising exclusive statewide jurisdiction for insurance reorganizations/liquidations and medical liens. The court also supervises the nine Marion County Small Claims Courts and has exclusive jurisdiction in Marion County for all county tax collections, name changes, and hardship driver's licenses. As presiding judge of this court, I handled all civil matters and conducted many trials both to the bench and to a jury.

On November 12, 2002, I was appointed to be a United States Magistrate Judge for the Southern District of Indiana. I was appointed to this position for an eight-year term by the five sitting judges of Indiana's Southern District after an open selection process pursuant to 28 U.S.C. § 631. The jurisdiction and powers of Magistrate Judges generally are found at 28 U.S.C. § 636. I generally conduct all pre-trial proceedings and rule on all non-dispositive motions filed in the civil cases that are assigned to me. One of the main focuses of my responsibilities is to conduct settlement conferences and I schedule between six and eight of these per week. I also have full responsibility, including trial, for those cases that are referred to me on a "consent" basis pursuant to 28 U.S.C. § 636(c). In addition, on occasion I conduct preliminary criminal proceedings.

15. **Citations**: If you are or have been a judge, please provide:

    a. citations for all opinions you have written (including concurrences and dissents);



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01356 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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To my knowledge, I have only one published opinion:

*Magee v. AllianceOne, Ltd.*, 487 F. Supp.2d 1024 (S.D. Ind. 2007)

There are no citations for the vast majority of opinions I have written. There was no mechanism for publishing opinions when I was a state court trial judge, and I have not chosen to publish any opinions since becoming a United States Magistrate Judge except for the one listed above, which was published at the request of counsel in the case. The following unpublished decisions appear on Westlaw® and/or LEXIS®:

*King-Indiana Forge, Inc. v. Millennium Forge, Inc.*, 2007 WL 3333254 (S.D. Ind. 2007) (Entry on Motion to Compel)

*Knowledge A-Z, Inc. v. Jim Walter Resources, Inc.*, 2007 WL 3333271 (S.D. Ind. 2007) (Entry on Motion to Exclude Expert Witnesses)

*Heritage Technologies, LLC v. Phibro-Tech, Inc.*, 2007 WL 3287216 (S.D. Ind. 2007) (Entry on Motion to Compel)

*Classic Cheesecake Co., Inc. v. JPMorgan Chase Bank*, 2007 WL 3285806 (S.D. Ind. 2007) (Entry Regarding Post-Trial Motions)

*Custer v. Schumacher Racing Corp.*, 2007 WL 3239023 (S.D. Ind. 2007) (Entry on Motions for Summary Judgment)

*Knowledge A-Z, Inc. v. Jim Walter Resources, Inc.*, 2007 WL 3284013 (S.D. Ind. 2007) (Entry Resolving Motions Relating to Revised Non-Party Subpoenas)

*Spencer v. General Motors Corp.*, 2007 WL 3171504 (S.D. Ind. 2007) (Entry on Motions for Protective Order)

*Knowledge A-Z, Inc. v. Jim Walter Resources, Inc.*, 2007 WL 3119756 (S.D. Ind. 2007) (Order Regarding Motion to Compel)

*Eicks v. City of Anderson, Ind.*, 2007 WL 3023467 (S.D. Ind. 2007) (Entry on Motion for Summary Judgment)

*Interactive Intelligence, Inc. v. Keycorp*, 2007 WL 3047057 (S.D. Ind. 2007) (Entry on Keybank's Motion to Compel)

*Muren v. Smith*, 2007 WL 2994002 (S.D. Ind. 2007) (Entry on Motion for Partial Summary Judgment)

*U.S. ex rel. Glaser v. Wound Care Consultants, Inc.*, 2007 WL 2934885 (S.D. Ind. 2007) (Entry on Motion to Stay Discovery)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01357 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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*Centillion Data Systems, LLC v. Convergys Corp.*, 2007 WL 2915626 (S.D. Ind. 2007) (Entry Regarding Motion to Enforce Entry)

*Harpold v. Ethicon Endo-Surgery, Inc.*, 2007 WL 2900554 (S.D. Ind. 2007) (Entry on Motion for Protective Order)

*Denistran v. Excel Decorators, Inc.*, 2007 WL 2904084 (S.D. Ind. 2007) (Entry on Motion for Summary Judgment)

*RMA Brokerage, LLC v. LTC Risk Management, LLC*, 2007 WL 2904076 (S.D. Ind. 2007) (Entry on Motion to Compel)

*Hiatt Enterprises v. Ikon Office Solutions, Inc.*, 2007 WL 2904074 (S.D. Ind. 2007) (Entry on Motion for Summary Judgment)

*Geary v. Scharbrough*, 2007 WL 2901695 (S.D. Ind. 2007) (Entry on Motion for Partial Summary Judgment)

*Custer v. Schumacher Racing Corp.*, 2007 WL 2902047 (S.D. Ind. 2007) (Entry on Motion to Amend Answer and Related Motion to Strike)

*Kapoor v. Indiana University Bd. of Trustees*, 2007 WL 2901881 (S.D. Ind. 2007) (Entry on Motion to Compel)

*Butterfield v. Navistar Intern. Transp. Corp.*, 2007 WL 2901693 (S.D. Ind. 2007) (Entry on Motion to Strike)

*Leonard's Linen Service v. City of Bloomington*, 2007 WL 2902210 (S.D. Ind. 2007) (Entry on Motion to Compel and Motion for Protective Order)

*1100 West, LLC v. Red Spot Paint and Varnish Co., Inc.*, 2007 WL 2904073 (S.D. Ind. 2007) (Entry on Motions for Protective Order)

*Brown v. Enterprise Leasing Co. of Chicago*, 2007 WL 2900589 (S.D. Ind. 2007) (Entry Regarding Choice of Law)

*Van Hoose v. Nucor Corp.*, 2007 WL 2898697 (S.D. Ind. 2007) (Entry on Motions Relating to Admissions)

*Landeen v. Phonebillit, Inc.*, 2007 WL 2902212 (S.D. Ind. 2007) (Entry on Motions Relating to Discovery)

*Martin v. Indiana Heart Hosp., LLC*, 2007 WL 2900592 (S.D. Ind. 2007) (Entry on Motion to Amend Complaint)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01358 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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*Classic Cheesecake Co., Inc. v. JPMorgan Chase Bank*, 2007 WL 2897747 (S.D. Ind. 2007) (Entry Regarding Emotional Distress Damages)

*Classic Cheesecake Co., Inc. v. JPMorgan Chase Bank, NA*, 2007 WL 2897842 (S.D. Ind. 2007) (Entry Regarding 12 C.F.R. § 202.9(c))

*Gabhart v. Indiana Bd. of Law Examiners*, 2007 WL 2904075 (S.D. Ind. 2007) (Entry on Defendant's Motion to Dismiss)

*Koch v. Convenience Industry Associates LLC*, 2007 WL 2901128 (S.D. Ind. 2007) (Entry on Motion to Compel)

*Classic Cheesecake Co., Inc. v. JPMorgan Chase Bank, NA*, 2007 WL 2894291 (S.D. Ind. 2007) (Entry Regarding Motions in Limine and Plaintiff Macon's Race Discrimination Claim)

*Classic Cheesecake Co., Inc. v. JPMorgan Chase Bank, NA*, 2007 WL 2894303 (S.D. Ind. 2007) (Entry on Motions for Summary Judgment)

*RLI Ins. Co. v. Conseco, Inc.*, 2006 WL 4833630 (S.D. Ind. 2006) (Entry on Motion for Protective Order)

*Moore v. Correctional Indus. Facility*, 2006 WL 4808523 (S.D. Ind. 2006) (Entry on Motion for Judgment on the Pleadings)

*Hendricks v. Goszkowski*, 2006 WL 4843406 (S.D. Ind. 2006) (Entry on Motion for Summary Judgment)

*Product Action Intern., LLC v. Plastech Engineered Products, Inc.*, 2006 WL 4835919 (S.D. Ind. 2006) (Entry on Motion for Summary Judgment)

*Hall v. Richwine*, 2006 WL 4835918 (S.D. Ind. 2006) (Entry on Motion for Leave to Amend Complaint)

*Jennings v. Auto Meter Products, Inc.*, 2006 WL 4834467 (S.D. Ind. 2006) (Entry on Motion to Dismiss, etc.)

*Directv, Inc. v. Adams*, 2006 U.S. Dist. LEXIS 78649 (S.D. Ind. 2006) (Report and Recommendation Regarding Default Judgment)

*Directv, Inc. v. Beckler*, 2006 U.S. Dist. LEXIS 67678 (S.D. Ind. 2006) (Report and Recommendation Regarding Default Judgment)

*Directv, Inc. v. Cox*, 2006 U.S. Dist. LEXIS 67674 (S.D. Ind. 2006) (Report and Recommendation Regarding Default Judgment)



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*Directv, Inc. v. Ryan*, 2006 U.S. Dist. LEXIS 67676 (S.D. Ind. 2006) (Report and Recommendation Regarding Default Judgment)

*Directv, Inc. v. Britt*, 2006 U.S. Dist. LEXIS 67675 (S.D. Ind. 2006) (Report and Recommendation Regarding Default Judgment)

*Directv, Inc. v. Burton*, 2006 U.S. Dist. LEXIS 67618 (S.D. Ind. 2006) (Report and Recommendation Regarding Default Judgment)

*Directv, Inc. v. Applegate*, 2006 U.S. Dist. LEXIS 58098 (S.D. Ind. 2006) (Report and Recommendation Regarding Default Judgment)

*In re Guidant Corp. Shareholders Derivative Litig.*, 2005 U.S. Dist. LEXIS 45701 (S.D. Ind. 2005) (Entry on Motion to Strike Amended Complaint for Violation of Federal Rule of Civil Procedure)

*Recker v. Cent. Collection Bureau*, 2005 U.S. Dist. LEXIS 24780 (S.D. Ind. 2005) (Entry on Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment)

*Estate of Ellington v. Gibson Piano Ventures, Inc.*, 2005 U.S. Dist. LEXIS 21003, 75 U.S.P.Q.2D (BNA) 1724 (S.D. Ind. 2005) (Entry on Defendants' Motion for Partial Summary Judgment and Plaintiff's Motion for Partial Summary Judgment)

*Classic Cheesecake Co. v. JP Morgan Chase Bank, NA*, 2005 WL 5830400 (S.D. Ind. 2005) (Entry on Motion to Dismiss)

*Barmes v. United States*, 2003 U.S. Dist. LEXIS 8583, 91 A.F.T.R.2d (RIA) 2251 (S.D. Ind. 2003) (Entry on Plaintiffs/Counterclaim Defendants' and Third-Party Defendants' Motion for Order of Inspection); objection sustained, *Barmes v. IRS*, 2003 U.S. Dist. LEXIS 17361 (S.D. Ind. 2003)

b. a list of cases in which certiorari has been requested or granted;

None

c. a short summary of and citations for all appellate opinions or orders where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

1. *Barmes v. IRS*, 2003 U.S. Dist. LEXIS 17361 (S.D. Ind. 2003)

The Plaintiffs in this case had responded to the Defendant's discovery requests by invoking the Fifth Amendment. After the Defendant moved for summary judgment, the Plaintiffs sought to inspect documents that had been seized from them by the IRS, asserting that they might be relevant to their response to the



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summary judgment motion. I granted the Plaintiffs' motion. The Defendant objected to the District Court judge assigned to the case, Hon. John D. Tinder. Judge Tinder sustained the objection, ruling that the inspection could not lead to admissible evidence because the Plaintiffs already had invoked their Fifth Amendment rights as to the documents and the information contained therein; to the extent that some of the documents did not fall into this category, it was nonetheless improper to grant the motion to inspect because the Plaintiffs had failed to comply with the requirements of Federal Rule of Civil Procedure 56(f).

2. *Alexander v. Cottey*, 801 N.E.2d 651 (Ind. App. 2004), and on rehearing, 806 N.E.2d 315 (Ind. App. 2004)

This case involved a proposed class of persons who received collect telephone calls from inmates who alleged that the contracts between the sheriffs (and the state) and the telephone companies that provided the phone service in the jails resulted in excessive charges for accepting the inmates' collect calls. I dismissed the case for lack of subject matter jurisdiction, finding that the Plaintiffs had failed to exhaust their administrative remedies because the claims challenged the reasonableness of telephone rates and thus fell under the jurisdiction of the Indiana Utility Regulatory Commission ("IURC"). The Indiana Court of Appeals reversed and remanded, holding that the threshold question of whether the sheriffs and the state had the authority to enter into the contracts in question had to be decided by the court before the reasonableness question could be addressed, either by the court or the IURC.

3. *Embry v. O'Bannon*, 798 N.E.2d 157 (Ind. 2003)

In this case, taxpayers asserted that the state's dual-enrollment program, under which public school corporations provided services to parochial school students in their parochial schools and were permitted to count those students as enrolled in the public school for state funding purposes, violated the state constitutional provision forbidding the use of public money "for the benefit of any religious or theological institution." I granted summary judgment in favor of the Defendants, holding that the Plaintiffs lacked standing and, even if they did not, the program did not violate the Indiana Constitution. The Indiana Court of Appeals affirmed on the standing issue and did not consider the constitutional issue. The Indiana Supreme Court reversed in part, finding that the taxpayers had standing under the public standing doctrine; however, they affirmed my decision that the dual-enrollment program was constitutional.

4. *Indiana Fireworks Distributors Ass'n v. Boatwright*, 764 N.E.2d 208 (Ind. 2002)

The Indiana State Fire Marshal brought a declaratory judgment action against various fireworks retailers and distributors seeking to clarify the meaning of a fireworks retailing statute that he was charged with enforcing. The Court of Appeals and the Indiana Supreme Court reversed my ruling that granted summary



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judgment in favor of the fire marshal, holding that state agency officials have no standing under the Indiana Uniform Declaratory Judgment Act to bring an action on behalf of a state agency.

5. *Commissioner, Dept. of Revenue v. Fort*, 760 N.E.2d 1103 (Ind. App. 2001)

This case involved the appeal of an administrative law judge's decision suspending indefinitely the Plaintiff's commercial driver's license ("CDL") because he had an unrepaired aneurysm. The Court of Appeals, in a 2-to-1 decision, reversed my ruling that the decision that the Plaintiff was not medically qualified to hold a CDL was not supported by substantial evidence.

6. *In re Paternity of A.M.C.*, 758 N.E.2d 536 (Ind. App. 2001)

The Plaintiff filed a petition to modify his child support obligation which was untimely under the applicable local rule. The Court of Appeals reversed my dismissal of the petition as untimely, holding that the local rule conflicted with the controlling state statute.

7. *Branham v. Celadon Trucking Services, Inc.*, 744 N.E.2d 514 (Ind. App. 2001)

In this case, an employee and his wife sued his employer and supervisor for invasion of privacy, libel, intentional infliction of emotional distress, negligent supervision, and loss of consortium after he was humiliated by a workplace prank. The Court of Appeals affirmed my ruling that the employee's claim was not barred by exclusivity provision of Indiana's Workers' Compensation Act. However, the court found that I improperly denied the Defendants' motion for summary judgment on the claims for defamation, intentional infliction of emotional distress, and invasion of privacy.

8. *Indianapolis Newspapers v. Indiana State Lottery Commission,* 739 N.E.2d 144 (Ind. App. 2000)

The Indianapolis Star newspaper requested from the Indiana Lottery Commission the revenue figures of individual lottery ticket retailers pursuant to the Access to Public Records Act (APRA). The Lottery Commission took the position that the information constituted trade secrets and denied the request. Pursuant to the applicable statute, the newspaper sought and obtained an advisory opinion that its request should be granted; this triggered the Lottery Commission's obligation to pay any additional attorney fees incurred by the newspaper to obtain compliance. An association of grocery and convenience stores and other lottery ticket retailers then filed suit against the Lottery Commission seeking declaratory and injunctive relief to prohibit the disclosure sought by the newspaper. The newspaper intervened and filed a cross-claim against the Lottery Commission for disclosure. The Lottery Commission filed a counterclaim for interpleader, seeking dismissal after depositing the requested information with the court. The newspaper moved



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01362 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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to dismiss the interpleader counterclaim; I denied the motion to dismiss and certified the case for appeal. The Court of Appeals affirmed all aspects of my ruling except one: it found that it was error to discharge the Lottery Commission from all liability, because in the event the newspaper ultimately prevailed, the Commission would be liable for the newspaper's attorney fees incurred between the date of the advisory opinion and the date the information was deposited with the court.

9. *City of Indianapolis v. Johnson*, 736 N.E.2d 295 (Ind. App. 2000)

In this case, the mother of a child who drowned in a pond in a city park brought a negligence action against the city. I denied the city's motion for summary judgment and certified the ruling for interlocutory appeal. The Court of Appeals affirmed my ruling that a genuine issue of material fact existed as to whether the city breached its duty to exercise reasonable care for the protection of the child, but reversed my ruling denying the city summary judgment on the mother's attractive nuisance theory.

10. *Insurance Commissioner v. Smith*, 714 N.E.2d 1285 (Ind. App. 1999)

Under Indiana law, a medical malpractice claimant may access the Patient's Compensation Fund when a "qualified healthcare provider" has agreed to settle its liability on the claim by paying its policy limits. In this case, a patient resolved his malpractice claim against his psychiatrist by entering into a settlement agreement with a corporation that the psychiatrist controlled rather than with the psychiatrist himself. The patient sought payment on the claim from the Patient's Compensation Fund and filed a motion for partial summary judgment on the issue of whether the psychiatrist, who was a "qualified healthcare provider," had agreed to settle the claim, or whether the settlement was only with the non-qualified corporation. The Court of Appeals held that a fact issue existed as to whether the patient had settled with the psychiatrist, and therefore reversed my ruling granting the patient's motion for partial summary judgment on that issue.

11. *Thacker v. Thacker*, 710 N.E.2d 942 (Ind. App. 1999)

In this case, the Court of Appeals affirmed in part and reversed in part my ruling regarding the modification of a child support award and the allocation of college expenses between mother and father, holding that a support award may not be modified retroactively and also may not be modified by agreement of the parties.

12. *National General Ins. Co. v. Riddell*, 705 N.E.2d 465 (Ind. App. 1998)

This case arose out of the arbitration of a claim between an automobile insurer and an insured in which the contract of insurance contained an escape clause that provided that an arbitration award was not binding as to the amount of damages if the amount exceeded the statutory minimum for bodily injury liability. The Court



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01363 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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of Appeals reversed my ruling that the escape clause was void as violative of public policy.

13. *Firstmark Standard Life Ins. Co. v. Goss*, 699 N.E.2d 689 (Ind. App. 1998)

In this case, an insured chose to use dividends to purchase additional paid-up life insurance based upon the insurer's miscalculation of the amount of additional insurance the accrued dividends would buy. When the insurer would pay only the corrected (lesser) amount, rather than the miscalculated amount, the insurer sued. The Court of Appeals affirmed the jury's verdict of contractual damages and my judgment on the evidence regarding punitive damages, but reversed the jury's award of compensatory damages, finding there was no evidence to support a finding of bad faith on the part of the insurer, and also reversed my award of compound, rather than simple, prejudgment interest.

14. *Johnson v. Steffen,* 685 N.E.2d 1117 (Ind. App. 1997)

This case involved a police officer who was injured when he was struck by a bicyclist participating in a triathlon. The officer brought a negligence action against the bicyclist and the sponsors and organizers of the triathlon. Serving as a commissioner on the Marion Circuit Court, I granted the Defendants' motion for summary judgment, finding that the Fireman's Rule barred the Plaintiff's claims. The Court of Appeals, in a 2-to-1 decision, reversed, finding that to the extent that the Fireman's Rule remained viable in Indiana, it was limited to cases involving premises liability; since none of the Defendants owned the street on which the accident occurred, premises liability was not at issue in this case.

15. *Buford v. Flori Roberts, Inc.*, 663 N.E.2d 1159 (Ind. App. 1996)

In this case, I, serving as judge pro tem, granted a motion to compel the Plaintiff's psychiatrist to produce her mental health records and denied the Plaintiff's motion to reconsider that order. The Court of Appeals reversed, holding that the applicable statute gave the Plaintiff the right to a hearing and required a showing of good cause before her records were disclosed.

16. *State ex rel. Jacobs v. Marion Circuit Court*, 644 N.E.2d 852 (Ind. 1994)

This case involved the interpretation of Indiana statutes relating to election recounts. When recount petitions were filed regarding three state legislative races, the Indiana Secretary of State declined to serve as the chair of the Recount Commission based upon his reading of a state statute, and another chair was appointed. A *quo warranto* proceeding was instituted asserting that the Secretary of State was the proper chairman. Acting as judge pro tem in the Marion Circuit Court, I issued an order in that proceeding that temporarily restrained the Recount Commission from further action and requiring the Secretary of State to remain as the chairman of the Commission pending further order of the court. A writ of



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01364 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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mandamus was then filed in the Indiana Supreme Court seeking to bar the Circuit Court from proceeding further with the *quo warranto* proceeding and requiring the dissolution of the restraining order. The Supreme Court held that the recount statutes required that any court action related to a recount be stayed until final determination of the Recount Commission was reached.

17. *Moss v. Frazer*, 614 N.E.2d 969 (Ind. App. 1993)

In this case, a mother filed a petition to modify her former husband's child support obligation and requested a contempt citation against him because he refused to pay one-half of their child's private school expenses. Acting as judge pro tem, I ordered the former husband to pay past and future private school expenses. The Court of Appeals reversed with regard to those expenses that were incurred prior to the filing of the petition to modify and affirmed with regard to those expenses that were incurred after the petition to modify was filed.

d. a list of and copies of any of your unpublished opinions that were reversed on appeal or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

Each of the cases listed in response to Question 15c were unpublished opinions that were reversed on appeal or were affirmed with significant criticism of my substantive or procedural rulings. I do not have copies of my state court opinions. To my knowledge, they are available only in the state court's archives and can be obtained only from the individual files for the cases in which they were entered and the archived case files of the Court of Appeals if they were reviewed on appeal.

e. a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored; and

As noted above, all but one of my decisions have been unpublished.

There was no mechanism for publishing opinions when I served on the state court bench. To my knowledge, those opinions are not retained in any electronic or searchable form, but rather are available only in the state court's archives and can be obtained only from the individual files for the cases in which they were entered Most of the decisions that I have written as a United States Magistrate Judge are stored in the individual case dockets on the court's electronic docketing system. In addition, some of them are accessible via the "Search Court Opinions" section of the court's public website and, as listed above, some of them are available on Westlaw® and/or LEXIS®. When I first took the federal bench, some of the cases that were assigned to me had not been transferred to the court's electronic docketing system; any decisions that I wrote in those cases are maintained in paper form in the files of the Clerk of the Court.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01365 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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f. citations to all cases in which you were a panel member in which you did not issue an opinion.

None.

