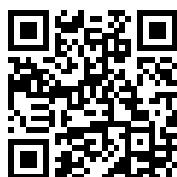

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S. HRG. 102-505, PT. 5

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

CONFIRMATION HEARINGS ON APPOINTMENTS TO THE
FEDERAL JUDICIARY

JULY 24, 29, 31, AND SEPTEMBER 26, 1991

Part 5

Serial No. J-102-7

Printed for the use of the Committee on the Judiciary



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(VI)

CONFIRMATION HEARING ON: EUGENE E. SILER, JR., WILLIAM G. BASSLER, JORGE A. SOLIS, AND JAMES R. TRIMBLE, JR.

WEDNESDAY, JULY 24, 1991

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

The committee met, pursuant to notice, at 9:35 a.m., in room SR-332, Russell Senate Office Building, Hon. Patrick J. Leahy, presiding.

OPENING STATEMENT OF SENATOR LEAHY

Senator LEAHY. If we could be in order in the Committee of the Judiciary. First; because there are a number of Senators here to introduce nominees, and because each of these Senators is also scheduled to be in other committee meetings at the same time, I am going to ask the Senators to introduce their nominees. If we could have the attention of the audience, what I suggest we do is have Senators Ford and McConnell introduce Eugene Siler, and then we will go to Senators Bradley and Lautenberg, and then to Senator Breaux so they can introduce their nominees.

Senator Ford, deputy majority leader, I yield to you.

STATEMENT OF HON. WENDELL H. FORD, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator FORD. Mr. Chairman, it gives me a great deal of pleasure to introduce to you and the committee today Judge Eugene Siler, Jr., the Kentucky nominee for the U.S. Court of Appeals for the Sixth Circuit Court. It is my hope that after hearing from Judge Siler, Mr. Chairman, you will reach the same conclusion I have that he is extremely well qualified to fill the seat. Judge Siler's roots are in Williamsburg, KY, a small town in southeastern Kentucky of about 5,500 people. Williamsburg is the county seat and the second largest city in Whitley County, although the recent census figures show that its population has been closing in on Corbin in the last 10 years as the county's biggest city.

I give you these figures, Mr. Chairman, on Judge Siler's hometown to tell you something about the background and the important values I think he brings to the sixth circuit. Judge Siler comes from a prominent and well-respected family in Williamsburg. His father, Eugene Siler, Sr., served as a judge on the Kentucky court of appeals in the late 1940's, which was then the State's highest court. Later, Eugene Siler, Sr., served as a U.S. Congressman, elect-

ed to Kentucky's old Eighth District in 1954, and served for 10 years.

Eugene Siler, Jr., began the private practice of law with his father as a country lawyer in his hometown of Williamsburg in 1964. He began serving as Whitley County Attorney in 1965. In 1970, he moved on to become a U.S. attorney in the eastern district of Kentucky where he served for 5 years. In 1975, Judge Siler was confirmed for his current position as a judge for the eastern district of Kentucky and has served for 16 years. He was appointed as Chief Judge for the eastern district in September 1984.

Mr. Chairman, Judge Siler may be the most well-regarded Federal district court judge among the legal community in my State, and I believe his experience makes him extremely well qualified. And as you know, Mr. Chairman, the American Bar Association would agree with this assessment as it unanimously rated him to be well qualified, the highest rating given by the ABA for a court of appeals nominee. Judge Siler is experienced first as a lawyer, in my opinion, and then as a judge, in matters of general litigation as well as criminal defense and prosecution. He has lectured on various Federal cases, issues of ethics, and civil procedures. He has sat on special assignment with the Sixth Circuit Court of Appeals on many occasion.

Mr. Chairman, I believe Judge Siler is committed to the principles of judicial restraint, which in my view is an important issue for Federal judicial nominees at all levels. I think you will find that Judge Siler will not invent jurisdiction for the court where it does not exist, will stay within the factual confines of any given case, will respect the separation of powers doctrine, and will avoid wading into constitutional waters where narrower grounds exist for deciding a case.

Finally, Mr. Chairman, let me say a brief word about judicial administration and efficiency in eastern district under Judge Siler. Back in the early 1980's for a number of reasons, there was a tremendous backup of cases in the eastern district. In 1982, for instance, 40 percent of the pending civil cases were more than 3 years old, the second worst rating of any district in the country as compiled by the Administrative Office of the U.S. Courts. Civil trials averaged 33 months, and there was a significant backlog of criminal matters as well.

Since Judge Siler assumed the responsibilities of Chief Judge in 1984, Mr. Chairman, this situation has improved dramatically. A few figures, I believe, are worth mentioning for the record. From 1984 to 1990, the number of unresolved or pending cases has decreased from 2,939 to 1,750, a decrease of 40 percent. The number of old civil cases, those pending for 3 years or more, has dropped from 515 to 81, a decrease of 84 percent, and the average number of trials completed per judge increased by 11 percent. The eastern district became more efficient in other areas as well, all during the period when the cases filed per judge increased by 13 percent. While all judges serving in the eastern district deserve credit for these changes, I believe the overall turnaround is a reflection of the leadership and abilities provided by Judge Siler.

Mr. Chairman, for all these reasons and many others, I recommend Judge Siler to you for confirmation. I believe he will make

an outstanding addition to the Sixth Circuit Court of Appeals and deserves a favorable recommendation from the Judiciary Committee. And Mr. Chairman, let me compliment you and the members of your staff. As you know, President Bush forwarded this nomination to the Senate on June 19, only 34 days ago. This came after several months of waiting to fill the vacancy. The fact that this confirmation is being held today, in my view, is a tribute to the competence and thoroughness of the members and staff of this committee as well as the cooperative efforts of Judge Siler in this process. I may not want you to move quite as fast for the nominee to fill his vacancy but I compliment you and look forward to his confirmation at an early date.

Senator LEAHY. Thank you, Senator Ford. And Judge Siler, as you know, the way we run things, most of us have to take our marching orders from Senator Ford each day. He is the majority whip. So when he comes in here to introduce a nominee, it weighs heavily. That is why everybody sits up and pays attention.

[The prepared statement of Senator Ford follows:]

**STATEMENT OF SENATOR WENDELL FORD
IN SUPPORT OF THE NOMINATION OF
EUGENE SILER, JR.
FOR THE SIXTH CIRCUIT COURT OF APPEALS
July 24, 1991**

Mr. Chairman, it gives me great pleasure to introduce to you today Judge Eugene Siler, Jr., the Kentucky nominee for the U.S. Court of Appeals for the Sixth Circuit. It is my hope that after hearing from Judge Siler, you will reach the same conclusion I have that he is extremely well qualified to fill this seat.

Judge Siler's roots are in Williamsburg, Kentucky, a small town in southeastern Kentucky of about 5,500 people. Williamsburg is the county seat and second largest town in Whitley County, although the recent Census figures show that its population has been closing in on Corbin over the last ten years as the county's biggest city.

I give you these figures on Judge Siler's hometown to tell you something about his background and the important values I think he will bring to the Sixth Circuit. Judge Siler comes from a prominent and well respected family in Williamsburg. His father, Eugene Siler, Sr., served as a Judge on the Kentucky Court of Appeals in the late forties, which was then the state's highest court. Later, Eugene Siler, Sr. served as a U.S. Congressman, elected to Kentucky's old Eighth District in 1954 and serving for ten years.

Eugene Siler, Jr. began the private practice of law with his father as a country lawyer in his hometown of Williamsburg in 1964. He began serving as Whitley County Attorney in 1965. In 1970, he moved on to become a U.S. Attorney in the Eastern District of Kentucky, where he served for five years. In 1975, Judge Siler was confirmed for his current position as a Judge for the Eastern District of Kentucky, and has served for sixteen years. He was appointed as Chief Judge for the Eastern District on September 30, 1984.

Mr. Chairman, Judge Siler may be the most well regarded federal District Court Judge among the legal community in my state. And I believe his experience makes him extremely well qualified. As you know, the American Bar Association would agree with this assessment, as it unanimously rated him to be "well qualified," the highest rating given by the ABA for a Court of Appeals nominee.

Judge Siler is experienced first as a lawyer and then as a judge in matters of general litigation, as well as criminal defense and prosecution work. He has lectured on various federal cases, issues of ethics, and civil procedure. He has sat on special assignment with the Sixth Circuit Court of Appeals on many occasions.

And I believe Judge Siler is committed to the principles of judicial restraint, which in my view is an important issue for federal judicial nominees at all levels. I think you will find that Judge Siler will not invent jurisdiction for the court where it does not exist, will stay within the factual confines of any given case, will respect the Separation of Powers doctrine, and will avoid wading into Constitutional waters where narrower grounds exist for deciding a case.

Finally, Mr. Chairman, let me say a brief word about judicial administration and efficiency in the Eastern District under Judge Siler. Back in the early eighties, for a number of reasons, there was a tremendous backup of cases in the Eastern District. In 1982, for instance, 40% of the pending civil cases were more than 3 years old, the second worst rating of any district in the country as compiled by the Administrative Office of the United States Courts. Civil trials averaged 33 months, and there was a significant backlog of criminal matters as well.

-5-

Since Judge Siler assumed the responsibilities of Chief Judge in 1984, Mr. Chairman, this situation has improved dramatically. A few figures are worth mentioning. From 1984 to 1990, the number of unresolved, or pending, cases has decreased from 2,939 to 1,750, a decrease of 40%. The number of "old" civil cases -- those pending for three years or more -- dropped from 515 to 81, a decrease of 84%. And the average number of trials completed per judge increased by 11%. The Eastern District became more efficient in other areas as well, all during a period when the cases filed per judge increased by 13%. While all judges serving in the Eastern District deserve ~~some~~ credit for these changes, I believe the overall turnaround is a reflection of the leadership and abilities provided by Judge Siler.

Mr. Chairman, for all of these reasons and many others, I recommend Judge Siler to you for confirmation. I believe he will make an outstanding addition to the Sixth Circuit Court of Appeals, and deserves a favorable recommendation from the Judiciary Committee.