16. **Recusal:** If you are or have been a judge, please provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest, or for any other apparent reason, or in which you recused yourself sua sponte. (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Please identify each such case, and for each provide the following information:

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

To the best of my recollection, I was not asked to recuse myself from any case while I served on the state court bench and I did not have occasion to recuse myself sua sponte from any case, with the exception that for a period of one year after my election I routinely recused myself from cases in which a lawyer from one of my previous law firms entered an appearance.

In my current position, the court utilizes an automatic recusal system pursuant to which a "conflicts list" for each judicial officer is kept by the Clerk of the Court. By virtue of this system, a judicial officer is not assigned to any case in which a person or entity on his or her conflicts list is involved. This process occurs without any involvement by or notification to the judicial officer. Other than such cases, since becoming a United States Magistrate Judge I have not been required to recuse myself from any case and no party has sought my recusal.

17. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01366 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Indianapolis Fire Department Civilian Merit Board, 1983-1989. I was appointed by the Honorable William Hudnut, Mayor of the City of Indianapolis.

Indiana State Forensic Science Commission, 1984-1990. I was appointed by the Honorable Robert Orr, Governor of the State of Inidana.

Indiana State Recount Commission, 1988-1990. I was appointed by Keith Luse, Indiana State Republican Chairman.

Board of Directors of the Marion County Justice Agency, 1996-2002. I served on this board as a result of my position as Presiding Judge of the Marion County Circuit Court.

I have never been an unsuccessful nominee for any appointed office. I have never been a candidate for or served in a non-judicial elective office.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have not held membership or office in any political party or election committee. Additionally, I have not held any position or played any role in any political campaign other than my own candidacy for judge of the Circuit Court. Prior to becoming a United States Magistrate Judge, I did at times perform minor volunteer roles in various campaigns at the request of a political organization or a particular candidate.

18. **Legal Career:** Please answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I have not served as a law clerk to a judge.

ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone, but was "self-employed" in various positions. Essentially I was in a shared space environment where I paid my share of the overhead, paid my own secretary and other staff, and retained all fees personally collected.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01367 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

11/2002 to Present
U.S. District Court for the Southern District of Indiana
Birch Bayh Federal Building and United States Courthouse
Indianapolis, Indiana 46204
Magistrate Judge

08/1993 to 11/2002
Marion County Circuit Court
200 East Washington Street, Room W-506
Indianapolis, Indiana 46204
Presiding Judge; 01/1997 to 11/2002 ;
Master Commissioner (part-time); 08/1983 to 01/1997

01/1989 to 01/1997
Johnson Smith Pence Densborn Wright & Heath
One Indiana Square, Suite 1800
Indianapolis, Indiana 46204
Attorney (Self-employed)

08/1979 to 01/1989
Lawrence Carter Gresk Leerkamp & Walsh
151 North Delaware Street, Suite 1100
Indianapolis, Indiana 46204
Attorney (Self-employed)

10/1974 to 08/1983
Marion County Superior Court, Criminal Division 4
200 East Washington Street, Room W-203
Indianapolis, Indiana 46204
Public Defender (This was a part-time position.)

08/1976 to 08/1979
Popcheff Lawrence & Page
5023 West 16th Street
Speedway, Indiana 46224
Attorney (Self-employed)

10/1973 to 8/1976
Poore Popcheff Wurster Sullivan & Burke
136 East Market Street, Suite 1101
Indianapolis, Indiana 46204
Attorney (Self-employed)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01368 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

Prior to my full-time service as a judge, I practiced law as a self-employed attorney with a number of firms. From January 1989 to January 1997 I was affiliated with Johnson Smith Pence Densborn Wright & Heath, a mid-sized (approximately seventy lawyers) Indianapolis law firm. Due to my duties as Marion County Circuit Court Master Commissioner, my law practice was part-time during this time period. Other firms with which I was affiliated during my law practice were Lawrence Carter Gresk Leerkamp & Walsh, August 1979 to January 1989; Popcheff Lawrence & Page, August 1976 to August 1979; and Poore Popcheff Wurster Sullivan & Burke, October 1973 to August 1976. I practiced in both the criminal and civil areas, predominately in state court; in civil matters I represented both plaintiffs and defendants. I also practiced family law.

In addition, from August 1974 to August 1983 I served as a Major Felony Public Defender. This was a part-time position for which I was paid a nominal salary. I had no support staff and donated my secretary's time for any necessary paperwork. I regularly represented indigents charged with felonies. My representation included pre-trial preparation, plea bargaining, jury and court trials, and an occasional appeal.

ii. your typical clients and the areas, if any, in which you have specialized.

My clients were primarily individuals. I practiced in both the criminal and civil areas, predominately in state court; in civil matters I represented both plaintiffs and defendants. I also practiced family law.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

i. Indicate the percentage of your practice in:
   1. federal courts: 5%
   2. state courts of record: 95%
   3. other courts:

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 50%
   2. criminal proceedings: 50%



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01369 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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d. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I tried as sole counsel close to 100 cases to verdict or judgment during my career as an attorney. I do not remember ever serving as "chief counsel" or "associate counsel."

i. What percentage of these trials were:
   1. jury: 80%
   2. non-jury: 20%

e. Describe your practice, if any, before the Supreme Court of the United States. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have never practiced before the Supreme Court of the United States.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *United States v. Yearwood*, N.D. Indiana (1975)

This was a federal jury trial before Judge Allen Sharp. Acting as sole counsel, I represented Shailer Judson Yearwood, who was charged with extortion. The charges alleged that Mr. Yearwood and an accomplice planned and executed a plot to extort large sums of money from a Lake County, Indiana bank by threatening to harm the bank's president. Despite numerous witnesses, including FBI agents and various experts, the jury acquitted Mr. Yearwood.

Opposing Counsel:
former Assistant United States Attorney Richard Hanning,
No longer practicing law.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01370 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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2. *State of Indiana v. Heywood*, Marion County Superior Court ; The appeal of this case to the Indiana Supreme Court is reported at 470 N.E.2d 63 (Ind. 1984);

In this case, I represented James H. Heywood, who was charged by information with class A felony robbery, class B felony confinement, and class A misdemeanor carrying a firearm without a license. I acted as sole counsel before Judge Webster L. Brewer. This case presented the issue of whether the insanity standard should be applied to the defense of involuntary intoxication. I do not recall who my opposing counsel was. Mr. Heywood was convicted. I did not represent Mr. Heywood on appeal.

3. *Richardson v. Clark*, Marion County Municipal Court, Cause No. M277-510; appeal reported at 444 N.E.2d 868 (Ind. App. 1983) (Judges Young, Miller and Conover).

Acting as sole counsel, I successfully represented Mr. and Mrs. Richardson at trial before Judge Max F. Page and on appeal. The case, which involved damage to the Richardsons' automobile, was originally filed in small claims court and was automatically transferred to Municipal Court when the defendant requested a jury trial. While the case did not involve a large amount of damages, it was significant in that it established that the jurisdictional limit on the amount of damages that applies in small claims court no longer applies once the case is transferred to Municipal Court at the defendant's request. My opposing counsel at trial and on appeal was Richard Crokin, who is now retired.

4. *Fultz v. Newkirk*, reported at 475 N.E.2d 706 (Ind. App. 1985) (Judges Robertson, Ratliff, and Neal).

John D. Fultz ran for mayor of Salem, Indiana, in 1983. The initial vote showed the Mr. Fultz won the election by five votes; both candidates sought a recount, and the Recount Commission found that the election was tied. After a hearing, the Washington Circuit Court determined that Mr. Fultz's opponent received more votes. I represented Mr. Fultz in his unsuccessful appeal from the trial court's ruling, in which the essential issue was the validity of certain absentee ballots. Prior to this case, two lines of cases had been developing in Indiana regarding the validity of absentee ballots; the decision in this case essentially established which of the two would prevail.

Opposing counsel:
Andrew Wright
P.O. Box 342
Salem, IN 47167
812-883-6795



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01371 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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5. *State of Indiana v. Arthur*, Marion County Criminal Court, Cause No. CR75-391D (case filed in 1975); Special Judge Richard Kammen

In this case, I represented Bobbie Lee Arthur, who was charged with first degree murder. Mr. Arthur was a rather notorious character in Indianapolis with a very lengthy criminal record. After a lengthy deliberation, the jury returned a verdict convicting Mr. Arthur of the lesser-included offense of manslaughter.

Co-counsel:
Arnold Baratz
Marion County Public Defender Agency
151 N. Delaware St., Suite 200
Indianapolis, IN 46204
(317) 327-5755

Opposing counsel:
Patricia Riley
Indiana Court of Appeals
411 State House
Indianapolis, IN 46204
(317) 232-6902

6. *Herring v. Hauk,* Marion County Superior Court Civil Division, Cause No. S687-1027 (*circa* 1990).

I represented Robin Hauk Godwin in this case that is significant for how highly contentious it became. Mr. Hauk was the custodial parent of the parties' seven-year-old child, and Ms. Godwin sought custody. Both sides retained experts and introduced many witnesses in the custody modification hearing. At the close of the evidence and after final argument, Judge John Hanley modified the prior court order and awarded custody to Ms. Godwin.

Opposing counsel:
Michael Coppes
Emswiller Williams Noland
8500 Keystone Crossing #500
Indianapolis, IN 46240
(317) 257-8787

7. *United States of America v. Marvin Kinsler,* United States District Court for the Southern District of Indiana, Cause Number IP 93-20-CR-02; Honorable S. Hugh Dillin (now deceased).

In 1993, I was retained as private counsel for Mr. Kinsler in this drug conspiracy case which was filed by indictment. It was alleged that Mr. Kinsler had for several



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01372 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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years purchased for resale fifty to sixty pounds of marijuana twice per month from a known wholesaler. The sentencing guidelines in place at the time provided for a maximum sentence of more than fifty years. After protracted negotiations, Mr. Kinsler plead guilty to one count of the four count indictment. He was sentenced to 60 months incarceration, which was the minimum allowed per the guidelines.

Opposing Counsel:
Assistant U.S. Attorney Donna R. Eide, retired.

8. *State of Indiana v. Gilberto Reyna*, Marion County Superior Court, Cause Number 49G049312CF164695; Judge Patricia Gifford

I was appointed as public defender to represent Mr. Reyna in this case. Mr. Reyna had a very intense and extensive criminal history and was charged in this case with attempted murder, rape, criminal deviate conduct, criminal confinement and carrying a handgun without a license. The factual allegations against Mr. Reyna were remarkably vicious, involving shooting one victim and kidnapping and sexually assaulting another at gunpoint. Mr. Reyna's co-defendant, who was a minor participant in the acts alleged, testified against him at trial.

Opposing counsel:
Carol Orbison (now a Judge)
Marion County Superior Court
200 E. Washington Street, Room T-401
Indianapolis, IN 46204
(317) 327-8673

9. *Smith v. State of Indiana*, reported at 419 N.E.2d 743 (Ind. 1981) (Justices DeBruler, Givan, Hunter, Prentice and Pivarnik).

In my capacity as a public defender, I represented John A. Smith in his unsuccessful appeal of his murder conviction.

Opposing counsel:
Stephen J. Cuthbert
7805 Paddington Lane W.
Indianapolis, IN 46268
(317) 334-0517

10. *Spinks v. State*, reported at 437 N.E.2d 963 (Ind. 1982) (Justices Pivarnik, Givan, DeBruler, Prentice, and Hunter).



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In my capacity as a public defender, I represented Bessie Spinks in her unsuccessful appeal of her conviction of voluntary manslaughter.

Opposing counsel:
Joseph N. Stevenson
5252 Decatur Blvd.
Indianapolis, IN 46241
(317) 615-7382

20. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

In 1980, I was appointed as the first Executive Director of the Indiana Merit Selection Commission on Federal Judicial Appointments by United States Senator Richard G. Lugar. In this position, I developed an application and selection process for the nomination of Federal District Court Judges, United States Attorneys and United States Federal Marshals for the Northern and Southern Districts of Indiana. Once the process was developed, I was responsible for its implementation, including coordinating the screening of applicants and organizing meetings of the Commission as needed. I served in this capacity until 1986.

My record reflects a longstanding history of commitment and involvement in continuing legal education for both the bench and the bar. I have actively participated in seminars for lawyers and judges and became the Indianapolis Bar Association's first Commissioner for Continuing Legal Education in 2002. In 1998 I was instrumental in preparing the first instruction manual which is still in use for presenters at seminars sponsored by the Bar Association.

At the time I took office as Presiding Judge of the Marion County Circuit Court, the court had one of the largest caseloads in the state as determined by the weighted caseload study prepared by the Indiana Supreme Court. This same study determined that with the volume of cases flowing through the court, it would take an additional 2.77 judicial officers to adequately service the pending caseload. When I took office, there were 8,400 cases pending; within twenty months of my leadership there were 6,850 cases pending, a reduction of almost 20%. This was accomplished with no additional staff or supplemental judicial officers and within budget; in fact, approximately 8% of my annual budget allocation was returned to the county general fund as unused in each year of my term.

During my tenure on the state court bench, I became aware of a great need for a more efficient and focused way to address the paternity and child support collections issues of



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welfare recipients to ensure that their children were receiving the support to which they were entitled. In response to this need, I spearheaded the creation of the Marion County Paternity Court in 2000, which I believe was the first, or at least one of the first, courts in the nation solely dedicated to establishing paternity and the collection of child support for welfare recipients. By 2004, the Paternity Court had accounted for approximately eighty million dollars in child support collections benefiting 59,875 single heads of households and 8,332 welfare families.

One of the most significant aspects of my work as a United States Magistrate Judge–facilitating the settlement of cases–is not reflected in my written decisions, but nonetheless contributes greatly to the efficient administration of justice by the court. This work is not limited to the many formal settlement conferences that I conduct each month. Rather, it is my practice to encourage the parties to be mindful of the possibility of settlement beginning at the initial pretrial conference and continuing during regular status conferences, and also to monitor the deadlines and dispositive rulings in cases so that I can make telephone calls to counsel at various times during the litigation where the case might be particularly amenable to settlement.

21. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, please provide four (4) copies to the committee.

I have not taught any courses at any educational institution. However, as indicated in various other responses above, throughout my judicial career I have been actively involved in the continuing legal education of Indiana attorneys and judges.

22. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I currently maintain a Thrift Savings Plan Account (TSP) with the Administrative Office of the U.S. Courts. Also, I have a vested pension as a result of my service as a state court judge. I have no other expectation of future income or benefits.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I do not.

24. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all



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salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached Financial Disclosure Report.

25. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

26. **Potential Conflicts of Interest**:

a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

Other than those entities in which I have invested that would appear on my "conflicts list" as explained in my response to Question 16 above, the only other potential conflicts-of-interest that I would foresee if I am confirmed as a District Judge would arise out of my role as a Magistrate Judge in a case that was then assigned to me as a District Judge. In some cases, while attempting to facilitate a settlement, I as a Magistrate Judge become privy to information (e.g. counsel's frank evaluation of the strengths and weaknesses of his or her client's case) that a party would not feel comfortable disclosing to the judge who will be trying the case, especially if the trial were to the court rather than to a jury. I would not expect this situation to exist in more than a few cases, and I would resolve any such conflict by recusing myself sua sponte.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I believe that the cases in which I have been working closely with counsel to facilitate settlement would be readily apparent to me. Therefore, no procedure other than my own review of the list of cases that were assigned to me as a District Judge would be necessary.

In order to identify any other cases in which a potential conflict of interest might arise, if I am confirmed as a District Judge I would utilize the Southern District of Indiana's automatic recusal system and maintain a current "conflicts list" with the Clerk of the Court. I would also review the Corporate and Business Entity Disclosure Statement required by the Southern District's Local Rule 7.2 in each case assigned to me and, guided by the applicable provisions of the Code of Conduct for United States Judges, the Judicial Conference Committee on Codes of Conduct, and the American Bar Association Code of Judicial Conduct, as well



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as 28 U.S.C. § 144 and § 455, would make a case-by-case determination of whether any ground for recusal exists.

27. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Prior to my election to the bench, I was active on the Indianapolis Bar Association's pro bono panel, devoting approximately thirty 30 hours per year of my time. In the early 1970's, I was part of the Indianapolis Bar Association's Pro Bono Task force, which established a mechanism for indigent litigants to secure representation in civil actions. Also, I served as a major felony public defender for nine years. While I received nominal compensation for this part-time position, I carried a large caseload and had no support staff. I donated my secretary's time for clerical work and did all pre-trial investigation and witness interviews myself.

As a full time judicial officer for the last eleven years I have been precluded from practicing law. Because of this prohibition I have had to channel my efforts in other directions. I have several times been a guest on WTLC, an Indianapolis radio station that is primarily targeted to an African-American audience, discussing topics such as minority representation on jury panels and the impact minorities could potentially have on the selection of state court judges. I have also been on panel discussions on WTLC with Rozelle Boyd, a prominent African-American businessman in Indianapolis and at the time the minority leader of the City-County Council. We were available to answer questions from the listening audience on topics chosen by the host.

I have also been a guest on a radio show hosted by Dr. Esperanza Zendejas, the former superintendent of Indianapolis Public Schools, on WSYW, an Indianapolis radio station that is primarily targeted to an Hispanic audience. I appeared with Dr. Zendejas answering questions from the listening audience regarding the impact of criminal convictions on naturalization status. I also appeared with her to answer call-in questions from listeners regarding issues relating to access to our American courts.

In 2000 and during my tenure as Circuit Court Judge as described in my response to Question 20 above, I initiated and was responsible for the creation of a court singularly dedicated to paternity actions. I include this among my pro bono work because I spent a great deal of my time and effort to make the Paternity Court a reality, and as a result the court continues to serve disadvantaged families in Marion County today.

28. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01377 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Please do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

On May 18, 2007, and again on November 24, 2007, I interviewed with United States Senator Richard G. Lugar regarding my interest in being considered for a potential vacancy on the United States District Court for the Southern District of Indiana. Since that time, I have had periodic contact with members of Senator Lugar's staff. I did not go through a selection commission process. On October 5, 2007, I interviewed with staff from the White House Counsel's Office and from the U.S. Department of Justice. After being notified that I was being considered for nomination to the federal judiciary, I was contacted by a representative of the Department of Justice regarding nomination paperwork. I have had periodic conversations with the Department of Justice regarding that paperwork and the nomination process. My nomination was submitted to the United States Senate on February 14, 2008.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

No.



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Rev. 1/2007

# FINANCIAL DISCLOSURE REPORT

F NOMINATION REPORT

*Report Required by the Ethics in Government Act of 1978, (5 U.S.C. app. §§101-111)*

| 1. Person Reporting *(Last name, first, middle initial)* | 2. Court or Organization | 3. Date of Report |
|---|---|---|
| Lawrence, William T. | Southern District of Indiana | February 15, 2008 |

| 4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)* | 5a. Report Type (check appropriate type) | 6. Reporting Period |
|---|---|---|
| District Judge - - Nominee | X Nomination, Date 2/14/08<br>___ Initial ___ Annual ___ Final<br>5b. ___ Amended Report | 1/1/2007 to 1/31/2008 |

| 7. 277 Birch Bayh Federal Building<br>46 E. Ohio Street<br>Indianapolis, Indiana 46204 | 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.<br>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 |
|---|---|---|
| X | **NONE** (No reportable positions.) | |
| 1 | | |
| 2 | | |
| 3 | | |

## II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

| | DATE | PARTIES AND TERMS |
|---|---|---|
| | **NONE** (No reportable agreements.) | |
| 1 | 2002 | Indiana Judicial Retirement - Pension Upon Retirement |
| 2 | | |

## III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

**A. Filer's Non-Investment Income**

| | DATE | SOURCE AND TYPE | INCOME |
|---|---|---|---|
| X | **NONE** (No reportable non-investment income.) | | |
| 1 | | | $ |
| 2 | | | $ |
| 3 | | | $ |

**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 | 2007-8 | Marion County Superior Court #21 (Bailiff), Salary |
| 2 | 2007-8 | Chico's Women's Clothing Store (Sales Clerk), Salary |

**FINANCIAL DISCLOSURE REPORT**

| Name of Person Reporting | Date of Report |
|---|---|
| Lawrence, William T. | February 15, 2008 |

**IV. REIMBURSEMENTS** -- transportation, lodging, food, entertainment.
*(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)*

| | SOURCE | DESCRIPTION |
|---|---|---|
| ☐ | **NONE** (No such reportable reimbursements.) | |
| 1 | Exempt | |
| 2 | | |
| 3 | | |
| 4 | | |
| 5 | | |
| 6 | | |
| 7 | | |

**V. GIFTS.** *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

| | SOURCE | DESCRIPTION | VALUE |
|---|---|---|---|
| ☐ | **NONE** (No such reportable gifts.) | | |
| 1 | Exempt | | $ |
| 2 | | | $ |
| 3 | | | $ |
| 4 | | | $ |

**VI. LIABILITIES.** *(Includes those of spouse and dependent children See pp. 32-33 of Instructions.)*

| | CREDITOR | DESCRIPTION | VALUE CODE* |
|---|---|---|---|
| ☐ | **NONE** (No reportable liabilities.) | | |
| 1 | Bank of America | Visa Credit Card | K |
| 2 | | | |
| 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



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**FINANCIAL DISCLOSURE REPORT**

| Name of Person Reporting | Date of Report |
|---|---|
| Lawrence, William T. | February 15, 2008 |

**VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions** *(Includes those of spouse and dependent children. See pp. 34-60 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 Code1 (A-H) | (5) Identity of buyer/seller (if private transaction) |
|---|---|---|---|---|---|---|---|---|---|
| ☐ **NONE** (No reportable income, assets, or transactions.) | | | | | | | | | |
| 1 (2002 85,000) Rental Property, Naples FL | C | Rent | M | S | Exempt | | | | |
| 2 ML S&P Index Fund | | | | | | | | | |
| 3 IRA - Merrill Lynch | A | Dividend | K | T | | | | | |
| 4 Dreyfus Premier Alpha Group Fund | | | | | | | | | |
| 5 Merrill Lynch Cash Management | A | Interest | J | T | | | | | |
| 6 Eaton Vance Greater India Fund | A | Dividend | J | T | | | | | |
| 7 IN Members Federal Credit Union | A | Interest | J | T | | | | | |
| 8 JP Morgan Chase Bank | A | Interest | J | T | | | | | |
| 9 Fifth Third Bank Account | A | Interest | J | T | | | | | |
| 10 | | | | | | | | | |
| 11 | | | | | | | | | |
| 12 | | | | | | | | | |
| 13 | | | | | | | | | |
| 14 | | | | | | | | | |
| 15 | | | | | | | | | |
| 16 | | | | | | | | | |
| 17 | | | | | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1 Income/Gain Codes: (See Col. B1, D4) | A=$1,000 or less<br>F=$50,001- $100,000 | B=$1,001-$2,500<br>G=$100,001-$1,000,000 | C=$2,501-$5,000<br>H1=$1,000,001-$5,000,000 | D=$5,001-$15,000<br>H2=More than $5,000,000 | E=$15,001-$50,000 |
| 2 Value Codes: (See Col. C1, D3) | J=$15,000 or less<br>N=$250,001-$500,000<br>P3=$25,000,001-$50,000,000 | K=$15,001-$50,000<br>O=$500,001-$1,000,000 | L=$50,001- $100,000<br>P1=$1,000,001-$5,000,000<br>P4=More than $50,000,000 | M=$100,001-$250,000<br>P2=$5,000,001-$25,000,000 | |
| 3 Value Method Codes: (See Col. C2) | Q=Appraisal<br>U=Book value | R=Cost (real estate only)<br>V=Other | S=Assessment<br>W=Estimated | T=Cash/Market | |

| FINANCIAL DISCLOSURE REPORT | Name of Person Reporting | Date of Report |
|---|---|---|
| | Lawrence, William T. | February 15, 2008 |

**VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)**

Part III.A. - Non-Investment Income was received during the reporting period as salary for duties as a U.S. Magistrate Judge.

**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 Wm T Lawrence Date 2/15/08

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 | | 9 | 499 | Notes payable to banks-secured | | | |
| U.S. Government securities-add schedule | | | | Notes payable to banks-unsecured | | | |
| Listed securities-add schedule | | 21 | 369 | Notes payable to relatives | | | |
| Unlisted securities--add schedule | | | | Notes payable to others | | | |
| Accounts and notes receivable: | | | | Accounts and bills due | | 24 | 934 |
| Due from relatives and friends | | | | Unpaid income tax | | | |
| Due from others | | | | Other unpaid income and interest | | | |
| Doubtful | | | | Real estate mortgages payable-add schedule | | 293 | 068 |
| Real estate owned-add schedule | | 660 | 000 | Chattel mortgages and other liens payable | | | |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 35 | 000 | | | | |
| Cash value-life insurance | | | | | | | |
| Other assets itemize: | | | | | | | |
| TSP Account | | 105 | 308 | | | | |
| | | | | | | | |
| | | | | Total liabilities | | 318 | 002 |
| | | | | Net Worth | | 513 | 174 |
| Total Assets | | 831 | 176 | Total liabilities and net worth | | 831 | 176 |
| 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 | | | | | | | |



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## FINANCIAL STATEMENT

NET WORTH SCHEDULES

| | |
|---|---|
| Listed Securities | |
| Eaton Vance Greater India Fund | 1,752 |
| Dreyfus Premier Alpha Fund | 19,617 |
| Total Listed Securities | $ 21,369 |
| | |
| Real Estate Owned | |
| Personal residence 1 (Primary residence) | $ 395,000 |
| Rental Property | 265,000 |
| Total Real Estate Owned | 660,000 |
| | |
| Real Estate Mortgages Payable | |
| Personal residence | $ 293,068 |



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AFFIDAVIT

I, William T. Lawrence, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

2/15/08
(DATE)

William T Lawrence
(NAME)

Becky A. Sture
(NOTARY) BECKY A. STURE
Notary Public
Hamilton Co., IN
My Commission expires
August 17, 2008



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Judge Snow.

**STATEMENT OF G. MURRAY SNOW, NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA**

Judge SNOW. Mr. Chair, I, too, appreciate the Committee and you taking the time to consider my nomination. I'm thankful to the President for that nomination, and also to Senator Kyl and Senator McCain, especially under the circumstances of his health, appearing and presenting me today.

Although I have a wife and children of whom I am very proud, they're unable to be here today. I do have my brother-in-law with me, Keith Teel. I'm glad to have him here, and some friends from Phoenix, Anna Duran-Krauss and Tim Eckstein.

Senator CARDIN. Well, we welcome you and we welcome your families and friends. Again, we understand that there is a tremendous sacrifice in serving in the public sector and the families have a huge part of that, and we thank you for the commitment that all of you have made.

I just want to start off with a general question to each one of you. If you would comment briefly on your commitment to pro bono access to the legal system and your philosophy as it relates to those that otherwise could not afford a lawyer or a legal system as to what we as attorneys and the courts have responsibility to provide equal justice to our courts?

[The biographical information follows:]

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

1. **Name**: Full name (include any former names used).

   Grant Murray Snow

2. **Position**: State the position for which you have been nominated.

   United States District Judge for the District of Arizona

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Office: Arizona Court of Appeals; 1501 W. Washington, Room 303; Phoenix, AZ 85007

   Residence: Tempe, AZ

4. **Birthplace**: State year and place of birth.

   1959; Boulder City, NV

5. **Marital Status**: (include name of spouse, and names of spouse pre-marriage, if different). List spouse's occupation, employer's name and business address(es). Please, also indicate the number of dependent children.

   I am married to Charmaine Marie (Cheri) Snow (nee Charmaine Marie (Cheri) Smock). She is a homemaker and occasional substitute school teacher for Tempe Union High School District # 213; 500 W. Guadalupe Road; Tempe, AZ. 85283-3599.
   We have three dependent children.

6. **Education**: List in reverse chronological order, listing most recent first, each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   J. Reuben Clark Law School, Brigham Young University; September 1984 to April 1987; Juris Doctor magna cum laude awarded April 1987.

   Brigham Young University; January 1981 to April 1984; Bachelor of Arts magna cum laude awarded April 1984.



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7. **Employment Record**: List in reverse chronological order, listing most recent first, all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

August 2002 – present
Arizona Court of Appeals, Division One
1501 W. Washington, Room 303, Phoenix, AZ 85007
Judge

May 1995 – August 2002
Osborn Maledon, P.A.
2929 N. Central Avenue, Suite 2100, Phoenix, AZ 85012-2794
Member

September 1988 – May 1995
Meyer, Hendricks, Victor, Osborn & Maledon, P.A.
2929 N. Central Avenue, Suite 2100, Phoenix, AZ 85012-2794
Member (Jan. 1994-May 1995); Associate (Sept. 1988-Jan. 1994)

September 1987 – September 1988
Law Clerk to the Honorable Stephen H. Anderson, United States Court of Appeals for the Tenth Circuit, Federal Courthouse, 125 S. State Street, Salt Lake City, UT 84138

Meyer, Hendricks, Victor, Osborn & Maledon, P.A.
2929 N. Central Avenue, Suite 2100, Phoenix, AZ 85012-2794
Summer Law Clerk (May-August 1987; May-August 1986)

Property Tutor for Professor James H. Backman, J. Reuben Clark Law School, Brigham Young University, Provo, UT 84602 (tutored students on fundamental principles of property law) (Sept.1985-April 1986; Sept. 1986-April 1987)

Research Assistant for Dean Bruce C. Hafen, J. Reuben Clark Law School, Brigham Young University, Provo, UT 84602 (Sept.1986-April 1987)

Lionel, Sawyer & Collins, 300 S. Fourth Street, Las Vegas, NV 89101; Summer Law Clerk (May-August 1985)

8. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received.

I have not served in the military.



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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.

Presidential Scholarship, 1981-83
Harry S. Truman Scholar for Nevada, 1982
Karl G. Maeser Scholar, 1983-84
Pi Sigma Alpha Writing Award, 1984
Phi Kappa Phi
AmJur Awards for Property, Criminal Law, Evidence, Constitutional Law I and II, and Public Lands
Brigham Young University Law Review, 1985-87
Editor-in-Chief, Brigham Young University Law Review, 1986-87
Special Faculty Merit Award, 1987
Order of the Coif
Founding Fathers Freedom Award
Maricopa County Bar Association's Volunteer Lawyer of the Month, April 1991
Halo Award, presented by the Arizona Association of Providers for People With Disabilities, 2000
Citation for Service on the Arizona State Bar Committee on The Rules of Professional Conduct, 1998-2004

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.

Arizona State Bar Association, 1987-present
Arizona State Bar Committee On The Rules of Professional Conduct, 1998-2004
Arizona State Bar Ethical Rules Review Group, 2000-2002
Mesa [Arizona] Judicial Advisory Board Member, 2003-present
Judicial College of Arizona
-Board Member, 2003-2004;
-Dean, 2005-present
Committee on Judicial Education and Training ("COJET")
-Board Member, 2005-present
-Executive Committee, 2005-present
Task Force on Model Code of Judicial Conduct, 2007-present
-Chair, March 2007-present

11. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Arizona State Bar, 1987-present



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01389 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of Arizona, 1987
United States Court of Appeals for the Tenth Circuit, 1987
United States District Court for the District of Arizona, 1988
United States Court of Appeals for the Ninth Circuit, 1989

12. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 or 11 to which you belong, or to which you have belonged, or in which you have significantly participated, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Maricopa County Bar Association, 1987-2002
J. Reuben Clark Law Society, 1990-present
Arizona Association of Health Care Lawyers, 1991-2002
American Judicature Society, 1991-93
The Horace Rumpole Inn of Court, 2002-2007

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Please indicate whether any of these organizations listed in response to 12a above currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

No.

13. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Please supply four (4) copies of all published material to the Committee.

Note, *County Sanitation District No. 2 v. Los Angeles County Employees Ass'n: A Study in Judicial Legislation*, 1986 BYU L. Rev. 197 (1986)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01390 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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b. Please supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, please give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

Petition for Modification to Rule 42, Rules of the Supreme Court of Arizona
State Bar Ethics Opinion 2004-01
Informal Ethics Opinion No. 2049

c. Please supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

At the request of the Arizona Judicial Council I have testified in successive years (2004-05) before Arizona legislative committees that were considering a concurrent resolution referring to voters the elimination of the provision of the Arizona Constitution granting the Arizona Supreme Court the power to issue procedural rules for judicial proceedings. My testimony discussed the concurrent power of the legislature to create court procedural rules and contrasted the system proposed by the resolution with the process by which rules are normally promulgated for the federal courts.

At some time in approximately 1998 or 1999, while still in private practice, I testified before the Arizona Senate concerning the incompatibility with federal housing law of proposed legislation regulating group homes for the disabled. I did so on behalf of the Arizona Association of Providers for People With Disabilities.

d. Please supply four (4) copies, transcripts or tape recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Please include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke.

"Who Defines What It Means to be a Citizen of the United States Under the Fourteenth Amendment," November 29, 2007, presented to court staff, Arizona State Courts Building, 1501 W. Washington, Phoenix, Arizona 85007



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01391 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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"Priorities For Practice" July 26, 2007, July 13, 2006, presentation to Maricopa County judicial externs, Maricopa County Superior Court, 101 W. Jefferson, Phoenix, Arizona 85003

Welcome and Introduction, Plenary Session, Arizona Judicial Conference, June 20, 2007. Carefree, Arizona

"The Bill of Rights and the Civil War Amendments," June 14, 2007, Yavapai Community College Prescott, Arizona

New Judge Orientation, "Contracts," January 9, 2007, Judicial Education Center Phoenix, Arizona

Welcome and Introduction, Plenary Session, Arizona Judicial Conference, June 21, 2006, Ventana Canyon Resort, Tucson, Arizona

New Judges Orientation: "So You Want to Be A Millionaire?" April 26, 2006, Judicial Education Center, Phoenix, Arizona

"Is It Harassment?" October 19, 2005, Arizona Court of Appeals Brown Bag Session for state court employees on recognizing and preventing harassment, Arizona State Courts Building

"Arizona Supreme Court Review," April 8, 2005, participation on a panel at a Goldwater Institute Presentation discussing the Arizona Supreme Court's opinion in *Bennett v. Napolitano*, 206 Ariz. 520, 81 P.3d 311 (2003), Goldwater Institute, 500 E. Coronado Road, Phoenix, Arizona 85004

"The New Ethics Rules Say What?" February 8, 2005, State Bar of Arizona Continuing Legal Education

"Working With the Arizona Court of Appeals," November 2004, State Bar of Arizona, Continuing Legal Education

"Avoiding Short Life & Violent Death," December 19, 2003, Arizona Court of Appeals Brown Bag Presentation on the theory of the extended republic, Arizona State Courts Building

"The New Ethics Rules A View From the Bench," November 20, 2003, State Bar of Arizona, Continuing Legal Education

"Remarks at Investiture," August 16, 2002, Arizona State Courts Building, 1501 W. Washington, Phoenix, Arizona 85007

"Ethics and Money," February 21, 2002, State Bar of Arizona Continuing Legal Education



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01392 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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e. Please list all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

None

14. **Judicial Office**: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

In 2002, I was appointed Judge, Arizona State Court of Appeals, Division One by Governor Jane D. Hull. I was retained in office in the 2004 general election. My current term ends on January 2, 2011.

Judges are appointed by the Governor from persons selected by the Commission on Appellate Court Appointments after a merit evaluation. After being appointed, judges periodically stand for retention in an unopposed general election.

The Arizona Court of Appeals has jurisdiction over all civil, juvenile and criminal appeals with the exception of cases in which a death sentence has been imposed. The Court of Appeals also hears appeals from the decisions of worker's compensation and other administrative agency tribunals.

15. **Citations**: If you are or have been a judge, please provide:

a. citations for all opinions you have written (including concurrences and dissents);

*Tiffany O.*, ___ P.3d ___, 2007 WL 4616633, Ariz. App. Div. 1, December 24, 2007 (No. 1 CA JV 06-0094)

*Gravel Resources of Arizona v. Hills*, ___ Ariz. ___, 170 P.3d 282 (App. 2007)

*Callen v. Rogers*, 216 Ariz. 499, 168 P.3d 907 (App. 2007)

*State ex rel. Goddard v. Western Union*, 216 Ariz 361, 166 P.3d 916 (App. 2007)

*State v. Connor*, 215 Ariz. 553, 161 P.3d 596 (App. 2007)

*Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 160 P.3d 1216 (App. 2007)

*Jenkins v. Jenkins*, 215 Ariz. 352, 156 P.3d 1140 (App. 2007)

*State v. Slayton*, 214 Ariz. 511, 154 P.3d 1057 (App. 2007)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01393 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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*Marina P. v. Arizona Dep't of Econ. Sec.*, 214 Ariz. 326, 152 P.3d 1209 (App. 2007)

*Lennar Corp. v. Auto Owners Ins. Co.*, 214 Ariz. 255, 151 P.3d 538 (App. 2007)

*State v. Olmstead*, 213 Ariz. 534, 145 P.3d 631 (App. 2006)

*Kay S. v. Mark S.*, 213 Ariz. 373, 142 P.3d 249 (App. 2006)

*Schwager v. VHS Acquisition Corp.*, 213 Ariz. 414, 142 P.3d 1227 (App. 2006)

*Brunet v. Murphy*, 212 Ariz. 534, 135 P.3d 714 (Ariz. 2006)

*Evans Withycombe, Inc.* v. *Western Innovations, Inc.*, 215 Ariz. 237, 159 P.3d 547 (App. 2006)

*Progressive Classic Ins. Co. v. Blaud*, 212 Ariz 359, 132 P.3d 298 (App. 2006)

*State ex rel. Thomas v. Schneider*, 212 Ariz. 292, 130 P.3d 991 (App. 2006)

*State v. Freitag*, 212 Ariz. 269, 130 P.3d 544 (App. 2006)

*Williams v. Miles*, 212 Ariz. 155, 128 P.3d 778 (App. 2006)

*Hanson Aggregates Arizona, Inc. v. Rissling Constr. Group, Inc.*, 212 Ariz. 92, 127 P.3d 910 (App. 2006)

*State v. Gaynor-Fonte*, 211 Ariz. 516, 123 P.3d 1153 (App. 2005)

*Martens v. Indus. Comm'n of Arizona*, 211 Ariz. 319, 121 P.3d 186 (App. 2005)

*Scheehle v. Justices of the Supreme Court of the State of Arizona*, 211 Ariz. 282, 120 P.3d 1092 (2005)

*State ex rel. Thomas v. Blakey*, 211 Ariz. 124, 118 P.3d 639 (App. 2005)

*Astorga v. Wing*, 211 Ariz. 139, 118 P.3d 1103 (App. 2005)

*Grand Canyon Trust v. Arizona Corp. Comm'n.*, 210 Ariz. 30, 107 P.3d 356 (App. 2005)

*State v. Miranda-Cabrera*, 209 Ariz. 220, 99 P.3d 35 (App. 2004)

*Arizona-American Water Co. v. Arizona Corp. Comm'n*, 209 Ariz. 189, 98 P.3d 624 (App. 2004)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01394 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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*Long v. City of Glendale*, 208 Ariz. 319, 93 P.3d 519 (App. 2004)

*Case Corp. v. Gehrke*, 208 Ariz. 140, 91 P.3d 362 (App. 2004)

*John C. v. Sargeant ex rel. County of Maricopa*, 208 Ariz. 44, 90 P.3d 781 (App. 2004)

*State v. Nieves*, 207 Ariz. 438, 87 P.3d 851 (App. 2004)

*In Re Ubaldo B.*, 206 Ariz. 543, 81 P.3d 334 (App. 2003)

*Downs v. Scheffler*, 206 Ariz. 496, 80 P.3d 775 (App. 2003)

*Daniel Y. v. Arizona Dep't of Econ. Sec.*, 206 Ariz. 257, 77 P.3d 55 (App. 2003)

*Univ. Physicians, Inc. v. Pima County*, 206 Ariz. 63, 75 P.3d 153 (App. 2003)

*State v. Akins*, 206 Ariz. 113, 75 P.3d 718 (App. 2003)

*Jachimek v. State*, 205 Ariz. 632, 74 P.3d 944 (App. 2003)

*Johnson v. Pointe Cmty Ass'n, Inc.*, 205 Ariz. 485, 73 P.3d 616 (App. 2003)

*State ex rel. Romley v. Gaines*, 205 Ariz. 138, 67 P.3d 734 (App. 2003)

*Inmon v. Crane Rental Servs., Inc.*, 205 Ariz. 130, 67 P.3d 726 (App. 2003)

*Montero v. Foreman*, 204 Ariz. 378, 64 P.3d 206 (App. 2003)

*State v. Bronson*, 204 Ariz. 321, 63 P.3d 1058 (App. 2003)

*Scruggs v. State Farm Mut. Auto. Ins. Co.*, 204 Ariz. 244, 62 P.3d 989 (App. 2003)

*U-Stor Bell, L.L.C. v. Maricopa County*, 204 Ariz. 79, 59 P.3d 843 (App. 2002)

*State v. Darnell*, 209 Ariz. 182, 98 P.3d 617 (App. 2004) (specially concurring)

I have authored 369 memorandum decisions that have not been published.

b. a list of cases in which certiorari has been requested or granted;

*Clark v. Arizona*, 126 S.Ct. 2709 (2006)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01395 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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c. a short summary of and citations for all appellate opinions or orders where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

*State v. Rivera*, 207 Ariz. 383, 86 P.3d 963 (App. 2004) – Vacated

In this case plea agreements between the State and the Defendant's two accomplices required the accomplices to testify against the Defendant at trial. The agreement further required that the accomplices' testimony be consistent with the version of events the accomplices had provided to the State in earlier "free talks" between the State and the accomplices. The State acknowledged that if the trial testimony of the accomplices varied from the account given in their free talks their plea agreements would be canceled. The accomplices testified that this was also their understanding. Under such circumstances our panel determined that the accomplices' testimony was obtained pursuant to an unenforceable "consistency" agreement as defined by Arizona law. *State v. Fisher,* 176 Ariz. 69, 859 P.2d 179 (1993). In reversing, the Supreme Court noted that despite the understanding of both the state and the accomplices that the accomplices were required to testify consistently with their "free talk," the plea agreements also specified that the plea was in exchange for truthful testimony. Thus, the agreement could not be used to require an accomplice to give pre-scripted testimony that was untrue. Because this was the concern behind the invalidity of "consistency agreements," the plea agreements at issue in this case did not constitute consistency agreements and no new trial would be necessary

*Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 210 Ariz. 375, 111 P.3d 417 (App. 2005) – Vacated

In this case our panel reversed the summary judgment granted by the trial court to an auto dealer and held that an extended manufacturer's service agreement sold by the auto dealer to the purchaser at the time of the car sale constituted a warranty under the Magnusson-Moss Warranty Act and thus could not be limited pursuant to state law. On review the Supreme Court agreed that summary judgment was improper but vacated our opinion because it determined there were questions of fact as to whether the dealer was a party to the service contract, and, referring to law not argued by the parties at the Court of Appeals, held that because a separate amount was paid for the service contract it did not constitute a warranty under federal law.

d. a list of and copies of any of your unpublished opinions that were reversed on appeal or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

None



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01396 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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e. a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored;

I have issued 50 opinions (approximately 12%) and 369 memorandum decisions (approximately 88%). Memorandum decisions (unpublished) filed after July 2007 can be located on the Court of Appeals website: http://www.cofad1.state.az.us/. Memorandum decisions prior to that date are archived on microfiche. An unpublished decision filed prior to July 2007 may be obtained by a written request to the Clerk of the Court.

f. citations to all cases in which you were a panel member in which you did not issue an opinion.