I would also commend the Committee for the great speed with which it has acted in reviewing this nominee. As you know, President Bush forwarded this nomination to the Senate on June 19, only 34 days ago. This came after several months of waiting to fill this vacancy. The fact that this confirmation is being held today, in my view, is a tribute to the competence and thoroughness of the Members and staff of this Committee, as well as the cooperative efforts of Judge Siler in this process. I remain hopeful that the nomination process will continue to move forward quickly, and stand ready to assist the Committee in securing confirmation in any way I can. Thank you, Mr. Chairman, for this opportunity to appear before you today.

Senator FORD. Is that a matter of record, Mr. Chairman? [Laughter.]

Senator LEAHY. Senator McConnell, of course, is no stranger to this committee room, as a valued member of the Agriculture Committee, whose room we are using today, and a good friend.

Senator McConnell, please go ahead.

STATEMENT OF HON. MITCH McCONNELL, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator McCONNELL. Thank you, Mr. Chairman.

I appreciate the opportunity to be here today for my friend Gene Siler. I have known Gene for 25 years. I think Senator Ford has certainly covered his résumé in great detail, and it speaks for itself.

A few personal observations. Gene Siler has chosen, the judiciary; there are any number of different ways he could have gone. He could have gone into politics, but he chose the law, and it was pretty clear very early that he was going to be a distinguished lawyer having graduated from the University of Virginia and then getting an LL.M. at Georgetown University.

Gene went in the direction of the law as county attorney, U.S. attorney, and now Federal judge, and I think clearly if there were a vote—it would probably have to be a secret vote—but if there were a vote among were the Federal judges, it would be unanimous that Gene Siler is the cream of the crop. I recommended him to the administration feeling that he was the kind of quality individual that they were looking for on the sixth circuit, and they agreed, and that is why he is here today. And so it is with particular pleasure that I come here today to second the nomination, to endorse Judge Siler. I think it might be appropriate, Judge Siler, for you to introduce your family, who are here with you today. Why do you not do that at this point, and then Senator Ford and I will get on out of here and let the proceedings go forward.

Judge SILER. All right. Thank you, Senator. I have first my wife, Chris Siler, in the front row; my son, Gene Siler III, in the green jacket; my other son, A.T. Siler, in the front row; and in the second row is my sister, Carolyn Browning, and my other sister, Annette Hungerford.

Senator LEAHY. The green jacket was not because you saw an Irish name is chairing. [Laughter.]

All right.

Senator McCONNELL. Mr. Chairman, I would just like to ask that my full statement be made a part of the record.

Senator LEAHY. And it will be.

[The statement of Senator McConnell follows:]

EUGENE E. SILER, JR.

Eugene Siler has had a distinguished career in private practice, and public service. His rise in the federal judiciary has been marked by excellence and leadership, which explains why he is so broadly respected by the entire legal community in Kentucky.

Judge Siler's commitment to excellence was evident as a cum laude graduate of Vanderbilt University in 1958, and in the attainment of law degrees from the University of Virginia and Georgetown University. After serving two years in active duty with the U.S. Navy, he served a legal internship at Georgetown University as a E. Barrett Prettyman Fellow, followed by six years in private practice in Kentucky.

This was all a prelude to Judge Siler's lengthy public service as Whitley County Attorney, U.S. Attorney for the Eastern District of Kentucky in Lexington, and since 1975, United States District Judge Siler has risen to become Chief Judge for the Eastern District of Kentucky where he has demonstrated both his judicial and administrative skills. He is an active member of the U.S. Judicial Conference and on the Board of Directors of the Federal Judges Association.

In his spare time, Judge Siler has been a member of the U.S. Navy Reserve, retiring as a Commander after 25 years of service. He also has been an active member of the community, as Chairman of the Board of Trustees of Cumberland College and as a Board Member of the nonprofit Baptist Hospitals, Inc.

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Senator LEAHY. I am delighted to see so many members of the family. As I always do in these hearings, I would like to make sure that they can be recognized, too, because some day when you are dusting off your archives, it will always be nice to look at this transcript and remember this proud day. Now, I know Senator Ford and Senator McConnell both have other places they are supposed to be. I thank you both, gentlemen, for being here.

Before we start the hearings, let us hear from Senator Bradley and Senator Lautenberg. Judge Siler, maybe you just want to go back and join your family there for a moment.

Senator LAUTENBERG. We are going to move closer to Mr. Chairman to show that we are not distant from the chairman. So we wanted to get a little—

Senator LEAHY. Of course, I just think it is a great honor having both of you here in the committee room. Before you leave, we have other matters that this committee room deals with we would be happy to talk with you about. Go ahead. [Laughter.]

STATEMENT OF HON. BILL BRADLEY, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator BRADLEY. Thank you very much, Mr. Chairman.

I am pleased to introduce Judge William Bassler to the Judiciary Committee. He is here today with his wife and three daughters.

Senator LEAHY. Judge Bassler, if you could, sir, just note their names for the record.

Judge BASSLER. My wife Eileen is here.

Senator LAUTENBERG. Let them stand. We are proud of our people from New Jersey.

Judge BASSLER. And my daughter, Julia, and my daughter, Elizabeth, and my daughter, Roseann. And my sister here—we will get to that later. I just want to tell you, Mr. Chairman, my daughter, Elizabeth, has fallen in love with the Green Mountain State, and she plans to attend college in Vermont in the fall.

Senator LEAHY. Wonderful.

Senator LAUTENBERG. We can leave, Mr. Chairman. [Laughter.]

Senator LEAHY. Well, which school?

Judge BASSLER. St. Michael's, Winooski Park.

Senator LEAHY. I graduated from St. Michael's.

Judge BASSLER. I did not know that.

Senator LAUTENBERG. Do you want to go right to the Supreme Court? [Laughter.]

Senator BRADLEY. Mr. Chairman, it should be noted for the record that Judge Bassler and his entire family drink milk everyday. [Laughter.]

Senator LEAHY. Obviously not enough. I should also note that Judge Bassler graduated from Georgetown Law School 1 year ahead of me, and I do recall him as being 1 of the upperclassmen who used to give me a really rough time when I was at—[Laughter.]

No, that is not so. He was just 1 year ahead of me at Georgetown. Go ahead, Senator Bradley.

Senator LAUTENBERG. We are on a roll here.

Senator LEAHY. What?

Senator LAUTENBERG. We are on a roll here.

Judge BASSLER. Quit while we are ahead.

Senator BRADLEY. Thank you very much, Mr. Chairman. Judge Bassler has an excellent record as a judge on the New Jersey Superior Court. His record of impartiality and respect for all parties who appear in his court bodes well for his service on the Federal District Court for New Jersey. For over 30 years, William Bassler has displayed a genuine respect and appreciation for the law. Throughout his 24 years as a practicing attorney, Judge Bassler displayed a comprehensive understanding of the law. Arguing before the Supreme Court of New Jersey, he won a landmark case which emphasized the importance of the law of eminent domain. As a judge for the New Jersey Superior Court, Judge Bassler's rulings have achieved great respect.

Judge Bassler's commitment to public service initially took a different bent, however. His higher education began at the seminary where he studied for the priesthood. Judge Bassler completed his education at Fordham University in New York and pursued a legal education, receiving his juris doctorate, as you pointed out, from Georgetown University Law Center. Judge Bassler has used that legal education to assist others, both on and off the bench. Judge Bassler is a strong supporter of education. And as an attorney he devoted time and energy as a part of the president's advisory council at Brookdale Community College. He has also agreed to assist the State university, Rutgers, design and offer a course in legal writing.

As a superior court judge in New Jersey, Judge Bassler participated in judicial committees ranging from model civil charges to family division practice. The chief justice recognized Judge Bassler's dedication and assigned him to the law and chancery divisions of the Superior Court of New Jersey. While I have not had the opportunity to know Judge Bassler a long time, I have made a number of inquiries, and I believe his character, demeanor, and experience in the legal field and experience on the trial bench gives me the confidence to recommend him strongly to you and to the committee for confirmation as a Federal district court judge.

If his past record is an indication of his future performance, I am confident that Judge William Bassler will live up to the high ethical and intellectual standards this country expects from a Federal district court judge, and it is my pleasure to appear with him today to recommend him to the committee for confirmation.

Senator LEAHY. Thank you very much, Senator Bradley.

Senator Lautenberg.

**STATEMENT OF HON. FRANK R. LAUTENBERG, A U.S. SENATOR
FROM THE STATE OF NEW JERSEY**

Senator LAUTENBERG. Thank you very much, Mr. Chairman.

I, too, am pleased to appear here with Judge William Bassler and his lovely family. In New Jersey, we find that families with three daughters are exceptional families. I also have a son, but I did want to indicate, Mr. Chairman. There is something rather unique about this presentation because I think New Jersey, perhaps, is one of the only States in the country represented by two nonlawyers in

the U.S. Senate. So we, therefore, take great pride when we have a chance to introduce someone who has the skills and the interest, the devotion and dedication, that Judge Bassler brings to the court.

He, as you heard from Senator Bradley, was an accomplished attorney in New Jersey and has served since 1988 as a judge of the superior court, and that is a general trial court in our State. He served, from 1984 until he went to the bench, as a partner in Carton, Nary, Witt & Arvanitis. His practice was primarily in civil law before the State courts. His areas of expertise were in the areas of local government law, real estate, trusts and estates, insurance, and he practiced as a general counsel for one of our insurance companies. He served as borough counsel to the community of Red Bank, NJ, and to local zoning boards.

Judge Bassler has served since September 1988 in the chancery division, family part, in Monmouth County, and he has distinguished himself with his presence there. Mr. Chairman, the family court brings out the human side of judgment, a side that we sometimes lose sight of, in tragic, heart-rending cases of child and spousal abuse. The court is often asked to separate a child from a parent or a spouse from a family. In those cases, a judge is called upon to make some of the most difficult decisions that a person can be asked to make. The answers are often of the sort that are not found in the law books but in one's judgment of character and understanding of the facts and a sense of justice, and the public's perception of the fairness of judicial system is shaped by how our system handles such cases.