*State v. Avila*, ___ Ariz. ___, 170 P.3d 706 (App. 2007)

*State v. Soria*, ___ Ariz. ___, 170 P.3d 710 (App. 2007)

*In re Estate of Stephenson*, ___ P.3d ___, 2007 WL 4166510, Ariz. App. Div. 1, November 27, 2007 (No. 1 CA CV-06-0785)

*In Re MH 2006-002044*, ___ Ariz. ___, 120 P.3d 280 (App. 2007)

*PF Chang's v. Indus. Comm'n of Arizona*, 216 Ariz. 344, 166 P.3d 135 (App. 2007)

*State v. Taylor*, 216 Ariz. 327, 166 P.3d 118 (App. 2007)

*Belliard v. Becker*, 216 Ariz. 356, 166 P.3d 911 (App. 2007)

*State v. Mabery Ranch, Co., L.L.C.*, ___ Ariz. ___, 165 P.3d 211 (App. 2007)

*State v. Almly*, 216 Ariz. 41, 162 P.3d 680 (App. 2007)

*State v. Salerno*, 216 Ariz. 22, 162 P.3d 661 (App. 2007)

*Crowell v. Jejna*, 215 Ariz. 534, 161 P.3d 577 (App. 2007)

*In re Andrew C.*, 215 Ariz. 366, 160 P.3d 687 (App. 2007)

*Vanessa H. v. Arizona Dep't of Econ. Sec.*, 215 Ariz. 252, 159 P.3d 562 (App. 2007)

*Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 159 P.3d 578 (App. 2007)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01397 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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*Girouard v. Skyline Steel, Inc.*, 215 Ariz. 126, 158 P.3d 255 (App. 2007)

*State v. Walker*, 215 Ariz. 91, 158 P.3d 220 (App. 2007)

*In re MH 2006-000490*, 214 Ariz. 485, 154 P.3d 387 (App. 2007)

*State v. Levens*, 214 Ariz. 339, 152 P.3d 1222 (App. 2007)

*Center Bay Gardens, L.L.C. v. City of Tempe City Council*, 214 Ariz. 353, 153 P.3d 374 (App. 2007)

*In re Jerry C.*, 214 Ariz. 270, 151 P.3d 553 (App. 2007)

*Kromko v. Arizona Bd. of Regents*, 213 Ariz. 607, 146 P.3d 1016 (App. 2006)

*State v. Parks*, 213 Ariz. 412, 142 P.3d 720 (App. 2006)

*In re MH 2005-001290*, 213 Ariz. 442, 142 P.3d 1255 (App. 2006)

*Phelps Dodge Corp. v. El Paso Corp.*, 213 Ariz. 400, 142 P.3d 708 (App. 2006)

*Austin Shea (Arizona) 7th Street and Van Buren, L.L.C. v. City of Phoenix*, 213 Ariz. 385, 142 P.3d 693 (App. 2006)

*Bolser Enters., Inc. v. Arizona Registrar of Contractors*, 213 Ariz. 110, 139 P.3d 1286 (App. 2006)

*Butch Randolph & Assocs., Inc. v. Int'l Fid. Ins. Co.*, 212 Ariz. 550, 136 P.3d 232 (App. 2006)

*Guerra v. Bejarano*, 212 Ariz. 442, 133 P.3d 752 (App. 2006)

*State v. King*, 212 Ariz. 372, 132 P.3d 311 (App. 2006)

*Slade v. Schneider*, 212 Ariz. 176, 129 P.3d 465 (App. 2006)

*State v. Pitre*, Not Reported in P.3d, 2006 WL 1686506, Ariz. App. Div. 1, February 07, 2006 (No. 1 CA-CR 03-0526)

*Vales v. Kings Hill Condominium Ass'n*, 211 Ariz. 561, 125 P.3d 381 (App. 2005)

*Haines v. Goldfield Prop. Owners Ass'n*, 211 Ariz. 406, 121 P.3d 1276 (App. 2005)

*Nat'l Broker Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, 119 P.3d 477 (App. 2005)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01398 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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*State ex rel. Wangberg v. Smith*, 211 Ariz. 101, 118 P.3d 49 (App. 2005)

*Kohler v. Kohler*, 211 Ariz. 106, 118 P.3d 621 (App. 2005)

*State v. Parks*, 211 Ariz. 19, 116 P.3d 631 (App. 2005)

*State v. Febles*, 210 Ariz. 589, 115 P.3d 629 (App. 2005)

*Baker v. Rolnick*, 210 Ariz. 321, 110 P.3d 1284 (App. 2005)

*In re Stephanie N.*, 210 Ariz. 317, 110 P.3d 1280 (App. 2005)

*Day ex rel. Arizona Dep't of Veterans' Servs. v. Arizona Health Care Cost Containment Sys. Admin.*, 210 Ariz. 207, 109 P.3d 102 (App. 2005)

*State v. Pitre*, 210 Ariz. 93, 107 P.3d 939 (App. 2005)

*State v. Cofield*, 210 Ariz. 84, 107 P.3d 930 (App. 2005)

*James H. v. Arizona Dep't of Econ. Sec.*, 210 Ariz. 1, 106 P.3d 327 (App. 2005)

*State v. Darnell*, 209 Ariz. 182, 98 P.3d 617 (App. 2004)

*Desilva v. Baker*, 208 Ariz. 597, 96 P.3d 1084 (App. 2004)

*Fuentes v. Fuentes*, 209 Ariz. 51, 97 P.3d 876 (App. 2004)

*State v. Reinhardt*, 208 Ariz. 271, 92 P.3d 901 (App. 2004)

*State v. Dewakuku*, 208 Ariz. 211, 92 P.3d 437 (App. 2004)

*Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, 90 P.3d 1236 (App. 2004)

*Morgan v. Carillon Invs., Inc.*, 207 Ariz. 547, 88 P.3d 1159 (App. 2004)

*Reinke v. Alliance Towing*, 207 Ariz. 542, 88 P.3d 1154 (App. 2004)

*O'Connor v. Hyatt ex rel. County of Maricopa*, 207 Ariz. 409, 87 P.3d 97 (App. 2004)

*Magee v. Magee*, 206 Ariz. 589, 81 P.3d 1048 (App. 2004)

*State v. Cowles*, 207 Ariz. 8, 82 P.3d 369 (App. 2004)

*State v. Ontiveros*, 206 Ariz. 539, 81 P.3d 330 (App. 2003)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01399 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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*Owen v. Blackhawk*, 206 Ariz. 418, 79 P.3d 667 (App. 2003)

*In re Stephen H.*, 206 Ariz. 290, 77 P.3d 465 (App. 2003)

*Mealey v. Arndt*, 206 Ariz. 218, 76 P.3d 892 (App. 2003)

*Raye v. Jones*, 206 Ariz. 189, 76 P.3d 863 (App. 2003)

*Cervantes v. Cates*, 206 Ariz. 178, 76 P.3d 449 (App. 2003)

*Arizona Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 75 P.3d 1088 (App. 2003)

*State v. Story*, 206 Ariz. 47, 75 P.3d 137 (App. 2003)

*In re B.S.*, 205 Ariz. 611, 74 P.3d 285 (App. 2003)

*Roosevelt Elementary Sch. Dist. No. 66 v. State*, 205 Ariz. 584, 74 P.3d 258 (App. 2003)

*Moulton v. Napolitano*, 205 Ariz. 506, 73 P.3d 637 (App. 2003)

*State v. Reyna*, 205 Ariz. 374, 71 P.3d 366 (App. 2003)

*Goy v. Jones*, 205 Ariz. 421, 72 P.3d 351 (App. 2003)

*State v. Gallagher*, 205 Ariz. 267, 69 P.3d 38 (App. 2003)

*Golonka v. Gen. Motors Corp.*, 204 Ariz. 575, 65 P.3d 956 (App. 2003)

*In re Miguel R.*, 204 Ariz. 328, 63 P.3d 1065 (App. 2003)

*Roman Catholic Diocese of Phoenix v. Superior Court ex rel. County of Maricopa*, 204 Ariz. 225, 62 P.3d 970 (App. 2003)

*Hanley v. Pearson*, 204 Ariz. 147, 61 P.3d 29 (App. 2003)

*Potter v. Arizona Dep't of Transp.*, 204 Ariz. 73, 59 P.3d 837 (App. 2002)

*Peeples, Inc. v. Arizona State Land Dep't ex rel. Anable*, 204 Ariz. 66, 59 P.3d 830 (App. 2002)

*Arizona Joint Venture v. Arizona Dep't of Revenue*, 205 Ariz. 50, 66 P.3d 771 (App. 2002)



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01400 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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*Demarce v. Willrich*, 203 Ariz. 502, 56 P.3d 76 (App. 2002)

*Energy Squared, Inc. v. Arizona Dep't of Revenue*, 203 Ariz. 507, 56 P.3d 686 (App. 2002)

*State v. Thues*, 203 Ariz. 339, 54 P.3d 368 (App. 2002)

I have been a panel member on 617 cases decided by memorandum decision that have not been published.

16. **Recusal:** If you are or have been a judge, please provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest, or for any other apparent reason, or in which you recused yourself sua sponte. (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Please identify each such case, and for each provide the following information:

    a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

    b. a brief description of the asserted conflict of interest or other ground for recusal;

    c. the procedure you followed in determining whether or not to recuse yourself;

    d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

    Each judge on our court provides to the clerk a list of parties, lawyers or law firms that might present a conflict of interest or an appearance of impropriety. In making assignments of cases to panels, our court clerk ensures that the judge's panel is not assigned parties, lawyers or firms that appear on the conflict lists of the judges on the panel. I have placed on my recusal list my former law firm and several clients for which I did significant work. I have also placed on the list one superior court judge and one administrative law judge who are personal friends. No records are maintained by our court clerk to indicate when a judge's conflict list affected panel assignments.

    A monthly list circulates of parties, attorneys and judges that are involved in matters scheduled for civil appeal. I review this list monthly. On occasion I will note a matter in which, due to familiarity with the parties or an attorney, I believe it best not to sit on the appeal because someone involved might question my impartiality. I inform the clerk and, in making the panel assignments, the case is assigned to a different panel. This happens infrequently. No party has ever



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01401 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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requested that I recuse myself due to an asserted conflict of interest after panel assignments have been made. However, I can think of one occasion in which, after panel assignments were made, I contacted our chief judge to have a judge appointed in my stead. I did so because an issue on appeal was an allegation that the superior court judge who entered the judgment had too close a relationship with one of my former partners who represented the Appellee in the proceedings below. Reviewing the conflict list did not make me aware of this issue because my former partner was no longer involved in the appeal.

17. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have not held a public office, other than judicial office.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

None.

18. **Legal Career:** Please answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I served as a Law Clerk to the Honorable Stephen H. Anderson, United States Circuit Judge for the Tenth Circuit from September 1987 to September 1988.

ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced alone.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01402 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

Arizona Court of Appeals, Division One
1501 W. Washington, Room 303, Phoenix, AZ 85007
Judge, August 2002 – present

Osborn Maledon, P.A.
2929 N. Central Avenue, Suite 2100, Phoenix, AZ 85012-2794
Member, May 1995 – August 2002

Meyer, Hendricks, Victor, Osborn & Maledon, P.A.
2929 N. Central Avenue, Suite 2100, Phoenix, AZ 85012-2794
Member (Jan. 1994-May 1995); Associate (Sept. 1988-Jan. 1994)

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

Over the past five years I have served on the Arizona Court of Appeals. We resolve criminal and civil appeals. Probably 60-65% of our caseload consists of criminal and juvenile appeals, with the vast remainder of the appeals being civil cases of all types and a few pertaining to appeals from administrative agency tribunals.

Prior to my experience on the court, I had a diverse civil litigation practice. Approximately 65% of my practice was made up of complex commercial cases. I represented companies in large contract cases, insurance coverage claims, covenant not to compete/trade secret cases, requests for emergency and other injunctive and declaratory relief, and real property disputes. I also occasionally represented churches and ministers concerning privilege matters and liability questions. I also occasionally represented health care organizations in professional liability and health care finance cases. Approximately 30% of my practice consisted of representing clients in disputes before state or local government agencies concerning regulatory matters, government contracts, or other matters that were required to be tried in administrative forums. I had a considerable practice in areas where there was overlapping federal and state authority. About 5% of my practice was devoted to various pro bono projects.

Earlier in my career I had represented school districts in tort liability cases and also did some work involving condemnation and construction and state taxation of Indian tribes. I began to phase out such work in



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approximately 1995-98.

ii. Your typical clients and the areas, if any, in which you have specialized.

When I left the practice of law I was representing or had recently represented: CompUSA, Pitney Bowes, First Health Group Corp., Carter & Burgess, Unilab, The Church of Jesus Christ of Latter-Day Saints, Arizona Physicians IPA, Inc., Huck International and Schreiber Foods International. I also regularly represented several mid-size Arizona businesses, including The Tungland Corporation, Community Psychology and Education Services, Arizona Training and Evaluation Center (AZTEC) and others.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

The vast majority of my practice was in litigation. I regularly appeared in state court, federal court and administrative tribunals throughout my practice career.

i. Indicate the percentage of your practice in:

1. federal courts: 15%
2. state courts of record: 65%
3. other courts. 20%

ii. Indicate the percentage of your practice in:

1. civil proceedings: 98%
2. criminal proceedings: 2%

d. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

e. I have tried to judgment more than forty cases in the Arizona Administrative Tribunals. I have taken three cases to trial before a court of record. I was sole counsel in approximately thirty of these cases; lead counsel on approximately six cases and sole counsel on approximately six.

i. What percentage of these trials were:

1. jury: 2%
2. non-jury. 98%



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01404 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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f. Describe your practice, if any, before the Supreme Court of the United States. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

In 1990 I assisted in drafting and was counsel on an amicus brief filed in the Supreme Court of the United States on behalf of the American Judicature Society in two consolidated cases involving the Voting Rights Act. The resulting Supreme Court opinion is *Chisom v. Roemer,* 501 U.S. 380, 111 S.Ct. 2354 (1991). The brief attempted to inform the Court concerning the merit selection processes used in many states for selecting judges and to suggest that the Court, in deciding *Chisom,* did not need to determine whether the Voting Rights Act applied to retention elections that are part of the merit selection process. Copies of the brief are provided.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *Zurich Insurance Co. v. Carter & Burgess.* (No. CIV 00-0857-PHX-SRB) (2000-02). United States District Court for the District of Arizona, Hon. Susan A. Bolton.

In this case, Zurich Insurance Co. brought a declaratory judgment action against my client, Carter & Burgess, an engineering firm, seeking to rescind the professional liability policy it had issued to my client. Zurich filed its action after the City of Phoenix brought a multi-million dollar claim for faulty construction and delay damages against Carter & Burgess for work performed by it at Phoenix's Sky Harbor Airport. I represented Carter & Burgess in the rescission action and filed declaratory and bad faith counterclaims. After some discovery we moved for summary judgment on our declaratory counterclaim for coverage. We prevailed on that motion, and at approximately the same time entered an agreement with the City of Phoenix. Shortly after I became a judge, both the federal and the state court actions were settled on terms favorable to my client.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01405 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Co-counsel:
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Opposing counsel:
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Brad Holm
Holm Wright Hyde & Hays, PLC,
10429 S. 51st St., Suite 285,
Phoenix, AZ 85044-5228

2. *Laboratory Corporation of America v. Gappa, Gaylord, Unilab et al.,* Maricopa County Superior Court, Judge Cathy Holt, Case No. CV2002-000588 (January-February 2002).

I represented Unilab in an action brought against it by a competitor—the Laboratory Corporation of America. Unilab hired LabCorp's Executive Director of Business Development to open its own Arizona laboratory operation. Immediately thereafter LabCorp sought to enjoin Unilab from: (1) seeking to do business with any insurance company that did business with LabCorp (which was virtually all of them); (2) soliciting LabCorp customers; or (3) soliciting LabCorp employees to go to work for Unilab. The requested injunction was based on the allegation that Unilab's new Executive Director had breached his non-solicitation agreement with LabCorp, retained LabCorp computer files and taken trade secrets. Due to the emergency nature of the proceedings, the parties engaged in extensive expedited discovery. Although the factual and legal issues were complex, once discovery occurred and the hearing for a temporary restraining order had begun, the parties were able to resolve and dismiss the matter through extensive negotiations. The settlement at which the parties arrived preserved Unilab's ability to fairly compete in the Arizona market while protecting LabCorp's legitimate, but now precisely defined, interests.

Opposing counsel:
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VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01406 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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3. *Arizona Training and Evaluation Centers (AZTEC) v. Department of Economic Security.* (2001-02). State of Arizona, Office of Administrative Hearings, ALJ Gary Strickland, Case No. 02F-8046-AHC.

In this case, my client, AZTEC had contracted with a state agency pursuant to state procurement law to provide education, training and habilitation services in rural parts of Arizona. After AZTEC invested considerable sums to obtain and provide facilities and services in these rural locations, the State entered separate additional contracts to provide these same services to the available client base with providers that had not submitted proposals in compliance with the requirements of state procurement law. AZTEC brought its breach of contract claim in an administrative tribunal, as was required by state contract. After three days of trial, the Administrative Law Judge advised the State in a bench conference that it should settle the case. It did so by paying my client a confidential settlement amount, and agreeing to promulgate and abide by procurement policies in compliance with state law.

Opposing counsel:
Cherie Howe
Office of the Attorney General
1275 W. Washington
Phoenix, AZ 85007
(602) 542-7725

4. *Johnson v. Rodriques (Orozco)*, 226 F.3d 1103 (10th Cir. 2000) (1999-2000). U.S. District Court for the District of Arizona, Hon. Warren R. Urbom; U.S. District Court for the District of Utah, Hon. Tena Campbell

Plaintiff, the putative Arizona father of a child adopted in the State of Utah, filed suit in Arizona federal court, challenging the Utah adoption statute as unconstitutional. I represented the Utah adoptive parents in the proceeding on a pro bono basis. We successfully moved to have the case dismissed in Arizona for lack of personal jurisdiction. Then, when the plaintiff refiled the case in Utah federal court, we obtained a dismissal for lack of subject-matter jurisdiction. This dismissal was reversed by the Tenth Circuit in the above-cited opinion and then remanded, after which we obtained a summary judgment from Utah federal court based on the merits. That judgment was affirmed by the Tenth Circuit.

Co-counsel:
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Phillip E. Lowry
Howard, Lewis & Peterson



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01407 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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120 E. 300 N.
P.O. Box 1248
Provo, UT 84603
(801) 373-6345

Opposing counsel:
C. Robert Collins
10801 N. 32nd St. Suite 3
Phoenix, AZ 85028-3235
(602) 788-7227

5. *NIE International, Inc. v. CompUSA, CompUSA Direct.* Maricopa County Case No. CV 2000-004333; Judge Paul Katz (2000-02).

I represented CompUSA in commercial litigation with one of its former suppliers, NIE International. CompUSA contracted with NIE to be one of the producers of its brand name computer. The relationship failed, and NIE brought suit seeking millions of dollars in both compensatory and punitive damages. We asserted various counterclaims. After a partial motion for summary judgment was granted in our favor and additional discovery occurred, CompUSA filed additional case-dispositive motions after which the parties arrived at a negotiated settlement favorable to my client in March 2002.

Opposing counsel:
Mark Samson
now of Keller Rohrback
3103 N. Central Suite 900
Phoenix, AZ 85012-2143
(602) 230-6323

6. *Arizona Physicians IPA Inc. v. Robert B. Mallon; Victor M. Alvarez; Mallon-Alvarez Pathology Group, P.C.* Maricopa County Superior Court Case No. 99-23217; Judge Jeffrey S. Cates (now retired) (1999-2001).

In this case, I represented APIPA, a private provider to the state AHCCCS (federal Medicaid) plan. APIPA had routinely but erroneously paid for years separate bills it received from hospital-based pathologists working at the Yuma Regional Medical Center for the professional component of lab tests run on AHCCCS-eligible patients at Yuma Regional. APIPA paid the providers' separate bills after paying Yuma Regional for these lab tests through its capitation contract with the hospital. APIPA informed the pathologists that it would recoup those funds from future payments due the pathologists, and the pathologists initiated a state administrative proceeding challenging that decision. Meanwhile, APIPA filed the above suit in Maricopa County Superior Court to recover the amounts erroneously paid. The pathologists attempted to have the suit dismissed based on the pending administrative proceeding. When the motion was denied,



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01408 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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the pathologists attempted interlocutory appeals through the Arizona state court system. After APIPA filed case-dispositive motions, the parties arrived at a confidential settlement.

Opposing counsel:
John Dacey
Gammage & Burnham PLC
Two North Central 18th Floor
Phoenix, AZ 85004-4402
(602) 256-4491

7. *Schreiber Foods International Inc. v. United Dairymen of Arizona*. Maricopa County Case No. CV2000-019948; Judge Carrie Snyder Hyatt (2000-2001).

Schreiber leased half of a large milk-processing facility in the City of Tempe from the United Dairymen (UDA). Both parties processed milk at the facility to make cheese and other products. The by-product that remained after processing had to be disposed of appropriately. UDA proposed to Schreiber that it would take Schreiber's milk by-product and use it in its own processes if Schreiber would construct improvements to transfer the by-product to UDA at a specific temperature and pH level. Schreiber constructed the improvements at a cost of millions of dollars after which UDA rejected the transfer of the by-product. I represented Schreiber in bringing suit against UDA as a result of this refusal. After UDA tried unsuccessfully to dismiss the suit, the parties engaged in successful settlement discussions involving environmental and indemnity issues.

Opposing counsel:
Chris Thomas and George Brandon
Squire, Sanders & Dempsey
Two Renaissance Square
40 N. Central Ave. Suite 2700
Phoenix AZ 85004-4441
(602) 528-4044

8. *Tungland Corp., Developmental Systems Inc. v. Department of Economic Security*. Maricopa County Superior Court CV-93-24305; Judge Thomas Dunevant (1993-94).

The state Department of Economic Security contracted with my clients to provide services covered under the state's AHCCCS (federal Medicaid) plan to the developmentally disabled population of Arizona. DES issued press releases that announced that DES was initiating state administrative recoupment actions against my clients, whom it accused of misspending millions of dollars of government funds, and further announced that my clients had been referred for criminal charges. I represented the providers in the administrative actions and in



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01409 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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the above suit. Discovery in the case revealed that the auditors hired by the State had applied cost-based audit principles to a rate-based accounting contract, and in fact that no funds had been misspent or misappropriated by my clients. The suit was settled when DES dropped its recoupment actions, withdrew any criminal referral, acknowledged its previous press releases were without basis and indicated that my clients were valued contracting partners with which it intended to continue to contract.

Opposing counsel:
Robert S. Segelbaum
then of the Arizona Attorney General's Office.
1275 W. Washington,
Phoenix, AZ 85007-2997
(602) 542-9236

9. *State ex rel. Miller v. Dawson*, 175 Ariz. 610, 585 P.2d 1213 (1993).
In this case I represented a client who brought an inverse condemnation case against the State for using his land for a state highway. The State argued that, pursuant to state statute, it had no need to pay our client due to the length of time that it had used the land as a highway. On appeal to the Arizona Supreme Court, we challenged the interpretation of the statute given by the Court of Appeals in an earlier but consolidated case, *Gotland v. Town of Cave Creek*, 175 Ariz. 614, 858 P.2d 1217 (1993). We suggested that a different interpretation was needed to be in compliance with the Arizona Constitution. The Arizona Supreme Court accepted our proposed interpretation, and used it to resolve both our case and *Gotland*, whose analysis it rejected.

Co-counsel:
Robert V. Kerrick
(now of Gallagher & Kennedy)
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(602) 530-8374

Opposing counsel:
Bryan B. Perry
Graham & Associates, Ltd.
3602 E. Campbell
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(602) 224-4100

Robert J. Sokol
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VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01410 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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10. *Resolution Trust Corp. v. Freeway Land Investors*, 798 F. Supp. 593 (D. Ariz. 1992); No. Civ. 91-2107 PHX SMM; United States District Court for the District of Arizona, Hon. Stephen McNamee (1991-93)

In this case, the Resolution Trust Corporation, as receiver for the Great American Bank, sought to recover a several-million-dollar deficiency from a partnership. The deficiency remained after the RTC foreclosed on real property that served as security for the defaulted note. Because the partnership was without assets, the RTC was seeking to recover the entire deficiency from each of the general partners. My clients, the general partnership and one of its general partners, brought several motions for summary judgment. As the above-reported opinion reflects, the partnership did not succeed in eliminating all liability for the deficiency. But, with a subsequent ruling, we succeeded in limiting each general partner's liability for the remaining deficiency to the much more limited extent to which each partner had personally guaranteed the note. After receiving this ruling, the matter settled on grounds favorable to my clients. I was responsible for the litigation on the case, but worked on it with my partner.

Co-counsel:
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Osborn, Maledon
2929 N. Central Ave, Suite 2100
Phoenix, AZ 85012
(602) 640-9000

Opposing counsel:
Paul Golab and Mark Nadeau
then of the firm of Morrison, Hecker
Mr. Golab is currently with the Maricopa County Attorney Division of County Counsel, 222 N. Central Suite 1100, Phoenix, AZ 85004-2206
(602) 506-8567

20. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Among the most personally significant activities have been the pro bono representations described in response to question 27 below. Further, as a member of the court, I have been involved in resolving disputes about the meaning of Arizona statutory and common law. I have frequently served as a mediator in our court's mediation program, in which judges volunteer to serve as mediators to assist in the resolution and voluntary dismissal of matters slated for appeal. As detailed in response to paragraph 13(c) above, I have testified before the Arizona Legislature on behalf of the Arizona Judicial Council and the



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01411 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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Administrative Office of the Courts concerning proposed resolutions to remove from the Arizona Supreme Court the authority to make procedural rules for the Arizona Court System.

In March 2007, I was asked by the Arizona Chief Justice to chair a Task Force assigned to review the American Bar Association's recently-revised Model Rules of Judicial Conduct and to comprehensively evaluate and make specific recommendations for revision to the Arizona Canons in light of the new ABA Model Code. The Task Force consists of both judges and public members. It began its work in May and has been working continually with monthly day-long meetings to perform its task.

In 2003, I was named a member of the Judicial College Board of Arizona. This board oversees all judicial education offered to all judicial officers in the state, including all appellate, general jurisdiction and limited jurisdiction judges and judicial officers. In 2005, I was appointed Dean of the College and continue to serve in that capacity. Together with our staff, we provide, supervise and oversee new judge orientation, an intensive multi-week course for new judges appointed to either the general or limited jurisdiction courts. We select and offer continuing education courses on current topics that arise from new legislation or other needs of the various courts, and we coordinate and create the training for the annual three-day judicial conference, which is mandatory for the judiciary. The College also supervises and coordinates the production of bench books and other publications.

Since 2003, I have served as a member of the Mesa [Arizona] Judicial Advisory Board. This board created by city ordinance governs the selection and retention of Mesa City Court Magistrates. It meets to consider candidates for available magistrate positions and pares the list of potential candidates to three, which it then sends to the City Council with its comments pertaining to the candidate. The Board also reviews the performance record of sitting magistrates when they are up for reappointment and makes a recommendation to the City Council as to the retention of those candidates.

From 2000-2002, I was a member of the Ethical Rules Review Group. This Group was a select Arizona State Bar committee appointed by the Board of Governors to draft comprehensive revisions to the Rules of Professional Conduct in light of the American Bar Association's then recently-revised Model Rules of Professional Conduct. The group did so, and the vast majority of our recommended changes were implemented by the Arizona Supreme Court.

21. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, please provide four (4) copies to the committee.

Constitutional Law I – The Separation of Powers, Political Science 471. I taught the course four different times from 1992-97 in the political science department at Arizona State University. The readings and the course discussion are designed to illustrate some



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01412 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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of the political theory behind the Constitution and how the government it established has operated since the founding. The course also focuses on how the Constitution separates and distributes the powers of government among three branches and between two sovereigns, at least partially to protect the individual rights and prerogatives of its citizens.

22. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I anticipate no deferred payment relationships from firms, clients or other investments. I do maintain a 401(k) account from my private practice. The account is with Charles Schwab Co.. Because I have now served for five years on the Arizona Court of Appeals, I am at least partially vested in the Arizona Elected Officials Retirement Plan.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

24. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached Financial Disclosure Report

25. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement

26. **Potential Conflicts of Interest**:

    a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

    There are no categories of litigation that are likely to present potential conflicts of interest during my service. Although it has been more than five years since I



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01413 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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practiced law, I would still be cautious for a period about hearing matters in which parties were represented by my former law firm, Osborn Maledon, P.A., or were my former significant clients. I currently own no stock except through a Mutual Fund. My wife owns one publicly traded stock.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I will follow the Code of Conduct for United States Judges and all applicable statutes, policies and procedures. I would sit on no case in which my impartiality might reasonably be questioned. Currently I review the cases filed with the court prior to their assignment by the clerk to determine whether they present any fact or relationship that would prevent me from ethically hearing the case. Should such a case present itself, I inform the clerk who then assigns the case to a different panel. I anticipate following a similar procedure for cases assigned in the District of Arizona.

27. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

During my years as a lawyer, pro bono representations were a regular part of my legal practice. I was named the Maricopa County Volunteer Lawyer of the Month for representing in a divorce proceeding a disabled spouse who had been abandoned without assets by her departing husband. I have, both before and after that time, represented clients pro bono in a variety of matters, including canceling automobile purchases, disputes with landlords, and employment matters. I successfully represented on a pro bono basis a self-help organization for unwed parents in a trademark infringement action brought in Arizona federal district court by another self-help organization. I was given the Halo Award by the Arizona Association of Providers for People With Disabilities for my pro bono representation of a foster mother who was threatened with losing the ability to care for her developmentally disabled foster son who had been in her care for more than twenty years. I have represented the disabled in their efforts to obtain fair housing. I have represented adoptive parents in legal challenges brought in federal court to the adoption of their child. My pro bono representations made up about 5% of my practice.

Since I have been on the bench, the nature of my pro bono commitments has necessarily changed. It has become more system-oriented than individual-oriented. I have been significantly involved in organizations to promulgate new ethical rules for judges, educate judges, and in selecting and retaining quality judicial officers for Mesa, Arizona. I have also been involved as a teacher, judge and a volunteer coach in the "We The People" Competition. This is an annual competition between teams from various Arizona high schools designed to demonstrate knowledge and application of constitutional history and principles.



VerDate Nov 24 2008 12:21 Apr 06, 2009 Jkt 047450 PO 00000 Frm 01414 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\47450.TXT SJUD1 PsN: CMORC

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I have also regularly participated in our court's mediation program, in which judges volunteer to serve as mediators to assist in the resolution and voluntary dismissal of matters slated for appeal.

28. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Please do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

In April 2007 I received a phone call from U.S. Senator Jon Kyl's staff requesting my resume and inviting me to meet with the Senator. In our subsequent interview he told me that several people whose opinion he valued had recommended me as one who might merit consideration for a vacancy on the federal district court. He inquired as to my background, law practice and the nature of my work on the Arizona Court of Appeals. He explained to me that he and Senator John McCain would provide several recommendations for the position to the White House, together with their impressions of those candidates.

On August 1, 2007, I met with the Deputy Counsel to the President and staff from the White House Counsel's Office and the U.S. Department of Justice. On September 6, 2007, I received a telephone call from the White House informing me that my nomination would move forward to the next phase. I had subsequent conversations with staff from the Department of Justice regarding the nomination process and nomination paperwork. My nomination was submitted to the United States Senate on December 11, 2007.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

No.



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AO-10 (WP)
Rev. 1/2004

# FINANCIAL DISCLOSURE REPORT

## Nomination Report

*Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App. §§101-111)*

| 1. Person Reporting *(Last name, first, middle initial)* | 2. Court or Organization | 3. Date of Report |
|---|---|---|
| Snow, Grant M. | U.S. District Court, Arizona | 12/13/07 |

| 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 |
|---|---|---|
| District Judge - Nominee | X Nomination, Date 12/11/07<br>Initial Annual Final | 1/1/06 to 11/30/07 |

| 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. |
|---|---|
| 1501 W. Washington Street, Suite 303<br>Phoenix, AZ 85007 | 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 | Judge | Arizona Court of Appeals, Div. 1 |
| 2 | | |
| 3 | | |

## II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

| | DATE | PARTIES AND TERMS |
|---|---|---|
| ☐ | **NONE** (No reportable agreements.) | |
| 1 | | Arizona Elected Officials Retirement Plan; benefits partially vested, but not accrued until retirement age |
| 2 | | |

## III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

**A. Filer's Non-Investment Income**

| | DATE | SOURCE AND TYPE | GROSS INCOME |
|---|---|---|---|
| ☐ | **NONE** (No reportable non-investment income.) | | |
| 1 | 2007 | State of Arizona - Salary | $ 134,026.92 |
| 2 | 2006 | State of Arizona - Salary | $ 123,900.00 |
| 3 | 2005 | State of Arizona - Salary | $ 123,980.00 |

**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 | 2007 | Tempe Union High School District; Pay for part-time substitution |
| 2 | 2006 | Tempe Union High School District; Pay for part-time substitution |

**FINANCIAL DISCLOSURE REPORT**

| Name of Person Reporting | Date of Report |
|---|---|
| Snow, Grant M. | 12/13/07 |

**IV. REIMBURSEMENTS** -- transportation, lodging, food, entertainment.
*(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)*

| | SOURCE | DESCRIPTION |
|---|---|---|
| [ ] | NONE (No such reportable reimbursements.) | |
| 1 | Exempt | |
| 2 | | |
| 3 | | |
| 4 | | |
| 5 | | |
| 6 | | |
| 7 | | |

**V. GIFTS.** *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

| | SOURCE | DESCRIPTION | VALUE |
|---|---|---|---|
| [ ] | NONE (No such reportable gifts.) | | |
| 1 | Exempt | | $ |
| 2 | | | $ |
| 3 | | | $ |
| 4 | | | $ |

**VI. LIABILITIES.** *(Includes those of spouse and dependent children See pp. 32-33 of Instructions.)*

| | CREDITOR | DESCRIPTION | VALUE CODE* |
|---|---|---|---|
| [X] | NONE (No reportable liabilities.) | | |
| 1 | | | |
| 2 | | | |
| 3 | | | |
| 4 | | | |
| 5 | | | |

*Value Codes

**FINANCIAL DISCLOSURE REPORT**

| Name of Person Reporting | Date of Report |
|---|---|
| Snow, Grant M. | 12/13/07 |

**VII. Page 1 INVESTMENTS and TRUSTS – income, value, transactions** *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| ☐ | **NONE** (No reportable income, | | | | | | | | | |
| 1 | Chase Bank | A | Int. | K | T | Exempt | | | | |
| 2 | Google Common Stock | A | Div. | K | T | | | | | |
| 3 | Osborn Maledon 401(K) | A | Div. | G | T | | | | | |
| 4 | -Am Funds Growth Fund America | | | | | | | | | |
| 5 | -Schwab S&P 500 Index | | | | | | | | | |
| 6 | -Am. Funds Wash. Mut. A | | | | | | | | | |
| 7 | -Wilshire Large Co. Growth | | | | | | | | | |
| 8 | -Am. Funds Euro Pac. Group A | | | | | | | | | |
| 9 | -Am Funds Bond Fund of America | | | | | | | | | |
| 10 | -Am Funds Inc. Fund of America | | | | | | | | | |
| 11 | -Schwab Retirement Adv Money | | | | | | | | | |
| 12 | Gen Am Universal Life | A | Div. | K | T | | | | | |
| 13 | -Fidelity VIP Equity | | | | | | | | | |
| 14 | -Blackrock Aggressive Grouth | | | | | | | | | |
| 15 | -MetLife Stock Index | | | | | | | | | |
| 16 | -Morgan Stanley EAFE Index Portfolio | | | | | | | | | |
| 17 | Time Warner Common Stock | A | Div. | J | T | | | | | |

**FINANCIAL DISCLOSURE REPORT**

| Name of Person Reporting | Date of Report |
|---|---|
| Snow, Grant M. | 12/13/07 |

**VII. Page 2 INVESTMENTS and TRUSTS – income, value, transactions** *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| ☐ **NONE** (No reportable income, assets, or transactions) | | | | | | | | | |
| 18 E-Bay | A | Div. | K | T | Exempt | | | | |
| 19 | | | | | | | | | |
| 20 | | | | | | | | | |
| 21 | | | | | | | | | |
| 22 | | | | | | | | | |
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| 29 | | | | | | | | | |
| 30 | | | | | | | | | |
| 31 | | | | | | | | | |
| 32 | | | | | | | | | |
| 33 | | | | | | | | | |
| 34 | | | | | | | | | |

| FINANCIAL DISCLOSURE REPORT | Name of Person Reporting | Date of Report |
|---|---|---|
| | Snow, Grant M. | 12/13/07 |

**VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)**

The Osborn Maledon 401(K) account disclosed in VII is an individually-owned account within the umbrella of my former employer's trust. I am the complete owner of the account and receive no distributions from the firm thereon.

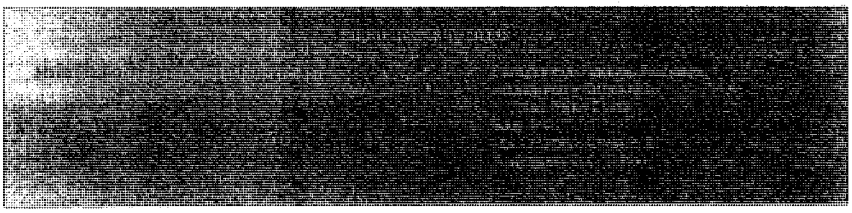
**IX. CERTIFICATION.**

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 G. Murray Snow Date 13 December 2007

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.)



## 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 | | 28 | 599 | Notes payable to banks-secured | | | |
| U.S. Government securities-add schedule | | | | Notes payable to banks-unsecured | | | |
| Listed securities-add schedule | | 46 | 316 | Notes payable to relatives | | | |
| Unlisted securities--add schedule | | | | Notes payable to others | | | |
| Accounts and notes receivable: | | | | Accounts and bills due (monthly household expenses) | | 5 | 000 |
| Due from relatives and friends | | | | Unpaid income tax | | | |
| Due from others | | | | Other unpaid income and interest | | | |
| Doubtful | | | | Real estate mortgages payable-add schedule | | | |
| Real estate owned-add schedule | | 320 | 000 | Chattel mortgages and other liens payable | | | |
| Real estate mortgages receivable | | | | Other debts-itemize: | | | |
| Autos and other personal property | | 27 | 000 | | | | |
| Cash value-life insurance | | 26 | 177 | | | | |
| Other assets itemize: | | | | | | | |
| 401(k) account | | 439 | 777 | | | | |
| State retirement plan (estimated) | | 45 | 000 | | | | |
| | | | | Total liabilities | | 5 | 000 |
| | | | | Net Worth | | 927 | 869 |
| Total Assets | | 932 | 869 | Total liabilities and net worth | | 932 | 869 |
| 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 | | | | | | | |



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## FINANCIAL STATEMENT

NET WORTH SCHEDULES

| | |
|---|---|
| Listed Securities | |
| Google (Chase brokerage) | $46,316 |
| | |
| Real Estate Owned | |
| Personal residence | $ 320,000 |



47450l.311

AFFIDAVIT

I, G. Murray Snow, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

January 8, 2008
(DATE)

G. Murray Snow
(NAME)

Linda S. McPherson
(NOTARY)

OFFICIAL SEAL
LINDA S. MCPHERSON
NOTARY PUBLIC - STATE OF ARIZONA
MARICOPA COUNTY
My Comm. Expires April 1, 2010

We'll start with Judge Agee.

Judge AGEE. Mr. Chairman, when I was in private practice I participated for all of my private practice years in the local Bar Association's pro bono programs, which provided primarily domestic relations and bankruptcy services for the indigent.

I also served throughout my career in private practice doing court-appointed work in the Federal system, which isn't quite the same as pro bono, but it gave me a look both on the civil and the criminal side.

As a member of the Supreme Court of Virginia, I've worked with my other colleagues on the court and the chief justice in trying to implement better pay conditions for those who represent the criminally indigent. We've been working on a system to provide a bank of attorneys and appellate cases for indigent and pro se civil litigants, and that's a commitment, if I'm accorded the high privilege of serving on the Court of Appeals, that I would continue to carry on.

Senator CARDIN. Thank you.

Judge LAWRENCE. Mr. Chairman, thank you. As previously noted, I was a public defender in the Marion County criminal courts in the Major Felony Division for 9 years at the beginning of my practice. At that period of time the public defender office was my office. I handled cases as they came in, obviously from indigent clients. I was not only the trial attorney, but I was also the paralegal, the witness coordinator, the investigator, and the secretary. I think I was paid $5,700 back there in the mid-1970's. I did that for 9 years, and probably over-stayed my welcome as far as my own practice was concerned.

Thereafter and in the late 1970's, I was part of a Bar Association task force, Pro Bono Task Force, if you will, that organized the Pro Bono Panel that is now in effect in Indianapolis, and has been for the last several years. So not only did I organize it, I was also a participant for many years, handling pro bono cases at either no fee or a reduced fee.

Third, during my early years as a Circuit Court judge, a State court judge, if you will, in Indianapolis, I saw a need for a consolidated paternity court. I think it might have been the first, or one of the first, consolidated paternity courts in the Nation at that point. Essentially what we did, is we provided a forum to establish paternity and for essentially welfare individuals to come forward and try to collect support.

At the beginning, we believed that we could maybe collect $30 million. I'm happy to report that, in 2004, that court was directly responsible for putting $80 million of money into the pockets of single head-of-household custodial parents of children born out of wedlock, and I'm proud of that.

Senator CARDIN. You should be.

Judge Snow.

Judge SNOW. Mr. Chairman, a substantial part of my private practice, when I was a private practice lawyer, was always dedicated to pro bono work. I received several awards from different organizations, including the Maricopa County Bar Association and the Arizona Association for Providers for Persons with Disabilities,

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for my pro bono work on behalf of various people and enjoyed that very much.

I also believe that Maricopa County, the Phoenix area, and the Arizona court systems have done a lot with the Internet, with available resources in the courthouses so that litigants who can't afford the services of a lawyer can, nonetheless, have the process to file and to bring about a lawsuit, explained to them in plain English, and help them step-by-step through the process. I've been a supporter of those efforts.

The American Bar Association has just put out new rules, or canons, model canons, for judges and they've emphasized in their proposed model rules rule changes which would make it clear that judges that explain the process to pro-per litigants are not violating their responsibilities in any way. I've been involved in Arizona in adopting those new rules, and they're currently proposed.

Senator CARDIN. Well, thank you. I appreciate those answers.

Judge Agee, in regards to existing precedents and judicial restraint, could you just share with me your philosophy of when you think it's appropriate to overrule precedent to move in a different direction in the courts?

Judge AGEE. Stare decisis is a foundational principal of our justice system and it is an obligation of members of the judiciary to follow the stare decisis in most all circumstances.

In looking at my career as a member of the Supreme Court of Virginia and of the Court of Appeals of Virginia, I have followed precedent and looked at stare decisis as a very high principle that we are to follow. There have been a few occasions where we have overruled cases. Those are very rare cases, usually on very narrow points and where it can be determined that the prior decision was plainly wrong. But as a member of the Court of Appeals, if I'm accorded that privilege by the Senate, it would be my responsibility to apply the precedent as it is handed down from our Supreme Court.

Senator CARDIN. Sometimes the plain meaning of a statute is difficult to determine. What standards do you use if you need to go beyond the language of a statute in rendering a judgment?

Judge AGEE. In those circumstances there are canons of construction that judges use as part of the discharge of their duties. Hopefully the statute would have sufficient plain meaning that that would not be necessary, but there are canons of construction that judges use which may begin with simply going to a dictionary definition of terms. But those are fairly well laid out, and I think that in my opinions as a member of the Supreme Court of Virginia where those circumstances have been necessary, I have followed those.

Senator CARDIN. One of those tools would be legislative intent. I've always wondered how judges determined legislative intent, because I'm not sure what we all mean when we pass the laws around here. Maybe Senator Specter has a different interpretation there. But when you try to interpret the intent behind statutes, how do you go about doing that?

Judge AGEE. That's often a very interesting question. Coming from my background, having served 12 years in the legislature, I suppose I have a way of looking at the separation of powers that's

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more empirical than perhaps some members of the bench having been able to serve in that branch of government as well.

At least on the State level, there are very rare circumstances where there would be any type of legislative history that we could use in terms of interpretation. I know that's different on the Federal level to a certain extent. But in looking at plain meaning again, you would go back to canons of construction that may start from as simple a standpoint as going to dictionary definitions to interpret terms.

Senator CARDIN. You do have the advantage of having served in the legislature and of serving in the judicial branch. There are times that there are direct conflicts between the executive branch, and the judicial branch, and the legislative branch. I guess my question to you is, what importance do you give to the independence of the judicial branch?

What is an appropriate involvement with the executive branch? We have national security issues. We have a lot of issues around here in which the policies of this country become vitally important, but the independence of the judiciary has been tested, certainly, since 9/11. Would you just share with the Committee your views as to how the independent judiciary works in checks and balances with the executive branch, but still mindful of the awesome responsibility that each of us has to our Nation?

Judge AGEE. Well, as a Virginian, I've always held in high regard our first Chief Justice, John Marshall, who was instrumental in our history in establishing the independence of the judicial branch as a co-equal branch of government. As a former legislator, I have deep respect for the separation of powers and see that the judiciary's job, while it is an independent branch, our job is to apply the law as adopted by the Congress or the State legislature, as the case may be. There is a distinction between those two branches.

As far as the relation with the executive branch is concerned, that's a topic that has not often arisen that I can recall in my experience on the State court.

Senator CARDIN. Well, at the national level, you're correct, there would be more testing of the independence of the judicial branch as it relates to matters involving the Presidential powers, which is an area that we have had some disagreement within this Committee as to how far the legislative branch can go in regards to the powers of the President.

I think that many of us here are very interested in maintaining the independence of the judiciary to make sure that the emotion of the moment does not cause permanent damage to our Constitution or to the powers of the different branches of government. If you could share a little bit more on this, I would appreciate it.

Judge AGEE. The independence of the judiciary is fundamental in our system of government. It is the judiciary that becomes the basic, fundamental conservator of the rights that are in the Bill of Rights. That is a duty that I take very seriously, from the first moment when I took the oath of office as a judge in the Court of Appeals of Virginia, and that would carry through for the remainder of my career, particularly if I'm accorded the privilege of serving on the Federal Court of Appeals.

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Senator CARDIN. Thank you. I'm going to have some additional questions, but let me yield, if I might, to Senator Specter.

Senator SPECTER. Judge Agee, on the issue of judiciary independence and the treatment of the expansion of executive authority, have you had any occasion in your career to take a look at the State Secrets doctrine?

Judge AGEE. No, Senator, I have not.

Senator SPECTER. Have you had an occasion to become involved in any way in any of the judicial review on the Foreign Intelligence Surveillance Act?

Judge AGEE. No, Senator. That's not been anything that's come across my duties in Virginia.

Senator SPECTER. On your State court duties, have you had any activities with respect to habeas corpus?

Judge AGEE. Yes, Senator. We have a fairly significant habeas corpus docket.

Senator SPECTER. What is your evaluation of the importance of habeas corpus, the so-called—emanating from the Magna Carta in 1215. It was a way of ensuring that there is sufficient evidence to warrant detention of individuals to await trial?