And I am pleased to report that from all that we have heard, Judge Bassler has handled those with sensitivity and skill. The people whom I know in the law and respect have told me that he has performed exceptionally well in the family court, and he has approached his cases with a sense of humanity and dignity, with a dedication to finding the just result. Mr. Chairman, Judge Bassler recognizes that despite his accomplished career as an attorney and as a State judge, he will, if confirmed, confront a range of new and complex legal issues. We had quite a discussion about this yesterday, and I feel very comfortable that Judge Bassler is going to do an outstanding job as a district court judge.

Those familiar with his work say that he has the will and the intellect to learn those things that he needs to know to be the kind of a judge that the public deserves and expects. I was, as I said, impressed with his commitment to the task ahead of him, and I believe that he is going to devote the energy and the skill and make the effort to do the job as all of us would like to see it done. So I am pleased to commend Judge William Bassler to you, Mr. Chairman, and I hope that it will not be too long before the administration fills the other three vacancies that will remain after Judge Bassler takes his position on the bench.

The caseload is heavy. There is a lot of work to be done, and I hope that we will not impede the process of justice in this country by not taking advantage of the opportunity to fill those places and get on with the job.

[The prepared statement of Senator Lautenberg follows:]

Sen. Frank R. Lautenberg
Hearing on Judge William Bassler
July 24, 1991

Mr. Chairman, I am pleased to join Senator Bradley in introducing Judge William Bassler, and to recommend him for a position on the U.S. District Court for the District of New Jersey.

Judge Bassler was an accomplished attorney in New Jersey, and has served since 1988 as a Judge of the Superior Court of New Jersey, the general trial court in our State.

Judge Bassler is a graduate of St. Charles College Seminary and Fordham University. He received his J.D. from Georgetown University Law Center in 1963 and a LLM from New York University in 1969.

He served as a clerk to then Appellate Division Judge Mark Sullivan, and then entered the private practice of law in Monmouth County, New Jersey.

He was an associate and then a partner in the law firm of Parsons, Canzona, Blair and Warren until 1970, when he became a partner in the law firm of Labrecque, Parsons & Bassler. In 1983, he joined as a partner of Evans, Koelzer, Osborne, Kreizman and Bassler. And in 1984 until his ascension to the bench, he was a partner in Carton, Nary, Witt and Arvanitis.

Judge Bassler's practice was primarily in civil law, before the state courts. His areas of expertise were in the areas of local governmental law; real estate; trusts and estates; and insurance law, which he practiced as general counsel for a local insurance company. He served as borough counsel to Red Bank, New Jersey and to local zoning boards.

After briefly serving in the law division of Superior Court, Judge Bassler has served since September 1988 in the chancery division, family part in Monmouth County.

Mr. Chairman, the family court brings out the human side of judging -- a side we sometimes lose sight of. In tragic, heart wrenching cases of child and spousal abuse, the court is often asked to separate a child from a parent, or a spouse from a family.

In those cases, a judge is called upon to make some of the most difficult decisions one person can be asked to make. The

answers are often of the sort that are found not in the law book, but in one's judgement of character, in one's careful review of the facts, in one's sense of humanity and justice. And the public's perception of our judicial system -- it's perception of its fairness -- is shaped by how a judge handles such cases.

People whom I respect have told me that Judge Bassler has performed well in the family court. He has approached his cases with sincerity, humanity, and with a dedication to finding the just result.

The ABA panel that reviewed his nomination unanimously rated him qualified.

Mr. Chairman, Judge Bassler recognizes that despite his accomplished career as a local attorney, and a State Judge, he will, if confirmed, confront a range of new and complex legal issues.

People I respect who know him well say he has the will and the intellect to learn what he needs to know, to be the kind of judge the public deserves and expects. In my own meeting with Judge Bassler, I was impressed with his sincerity, and his dedication to the task ahead of him.

Mr. Chairman and members of the Committee, I am pleased to commend Judge William Bassler to you.

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Senator LEAHY. If I might just add to a couple of things you have said, one on filling the vacancies. This committee has noted numerous times there are vacancies all over the country. The administration has been extraordinarily slow in filling them. I wish that was not so, because this committee has worked very hard to move confirmations quickly, but obviously we cannot confirm somebody without an appointment. You are right in pointing that out.

I also appreciate the comments you made about the family court, an area bearing repeating. Having spent time in family court, both in private practice and then later as a prosecutor, I think in many, many ways, that it is the most difficult assignment a judge can have. It is one thing to be in a trial court. You sit and you make the appropriate rulings, but the jury gets to make a lot of the decisions for you. Family court is usually not that way. And, as you say, they are heartrending and personal decisions. So many times, whatever decision he makes, the judge, has to be unhappy with it in one way or another. Things that have brought people into the family courts are usually, or often anyway, tragedy or irreconcilable problems that do not lead one to a happy conclusion but just to figure out what is fairest.

But gentlemen, I know you both have other committee assignments where you are supposed to be, and I appreciate your being here.

Senator LAUTENBERG. Thank you.

Senator LEAHY. Judge, if you could step down just for a moment. I want to bring Mr. Trimble and Senator Breaux over, and then I think we will have finished the introductions.

STATEMENT OF HON. JOHN R. BREAX, A U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator BREAUX. Thank you very much, Mr. Chairman.

This is my second day in a row in this committee, and yesterday you were wearing the hat of the Agriculture Committee chairman, and I note, I think, that contrary to our two colleagues from New Jersey, it is not a question of wanting to sit close to the chairman on his right, but to sit in a better position for the TV cameras on the left.

Senator LEAHY. The TV people have asked if somehow that tie, they figure it is going to blow out the rest—

Senator BREAUX. It is the right color balance, but it might blow out the tube. [Laughter.]

Well, I am also delighted to be able to present to the committee for consideration the nomination of Magistrate Jim Trimble from Lake Charles, LA, who is accompanied today by his wife Murel, if Murel would stand and be recognized. We are delighted to have her accompanying her husband as well. We also, I would just add, before I make a brief comment about Magistrate Trimble's qualifications, the fact that we in Louisiana are desperately in need of having the vacancies that are still there filled as rapidly as possible, and we certainly encourage the administration to move aggressively and to be able to set a confirmation hearing for the other vacancies which desperately need to be filled.

I am joined in spirit and support by my colleague, our colleague, Bennett Johnston, in recommending Jim Trimble to the committee. Jim is the type of person who is uniquely qualified; he is a graduate of the University of Southwestern Louisiana, my alma mater, and he is also a recipient of a juris doctorate degree in law from Louisiana State University, also my alma mater. He also served with great distinction in the U.S. military as an Air Force legal counsel in the Judge Advocate General's Office. And after the military, Mr. Chairman, he engaged in the general practice of law for some 27 years.

I think that is so important a qualification for Federal district judges that they have a history of experience and practice in the day-to-day operations before the court before they sit behind the desk and serve as judges. Magistrate Trimble brings that type of broad practice to his nomination, which I think is a great experience and so very important. His practice was a civil practice, and it was a criminal practice. It was also a commercial practice, so he has experience in every aspect of the law that he is now going to be judging.

He is also, I think, and I think is also important, a very well-rounded person in the sense he is an active participant in his community, serving in the Kiwanis Club, the American Red Cross, the Salvation Army, the junior chamber of commerce, the YMCA, the Lake Charles Symphony Orchestra, and is also a member of all of the major bar associations of his profession.

In February 1986, the Federal judiciary recognized the talent of this individual and appointed him to serve as U.S. magistrate for the U.S. District Court for the Western District, a position that he currently holds. He is ready to go back and get to work, Mr. Chairman, as soon as our confirmation is complete. I wholeheartedly endorse him and recommend him, and am joined in that recommendation by Bennett Johnston.

Senator LEAHY. We also have Senator Johnston's written statement since he could not be with us. It will be included in the record.

[The prepared statement of Senator Johnston follows:]

**STATEMENT OF
SENATOR J. BENNETT JOHNSTON
REGARDING THE NOMINATION
OF JAMES T. TRIMBLE, JR. TO THE UNITED
STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF
LOUISIANA**

**MR. CHAIRMAN AND MEMBERS OF THE
COMMITTEE, IT IS AN HONOR TO ENDORSE
PRESIDENT BUSH'S NOMINATION OF JAMES T.
TRIMBLE, JR. TO THE UNITED STATES**

**DISTRICT COURT FOR THE WESTERN
DISTRICT OF LOUISIANA.**

**I BELIEVE IT IS MOST FITTING THAT AN
INDIVIDUAL OF TRIMBLE'S HIGH STANDARDS
AND EMINENT QUALIFICATIONS BE
NOMINATED FOR THIS VERY IMPORTANT
POSITION.**

**JAMES T. TRIMBLE COMES TO THE
COMMITTEE WITH IMPRESSIVE CREDENTIALS,
HAVING SERVED SINCE 1986 AS UNITED
STATES MAGISTRATE FOR THE UNITED
STATES DISTRICT COURT FOR THE WESTERN**

**DISTRICT IN LAKE CHARLES, LOUISIANA. MR.
TRIMBLE IS A 1956 GRADUATE OF THE
LOUISIANA STATE UNIVERSITY SCHOOL OF
LAW IN BATON ROUGE, LOUISIANA.**

**MR. TRIMBLE HAS HAD A DISTINGUISHED
CAREER IN LAW AND PUBLIC SERVICE.
AMONG THE PROFESSIONAL ORGANIZATIONS
IN WHICH MR. TRIMBLE HOLDS MEMBERSHIP
ARE LOUISIANA STATE AND AMERICAN BAR
ASSOCIATIONS, LOUISIANA ASSOCIATION OF
DEFENSE COUNSEL; NATIONAL COUNCIL OF
UNITED STATES MAGISTRATES; NATIONAL
CONFERENCE OF SPECIAL COURT JUDGES**

AND THE LOUISIANA BAR FOUNDATION.