Judge AGEE. Habeas corpus has a long and distinguished history in our system of justice. It is a process that has been with us through the centuries and was foundational when our Constitution and the Bill of Rights were adopted in this country. On the Supreme Court of Virginia, we have a significant amount of our staff that's devoted to the review and assistance to the justices in habeas cases. It's something that we take very seriously and devote a fair amount of attention to.

Senator SPECTER. Well, those are all major issues. On the Fourth Circuit, you're in a very key position to rule on those matters. A great many of those cases come before the Fourth Circuit, perhaps because they originate in the Northern District of Virginia, finding their way to that Circuit. It is a tough job balancing security interests versus executive authority. What we have seen since 9/11 is a very substantial increase in executive authority.

I think an increase of executive authority has been necessary to deal with terrorism, which is a major problem which confronts us right up to this moment in the United States as well as in the reports of Al Qaeda involvement and the attempted assassination of the leader of Afghanistan. But there have to be—there have to be—limits and there have to be balances, and we have not yet had a determination as to whether the President was right in taking the position that his constitutional authority under Article 2 superseded the legislation of the Foreign Intelligence Surveillance Act.

There is no determination as to whether the President was right in ignoring the National Security Act of 1947 in not informing the Intelligence Committees of the Terrorist Surveillance Program. So I call those matters to your attention as very, very major items to be considered. I will not go into the State Secrets doctrine, but there may well be legislation, if it can overcome a Presidential veto, which will give the courts a balancing say in what is a legitimate state secret and what is not. I would encourage you, and Federal Judge-to-be Lawrence, and Federal Judge-to-be Snow, your records are very strong, but I do not want to make any predictions that

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could get you into trouble. But I think your confirmations are very highly likely at that time.

But I commend to you this issue of strength on the judiciary, on maintaining a check and balance. Congress has been totally ineffective at doing the job. Right now we're in the midst of reauthorization of the Foreign Intelligence Surveillance Act and the issue is immunity for telephone companies. Well, I think the telephone companies have been good citizens and I think they ought to be protected, although I have to tell you that, for the record, nobody knows exactly what they've done.

In a sense, Congress is being asked to give a pig-in-a-poke immunity without knowing what we're immunizing. Those of us in key positions have some information. I think it is important for the government to have cooperation from the telephone companies, but that can be maintained on an amendment which would substitute the government as the party defendant so the courts are not closed and the telephone companies are protected. But I urge you to weigh that very, very heavily because the beauty of America is our ability to maintain civil rights, at the same time protecting our security.

Senator Brownback has arrived and he is my replacement here, so I'm going to be moving on to other duties. I wanted at least one Republican here to guard you against the Chairman.

[Laughter.]

Against whom you need no guarding. But as a matter of protocol, there ought to be a member of the Minority here at all times.

Senator Brownback. I just want to thank the Senator for his confidence.

[Laughter.]

Senator SPECTER. It is total, and it is well placed.

I leave you with one question for the three of you, on the answer I know. In 1982, I was joining Senator Thurmond, who was Chairman of the Judiciary Committee, on the confirmation of two Pennsylvania Federal District Court judges. Senator Thurmond asked the two of them in unison, "If you are confirmed, do you promise to be courteous?" That's South Carolina for, "If you're are confirmed, do you promise to be courteous?" I thought to myself, that's not exactly a hard-hitting question. What do you expect them to say? Both replied, "Yes." Then Senator Thurmond went on to say, "If you're confirmed, the more power a person has, the more courteous a person should be." The more power a person has, the more courteous a person should be.

Whenever I participate in one of these confirmation hearings—Senator Thurmond is not around—I ask his question. Years later—decades, as a matter of fact—nominees have approached me and have said, I was really impressed by the Thurmond question that you asked because that black robe is the guard-all shield in front of the rest of the world when you're presiding. All those litigants have problems, all those lawyers have problems. Courtesy is something that cannot be overly exercised. There may be, just conceivably, some occasion when you're out of sorts someday and you might be inclined to be a little tougher on somebody before you. Remember Strom Thurmond.

Thank you, Mr. Chairman.

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Senator CARDIN. We won't require you to answer that because you're under oath.

[Laughter.]

Senator Brownback?

Senator Brownback. Thank you very much, Mr. Chairman. I want to thank Senator Specter, too, for the thoughts and his courage that he's shown to all of us, and is showing us again.

Gentlemen, thank you very much for being here.

I mostly wanted to come over to thank the Majority for moving these forward. I was presuming that Senator Leahy would be here, but that's fine. My good friend, Senator Cardin, I know can receive this as well. But thank you for moving these forward. I know it—

Senator CARDIN. We sort of heard that from Senator Specter, but he put a couple of different twists in it.

Senator Brownback. Yes. Well, I'm going to leave that for whether you move any more. But these, we're very happy that we're finally getting some moving on forward. I know several of you have waited for some lengthy period of time.

I also want to thank your families that I know are here. I wasn't here for the introduction. But these are family affairs. I mean, when you go into this, the family goes onto the bench, too. Everybody has their different activities, but it's all part of the family now, and it's part of the family lineage, too. It's a beautiful thing to go into these family records and you can see somebody was a judge, a Federal judge, a Circuit Court judge. I mean, that's really is something significant for a family tree to have. So, I congratulate you and I thank the family members that are here for being a part of this as well.

I don't have any hard-hitting questions. I looked briefly at the papers here. I do think, just as a very quick admonition, like what Senator Specter was saying, it is an amazingly important position, being a judge in this society. When you consider that here the people rule, and then all of a sudden in this system when we get a dispute, how do we get that resolved? The people rule here. Well, you can't just kind of, well, let's get all the people together and we'll have them vote on this. That doesn't quite work.

So, well, let's empower somebody. Well, who do we empower? Well, we've got to empower somebody we really trust here to resolve this, that the people will trust within the system, because there's not enough law enforcement to go around. If the people decide they don't start trusting the system, things don't work. You are one of the key areas of resort to justice. You are the key area of resort to justice that the people have.

That question of courtesy, I think is actually a pretty good one, because you're going to be in a position where you could get up, and get up on the wrong side of the bed, and maybe not have your second cup of coffee before you're going out, and you've got a full docket and you're maybe kind of cranky that day. Just, I would hope one would remember that the people have entrusted you with this incredible position in this society and that it's like we are.

We're entrusted with an incredible position in this society. I just, every day, wake up really happy that I get to be in this sort of job, and I hope you can look at it as well and treat people with courtesy and respect, and I also might add, a big dose of humility. My view

is, the further up you get called in these systems, the more humility I think a person needs to have, because you've just got to realize we aren't the be-all and end-all. While we've got these great positions, there's a whole bunch of people beside us and behind us and just a good dose of humility is, perhaps, one of the best things.

I had a businessman that I thought had the greatest thought that somebody in public office can't use. But he said, you know, in business, we really don't know anything about the future. We don't know anything. We're kind of looking at probabilities of what's going to happen, and you're trying to project and make the best decision you can for your company.

Well, you're going to have a lot of facts in front of you, but you've just got to have a lot of wisdom with those items that come in front of you. Going on a Circuit Court where you've got a precedent-setting body, even more so. It affects a whole bunch of people in this country, and around the world. I always think just a big, good dose of humility is one of the best things, just to realize I need a lot of help to be able to figure this stuff out and to rely on that help and assistance that's around.

Mr. Chairman, thank you again for moving these nominees forward on the hearing. We really appreciate that, and I hope we can get you confirmed through the full Senate. Godspeed to you.

Senator CARDIN. Thank you, Senator. I join you and Senator Specter in your observations on the importance of judicial temperament and courtesy.

Judge Agee, I have just a couple more questions, if I might. The Fourth Circuit has the largest number of African-American citizens of any circuit in the Nation. It was the last Circuit to be integrated as far as the judges' appointments. It wasn't until President Clinton's recess appointment of Judge Roger Gregory in 2000 that the Fourth Circuit finally had an African-American judge.

Given the history, I think it's particularly important that this Circuit's sensitivity to minority rights, and the rights of all the citizens, are represented on the Court of Appeals.

My question is somewhat related to a 1990 op-ed that you wrote in the Roanoke Times, commenting on the Virginia Employment Commission's ruling that gave extra weight to minority employment applicants in which I believe you expressed disdain for use of a system that adjusts the score solely on the basis of race. You used the comparison to a plot of George Orwell's 1984.

My question to you, and you can certainly go beyond affirmative action, but I am interested in your views as to the appropriateness of affirmative action and the matters that are attempts to make sure that all citizens of our State are included in all aspects of our society. At times, it's up to the courts to help in that regard.

Judge AGEE. Thank you, Senator. The obligation of an appellate judge, and mine if I'm accorded the privilege by the Senate to serve on the Court of Appeals, is to apply the precedent. That is what I have done as a member of the Supreme Court of Virginia, and would continue to do if accorded that opportunity.

I have been privileged to serve on two courts that have a wide diversity in terms of age, gender, geography, and race. I think that has enriched my experience as a member of the judiciary. In the approximate same period of time, I was the author of a floor

amendment in the General Assembly of Virginia that passed the legislature, indicating to the Supreme Court that they should adopt judicial canons that prohibited judges from belonging to any discriminatory club or organization.

The concern that I think was raised in the op-ed piece that you referenced was not so much that the activity was done, but it was done without the knowledge of other parts of government so there was no opportunity for input from the legislative branch, for instance.

Senator CARDIN. Well, I appreciate that answer. That clarifies that for me, and I thank you for that because practices have been upheld by the courts to try to deal with diversity. There has been some erosion, many of us think, over recent years. But it is important that the courts are prepared to enforce our laws, and I thank you for that response.

There was one part of your questionnaire that I want to give you a chance to clarify for the record, if you would, and that's your membership in the Shenandoah Club, which is Virginia's oldest continuously operated private club. In your Senate questionnaire, in response to a question about whether you ever held membership in an organization that discriminates on the basis of race, sex, or religion, you answered that the Shenandoah Club "probably discriminated, in fact, during the time I was a member." Although you resigned from this club in 1987, which is several years ago, you held membership in the club for 8 years prior to your resignation.

I just want to give you a chance to clarify or add to the record in regards to your membership in that organization.

Judge AGEE. I think what is stated on the questionnaire is accurate. I think, in fact, the club probably did have discriminatory policies during that period of time, and after a period of time I resigned.

Senator CARDIN. Were you aware that the club discriminated when you joined the club?

Judge AGEE. I can't recall if I had specific knowledge of that. Certainly as time went on, it seemed more likely than not that that occurred. After some period of time, I resigned.

Senator CARDIN. What was the reason that you resigned?

Judge AGEE. There were a multitude of reasons, and lack of openness to the full community was one of them.

Senator CARDIN. Thank you for that response.

Judge Lawrence, if I could ask you a question about one point in your background. You, in 2002, responded in the Indianapolis Star that you were looking forward to working in a Federal court as opposed to a State court. You said, "The administration of a State court often gets caught up in partisan politics." I thought that was an interesting comment.

Could you just, perhaps, clarify for us how you see being a Federal judge, following on Senator Specter's point where you're going to be called upon to judge, the appropriateness of executive actions, which clearly could be interpreted to have some partisan aspect to it? Right now, again, we're struggling with executive power during extraordinary times. If you could just help clarify for us your view as to the politics of being on the Federal bench.

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Judge LAWRENCE. Well, I don't think there is politics. I think when you are a judge—and in all candor, any type of judge—that you pretty much leave your agenda at the front door. I think part of the responsibilities of a judge is to provide a canvas that the lawyers can try their case. A judge's ideology, preferences, dislikes play no part in the decisionmaking process that a judge must render.

Senator CARDIN. And I don't want to get into too much detail about your home State, but I take it you do not find that comfort level at the State level?

Judge LAWRENCE. The judges in Marion County, Indiana were elected on a strictly partisan basis. We ran in primaries, we attended local political functions, and such as that. We also had to raise money, which I was very vocal about not particularly caring for. Clearly, the people we were running—we were asking for money were the very people that were going to be appearing in front of us after the election. I thought that was very distasteful and I was very vocal about my opposition to that.

Senator CARDIN. I appreciate that. I think that clarifies it, and I thank you very much for that.

Judge Snow, I wanted to go back to one of the articles that you wrote in 1986. I know that's a long time ago, but it just brings up an issue for me that I find interesting.

This is criticizing a 1984 California decision that decriminalized public employee strikes. You said something that I just would like to have you at least clarify for me. You said, "A court should not merely consider whether legitimate rights are unduly abridged, but whether the court is capable of realistically fashioning remedies for their deprivation."

Then you go on, "When, as in this case, granting such rights will require constant judicial supervision over an area in which the judiciary has little experience and in which the judiciary's role is not practically limited by legislation, the remedy may be worse than the injustice."

I just thought that was an interesting comment. Again, I know it was written in 1986. I'd just like you to clarify for me. It seems to me that some of the most dramatic court decisions dealing with the rights of the disabled, dealing with integration of our schools, dealing with the protection of constitutional rights, were decisions that were extremely difficult to implement and we still haven't gotten that right.

So I just want to give you a chance, if you might, to clarify a statement that was written over 20 years ago, if you still remember that statement.

Judge SNOW. Thank you, Mr. Senator. I don't remember the statement, but I certainly don't disavow it. I'm sure, as a second-year law student, I wrote it. That is—and I still believe that if I am fortunate enough to be nominated—and I guess over the course of years I've had some experience. If I'm fortunate enough to have my nomination confirmed, I'll be in a District Court capacity. I guess I still do hew to that statement in this respect. It is occasionally the case that a judge who oversteps his bounds can do more damage than he does good if his remedy sweeps more broadly than the harm.

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Certainly you're correct, that many times—and there are instances in our history where a broad remedy has been required. We still have a hard time implementing that. The advantage you get in being in a District Court is usually you're presented with a single problem and you can, I hope, as a judge find a single solution to that problem that fits the problem and doesn't overstep the judicial bounds, while at the same time meeting the requirements of the law.

Senator CARDIN. Well, I thank you for that clarification. I will point out that some of the most far-reaching decisions have been reached by District Court judges.

Judge SNOW. That's true.

Senator CARDIN. So you are going to be confronted with the issue of implementation of a judicial order, which may not be easy, it may be difficult to determine, but the overriding constitutional issues may require you to seek a remedy that the legislature and the executive branch have not done. So, I don't think you can avoid this. I'd just urge you to be passionate about the Constitution.

Judge SNOW. Thank you. I will do my best.

Senator CARDIN. Thank you.

Senator Brownback, anything further?

Senator Brownback. Yes, if I could, Mr. Chairman. One more just for Judge Agee, if I could.

You were asked about your membership in the Shenandoah Club. I was curious, and I appreciate your actions that you took after that. Are there any other actions you've taken to show commitment to equality for all people in the various positions or social activities you've been involved in?

Judge AGEE. Thank you, Senator, for the question. During my time in the General Assembly of Virginia, I introduced an amendment to a particular piece of legislation that dealt with the judicial canons with respect to judicial membership in discriminatory clubs. That was about 1990 or 1991. I had the privilege, during my private practice, to represent some plaintiffs in race discrimination cases.

I think my record on the Supreme Court of Virginia and on the Court of Appeals of Virginia demonstrates my commitment to equal access and equal opportunity to present the case before the court. I've had a long private involvement with a number of charitable organizations that deal with wide segments of society.

I've been on the Board of Directors of the Free Clinic in the Roanoke Valley for over 20 years that serves a large economically disadvantaged group of folks. I've been very active with my Rotary Club for over 25 years in all of the community activities it undertakes. I've been a member of the Board of Trustees of my undergraduate college now for over two decades, and we have also taken significant action with respect to increasing the diversity of the student body at the school, and also the diversity of the faculty.

Senator Brownback. Thank you very much.

Thank you, Mr. Chairman.

Senator CARDIN. Thank you, Senator.

A couple final points from me. That is, Judge Agee, the *Miranda* rights decision, you have been critical about. I want to give you a chance, if you might, to express your views as it relates to the

courts' requirements in regards to *Miranda* rights for criminal defendants.

Judge AGEE. I have always applied the precedent set by the Supreme Court of the United States in my decisions as a member of the Supreme Court of Virginia and the Court of Appeals of Virginia. I can't recall any particular instance of criticism of Miranda. In particular cases there may be fact-driven instances that may stand out for peculiar treatment, but I've always accorded the decisions of the Supreme Court the precedent that they're due in my judicial decisions, and would continue to do so if accorded the privilege of sitting on the Court of Appeals.

Senator CARDIN. Thank you.

My staff has informed me that you have been critical at times of the Attorney General of Virginia on giving the advice that the Governor always wanted rather than independent advice. I take it from that, it's a good sign of what Senator Specter was talking about as far as the independence of the judiciary. We've had some problems with the secret opinions given by the Attorney General to the President, which has been the basis of what we call secret laws, allowing the President certain powers that we don't know about, no one knows about, because these are opinions that are classified and are never brought to light.

I would hope that the judicial branch of government would be sensitive to the legitimate needs of the President and the executive branch to conduct affairs of this country during very extraordinary times, but that we have a Constitution for a good reason. The need for openness is very important. I was impressed, Judge Agee, with your view on the affirmative action decision, that it was not a transparent process. I agree with you, it should be a transparent process.

People should know what is going on and have a chance to review it. But that also holds for executive power. I would hope that the responses that you've given today are an indication of each of your commitments to the independence of the judicial branch of government, and to do what is right under our Constitution, not just because one branch or another, whether it's the legislative branch or the executive branch, believes it's right, although I certainly hope you would uphold any statute that I happen to be the sponsor of.

Senator Brownback, any further questions?

Senator BROWNBACK. I don't think so. Thank you, Chairman.

Senator CARDIN. Let me point out that the record will remain open for written questions that may be propounded by members of the Committee to you, and we would ask that you try to get those responses back as quickly as possible, if questions are propounded, so that we can schedule action on your nominations as soon as we can get all that information together.

If there are no further questions, the Committee will stand adjourned. Thank you all very much.

[Whereupon, at 3:34 p.m. the hearing was adjourned.]

[Submissions for the record follows:]

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# SUBMISSIONS FOR THE RECORD

**Statement of Chairman Patrick Leahy**
**Senate Judiciary Committee**
**Hearing on Judicial Nominations**
**May 1, 2008**

I thank Senator Cardin for chairing today's hearing for a nominee to the United States Court of Appeals for the Fourth Circuit and two additional district court nominees. I have commended President Bush for his nomination of Justice Steven Agee of Virginia to the Fourth Circuit. Justice Agee's nomination to a long vacant Fourth Circuit seat from Virginia is the result of a breakthrough with the White House that affords us the opportunity to be productive after years of contentiousness, even in a presidential election year. This nomination is a result of the good work of Senators Warner and Webb.

In contrast to the Republican Senate majority that more than doubled circuit court vacancies under President Clinton, we have reduced circuit vacancies by almost two thirds, reduced them in nearly every circuit, and five circuits are now without any vacancies. When Justice Agee is confirmed as a federal circuit judge, the Fourth Circuit will have fewer vacancies than at the end of the Clinton administration.

Today we also hear from Murray Snow, nominated to a district court seat in Arizona, who has been included at Senator Kyl's request. We will also hear from William Lawrence, nominated to a district court seat in Indiana, who has been included at Senator Lugar's request. I thank Senator Bayh for expediting his consideration of that nomination.

By turning today to the Agee nomination, we can make progress. The alternative approach being urged upon us by some would lead, instead, to more contentiousness. President Bush had until very recently insisted on confrontation by nominating Jim Haynes, Claude Allen and Duncan Getchell from Virginia. Each was controversial. The most recent nominee, Mr. Getchell, was nominated over the objections of both home state Senators, a Republican and a Democrat. Those Senators had sought to work with the White House and provided the administration with a number of recommended candidates. When the President nonetheless insisted on nominating Mr. Getchell, that nomination did not have their support. It was ultimately withdrawn. That misadventure resulted in the vacancy continuing for many months if not another year.

That delay came on top of the years we wasted on the highly controversial and failed nomination of William "Jim" Haynes II to the Fourth Circuit. As General Counsel at the Department of Defense, he was the architect of many discredited policies on detainee treatment, military tribunals, and torture. Mr. Haynes never fulfilled the pledge he made to me under oath at his hearing to supply the materials he discussed in an extended opening statement regarding his role in developing these policies and their legal justifications.

The Haynes nomination led the *Richmond Times-Dispatch* to write an editorial in late 2006 entitled, "No Vacancies," about the President's counterproductive approach to



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nominations in the Fourth Circuit. The editorial criticized the administration for pursuing political fights at the expense of filling vacancies. According to the *Times-Dispatch*, "The president erred by renominating . . . and may be squandering his opportunity to fill numerous other vacancies with judges of right reason."

The *Times-Dispatch* editorial focused on the renomination of Mr. Haynes, but could just as easily have been written about other controversial Fourth Circuit nominees. The President insisted on nominating and renominating Terrence Boyle over the course of six years to a North Carolina vacancy on the Fourth Circuit. This despite the fact that as a sitting United States District Judge and while a circuit court nominee, Judge Boyle ruled on multiple cases involving corporations in which he held investments. The President should have heeded the call of North Carolina Police Benevolent Association, the North Carolina Troopers' Association, the Police Benevolent Associations from South Carolina and Virginia, the National Association of Police Organizations, the Professional Fire Fighters and Paramedics of North Carolina, as well as the advice of Senator John Edwards. Law enforcement officers from North Carolina and across the country opposed the nomination. Civil rights groups opposed the nomination. Those knowledgeable and respectful of judicial ethics opposed the nomination. This President persisted for six years before withdrawing the Boyle nomination.

I mention these ill-advised nominations because so many Republican partisans seem to have forgotten this recent history and why there are continuing vacancies on the Fourth Circuit. The efforts and years wasted on President Bush's controversial nominations followed in the wake of the Republican Senate majority's refusal to consider any of President Clinton's Fourth Circuit nominees. All four nominees from North Carolina to the Fourth Circuit were blocked from consideration by the Republican Senate majority. These outstanding nominees included United States District Court Judge James Beaty, Jr., United States Bankruptcy Judge J. Richard Leonard, North Carolina Court of Appeals Judge James Wynn and Professor Elizabeth Gibson. The failure to proceed on these nominations has yet to be explained. Had either Judge Beaty or Judge Wynn been considered and confirmed, he would have been the first African-American judge appointed to the Fourth Circuit.

In contrast, I worked with Senator Edwards to break through the impasse and to confirm Judge Allyson Duncan of North Carolina to the Fourth Circuit when President Bush nominated her. I worked to reduce Federal judicial vacancies in North Carolina by confirming three judges last year -- Judge Schroeder, Judge Reidinger and Judge Osteen. Previously during the Bush administration, I cooperated in the confirmation of Judge Whitney, Judge Conrad, Judge Dever, Judge McKnight and Judge Flanagan. That totals nine Federal judges in North Carolina including a Fourth Circuit judge during the Bush Presidency. By contrast, during the entire eight years of the Clinton administration, one district court judge was allowed to be confirmed in North Carolina.

We have also made progress in South Carolina. Senator Graham follows Senator Thurmond as South Carolina's representative on the Judiciary Committee. Despite the controversy that accompanied the nomination of Judge Dennis Shedd, and my own



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opposition to it, I presided as chairman when we considered that nomination and when the Senate granted its consent. I also presided over consideration of the nomination of Terry Wooten. More recently, we acted favorably on the nominations of Harvey Floyd and Robert Bryan Harwell.

While I chaired the Senate Judiciary Committee from the summer of 2001 to the end of 2002, I presided over the consideration and confirmation of three Fourth Circuit judges nominated by President Bush. All together, President Bush has already appointed five judges to the Fourth Circuit. By contrast, President Clinton was allowed by Senate Republicans to appoint three and left office with five vacancies existing on that court.

Of course, during the Clinton administration, Republican Senators argued that the Fourth Circuit vacancies did not need to be filled because the Fourth Circuit had the fastest docket time to disposition in the country. If the Agee nomination is confirmed as I expect it will be, the Fourth Circuit will have fewer vacancies than it did when Republicans claimed no more judges were needed.

I am sure there are some who prefer partisan fights designed to energize a political base during an election year, but I do not. Under the Republican Senate majority during the Clinton administration, circuit court vacancies more than doubled, rising from 12 to 26 during the last five years of the Clinton administration. Those circuit vacancies grew to 32 during the transition to the Bush administration. We have been able to reverse that and reduce circuit vacancies by almost two-thirds. Today, there are just 12 circuit court vacancies across the nation, instead of 32, and there are fewer circuit court vacancies than at any time since the 1996 session.

We stand poised to reduce circuit court vacancies even lower and possibly reducing it to single digits for the first time in decades. Yesterday I noticed a hearing to be held next week for two nominations to the Sixth Circuit, Judge Helene White and Ray Kethledge. As with the Agee nomination, these nominations provide an opportunity not only to further reduce vacancies, but also to end a longstanding impasse.

I have urged the President to work with the Michigan Senators, and, after seven years, he finally has. Last month our extensive efforts culminated in a significant development that can lead to filling the last two vacancies on the Sixth Circuit before this year ends. This accomplishment stands in sharp contrast to the actions of Senate Republicans who refused to consider any nomination to the Sixth Circuit Court of Appeals during the last three years of the Clinton administration. Ultimately, the Republican-led Senate left open four vacancies on that circuit.

In fact, our work has led to a reduction in vacancies in nearly ever circuit. We have lowered vacancies in the Second Circuit, the Fifth Circuit, the Sixth Circuit, the Eighth Circuit, the Ninth Circuit, the Tenth Circuit, the Eleventh Circuit, the D.C. Circuit and the Federal Circuit. Both the Second and Fifth Circuits had circuit-wide emergencies due to the multiple simultaneous vacancies during the Clinton years with Republicans in control of the Senate. Both the Second Circuit and the Fifth Circuit now are without a single



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vacancy. Circuits with no vacancies also include the Seventh Circuit, the Eighth Circuit, the Tenth Circuit, the Eleventh Circuit and the Federal Circuit. That is five circuits without a single vacancy due to our efforts. The Sixth Circuit is poised to join them after our recent breakthrough if we focus on finishing the job.

Indeed, only one circuit has more vacancies than it did at the end of the Clinton administration and that is a circuit that has but a single vacancy. The other three circuits, the Third, the Fourth and the Seventh have the same number of vacancies today that they had at the end of the Clinton administration. When we confirm the Agee nomination, even the Fourth Circuit will be in an improved posture.

We have wasted too much valuable time that could be spent on the real priorities of ordinary Americans in disputes over a handful of controversial nominees. I am determined to prioritize progress and focus the Committee on those nominations on which we can make progress and, in particular, on those in which the White House has finally begun to work with the Senate.

The alternative is to risk becoming embroiled in contentious debates for months and thereby foreclose the opportunity to make progress where we can. The most recent controversial Bush judicial nomination took five and one-half months of debate after a hearing before Senate action was possible. We also saw what happened during the last several months of the last Congress, which was not even a presidential election year. There were many hearings on many controversial nominations. That resulted in a great deal of effort and conflict but not in as many confirmations as might have been achieved. I prefer to make progress where we can and to work together to do so.

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

April 23, 2008

The Honorable Lindsey Graham
United States Senate
290 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Elizabeth Dole
United States Senate
555 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Richard Burr
United States Senate
217 Russell Senate Office Building
Washington, DC 20510

The Honorable Jim DeMint
United States Senate
340 Russell Senate Office Building
Washington, DC 20510

Dear Senators Graham, Dole, Burr and DeMint:

I write in response to your recent joint letter.

I have been concerned about vacancies on the Fourth Circuit Court of Appeals long before this year. The reason there is an emergency vacancy on the Fourth Circuit from North Carolina is because the Republican majority refused to consider any of President Clinton's nominees. All four nominees from North Carolina to the Fourth Circuit were blocked from consideration by the Republican Senate majority. These outstanding nominees included United States District Court Judge James Beaty, Jr., United States Bankruptcy Judge J. Richard Leonard, North Carolina Court of Appeals Judge James Wynn and Professor Elizabeth Gibson. The failure to proceed on these nominations has yet to be explained. Had either Judge Beaty or Judge Wynn been considered and confirmed, he would have been the first African-American judge appointed to the Fourth Circuit.

In contrast, I worked with Senator Edwards to break through the impasse and to confirm Judge Allyson Duncan of North Carolina to the Fourth Circuit when President Bush nominated her. We could have made even more progress in North Carolina if we had not wasted over six years of the Committee's time debating President Bush's repeated nomination of Terry Boyle. His high reversal rate and failure to follow settled law led to his nomination being opposed by a coalition of law enforcement and civil rights groups, and it was ultimately withdrawn.



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I do not think you recall that I worked hard to reduce the Federal judicial vacancies in North Carolina with the confirmations of Judge Schroeder, Judge Reidinger and Judge Osteen. Previously, during the Bush administration we cooperated in the confirmation of Judge Whitney, Judge Conrad, Judge Dever, Judge McKnight and Judge Flanagan. That totals nine Federal judges including a Fourth Circuit judge. By contrast, during the entire eight years of the Clinton administration, one district court judge was confirmed in North Carolina.

Senator Graham follows Senator Thurmond as South Carolina's representative on the Judiciary Committee. Despite the controversy that accompanied the nomination of Judge Dennis Shedd, and my own opposition to it, I presided as chairman when we considered that nomination and when the Senate granted its consent. I also presided over consideration of the nomination of Terry Wooten. More recently, we acted favorably on the nominations of Harvey Floyd and Robert Bryan Harwell. As he knows, I had been discussing the Matthews nomination with Senator Graham privately.

While I chaired the Senate Judiciary Committee during a portion of the 107th Congress, I presided over the consideration and confirmation of three Fourth Circuit judges. All together, President Bush has already appointed five judges to the Fourth Circuit. By contrast, President Clinton was allowed by Senate Republicans to appoint three.

For your information I enclose a copy of my April 16 statement to the Senate. As you can see, I intend to proceed next to a nomination to the Fourth Circuit. It is that of Steven Agee of Virginia. I have already noticed his hearing for May 1. The nomination of Steven Agee is to one of Virginia's long vacant Fourth Circuit seats. It is my hope that this will help us to make progress in filling a longstanding vacancy on the Fourth Circuit.

The Agee nomination is a breakthrough that affords us the opportunity to be productive after years of contentiousness. President Bush had until recently insisted on nominations like those of Jim Haynes, Claude Allen and Duncan Getchell. You will recall that Mr. Getchell did not have the necessary support of either Senator Warner or Senator Webb. I have been working with the Virginia Senators. Their successful efforts working with the White House are to be commended. I am proceeding to the Agee nomination to reward the President for cooperating with the Senate in making this nomination.

Of course, during the Clinton administration, Republican Senators argued that the Fourth Circuit vacancies did not need to be filled because the Fourth Circuit had the fastest docket time to disposition in the country. That was the period when Fourth Circuit vacancies rose to five. After the confirmation of Steven Agee of Virginia, the Fourth Circuit will have fewer vacancies than it did when Republicans claimed no more judges were needed.



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I also have announced that I intend to proceed promptly to consideration of the nominations of Ray Kethledge and Judge Helene White to the Sixth Circuit. I have long urged the President to work with the Michigan Senators, and, after seven years, he finally has. Last week, our extensive efforts culminated in a significant development that can lead to filling the last two vacancies on the Sixth Circuit before this year ends. This accomplishment stands in sharp contrast to the actions of Senate Republicans who refused to consider any nomination to the Sixth Circuit Court of Appeals during the last three years of the Clinton administration. Ultimately, the Republican-led Senate left open four vacancies on that circuit. If we are successful in considering these nominations and confirming them this year, the Sixth Circuit will have no vacancies.

When the Republican Senate majority stalled consideration of President Clinton's judicial nominees, they more than doubled the circuit court vacancies from 12 to 26 during the last five years of the Clinton administration. Those circuit vacancies grew to 32 during the transition to the Bush administration. We have been able to reverse that. Today, circuit court vacancies have been reduced to only 12 – instead of 32 – across the Nation, less than at any time since the 1996. With the recent breakthroughs we have accomplished in the Fourth and Sixth Circuits, we are poised to lower circuit vacancies to single digits for the first time in decades.

The breakthroughs in these circuits will help us continue the work we have done that has led to a reduction in vacancies in nearly ever circuit. We have already cut Sixth Circuit vacancies in half, and lowered vacancies in the Second Circuit, the Fifth Circuit, the Eighth Circuit, the Ninth Circuit, the Tenth Circuit, the Eleventh Circuit, the D.C. Circuit and the Federal Circuit. Both the Second and Fifth Circuits had circuit-wide emergencies due to the multiple simultaneous vacancies during the Clinton years with Republicans in control of the Senate. Both the Second Circuit and the Fifth Circuit now are without a single vacancy. Circuits with no vacancies also include the Seventh Circuit, the Eighth Circuit, the Tenth Circuit, the Eleventh Circuit and the Federal Circuit. That is five circuits without a single vacancy due to our efforts. The Sixth Circuit is poised to join them after our recent breakthrough if we focus on finishing the job and do not breakdown into partisanship.

Indeed, the only circuit that has more vacancies than it did at the end of the Clinton administration is the First Circuit, which has gone from no vacancies to a single one. The other three circuits, the Third, the Fourth and the Seventh have the same number of vacancies today that they had at the end of the Clinton administration. When we take action on the Agee nomination for your Circuit, even that Circuit will be in an improved posture.

Democrats have not acted as Republicans did during the Clinton administration when Republicans pocket filibustered more than 60 judicial nominations and voted lock step against the confirmation of Ronnie White. I still await an acknowledgement of Republican responsibility and acceptance of accountability for those actions during those years. The Democratic Senate majority has not engaged in a tit-for-tat. Rather, by cutting the vacancies as we have, we have taken a giant step toward resolving problems. We are now, finally, on course to resolve a longstanding impasse in the Fourth Circuit and in the Sixth Circuit. I prefer to make progress where we can in this presidential election year, and to work together to do so. By moving our attention to more controversial nominations, we not only risk a contentious debate, but we would, in effect, be rejecting the White House's recent efforts to work with us to resolve impasses in the Sixth Circuit and in your own Fourth Circuit.

With your cooperation in the years ahead, I am confident we will be able to fill the remaining vacancies in the Federal courts in North and South Carolina. We have already made significant progress. I am sure there are some who prefer partisan fights designed to energize a political base, but I do not. I have tried to be productive.

We have seen the risk we run if we turn the Committee's attention to more controversial nominations that could embroil it in debate for months and foreclose the opportunity to make progress where we can. The last contentious judicial nomination was that of Leslie Southwick. The process of Senate consideration from the time of the hearing to his confirmation was five and one-half months.

The last several months of the last Congress provide another example. With a Republican chairman, the Committee held many hearings on many controversial nominations. That resulted in a great deal of effort and conflict, but not in as many confirmations as might have been achieved.
I trust you find this responsive to your scheduling request and that you understand the broader perspective I am taking as the chair of the Committee. I look forward to continuing to work with you in the future.

Sincerely,

PATRICK LEAHY
Chairman



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PATRICK J. LEAHY, VERMONT, CHAIRMAN

EDWARD M. KENNEDY, MASSACHUSETTS
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BRUCE A. COHEN, *Chief Counsel and Staff Director*
STEPHANIE A. MIDDLETON, *Republican Staff Director*
NICHOLAS A. ROSSI, *Republican Chief Counsel*

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

April 23, 2008

United States Senate Committee on the Judiciary
Minority Members
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Republican Senators:

I acknowledge your recent joint letter. I note that in our personal conversations several of you have worked with me and expressed a greater understanding of what we have accomplished.

First, I would urge each of you to read my statements about judicial nominations from throughout this year, most recently my remarks on April 16, and before that on April 10, April 1, March 7, March 3, and on February 7. I would also urge each of you to review my statements from our numerous confirmation hearings and business meetings. Of course, I would be happy to discuss them with you. They help establish the context in which we are proceeding, and the progress we have made and continue to make.

Frankly, your request lacks that context. It also fails to account for the conflicting and shifting demands that have been placed on me and this Committee. Earlier this year, Senator Kyl was very forceful in observing the importance of filling vacancies at the Department of Justice. Yet in subsequent choreographed Republican floor statements, the Republican leadership and all of you ignore the extensive work we have done in the wake of the resignations of nearly the entire leadership at the Justice Department. In the last several months, we have confirmed a new Attorney General, a new Deputy Attorney General, a new Associate Attorney General and held seven hearings for high-ranking Justice Department nominations. Of course, we could have made progress even sooner, had the Republican Members of the Judiciary Committee not effectively boycotted our business meetings in February and obstructed our ability to report the O'Connor nomination and had it not been the subject of a Republican hold on the Senate Executive Calendar.

A little more than a year ago, the Judiciary Committee began its oversight efforts for the 110th Congress. Over the next nine months, our efforts revealed a Department of Justice gone awry. The leadership crisis came more and more into view as Senator Specter and I led a bipartisan group of concerned Senators to consider the United States Attorney firing scandal, a confrontation over the legality of the administration's warrantless wiretapping program, the untoward political influence of the White House at the Department of Justice, and the secret legal memos excusing all manner of excess.

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This crisis of leadership has taken a heavy toll on the tradition of independence that has long guided the Justice Department and provided it with safe harbor from political interference. It shook the confidence of the American people. Through bipartisan efforts among those from both sides of the aisle who care about Federal law enforcement and the integrity of the Department of Justice, we joined together to press for accountability. That resulted in a change in leadership at the Department, with the resignations of the Attorney General and virtually the entire leadership and leadership staff. I regret that you seem to have abandoned our bipartisan efforts in favor of election year partisanship.

It is ironic that your letter is dated the day the Senate had previously been scheduled to vote on the nomination of Catharina Haynes to fill the last remaining vacancy on the Fifth Circuit Court of Appeals. I worked closely with Senator Cornyn to expedite consideration of that nomination this year and personally chaired her confirmation hearing during a February recess period.

When you refused to cooperate in establishing a quorum at our business meetings in February, you succeeded in assuring that no judicial nominations were able to be reported until March. In addition to the executive nominees on which we have held numerous hearings, the Committee has already held hearings this year on 11 judicial nominations, the Committee has favorably reported five, and the Senate has proceeded to confirm all five. I have placed another three judicial nominees on the agenda for our meeting today and I trust that you will work with me to make additional progress in this regard.

I might note in contrast that in 1999, toward the end of President Clinton's administration, a Republican chairman did not hold a hearing on any judicial nominees until June. We are well ahead of that mark. I also recall that during a recent presidential election year with a Democrat in the White House and a Republican Senate majority, the first judicial nominee was not confirmed until July. That was the 1996 session during which not a single circuit court nominee was confirmed. We did not wait until July this year and have already beaten that session's circuit total with the confirmation of Judge Haynes earlier this month.

Of course, the five lifetime judicial appointments confirmed on April 10 were not the first judicial nominations I have helped move. Senator Specter will recall my help as chairman in connection with the nominations of Nora Barry Fischer, Thomas Hardiman to the Third Circuit, Legrome Davis, Michael Baylson, Cynthia Rufe, Christopher Conner, John Jones III, David Cercone, Timothy Savage, Terrence McVerry, Arthur Schwab, James Gardner. I also helped the Committee proceed to the Third Circuit nomination of D. Brooks Smith, a nomination which I did not support. As ranking member, I worked with Chairman Hatch and Chairman Specter in connection with the confirmations of Michael Fisher and Franklin van Antwerpen to the Third Circuit, as well as the nominations of Thomas Hardiman, Gene Pratter, Lawrence Stengel, Paul Diamond, Juan Sanchez, and Thomas Golden. With the exception of two nominees from Pennsylvania currently pending before the Judiciary Committee, every judicial nominee for a Pennsylvania vacancy nominated by President Bush has been confirmed by the Senate. That is 23 nominations in all, including four to the Third Circuit.

Contrast this with the treatment of nominees from Pennsylvania during the last Democratic administration, when the Republican Senate majority stalled 10 nominations, one for the circuit and nine district court nominations.

Earlier this year, I thought that Senator Specter had a personal interest in the current nomination of Judge Pratter to the Third Circuit, and I was making plans to expedite consideration of that nomination in deference to him. As our process requires, that nomination needed the support of both Pennsylvania Senators. I was assured for some time that that was imminent. Unfortunately, that apparently was not the case. Nor has the President sent nominations for four district court vacancies in Pennsylvania. It is strange that the President has proceeded to nominate Carolyn Short for a vacancy that has yet to occurred, rather than one of the four that has already have. That is something the White House will need to explain.

At one point, it appeared that Senator Specter was urging me to ignore the lack of home state Senator support for the Pratter nomination, just as *The Washington Post* has recently urged consideration of nominations in Maryland and the District of Columbia that do not have such support. At various times and in your various statements and demands, and in those of the Republican leadership, I have heard a variety of suggestions and instructions for me, as well as demands for how the Committee should proceed. I have been trying to accommodate Republican Senators who have come to me individually and worked with me. That is how we prioritized consideration of the Haynes nomination at Senator Cornyn's request, the Hall nomination at Senator Chambliss's request and the Anderson nomination at Senator Alexander's request. I have also met and spoken to Senator Dole a number of times and have received a recent letter from her and others regarding the Conrad nomination. I intend to respond to that letter, as well.

As the former chairman who presided over the Republican Senate majority's pocket filibustering of more than 60 of President Clinton's judicial nominees, Senator Hatch is in position to answer a number of the unanswered questions that still haunt us. I recall a few of them in my April 16 statement to the Senate. One step toward reconciliation would be acknowledgement of this unfair behavior and acceptance of responsibility by Senate Republicans. Despite that recent history, while I have chaired the Committee, I proceeded on the nominations of Michael McConnell to the Tenth Circuit and Paul Cassell to the District Court in Utah and a number of Senator Hatch's former staffers. It is the subsequent resignation of Judge Cassell that is responsible for the only current vacancy on the Federal bench in Utah, a vacancy for which the President has not sent the Senate a nominee.

I know that Senator Grassley recalls my acting quickly at his request on the confirmation of Judge John Jarvey, Judge Michael Mellow to the Eighth Circuit, Judge James Gritzner and Judge Linda Reade. Only Steven Colloton's nomination to the Eighth Circuit was considered while I was the ranking Democratic member of this Committee. As we discussed at a recent Committee business meeting, thanks to all our work, there are no Federal judicial vacancies in Iowa.

Senator Kyl should recall that I cooperated with him over the years to confirm a number of judges in Arizona. Most recently, we have confirmed David Campbell, Neil Vincent Wake, Frederick Martone, Cindy Jorgenson, and David Bury. Among the last judges confirmed in 2000 was his good friend James Teilborg. Senator Kyl recently asked me to schedule a hearing on the nomination of Murray Snow. In response, I have included him in the upcoming hearing on May 1. If that nomination proceeds to confirmation, it will fill the only vacancy on the Federal bench in Arizona.

Of course, at times this year Senator Kyl has demanded we turn not to the Conrad nomination, but to that of Peter Keisler for the 11th seat on the D.C. Circuit. That circuit's membership already includes several controversial appointments of this President, including that of Brett Kavanaugh. Chairman Specter chose to proceed on the Kavanaugh nomination over the Keisler nomination. That confirmation added Judge Kavanaugh to a circuit that also now includes Janice Rogers Brown and Tom Griffith. I recall that during the last three years of the Clinton administration, the Republican Senate majority refused to consider either of President Clinton's qualified nominees, Allen Snyder and Elena Kagan, and that circuit court was left with three vacancies. Currently there is only one vacancy on the D.C. Circuit.

Senator Sessions is another member I have assisted over the years. In particular, I remember the confirmation of Kristi Dubose. There were also the confirmations of Karon Boudre, Callie Granade and Mark Fuller while I chaired the Committee. The Senate has also confirmed William Steele, L. Scott Coogler, R. David Proctor, Virginia Hopkins and W. Keith Watkins, all of whom I supported. There was also the confirmation of William Pryor, which I did not support. Having obtained 10 confirmations since 2001, Alabama is another state that, thanks to our efforts, has no judicial vacancies.

Senator Graham follows Senator Thurmond as South Carolina's representative on the Judiciary Committee. Despite the controversy that accompanied the nomination of Dennis Shedd, and my own opposition to it, I presided as chairman when we considered that nomination and when the Senate granted its consent. I also presided over consideration of the nomination of Terry Wooten. More recently we acted favorably on the nominations of Harvey Floyd and Robert Bryan Harwell. I have been discussing the Matthews nomination with Senator Graham, not the Conrad nomination, and thought that was his priority. Apparently that may not be the case, given his signature on the April 10 letter. I intend to follow up with him individually.

I have already alluded to the most recent confirmation from Texas to the Fifth Circuit, but there have been many others, so many in fact that the Federal bench in Texas has no current vacancies. There was Jennifer Elrod to the Fifth Circuit and Reed O'Connor to the Northern District just last year.

Before that there were confirmations of James E. Kinkeade, Alia M. Ludlum, Andrew S. Hanen, David C. Godbey, Leonard E. Davis, Ronald H. Clark, Philip R. Martinez, and Randy Crane. During my time as ranking member, the Senate confirmed Edward Prado to the Fifth Circuit, Robert Junell, Kathleen Cardone, Earl Yeakel III, Frank Montalvo, Xavier Rodriguez, Marcia Crone, Jane Boyle, Michael Schneider, Micaela Alvarez and Gray Miller. In addition, the Senate confirmed Priscilla Owen to the Fifth Circuit, although 43 Senators voted in opposition.