**IT IS ALSO IMPORTANT TO NOTE THAT
DURING HIS YEARS AS A PRACTICING
ATTORNEY, MR. TRIMBLE HAS SERVED WITH
DISTINCTION IN A NUMBER OF RESPONSIBLE
POSITIONS OUTSIDE THE LEGAL PROFESSION.
HE HAS BEEN VERY ACTIVE IN HIS
COMMUNITY AS A MEMBER OF THE LAKE
CHARLES KIWANAS CLUB; THE ALEXANDRIA
LOUISIANA CHAPTER OF THE AMERICAN RED
CROSS; SALVATION ARMY; YMCA AND THE
LAKE CHARLES SYMPHONY BOARD OF
DIRECTORS.**

**PRIOR TO FOUNDING THE LAW FIRM OF
TRIMBLE, PERCY, SMITH, WILSON, FOOTE,
WALKER & HONEYCUTT, MR. TRIMBLE
SERVED IN THE UNITED STATES AIR FORCE,
JUDGE ADVOCATE GENERAL DEPARTMENT
FROM 1956 TO 1959.**

**HE IS MARRIED TO THE FORMER MUREL
ELISE BILES AND HAS FOUR DAUGHTERS.**

**I HAVE KNOWN JAMES T. TRIMBLE FOR
MANY YEARS AND HAVE FOUND HIM TO BE
VERY PROFESSIONAL AND COMPETENT AS A
LAWYER AND COMMUNITY LEADER.**

**MOREOVER, I AM CONFIDENT HE POSSESSES
THE NECESSARY JUDICIAL TEMPERAMENT TO
SERVE ON THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
LOUISIANA.**

**IN SUM, I BELIEVE THAT MR. TRIMBLE
POSSESSES THE INTEGRITY, APPROPRIATE
DEMEANOR AND APTITUDE FOR LEGAL
SCHOLARSHIP THAT WILL ENABLE HIM TO
SERVE WELL AND WITH DISTINCTION IF HE IS
CONFIRMED.**

**MR. CHAIRMAN, JAMES T. TRIMBLE, JR. IS
IMMINENTLY QUALIFIED TO SERVE AS A
JUDGE TO THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
LOUISIANA AND I STRONGLY URGE THE
COMMITTEE TO ACT FAVORABLE ON HIS
NOMINATION.**

Senator LEAHY. Thank you very much.

Both yours and Senator Johnston's recommendation carry a lot of weight with this committee. I might ask Magistrate Trimble, there is a Judge Preston Trimble in Norman, OK. Any relation to you?

Mr. TRIMBLE. Not to my knowledge. Not to my knowledge.

Senator LEAHY. OK. Just thought I would ask. It was the only other person I knew with the same last name, and I thought I would try it out.

Senator BREAX. He likes milk, though. [Laughter.]

Senator LEAHY. Who? Preston Trimble or James Trimble?

Senator BREAX. All of us. Everybody.

Senator LEAHY. I wish this committee would bring out that same reaction in some of the members who sit at this committee. Thank you very much. And I should also note for the record that Senator Gramm of Texas has submitted a statement on behalf of George Solis, who is a nominee for U.S. district judge for the northern district of Texas, and that will be included in the record.

[The prepared statement of Senator Gramm follows:]

THE HONORABLE PHIL GRAMM, UNITED STATES SENATOR, TEXAS
STATEMENT BEFORE THE U.S. SENATE COMMITTEE ON THE JUDICIARY
JULY 24, 1991

Mr. Chairman, it is a great honor for me to commend to you the President's nominee for the District Court of the Northern District in the State of Texas, Judge Jorge Solis.

Mr. Chairman, Jorge Solis, the first Abilene resident ever to be nominated to the federal bench, has been an outstanding prosecutor, an outstanding judge and an outstanding member of his community. He is a graduate of the University of Texas Law School. He had a distinguished law practice in numerous criminal law areas of practice, and he has served as a district judge in the 350th State District Court in Abilene in Taylor County.

As a special prosecutor for the Narcotics Task Force and criminal district attorney, he learned about the drug thugs who plague our nation. As a member of the Governor's Task force on Drug Abuse and a member of the Board of Directors of the HRC Drug Abuse Treatment Center in Abilene, he knows about those who are victimized by crime and drugs.

Judge Solis is that rare combination of student of the law and a person who has been very actively involved in most of the good things happening in Taylor County. He is highly respected by his colleagues and by those who have come before his court, and I believe that he will be an outstanding Federal judge. I am confident that I will always be proud to have recommended him to the President.

Senator LEAHY. If we could go back to Judge Siler, and Judge, if you would just come on up and take a seat. Before you do, would you stand and raise your right hand? Do you solemnly swear the testimony you shall give before the committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge SILER. I do.

**TESTIMONY OF HON. EUGENE E. SILER, JR., OF KENTUCKY, TO
BE A JUDGE ON THE SIXTH CIRCUIT COURT OF APPEALS**

Senator LEAHY. Thank you, please sit down, sir.

Did you have any opening statement that you wished to make?

Judge SILER. No, Mr. Chairman. I just want to say that I am honored and humbled by being nominated by the President, and I will do my best if confirmed.

Senator LEAHY. Thank you very much. Let me ask a couple questions. When we went through your questionnaire, I noticed you mentioned two cases, *Christian v. Belcher*, and *Marohnic v. Walker*. Those are first amendment cases. Apparently, the claim was retaliation for political expression, and the sixth circuit reversed your summary judgment. How do you feel about that? If you had that case to do over again, do you think you would grant summary judgment?

Judge SILER. Well, since they told me I did wrong, it is kind of hard for me to say that I would do the same thing, but I thought in the Marohnic case that actually he had a first amendment violation, but he settled and had an agreement, and I felt that the first amendment had been settled out and that the case that I heard had to do with a breach of contract, but the sixth circuit disagreed, and of course, I cannot say they are wrong. So I will just have to say I would follow what they say in each case.

Senator LEAHY. Well, the reason I mention it, there is also *Stevens v. Bordenkircher* and the sixth circuit reversed on that. There was pretty sharp language saying that you cannot speak of the denial of a constitutional guarantee as being harmless. That kind of worries me, as it may reflect your own philosophy. If you have somebody who has been convicted of murder, of course, they should be behind bars. I go back to my prosecutorial days when I argued very strongly to put such people behind bars, but I also felt even as a prosecutor that I had certain duties to protect a defendant's fundamental rights, not the least of which was his right to confront his accusers.

Now you are going to be asked most assuredly, if confirmed to this position, in cases that will come up on appeal to you, to make sure that a defendant was given his right to confront his accuser. Do you feel that you are going to be in any way hampered in doing that?

Judge SILER. No, Mr. Chairman, I do not. I will, of course, follow precedent of the sixth circuit and the Supreme Court.

Senator LEAHY. Well, let me ask you about that, then. You have the precedent of your own circuit to follow, and, of course, Supreme Court precedent. Suppose you had a precedent, and you just looked at it, and said, I do not like that Supreme Court decision. If I were

on the Supreme Court, I would have ruled differently. What does that do when you have to apply it?

Judge SILER. Well, that comes up infrequently, but it does come up, and I think the court of appeals must follow the Supreme Court even if it disagrees. If the judges disagree individually with the Supreme Court, they might write in a concurring opinion that they think it might need looked at it again, but I think it is the duty of the lower courts to follow whatever the superior court is. And I have always done that as far as I can discern what the appellate court says.

Senator LEAHY. What if you have a sixth circuit court decision, not a Supreme Court decision, but a sixth circuit court opinion, and you are on the circuit. You also do not like that one. What do you do then?

Judge SILER. I think—

Senator LEAHY. How much weight do you give to the precedent of your own circuit?

Judge SILER. I give, as I understand the rules of the sixth circuit, unless it is to be changed, it cannot be changed by another three-judge panel. It has to go en banc, and so if I were a judge and felt it should be changed, I would probably concur and say I think this should go to the whole panel en banc and decide whether it should be overturned.

Senator LEAHY. But if it is not, you would feel bound by it?

Judge SILER. Yes, sir, I certainly would.

Senator LEAHY. OK. Thank you. Well, Judge, I appreciate the answers to the questions. I said you were given pretty solid backing by your two Senators before. As the rest of us do not live in your State, we have to rely very much on what we hear from our fellow Senators. I once made the comment that while marriages are probably made in heaven, Federal judgeships are made in the U.S. Senate, and so we rely heavily on that. I thank you very much for being here.

Judge SILER. Thank you.

Senator LEAHY. Judge Bassler, could you step forward, please? Raise your right hand. Do you solemnly swear the testimony you shall give before this committee will be the truth, the whole truth, nothing but the truth, so help you God?

Judge BASSLER. I do so swear.

TESTIMONY OF HON. WILLIAM G. BASSLER, OF NEW JERSEY, TO BE A U.S. DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY

Senator LEAHY. Did you have an opening statement you wish to make?

Judge BASSLER. No, Mr. Chairman, other than to express my appreciation for the opportunity to be here and to thank the President again for that opportunity.

Senator LEAHY. Thank you. You worked almost exclusively on civil matters when you were in private practice. Of course, that was primarily State, rather than Federal courts. We talked earlier about your service on the State bench. That has been family-related matters, civil disputes. We have seen in the past 5, 10 years,

more of the Federal courts becoming more and more active in criminal cases.

And if the bill recently voted on by the Senate on crime control becomes law, you will be able to handle everything from \$2 gas station stickups on through all those things that municipal courts used to handle. Now that we can show how hairy-chested we are on crime, we can let local courts take a vacation and turn it all over to the Federal court. We will have the advantage of not only clogging up the courts more but costing the taxpayers considerably more. We can all run our 30-second ads saying we are against crime. That is an aside to which you are not even supposed to respond. But you are going to have criminal cases, and some will be very important cases. It will not be just the ones that the Senate in its infinite wisdom says should be before the Federal court. How do you get up to speed on the kind of important criminal cases that are based on the old laws and precedents?

Judge BASSLER. I have met previously with Judge Gary, who is my chief judge to discuss that, and to discuss a program of self-education. I have also been meeting with the judges in the criminal part, and I have been observing some criminal trials when I have had the opportunity. And in addition, I spent yesterday morning over at the Federal Judicial Center to discuss with them what videotapes and audiotapes and other publications were available. Some of that has already been sent to me, and I am looking forward to a lot of hard work in that area.

Senator LEAHY. I cannot impress upon you enough the importance of that because you can just assume most serious criminal cases are going to go up on appeal. By far the best situation is one where the matter is disposed of at the district court level, where if there is an appeal it is found that everything was done properly. In my experience a case comes back from appeal, maybe 3 years later or 4 years later, and you finally get another retrial, witnesses' memories have faded and victims are put through the whole matter again. If the reason for that is because the judge made a mistake, it is really a very difficult thing to have to explain.

There are enough other people in the system who have a chance of making mistakes, but I think it really creates even more of a problem if the judges do. And I am sure you agree.

Judge BASSLER. I do agree with that, and I am very much aware of the importance of it.

Senator LEAHY. You used to belong to the all-male Root Beer and Checker Club in New Jersey. I love that name. You resigned from that club prior to joining the State bench. Why is that?

Judge BASSLER. When I was preparing to go on the State court bench, I received from the administrative office of the courts a set of guidelines that had been established by our own supreme court. The guidelines, I think, mirror the ABA canon, and there is a prohibition, which was left up to the individual judge to interpret, but basically it indicated it was inappropriate for a judge to belong to any organization which practiced invidious discrimination. I am not sure the club fit into that if you knew the club. But I did feel it was inappropriate for a judge who is going to be a superior court judge to belong to a club that did have any kind of exclusionary

language. I just did not think it appeared appropriate, and that is the reason I resigned.

Senator LEAHY. Last summer, the Judiciary Committee passed a resolution saying basically what apparently your State had already done. So I would assume that you agree with that kind of a position, is that correct?

Judge BASSLER. I do agree with that.

Senator LEAHY. I feel strongly that if the judiciary, the bar, and members of the bar generally take that kind of a position, it will probably do as much for discrimination as anything can because most members of the bar and certainly judges by their very nature tend to be leaders of the community. The example they set by resigning from or not joining such clubs in the first place, is an excellent one.

Judge BASSLER. The club itself eventually came to that same conclusion.

Senator LEAHY. That is what I understand. You were a trustee of Monmouth College from 1984 through 1988. You quoted from the college's 1980 to 1990 report, which said during the 1980's the college began consciously to promote greater racial and ethnic representation in the student body and faculty so that Monmouth would accurately reflect society's rich cultural diversity. Do you agree with that?

Judge BASSLER. Yes, I do.

Senator LEAHY. Do you believe it can ever be proper for courts to take over or to participate in the administration of institutions as a way of enforcing constitutional rights?

Judge BASSLER. I would say that it would have to be an exceptional situation.

Senator LEAHY. If an institution resists judicial orders, for example, regarding treatment of prisoners or intentional discrimination, or housing of inmates, what are the measures available to a judge to enforce those orders?

Judge BASSLER. I think that it is important to proceed incrementally in that kind of a situation because you never know what the ramifications of taking over an institution are. I would hope that the influence of the judge initially through settlement conferences might be able to persuade a change. If that were not possible, then you move perhaps into the area of damages and I suppose when you come down to the bottom line, eventually you would have to take stronger measures as has been done in New Jersey.

In fact, the county, my own county, has someone acting as a master for the judge for that reason. And the county eventually did appropriate the necessary money, and I think it is coming to an end.

Senator LEAHY. Yes. That was one of the cases I had in mind. I had seen it over there. Well, I have no further questions for you, and I hope your daughter enjoys St. Michael's.

Judge BASSLER. We think she will.

Senator LEAHY. It is a very nice school. I also advise her it gets colder than the devil there about January. I know. I live just a couple of miles from there, and it gets very, very cool.

Judge BASSLER. She has a cousin who has a nursery over in Charlotte. So we are hoping that she might get some R&R over there.

Senator LEAHY. That is not bad. And I commend you on that. It is very rare that we find a non-Vermonter who actually gives the Vermont pronunciation of Charlotte. Thank you.

Judge BASSLER. Thank you, Mr. Chairman.

Senator LEAHY. I would note for the record we did not rehearse that last bit.

Senator LEAHY. Judge Solis, would you raise your right hand. Do you solemnly swear that the testimony that you will give before the committee will be the truth, the whole truth, nothing but the truth, so help you God.

Judge SOLIS. I do.

**TESTIMONY OF HON. JORGE A. SOLIS, OF TEXAS, TO BE A U.S.
DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS**

Senator LEAHY. Judge, as I noted, Senator Gramm has a statement for the record strongly in favor of you.

Do you have members of your family here?

Judge SOLIS. Yes, sir, I do.

Senator LEAHY. Could we introduce them, please, so we can have that in the record?

Judge SOLIS. Yes, sir, I would like to. My wife, Rebecca, here on the front row, our four-year-old daughter, Diane, next to her, drinking the glass of water, and our son, Daniel, next to Diane. And I have some other family. I have two sisters, Gilda Pierce on the back row in the green dress, and my sister, Nora Reyes, next to her, and those are Nora's two children, Frank, Jr., and Armando, and then Nora's husband, Frank Reyes, and then another brother-in-law over here with a camera, Mark Pierce.

Senator LEAHY. This is about as large a group as we have had, but I am glad you mentioned that. The staff may want to make absolutely sure we have the names down and spelled correctly, because I think that should be in the record which you will have, because I am sure it is a matter of pride to you. But I think even more important, it is probably a great matter of pride to them to be able to be here with you, and I am delighted they are here. Coming from your part of the country, I will not have to make excuses for the hot weather you are having here. I am sure you have been used to that. But I hope that members of your family and members of all the nominees' families have a chance to do a little visiting around Washington because it is a beautiful city and the seat of our Government.

In your questionnaire, Judge, you said that as a State judge you have not had occasion to rule on State or Federal constitutional issues, and in private practice most of your cases were criminal ones. What steps are you going to take to familiarize yourself with the basic constitutional issues that have not been a staple of your own past practice, but are certainly going to be issues that are going to come up if you are confirmed to this position?

Judge SOLIS. Let me qualify that. The questionnaire asked for significant opinions.

Senator LEAHY. Yes.

Judge SOLIS. And, of course, we are dealing with fourth amendment, fifth amendment, sixth amendment, 14th amendment issues

all the time in criminal court, and I have handled those both as a lawyer, a prosecutor, and as judge. I just considered those matters fairly routine in the sense of every criminal case, if there is a search warrant or a search, we routinely have a motion to suppress, and I make a ruling on it. I have not had any of those rulings reversed. So I am familiar with the provisions of the Constitution and the different rights, and we deal with them on a regular basis.

Senator LEAHY. You also had an interesting case where you prosecuted the only reported case in Texas where a child victim gave testimony through closed circuit video television. For the record, it was an aggravated kidnapping and sexual abuse of a 6-year-old child. There has been a lot of discussion around the country, as you know, in my own State of Vermont, and others about using such videotaped testimony. Back when I was a prosecutor, we were just beginning to raise that kind of an issue. What are some of the constitutional issues the judge should consider before allowing such a practice?

Judge SOLIS. Primarily that the issue involved—and I guess it is just now getting resolved by the Supreme Court—the issue of the confrontation. And certainly the State court, we had a State statute in effect at that time, and I utilized that statute, and the judge gave his permission. The trial court did. And as far as our following the procedures, that has been upheld by an appellate court in Texas that we used the proper procedures. What is open before the State's highest court is the issue of the confrontation clause, and that is the primary issue involved as to what extent, where are you going to draw the line in balancing the rights of the individual parties involved, the defendant versus the child victim?

Senator LEAHY. Thank you. You also referred to a criminal case you prosecuted involving use of court-ordered wiretaps in *State v. Avila*. In one of the subcommittees I am on here in the Judiciary Committee, we do a great deal with the Federal wiretap statute. You were doing this under the Texas statute?

Judge SOLIS. It is identical to the Federal statute.

Senator LEAHY. That is what I understand.

Judge SOLIS. A few procedural differences, but substantively the same.

Senator LEAHY. What do you think of the statute?

Judge SOLIS. Well, I agree with the statute. We utilized it and we did two of those operations while I was district attorney in Taylor County. Those were the only two that have been done there. And I can say that we were able to make cases on some drug dealers in the area that we had known about for several years that we would not otherwise have been able to make. So it is useful in that sense, and certainly I agree it a pretty strictly controlled statute, and it should be. It is very intrusive. And I actually went to the listening post and monitored that regulations were being followed as far as minimization requirements and what the law requires of the officers, and it is very intrusive, and there is no getting around that.

But I think on the other hand, if all the safeguards are followed and the procedures are followed, and you are targeting individuals that you have good, strong probable cause to believe that they are

involved in narcotics in Texas, the statute is limited to narcotics trafficking.

Senator LEAHY. As a prosecutor, did you find that you were able to follow the steps and still make a case?

Judge SOLIS. Yes, we did, and some of those cases have been affirmed on appeal. We have not had any reversed.

Senator LEAHY. You may have heard the question I was asking Judge Bassler first, in effect about judicial activism. What do you do in the case of an institution or prison, mental institution, or just about any other institution that is not following a judicial order? I realize your feelings on judicial activism. You do not think that a court should go into the day-to-day functioning of institutions, and I tend to agree with you on that. But what happens if after you have heard the whole case, you have looked at it and said, all right, this is a constitutional violation? You must stop it. You must tell the institution to stop doing this, this, and this. And you issue the order. The institution is checked out later on, and the people there have just ignored the order. What do you do?

Judge SOLIS. Well, we had that example, exact situation, come up in Texas with our prison system, and what the judge did there was start levying fines for contempt of court, and through settlement conferences, as Judge Bassler pointed out, they were able to resolve the issues, and the State was not fined, but he was about to start fining the State so much per day until they came in compliance. So there are ways to, I think, assure compliance short of just taking over the operations of an institution.

Senator LEAHY. So, I do not want to put words in your mouth, but your idea would be the incremental approach?

Judge SOLIS. Yes, sir.

Senator LEAHY. Thank you. I have no further questions, but I appreciate your being here and thank you very much.

Judge SOLIS. Thank you.

Senator LEAHY. And our last nominee is Magistrate Trimble. If you would step forward and raise your right hand, please, sir. Do you solemnly swear that the testimony that you give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. TRIMBLE. I do so swear.

TESTIMONY OF JAMES T. TRIMBLE, JR., OF LOUISIANA, TO BE A U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF LOUISIANA

Senator LEAHY. Thank you.

You have been in your current position now for 5 years, since 1986. What matters might you handle as a judge that you did not handle as a magistrate? What are some of the things that come most to your mind?