I was quite disappointed to see Senator Cornyn taking part in partisan attacks on the very day that we were completing the confirmation of Catharina Haynes to fill the final vacancy in Texas. With that confirmation, the Senate has proceeded over the last seven years to confirm 23 judges in Texas, including five to the Fifth Circuit.

I have also tried while serving as Judiciary Chairman to accommodate Senator Brownback. I have worked to extend a temporary judgeship that was expiring in Kansas at his request, and I introduced and helped pass through the Senate a bill to make it permanent. I presided over the consideration of the nomination of Julie Robinson that ultimately led to her confirmation. At present, given our efforts, there is only one district court vacancy in Kansas. The President has not sent the Senate a nomination to fill that vacancy.

Senator Coburn only recently joined the Committee. As he knows, there are no judicial vacancies in Oklahoma. Last year I worked with Senator Inhofe to ensure that both Gregory Kent Frizzell and Timothy DeGiusti were confirmed.

I take the trouble to mention this background because I think it relevant. When Senators, Republican or Democratic, have come to me in good faith, I have done my best to work with them all. Your joint letter fails to recognize any of those efforts.

As you will see from my April 16 statement to the Senate, I intend to proceed next to the nomination of Steven Agee to the Fourth Circuit. I have already noticed his hearing for May 1, and I thank Senator Cardin for his willingness to chair that hearing. At that time, we will also consider the nomination of Murray Snow of Arizona, at Senator Kyl's request, and that of William Lawrence of Indiana, at Senator Lugar's request. The nomination of Steven Agee is to one of Virginia's long vacant Fourth Circuit seats. It is my hope that this will help us to make progress in filling vacancies and reducing those on the Fourth Circuit. The Agee nomination is a breakthrough that affords us the opportunity to be productive. It follows years of contentiousness, as President Bush insisted on nominations like those of Jim Haynes, Claude Allen and most recently Duncan Getchell. You will recall that Mr. Getchell did not have the necessary support of either Senator Warner or Senator Webb. I have been working with the Virginia Senators. Their successful efforts working with the White House are to be commended. I intend to encourage this President to finish out his term by finally acting in cooperation with the Senate by prioritizing action on this nomination.

I also have announced that I intend promptly to proceed to consideration of the nominations of Ray Kethledge and Judge Helene White to the Sixth Circuit. I have long urged the President to work with the Michigan Senators, and, after seven years, he finally has. Last week our extensive efforts culminated in a significant development that can lead to filling the last two vacancies on the Sixth Circuit before this year ends. This accomplishment stands in sharp contrast to the actions of Senate Republicans who refused to consider any nomination to the Sixth Circuit Court of Appeals during the last three years of the Clinton administration. Ultimately, the Republican-led Senate left open four vacancies on that circuit.

With the cooperation of the Committee I believe we should be able to consider and favorably report all three of these circuit court nominees. That is consistent with the approach I have taken throughout my chairmanship. I believe that the results have been positive. We were able to achieve 100 confirmations during the 17 months I chaired the Committee during the 107th Congress. Last year, we sent 40 judicial nominations to the Senate and all 40 were confirmed. That was more than had been confirmed in any of the three preceding years when a Republican chairman and Republican Senate majority managed the process.

If we were, instead, to turn the Committee's attention to other, more controversial nominations, we run the risk of becoming embroiled in debate for months, and will be foregoing the opportunity to make progress where I believe we can. We will also, in effect, be rejecting the White House's recent efforts to work with us. I prefer to make progress where we can in this presidential election year, and to work together to do so. I hope you will join me in these efforts.

I am sure there are some who prefer partisan fights designed to energize a political base, but I do not. I hope you will agree with me. When the Republican majority stalled consideration of President Clinton's judicial nominees, they more than doubled the circuit court vacancies from 12 to 26 during the last five years of the Clinton administration. Those circuit vacancies grew to 32 during the transition to the Bush administration. We have been able to reverse that. Today, circuit court vacancies have been reduced to only 12 across the nation, instead of 32, less than at any time since the 1996 session. With the confirmations of the Virginia and Michigan nominees I have identified, we could lower circuit vacancies to single digits for the first time in decades.

In fact, our work has led to a reduction in vacancies in nearly ever circuit. We have lowered vacancies in the Second Circuit, the Fifth Circuit, the Sixth Circuit, the Eighth Circuit, the Ninth Circuit, the Tenth Circuit, the Eleventh Circuit, the D.C. Circuit and the Federal Circuit. Both the Second and Fifth Circuits had circuit-wide emergencies due to the multiple simultaneous vacancies during the Clinton years with Republicans in control of the Senate. Both the Second Circuit and the Fifth Circuit now are without a single vacancy. Circuits with no vacancies also include the Seventh Circuit, the Eighth Circuit, the Tenth Circuit, the Eleventh Circuit and the Federal Circuit. That is five circuits without a single vacancy due to our efforts. The Sixth Circuit is poised to join them after our recent breakthrough if we focus on finishing the job and do not break down into partisanship.

Indeed, the only circuit that has more vacancies than it did at the end of the Clinton administration is the First Circuit, which has gone from no vacancies to a single one. The other three circuits, the Third, the Fourth and the Seventh have the same number of vacancies today that they had at the end of the Clinton administration. When we take action on the Agee nomination from the Fourth Circuit, even that circuit will be in an improved posture.

I am well aware of the recent history of judicial nominations to the Fourth Circuit. The reason there are so many vacancies on the Fourth Circuit from North Carolina and that they are labeled as judicial emergencies is because the Republican majority refused to consider any of President Clinton's nominees.

All four nominees from North Carolina to the Fourth Circuit were blocked from consideration by the Republican Senate majority. They included United States District Court Judge James Beaty, United States Bankruptcy Judge J. Richard Leonard, North Carolina Court of Appeals Judge James Wynn and Professor Elizabeth Gibson. The failure to proceed on these nominations has yet to be explained. In contrast, I presided over the confirmations of two of President Bush's nominees to the Fourth Circuit in the 107th Congress and as ranking member, worked to help confirm Judge Allyson Duncan of North Carolina to the Fourth Circuit when President Bush nominated her during the 108th Congress.

During the Clinton administration, Republican Senators argued that the Fourth Circuit vacancies did not need to be filled because the Fourth Circuit had the fastest docket time to disposition in the country. After the confirmation of Steven Agee of Virginia, the Fourth Circuit will have fewer vacancies than it did when Republicans claimed no more judges were needed.

I urge you to reconsider the course you appear to be taking. The last contentious judicial nomination was that of Leslie Southwick. The process of Senate consideration from the time of the hearing to his confirmation was five and one-half months. I urge you to consider what was not achieved in the last several months of the last Congress. The Republican chairman chose a different course, as was his right. He had the Committee hold many hearings on many controversial nominations. That resulted in a great deal of effort and conflict but not in as many confirmations as might have been achieved. You can pick fights over a few of the more controversial nominations or we can continue to make significant progress.

Democrats have not acted as Republicans did during the Clinton administration when Republicans pocket filibustered more than 60 judicial nominations and voted lock step against the confirmation of Ronnie White. I still await Republican acknowledgement of responsibility and acceptance of accountability for those actions during those years. The Democratic Senate majority has not engaged in a tit-for-tat. Rather, by cutting the vacancies as we have, we have taken a giant step toward resolving problems. We are now, finally, on course to resolve the longstanding impasse in the Fourth Circuit and in the Sixth Circuit. I continue my efforts to achieve what we can by working together this year. I will consult with you, as I will with the Senate Democratic leadership and all members of the Judiciary Committee.

During the remainder of this year, if you will work with me rather than pick fights, I am confident we can not only make progress but we will be in position to complete the restoration of the confirmation process during the next President's administration and finally overcome years of partisan rancor.

Sincerely,

PATRICK LEAHY
Chairman

The Honorable Arlen Specter
The Honorable Orrin G. Hatch
The Honorable Charles E. Grassley
The Honorable Jon Kyl
The Honorable Jeff Sessions
The Honorable Lindsey Graham
The Honorable John Cornyn
The Honorable Sam Brownback
The Honorable Tom Coburn



47450I.328

# United States Senate

WASHINGTON, DC 20510

April 29, 2008

The Honorable Harry Reid
Majority Leader
United States Senate
S-221 Capitol Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators Reid and Leahy:

We write to express our serious concern regarding statements made by Chairman Leahy during last week's Judiciary Committee Executive Business Meeting. In discussing Senator Reid's April 15, 2008, commitment[1] to confirm three more circuit court nominations before the Memorial Day recess, Senator Specter asked Chairman Leahy to clarify whether he was saying he would not honor the commitment if the scheduling was not "convenient for the two Michigan nominees." In response, Chairman Leahy stated, "I will do everything possible to get it [done] by Memorial Day, but if the White House slow walks [the Michigan nominees' paperwork], we probably won't."[2]

We all know there are several time-consuming steps in the judicial confirmation process, including a Federal Bureau of Investigation background investigation, the issuance of a rating by the American Bar Association (ABA), a hearing, questions for the nominee following the hearing, a Committee vote, and finally a floor vote. Given these standard prerequisites and Judge Helene White's recent nomination date of April 15, 2008, we do not believe regular order and process will allow for her confirmation prior to May 23, 2008. In addition, the FBI is currently conducting a supplemental investigation for Mr. Raymond Kethledge, which must be completed prior to his hearing. Chairman Leahy's statements insinuate that, if the Committee cannot process Judge White and Mr. Kethledge prior to the recess, then the straightforward commitment made by the Majority Leader and, by reference, Chairman Leahy will not be honored.

We would hope, given the likelihood that Judge White and Mr. Kethledge cannot be confirmed prior to the recess, that, in order to fulfill the commitment, Chairman Leahy would

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[1] "Senator Leahy and I are going to do everything we can to approve three circuit court judges by Memorial Day. ... Who knows, we may even get lucky and get more than that." (CONG. REC., S3013-14 (daily ed. Apr. 15, 2008) (statement of Sen. Reid)); *see also id.* at S3014 ("I will do everything within my power to get three judges approved to our circuits before the Memorial Day recess.")

[2] "I will set a course. I will set the agenda. I will discuss it with my caucus. But, certainly, after waiting several years, the White House has it in their power to move very quickly by getting material up here. ... I had a talk during the Easter Recess with the President's counsel urging him to go forward and get the paperwork here and we can move. We will then schedule these. I will do everything possible to get it by Memorial Day, but if the White House slow walks it, we probably won't." Chairman Leahy, Senate Judiciary Committee Executive Business Meeting, April 24, 2008.

turn to other outstanding circuit court nominees pending in Committee who have been ready for hearings and waiting far longer than Judge White or Mr. Kethledge. As we have mentioned previously, Mr. Peter Keisler has already had a hearing and has been waiting for over 660 days for a simple Committee vote, and Judge Robert Conrad and Mr. Steve Matthews, nominees to the Fourth Circuit, are ready for hearings and have been waiting for many months. Both Judge Conrad and Mr. Matthews have enjoyed strong home-state support from their Senate delegations, one of whom is a valued member of the Committee. All three of these nominees deserve prompt consideration by the Committee and up-or-down votes by the full Senate.

It is simply a matter of fairness to include in the commitment, nominees who clearly can be processed and who have been ready for hearings and pending the longest. Further, we object to the selective importance that the Judiciary Committee is placing on home-state senatorial support. The Committee appears to view the support of Republican senators as a necessary, but insufficient, condition for their constituent nominees; while at the same time deeming dispositive the views of Democratic senators, either for or against a nominee. As the Majority Leader himself noted, such disparate treatment is patently unfair.[3]

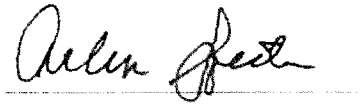
The clock is ticking. It has now been two full weeks since your commitment to do 'everything' you could to confirm three more circuit court nominees by the Memorial Day recess. Yet since that commitment, the Committee has only scheduled one hearing for one circuit court nominee. More troubling still is the fact that the Chairman strongly intimated last week that the Committee may refuse to honor the commitment, not because it is impossible for it to do so, but because the Chairman's preferred queue of nominees will not be ready in time due to the standard requirements of the FBI and the actions of a third party (the ABA), upon which the Democratic Majority has placed particular importance over the years.

If the Committee does not hold a hearing for two more circuit court nominees prior to May 6, 2008, it is exceedingly unlikely that the Senate will be able to confirm at least three circuit court nominees prior to May 23, 2008, given the standard amount of time it takes to move a nomination through the steps in the confirmation process. In order to honor the commitment, we respectfully urge the Committee to schedule hearings for Judge Conrad and Mr. Matthews, and hold a Committee vote for Mr. Keisler as soon as possible.

We look forward to your response.

Sincerely,





[3] "I say to my friend from Kentucky, no, it should not be because you have two from the same party from one State and they are not our party, that should not cause them not to have their nominee approved." (CONG. REC. S3013 (daily ed. April 15, 2008) (statement of Sen. Reid)).

PATRICK J. LEAHY, VERMONT, CHAIRMAN

EDWARD M. KENNEDY, MASSACHUSETTS
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TOM COBURN, OKLAHOMA

BRUCE A. COHEN, *Chief Counsel and Staff Director*
STEPHANIE A. MIDDLETON, *Republican Staff Director*
NICHOLAS A. ROSSI, *Republican Chief Counsel*

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

April 30, 2008

Republican Members
United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Republican Senators:

I have responded to your earlier letter dated April 10. My April 23 letter also responds to much of what you have now included in another joint letter to me also dated April 23 and posted on Senator Specter's website. Your most recent letter does not take my earlier response into account.

I appreciate the willingness of each of you and all of you to serve as Chairmen of the Judiciary Committee. In determining our schedule I take many factors into account.

Today I am proceeding, as I said that I would, to notice a hearing on an expedited basis for the Sixth Circuit nominees from Michigan. The Department of Justice did finally provide us with a nominee's questionnaire late last Friday, April 25. The FBI background investigation was also finally furnished to us late that same day. Perhaps my comments at the Judiciary business meeting and directly to the White House were helpful in getting those materials transmitted after more than a week had passed from our receipt of the nominations.

Even now, in order to notice the hearing, I am having to proceed in advance of the updated ABA peer review of two of the Michigan nominations and updated FBI reports on two of the Michigan nominees. Nonetheless, I have noticed the hearing for these nominations on May 7 in reliance on the earlier reviews and reports, and as another indication of my extreme good faith in working with the White House. I agree with the concern that Senators McConnell and Specter express in their recent letter to the Majority Leader that updated materials are important to the Committee and to the Senate. I want the Committee to proceed in an orderly fashion and for all Senators to have a fair opportunity to question the nominees and have all the materials they need in order fairly to consider these nominations.

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The hearing date you proposed in your April 23 letter would have provided less notice than is required by both Committee and Senate rules. I have tried throughout my chairmanship to respect your rights. I am sure you will understand that while I have taken extraordinary action to schedule this hearing, I do not intend to override the rights of any Senator.

Sincerely,

PATRICK LEAHY
Chairman

The Honorable Arlen Specter
The Honorable Orrin G. Hatch
The Honorable Charles E. Grassley
The Honorable Jon Kyl
The Honorable Jeff Sessions
The Honorable Lindsey Graham
The Honorable John Cornyn
The Honorable Sam Brownback
The Honorable Tom Coburn



47450I.332

HARRY REID
NEVADA

MAJORITY LEADER

United States Senate
OFFICE OF THE MAJORITY LEADER
WASHINGTON, D.C. 20510

April 30, 2008

The Honorable Mitch McConnell
Senate Minority Leader
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
Senate Judiciary Committee
Washington, DC 20510

Dear Senators McConnell and Specter:

Thank you for your letter yesterday regarding judicial nominations.

In a floor statement on April 15 I pledged my best efforts to have the Senate consider three circuit court nominations prior to the Memorial Day recess. I stand by my pledge. I cautioned explicitly that "I cannot guarantee" this outcome because it depends upon factors beyond my control. Nonetheless, I remain optimistic we can meet that goal.

A hearing for Fourth Circuit nominee Steven Agee, as well as district court nominees recommended by Senators Lugar and Kyl, will take place tomorrow afternoon. A hearing for Sixth Circuit nominees Raymond Kethledge and Helene White, as well as a Michigan district court nominee, will take place next Wednesday. Senator Leahy has expedited consideration of the Michigan nominees in light of my April 15 remarks.

Nothing in my pledge regarding judicial nominations deprived Chairman Leahy of his prerogative to determine the sequence of nomination hearings in his committee. No one presumed to instruct Senator Specter about the sequence of nominations during the years he served as Chairman of the Judiciary Committee. And certainly Senator Hatch exercised the chairman's prerogatives freely during the years in which more than sixty of President Clinton's nominees were denied hearings or floor consideration.

The Democratic majority has treated President Bush's judicial nominations with far greater deference than President Clinton was afforded by a Republican-controlled Senate. Three-quarters of President Bush's court of appeals nominees have been confirmed; in contrast, only half of President Clinton's appellate nominations were



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confirmed. Altogether, 145 of President Bush's judicial nominees – 90 percent of them - have been confirmed in the years that Democrats have controlled the Senate. Last year the Senate confirmed 40 judges, more than during any of the three previous years with Republicans in charge. The federal judicial vacancy rate is the lowest it has been in years.

Chairman Leahy and I will continue to work with you both to process judicial nominations in due course, consistent with the Senate's constitutional role.

Sincerely,

Harry

Harry Reid



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SENATOR JOHN WARNER
STATEMENT TO THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF THE HONORABLE G. STEVEN AGEE
TO SERVE ON THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT
May 1, 2008

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Mr. Chairman, Ranking Member Specter, and my distinguished colleagues on the Senate Judiciary Committee, I thank you for holding today's hearing on judicial nominations.

I am pleased to join you today to share my strong support for an eminently qualified Virginian - Justice Steven Agee of the Supreme Court of Virginia, who has been nominated by the President to serve on the United States Court of Appeals for the Fourth Circuit.

I would like to take a moment to recognize the members of the Agee family who join him today in support: his wife, Nancy, and his son, Zach.



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In my view, Justice Agee's qualifications to serve on the Fourth Circuit are as impressive as any circuit court nominee I have voted on in my thirty years in the Senate.

His nomination comes before us today as a product of a collaborative process between the Administration, Senator Webb and me, and by this Committee's leadership which scheduled a confirmation hearing in a timely fashion. I am grateful for the Committee's prompt consideration of this nominee.

In early 2007, Senator Webb and I personally, extensively interviewed more than a dozen individuals to serve on the Fourth Circuit, and ultimately, in June 2007, we submitted to the President a list of five individuals that both of us would strongly support for confirmation. Justice Steve Agee was one of those five individuals.



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A *magna cum laude* graduate of Bridgewater College in Virginia, Steve Agee subsequently earned his law degree from the University of Virginia School of Law and an L.L.M. in Taxation from New York University.

Since his graduation from law school he has been engaged in the Virginia legal community as either a practicing lawyer or as a jurist for the past 30 years.

For eleven years during his career in private practice, Steve Agee also served in the United States Army Reserve, Judge Advocate General Corps, completing his service at the rank of Major in 1997.

From 1982 to 1994, Steve Agee was a member of the Virginia House of Delegates, representing the City of Salem; the Counties of Craig, Montgomery, and Roanoke; and the Towns of Christiansburg, New Castle, and Vinton to Virginia's General Assembly.



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In 2000, the Virginia General Assembly unanimously confirmed Steve Agee to the Virginia Court of Appeals.

In January 2003, the General Assembly once again unanimously confirmed Judge Agee - this time to a seat on the Virginia Supreme Court. Since that time, Justice Agee has served with distinction as one of the seven judges on our highest state court.

Mr. Chairman, in addition to Justice Agee's military, elected, and judicial service, he has, over the course of his career, been actively engaged in a number of other forms of public service.



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For many years, he has been a member of the Board of Trustees for Bridgewater College; a member of the Board of Directors for the Bradley Free Clinic of Roanoke; a member of the Salem Rotary Club; and he has also contributed his time to the Western Virginia Foundation for the Arts and Sciences and the Governor's Regional Economic Development Council for the New Century Region.

Mr. Chairman, Justice Steve Agee is obviously a very accomplished American. I am confident that, if confirmed, he will serve on this court with distinction.

I am proud to give him my highest recommendation and am pleased to note that the American Bar Association concurs, giving Justice Agee its highest recommendation: unanimously well-qualified.

I urge the Committee to favorably report his nomination to the full Senate.



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**Statement of Senator Jim Webb**
**On the Confirmation of Justice G. Steven Agee to be a Judge on the U.S. Court of Appeals for the Fourth Circuit**

**Before the Senate Judiciary Committee**
May 1, 2008

Chairman,

Mr. ~~President~~, today it is my distinct pleasure to offer my support—along with my colleague Senator Warner—for the nomination of Justice G. Steven Agee to be a Judge on the U.S. Court of Appeals for the Fourth Circuit.

Justice Agee is regarded as a jurist of superior intellect and judicial temperament who exhibits the highest degree of integrity and professionalism. After graduating law school, Justice Agee began his legal career as an Associate with Martin, Hopkins & Lemon (1977-1979). In 1979, Justice Agee joined Rocovich, Dechow, Parvin & Wilson, P.C., where he did additional work as an associate. From 1980-2000 Justice Agee was a Shareholder and Director with Osterhoudt, Ferguson, Natt, Aheron & Agee. In 2001, Justice Agee began serving as a Judge on the Court of Appeals of Virginia, and has been a Justice on the Supreme Court of Virginia since 2003.

Justice Agee has unparalleled support from the entire legal community in the Commonwealth of Virginia. Justice Agee served for twelve years in the Virginia House of Delegates (1982-1994) and served as an appointed Member of the Virginia Criminal Sentencing Commission (1997-2000). He is active in myriad community and civic organizations. Justice Agee received his B.A., *magna cum laude*, from Bridgewater



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College in 1974, his J.D. from the University of Virginia School of Law in 1977, and his L.L.M. in Taxation from New York University School of Law in 1978. He is married to Nancy Howell Agee, the Chief Operating Officer and Executive Vice President of Carilion Clinic, and together they have one child.

I am acutely aware of the vitally important role that the Constitution assigns to the Senate in the advice and consent process related to Federal judges. Judgeships on our nation's Circuit Courts of Appeal are critical to the American system of jurisprudence. Senator Warner and I undertook a careful and deliberative process to find the most qualified nominees. Our collaborative process involved a thorough records review and rigorous interviews. We are of the opinion that Justice Agee not only met our high standards for selection but exceeded them. Justice Agee was on the joint list of recommended nominees that we submitted to President Bush last year. We are pleased that President Bush has chosen to respect our diligent bipartisan work.

I want to thank Chairman Leahy and Ranking Member Specter for the opportunity to make these remarks about Justice Agee today, and for the expeditious way the Senate has moved his nomination through the process during the 110th Congress. Again, it is with pride that I join Senator Warner in commending Justice Agee to this committee and to each of my colleagues in the United States Senate.