Mr. TRIMBLE. Well, I have been fortunate enough, Mr. Chairman, to have been entrusted with the full gamut of the matters that are within magistrate jurisdiction under title 28, United States Code, section 636, and the only thing I can think of that I will be required to handle that I have not been able to handle as a magistrate will be the actual trial of felony cases. I do not know that

many people realize it, but magistrates can with consent of the parties or the consent of the defendants in a criminal case handle any case that a Federal judge can handle except the trial of felony cases.

Senator LEAHY. As a Federal judge, would you then be in favor of utilizing magistrates as much as possible? I mean pushing it to the max?

Mr. TRIMBLE. To the fullest extent, yes, sir, Mr. Chairman, I certainly would.

Senator LEAHY. So you would look at all the areas in which magistrates might be used, and if you felt you had a qualified magistrate just use him or her?

Mr. TRIMBLE. That is the kind of magistrate that I hope if I am fortunate enough to be confirmed, we will select. I mean the kind of person in whom the local bar, and the bar in the neighboring cities who come to Lake Charles to practice, will have confidence in and will be willing to sign the necessary consents to have that magistrate hear their cases.

Senator LEAHY. What is the current state of the docket there now? Do you know offhand?

Mr. TRIMBLE. It has been kept very much well in hand thanks to the efforts of Judge Don Walt who is up in Monroe. It has been sort of a burden on litigants. This is in the criminal realm now. He has handled our felony cases. I have been doing all the misdemeanors. Judge Edwin Hunter is the senior status judge, been on senior status for about 14 to 16 years. He is 80 years old, but he is amazingly active. His mind is as sharp as it ever was, and he has really stepped forward like a trouper to take over the load and he tells me that what he does is he holds the pretrial conferences in all the cases, and he has a purpose behind that. It is easier for him—I am not comfortable suggesting to attorneys or asking if they are willing to submit to magistrate jurisdiction, but he has no problem doing that.

I do not want to feel that there is any coercion on my part that they submit. And he has advised me that in 100 percent of the cases where he has suggested, that they have all been willing to do that, and he has not, however, given me 100 percent of the cases. He has had a recent check done by the clerk of court and advised that I am now handling 45 percent of the civil docket.

Senator LEAHY. Well, if you have a good magistrate system, and you have good magistrates in there, as a practical matter, cooperation from the bench will result in litigants, attorneys who have built up some confidence in that system. They are going to look at the magistrate system as a way to expedite at least routine cases, would not that be so?

Mr. TRIMBLE. Yes, sir, not only the routine cases, however. We handled some fairly complex cases along with it. If they feel confident that the magistrate is capable of grasping the legal issues of handling the cases, the parties, fairly, of ruling properly in the evidentiary matters that come forward during the trial, they have no problem with submitting the very substantial cases to magistrates.

Senator LEAHY. I would assume that would be reflected by the personalities of the people involved insofar as it is basically a voluntary thing. They are going to look at the magistrates. Unlike the

Federal bench, where you get assigned a judge, and you have to go before that judge if you are within the jurisdiction of the district court. Sometimes you look at the judge, and you say, oh, my gosh, how did we get him or her? Other times, you say that is not a bad judge to have. With a magistrate, if you have good magistrates, the system will work, and it is going to be worthwhile. If you have lousy magistrates, no matter how much urging the court might do, people are not going to volunteer to go before a magistrate. Is that not basically it?

Mr. TRIMBLE. Yes, it is. Of course, with the new pay raise, there is quite a bit of incentive that was not there before for topnotch attorneys to seek the office, and I have already been advised by a number of the highest caliber attorneys in our community and in surrounding communities that they plan to apply for the job.

Senator LEAHY. As a matter of fact, I think that is a case where the higher pay is actually going to save us all money in the long run.

Mr. TRIMBLE. I think that is true.

Senator LEAHY. As you know, last August we passed a resolution here in the Judiciary Committee stating it was inappropriate for individuals nominated to the Federal bench to belong to clubs that engage in discrimination. Do you agree with that?

Mr. TRIMBLE. I do.

Senator LEAHY. You said you were unaware that the Kiwanis Club national bylaws required all male membership until about 3 years ago. You were advised at that time that the bylaws had been amended. Do you know since the bylaws were amended whether any women joined the club?

Mr. TRIMBLE. We have had two women join our club since that time.

Senator LEAHY. That is the Lake Charles club?

Mr. TRIMBLE. In Lake Charles, yes, sir. However, I think that there is another group that formed their own club, sort of an all women's Kiwanis Club.

Senator LEAHY. I understand. But you agree with—

Mr. TRIMBLE. With the precept, I do.

Senator LEAHY. Thank you. I have no further questions. And I thank you for being here. I wish you well.

Mr. TRIMBLE. Thank you very kindly, Mr. Chairman.

Senator LEAHY. We will keep the record open for questions from either Senator Thurmond or anybody else who wishes to include them. The hearing will be adjourned.

[Whereupon, at 10:35, the committee was adjourned.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
Eugene Edward Siler, Jr.
2. Address: List current place of residence and office address(es).
(R) 529 Redbird Road, Williamsburg, Kentucky 40769
(O) 207 U.S. Courthouse, London, Kentucky 40741
3. Date and place of birth.
October 19, 1936. Williamsburg, Kentucky.
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
Married. Christy Dyanne Minnich. Unemployed.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
1954-1958 B.A. cum laude, Vanderbilt University
1960-1963 LL.B., University of Virginia
1962 (summer) University of Madrid (certificate)
1964 LL.M., Georgetown University
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.
1961 (summer) Camp Twin Lakes, Rutland, Vermont (employee-camp counselor)
1963-64 Legal Intern (E. Barrett Prettyman Fellow), Georgetown University
1964-70 private law practice, Williamsburg, Kentucky
1965-70 Director, Bank of Williamsburg, Williamsburg, Kentucky
1965-70 Whitley County Attorney, Williamsburg, Kentucky
1966-69 Director, Williamsburg Golf & Country Club
1965-74, 1981-89 Trustee, Cumberland College, Williamsburg, KY
1967-70 Secretary, Whitley Republican, Inc.
1970-75 U.S. Attorney for the Eastern District of Kentucky
Lexington, Kentucky
1990-present Director, Baptist Hospitals, Inc. (non-profit organization)

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

1958-60 Active duty, United States Navy
1961-63 U.S. Navy Reserve. Retired as CDR after 25 years.
Serial No. 404-48-2281

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

1958 NROTC Naval Institute Award
1960-63 Merit scholarship at University of Virginia Law School
1963-64 E. Barrett Prettyman Fellowship at Georgetown University
1962 Raven Society and Omicron Delta Kappa at University of Virginia
1968 Freedom's Foundation Award for Naval Reservists

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

Virginia State Bar
Kentucky Bar Association
District of Columbia Bar Association
Federal Bar Association
American Bar Association
President, Vice President, Secretary and Treasurer of
Federal Judges' Association for the Sixth Circuit
about 1983-87
Treasurer (present) and Director (1989-present),
Federal Judges' Association
Member, U.S. Judicial Conference

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

As far as I know, I belong to no organizations which are active in lobbying before public bodies. Listed below are all other organizations to which I belong.

Naval Reserve Association
University of Virginia Alumni Association
Cumberland College Warrior Club
First Baptist Church, Williamsburg, Kentucky
Sons of the American Revolution

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if

any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Virginia Supreme Court of Appeals, 6/10/63
 U.S. District Court for the District of Columbia,
 12/12/63
 U.S. Court of Appeals for the D.C. Circuit, 1/6/64
 U.S. Court of Military Appeals, 12/12/63
 Whitley County (Kentucky) Circuit Court, 10/64
 Kentucky Supreme Court, 3/15/74
 U.S. District Court for the Eastern District of
 Kentucky, 11/9/64
 U.S. Court of Appeals for the Sixth Circuit, 6/1/70

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

I have very few published writings. Most of those occurred either in law school or in my early career. As a consequence, I do not have any copies of them. They are listed below, except for the one which was recently published in the Kentucky Bench and Bar. Those which I can recall are:

1. "The Non-Justiciable Controversy," 48 Va.L.Rev. 922 (1962).
2. "Legal Liability in Tobacco Products Cases," 53 Ky.L.J. 712 (1965 or 66).
3. "The Need for Defense Counsel in Juvenile Court," Crime and Delinquency (about 1964).
4. "Guilty Plea Negotiations," Cipes, Criminal Defense Techniques (about 1968).
5. "A Calculated Risk: Removal of the Indeterminate Complaint," Kentucky Bench and Bar (1990).

There are no copies of any speeches or press reports about speeches on any issues involving constitutional law or legal policy. I have not given public speeches about such matters except to review current law for the bar associations or to speak in churches about the separation of church and state. None of these materials are currently available.

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

date of your last physical examination.

Good. April 2, 1991.

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.

1975-present: Judge, U.S. District Court for the Eastern and Western Districts of Kentucky. This is an appointed position and primarily has jurisdiction over cases arising under the Constitution and laws of the United States and cases involving diversity jurisdiction with the amount in controversy over \$50,000.00.

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

(1) Ten Most Significant Opinions:

- (a) International Union, UAW v. Michigan, 886 F.2d 766 (6th Cir. 1989).
- (b) Southern Milk Sales, Inc. v. Martin, 924 F.2d 98 (6th Cir. 1991).
- (c) Turpin v. Merrell Dow Pharmaceuticals, Inc., 736 F. Supp. 737 (E.D. Ky. 1990), appeal pending.
- (d) Carman v. First Nat'l Bank of Louisville, 642 F. Supp. 862 (W.D. Ky. 1986), aff'd, 849 F.2d 1474 (6th Cir. 1988).
- (e) McKee v. Miles Laboratories, Inc., 675 F. Supp. 1060 (E.D. Ky. 1987), aff'd, 866 F.2d 219 (6th Cir. 1989).
- (f) Kentucky v. Long, 637 F. Supp. 1150 (W.D. Ky. 1986), aff'd, 837 F.2d 727 (6th Cir. 1988).
- (g) EEOC v. City of Bowling Green, 607 F. Supp. 524 (W.D. Ky. 1985).
- (h) Keck v. Wacker, 413 F. Supp. 1377 (E.D. Ky. 1976).

- (i) First State Bank of Wayne County v. City and County Bank of Knox County, Civil No. 83-141, E.D. Ky. at London (1988), aff'd, 827 F.2d 707 (6th Cir. 1989).
- (j) United States v. The Stearns Co., 595 F. Supp. 808 (E.D. Ky. 1984), aff'd, 816 F.2d 279 (6th Cir.), cert. denied, 484 U.S. 953 (1987).
- (2) Appellate Opinions where my decisions were reversed or where my judgment was affirmed with significant criticism of rulings:

(It is difficult to locate all of these, but we have done our best. After research, these are all that can be found.)

No cases were found where my judgment was affirmed with significant criticism of my rulings. However, some of the opinions where my decisions were reversed are listed below. All the decisions are from the Sixth Circuit, unless otherwise stated.

- (a) Chrysler Credit Corp. v. H&H Chrysler-Plymouth-Dodge, Inc., 927 F.2d 270 (1991) (affirmed primarily, but remanded on one issue that was overlooked at trial).

Summary: Secured creditor of automobile dealership brought action against dealer to recover deficiency judgment. Siler, J. denied relief, and appeal was taken. The Court of Appeals held that: (1) creditor failed to sell collateral in commercially reasonable manner, and (2) creditor could still recover portion of its claim that was not directly attributable to sale of collateral.

Affirmed issue (1) and remanded to resolve issue (2).

- (b) Official Unsecured Creditors' Committee of Belknap, Inc. v. The Shaler Corp., 909 F.2d 879 (1990) (affirmed in part and remanded for the resolution of one issue involving avoidable transfers).

Summary: Creditors' committee brought adversary proceeding to avoid alleged preferential transfers. The Bankruptcy Court voided as preferences the three

checks in question. Siler, J. ruled that the checks were not avoidable transfers. The Court of Appeals held that: (1) question as to what constitutes a "transfer of an interest of the debtor and property" for preference purposes was a federal question; (2) with the exception of postdated checks, "transfer" of a check, for preference purposes, occurs upon delivery from debtor to creditor; and (3) check must be presented for payment within 30-day period deemed reasonable under U.C.C. and honored upon presentment in order for delivery date to be considered the time of transfer for preference purposes.

- (c) Wooldridge v. Marlene Industries Corp., 898 F.2d 1169 (1990) (reversed and remanded for further computation of attorneys' fees in Title VII case).

Summary: Class action was brought under Title VII challenging employer's maternity leave policy. Siler, J. entered attorney fee award from which appeal was taken. The Court of Appeals held that: (1) though plaintiff's attorneys were entitled to recover fees for liability portion of litigation, they could not be compensated for time spent litigating damage claims of individual class members who did not receive back pay award; (2) district court erred in applying a presumption in favor of plaintiffs to resolve ambiguities in the billing records; and (3) district court erred in not explaining its reason for finding that certain unidentified hours included in billing entries were reasonable.

- (d) United States v. Williams, 894 F.2d 208 (1990) (affirmed in part and reversed in part for giving a two-level increase under Sentencing Guidelines).

Summary: Defendants were convicted of conspiring to distribute and to possess with intent to distribute cocaine and possession with intent to distribute cocaine. The Court of Appeals held that: (1) defendants who were not present at drug sale or charged with using weapon in relation to offense should not have been given two-level increase in guideline sentence for weapons possession based upon remaining defendant's possession of firearm when remaining defendant did not receive

increase; (2) defendant who claimed he had withdrawn from conspiracy was not entitled to reduction for acceptance of responsibility; (3) sentences of other two defendants were properly enhanced for their roles as organizers; and (4) there was more than 100 grams of cocaine for sentencing purposes.

- (e) McGuirk Oil Co. v. Amoco Oil Co., 889 F.2d 734 (1989) (reversed the trial court's finding a fiduciary duty between the oil company and the distributor).

Summary: Kentucky distributors sued an oil company with which they had franchise agreements, alleging breach of fiduciary duty and conversion of a partial refund of the Tennessee inspection fee levied against the oil company for all petroleum sold within Tennessee. Siler, J. entered judgment for distributors, and oil company appealed. The Court of Appeals held that: (1) the franchise agreements did not create a fiduciary duty on the part of the oil company, and (2) insufficient evidence supported the finding that the oil company converted the inspection fee refunds.

- (f) Christian v. Belcher, 888 F.2d 410 (1989) (affirmed in part and reversed and remanded in part, as the trial court should not have granted summary judgment for the county government against a fired flood plan administrator).

Summary: Former county flood plain administrator and building inspector brought action against the county judge executive and fiscal court magistrates arising out of their failure to rehire him after election of a new county judge executive. Siler, J. granted summary judgment to defendants. The Court of Appeals held that: (1) magistrates did not violate any First Amendment right of former administrator; (2) genuine issues of material fact existed as to whether former administrator was not reappointed because of his political association or expression and whether party affiliation was appropriate requirement for his position, precluding summary judgment on First Amendment claim against county judge executive; and (3) genuine issue of material fact existed as to whether

former administrator had a property interest in his employment such that failure to grant him a hearing violated due process, precluding summary judgment for plaintiff.

- (g) Safeco Ins. Co. of America v. W.B. Browning Construction Co., 886 F.2d 807 (1989) (reversed and remanded, as the trial court erred by finding the insurance company liable to a window manufacturer in a public construction project).

Summary: Payment bond surety sought declaratory judgment that it was not liable to window manufacturer that had sold windows to supplier for public construction project. Siler, J. entered summary judgment in favor of manufacturer. The Court of Appeals held that Kentucky's payment bond statute did not protect manufacturer.

- (h) Wooldridge v. Marlene Industries Corp., 875 F.2d 540 (1989) (affirmed in part and reversed in part for recomputation of damages).

Summary: Class action was brought under Title VII challenging the employer's maternity leave policy. Siler, J. determined that the policy which was in effect at employer's Kentucky and Tennessee locations during a specified period violated Title VII but that maternity leave policy in effect at its North and South Carolina plants was not unlawful. The Court of Appeals held that: (1) determination that maternity leave policy in effect at employer's North and South Carolina plants did not violate Title VII was not clearly erroneous, and (2) trial court applied incorrect legal principles in part of the damages phase.

- (i) United States v. The Stearns Co., 873 F.2d 134 (1989) (remanded for determination of issue which arose after the district court rendered its decision).

Summary: Coal company appealed from order denying its motion for relief from judgment prohibiting it from conducting strip mining operations on national forest land. The Court of Appeals held that issue of whether coal company had right to strip mine national forest land under 1937 deed of conveyance to United States would not be considered on appeal, until district court ruled on

constitutionality of State Constitution.

- (j) United States Fidelity & Guaranty Co. v. Starfire Coals, Inc., 856 F.2d 31 (1988) (reversed, as the trial court held that insurer had a duty to defend a suit against a coal company for the discharge of pollutants).

Summary: General liability insurer of defendant in pollution personal injury suit sought declaratory action that it had no duty to defend. Siler, J. found insurer had duty to defend. On appeal, the Court of Appeals held that: (1) insurer did not have duty to defend; (2) focus in determining insurer's duty to defend was not on damages suffered but on discharge of pollutants by insured; and (3) "sudden and accidental" phrase in policy was not ambiguous nor synonymous with phrase "unexpected and unintended."

- (k) Saylor v. Cornelius, 845 F.2d 1401 (1988) (reversed, as the trial court erred in not granting a writ of habeas corpus from a state murder conviction).

Summary: Murder defendant whose conviction on theory of murder by conspiracy was reversed on appeal filed a petition for writ of habeas corpus claiming that a retrial on the theory of accomplice liability was barred by the double jeopardy clause. Siler, J. denied the writ. The Court of Appeals held that retrial on accomplice theory of liability for murder which was charged in the indictment would violate the protection afforded by the double jeopardy clause where the first trial ended without a verdict on the accomplice liability charge for reasons of the prosecution's making.

- (l) Marohnic v. Walker, 800 F.2d 613 (1986) (reversed and remanded, as the trial court erroneously granted summary judgment for former employer in suit by employee for violation of First Amendment rights).

Summary: Former public employee brought action against employer and supervisor to recover for violation of First Amendment rights. Siler, J. granted defendants' motion for summary judgment. The Court of Appeals held that former employee

established prima facie First Amendment violation.

- (m) Cockerham v. Garvin, 768 F.2d 784 (1985) (reversed and remanded, as the trial court erred by allowing Veterans Administration to recoup medical costs for veteran injured in motorcycle accident).

Summary: Veteran injured in motorcycle accident entered into settlement with tort-feasors, in which tort-feasors agreed to pay \$150,000 in return for veteran's release. Settlement agreement stipulated, in order to protect tort-feasors from any future claims against them by Veterans Administration to recoup medical costs under Medical Care Recovery Act, veteran would place \$20,000 in escrow until appropriate settlement had been made between veteran and administrator. Following unsuccessful pursuit of settlement between veteran and United States, veteran's attorneys filed motion requesting permission to distribute \$20,000 plus interest held in escrow to veteran. Veterans Administration responded by filing motion, asking district court to order distribution of \$1885 to it. Siler, J. granted government's motion. The Court of Appeals held that: (1) six-year statute of limitations for contracts was applicable; (2) government's motion did not place Veterans Administration before court as proper party; and (3) government was not entitled to be reimbursed for full amount of its claim.

- (n) In re Becknell & Crace Coal Co., 761 F.2d 319 (1985) (affirmed in part and reversed and remanded in part, as the trial court erroneously found that a lease-purchase agreement was not an executory contract).

Summary: Lessors appealed from an order which affirmed decision of Bankruptcy Court concluding that a lease-purchase agreement regarding coal gave debtor a fee simple interest in unmined coal but that agreement was not an executory contract. The Court of Appeals held that: (1) terms of lease-purchase agreement gave debtor fee simple interest in coal, and (2) agreement was executory and trustee should have been given opportunity to assume or reject it.

- (o) United States v. Durham, 755 F.2d 511 (1985) (remanded to redetermine factual issues on order of restitution to a crime victim).
- Summary: Defendant appealed from the denial of his motion to be relieved from illegal sentence. The Court of Appeals held that: (1) "victim of the offense" within meaning of restitution provisions of Victim and Witness Protection Act included insurer of automobile which was burned during course of defendant's getaway from scene of bank robbery even though defendant was only convicted of bank robbery; (2) nonhuman entity could be "victim of the offense" within meaning of the Act; and (3) order of restitution under the Act did not deprive defendant of due process or right to jury trial where he did not challenge accuracy of any factual finding.
- (p) United States v. River Coal Co., 748 F.2d 1103 (1984) (reversed and remanded, as the court erred by not finding that reclamation fees are taxes under bankruptcy law).
- Summary: Action was filed by the United States to recover interest on delinquent abandoned mine reclamation fees from date fees were due until date they were paid pursuant to a Chapter XI plan of arrangement. On cross motions for summary judgment, Siler, J. entered judgment for debtors. The Court of Appeals held that: (1) reclamation fee is a "tax" for purposes of the former Bankruptcy Act precluding discharge of taxes which became legally due and owing to the United States within three years preceding bankruptcy; (2) debtor, rehabilitated through Chapter XI bankruptcy proceedings, remained liable for postpetition interest on delinquent fees; and (3) United States was not estopped from claiming interest, and did not waive interest, by failing to claim it on proof of claim form or to advise debtor of its intention to make later claim.
- (q) Stevens v. Bordenkircher, 746 F.2d 342 (1984) (reversed and remanded, as the trial court erred by not granting writ of habeas corpus in state murder conviction).
- Summary: Petitioner appealed denial of his petition for writ of habeas corpus. The Court of Appeals held that: (1) denial of permission

to cross-examine key government witness was reversible error, and (2) admission of death certificate violated confrontation clause.

- (r) Jones v. Hogg, 732 F.2d 53 (1984) (remanded for trial court to determine whether state court found a manifest necessity when it declared a mistrial after a deadlocked jury trial).

Summary: Appeal was taken from a judgment denying habeas corpus relief to petitioner alleging that his fourth prosecution, after three mistrials, was barred by double jeopardy clause. The Court of Appeals held that: (1) double jeopardy clause is not an absolute bar to retrial in every case; a defendant may be retried where a "manifest necessity" exists to declare a mistrial in his initial prosecution, such as a deadlocked jury, and (2) remand was appropriate as record below was inadequate to render proper disposition on claim that after three trials ended in hung jury and mistrial was declared, fourth prosecution was barred by double jeopardy clause.

- (s) Hollin v. Sowders, 710 F.2d 264 (1983) (vacated and remanded, as the trial court erred by granting petition for habeas corpus).

Summary: Appeal was taken from a judgment granting petition for habeas corpus collaterally attacking state murder conviction. The Court of appeals held that: (1) failure of petitioner's counsel to perfect direct appeal did not constitute ineffective assistance of counsel, because state's ruling on petitioner's motion for postconviction relief granted him an adequate substitute for direct appellate review, and (2) in view of petitioner's failure to object at trial, the claim of trial error was not reviewable under federal habeas corpus.

- (t) United States v. Robinson, 707 F.2d 872 (1983) (reversed and remanded, as the trial court erred by allowing jury to read transcripts of taped recordings played in evidence).

Summary: After second trial, defendants were convicted on charges of violating and

conspiring to violate the Racketeer Influenced and Corrupt Organizations Act. The Court of Appeals held that: (1) where transcriber could not have verified accuracy of transcripts of tape recordings because transcripts were product of government conference where several agents offered their independent recollection of the taped conversations, and where it was apparent to Court of Appeals after listening to master tape employed at trial that several conversations were so inaudible as to preclude transcription, it was error to permit jurors to read purported transcripts of electronically recorded conversations, and (2) in view of fact that tapes were partially inaudible and in view of jurors' heavy reliance upon their transcripts, error was prejudicial.

- (u) United States v. Johnson, 697 F.2d 735 (1983) (remanded as the trial court erred by allowing the introduction of evidence from a prior counterfeiting trial).

Summary: Defendants were convicted of counterfeiting. The Court of Appeals held that: (1) evidence relating to matters involved in a prior counterfeiting trial was admissible as tending to establish criminal intent, and (2) if in acquitting defendants on the prior charge the jury must necessarily have decided that defendants did not commit the acts in question, collateral estoppel would bar admission of the prior conduct evidence.

- (v) Murphy v. Secretary of Health & Human Services, 680 F.2d 466 (1982) (reversed and remanded the trial court's affirmance of the decision, as the Secretary should have applied new regulation in social security case).

Summary: Siler, J. affirmed decision of Secretary of Health and Human Services that impairments of disability benefit claimant were not of sufficient severity to preclude substantial gainful employment, and claimant appealed. The Court of Appeals held that Secretary should be permitted to reconsider all cases where it appears that application of grid may produce different result.

- (w) Anderson v. Mills, 664 F.2d 600 (1981) (affirmed in part and reversed in part,

as trial court erred in finding the petition requirement under Kentucky law for candidates is not a violation of the Constitution).

Summary: Independent presidential candidates brought action challenging various provisions of Kentucky election laws and seeking to have their names placed on the ballot as independent candidates in the general election. Siler, J. rendered judgment, from which appeals were taken. The Court of Appeals held that:

(1) district court properly refused to abstain; (2) under Kentucky law, the 55-day filing requirement for presidential candidates is measured from the date of the general, not the primary, election; (3) the "sore loser" provision of Kentucky law whereby one who is defeated for nomination in a primary may not have his name placed on the ballot for the same office in the general election does not apply to presidential candidates; (4) requiring 5,000 signatures before one can appear on general ballot while the endorsement of two party members is required to have one's name placed on primary ballot does not violate equal protection; (5) requirement that a petition signer declare his desire to vote for the candidate violates constitutional right to a secret ballot and also violates equal protection.

- (x) United States v. Taylor, 657 F.2d 92 (1981) (affirmed in part and remanded in part for further determination as to whether there was a conflict of interest by trial counsel).

Summary: Defendants were convicted of conspiracy, fraud, and interstate transportation of stolen property. The Court of Appeals held that there was sufficient showing of possibility of conflict of interest on the part of counsel with respect to one defendant to require a remand for further inquiry.

- (y) United States v. Jones, 647 F.2d 696 (1981) (affirmed primarily and remanded to set aside one count due to improper jury instructions).

Summary: Three defendants were convicted of conspiring to make unregistered destructive devices and maliciously damaging

and destroying property in interstate commerce, two defendants were also convicted for possession of an unregistered device, and one was convicted of maliciously destroying a building used in interstate commerce.

The Court of Appeals held that where defendants were indicted for conspiring to make and construct unregistered destructive device but government failed to present any proof that defendants made or constructed destructive device and district court instructed jury to disregard that portion of indictment and then instructed jury they could convict defendants if they found that defendants had conspired to possess destructive device, there was impermissible modification of indictment in charge to jury.

- (z) United States v. Sizemore, 632 F.2d 8 (1980) (conviction for possessing and making a bomb, reversed as to one defendant, but affirmed as to codefendant).

Summary: Defendants were convicted of making a destructive device without paying required tax and of possessing an unregistered destructive device. The Court of Appeals held that: (1) substantial evidence supported conclusion that defendant both possessed and made a destructive device in that he had motive, had access, had handled device, and had participation, and (2) substantial evidence did not support a similar conclusion for the other defendant in that there was evidence that he bought the knife used to make device operable, but there was no evidence that he used the knife at or about the scene of the explosion and, though there was evidence that the other defendant was at scene, there was no evidence that he had any control over the device or over any of its component parts.

- (aa) United States v. Phillips, 630 F.2d 1138 (1980) (affirmed primarily, but reversed on conviction for conspiracy, as defendant could not have conspired with insane wife).

Summary: Defendant was convicted on various charges brought in connection with alleged escape attempt. The Court of Appeals held that: (1) it was not an abuse of discretion to deny a continuance defendant sought in order to secure testimony of his

wife; (2) defendant could not be convicted of conspiracy where sole alleged coconspirator was insane at the time she was alleged to have conspired; and (3) it was not error to refuse to strike jurors for cause on the basis of their exposure to pretrial publicity.

- (bb) United States v. Garrett, 627 F.2d 14 (1980) (reversed on finding that there was probable cause for search of suspect in airport).

Summary: After denial of motion to suppress, defendant was convicted of possession of heroin with intent to distribute.

The Court of Appeals held that where a narcotics agent of Cincinnati police department narcotics unit received a telephone call from a person identifying himself as security guard at the Los Angeles International Airport and was informed that a described person was enroute on American Airlines from Los Angeles to Cincinnati, via Dallas, and would arrive about 9:00 A.M. carrying a large quantity of heroin, and the caller stated that his information was from a "very good informant" who had observed the man in possession of the heroin, but the narcotics officer requested a call-back number for verification purposes and was unable to reach anyone at such number, there was not probable cause for the arrest or search though narcotics officer saw person fitting physical description and wearing clothes fitting description, apparently coming from Los Angeles.

- (cc) United States v. Vandetti, 623 F.2d 1144 (1980) (reversed in part and remanded, as the trial court erred by allowing testimony that codefendants were convicted at a prior trial for same charge).

Summary: Defendant was convicted of conducting an illegal gambling business. The Court of Appeals held that after allowing prosecutor to call convicted codefendants and witnesses knowing that they would all assert their Fifth Amendment privileges, trial court erred by allowing admission of testimony that codefendants were convicted at a prior trial of conducting the same illegal gambling business, and error was not harmless in nature, where the prior convictions not only were

irrelevant to a determination of defendant's guilt, but may have persuaded the jury that the gambling operation in question was an illegal gambling business and that five or more persons were involved.

- (dd) United States v. Phillips, 599 F.2d 134 (1979) (reversed and remanded for new trial, as the trial court erred by allowing evidence of other similar bank robberies).

Summary: Defendant was convicted of bank robbery. The Court of Appeals held that where the only disputed issue was the identity of one of three bank robbers, it was error to allow an unindicted accomplice to testify that the defendant had recently participated in three other bank robberies, in view of the fact that only general testimony of the commission of such other robberies was given, without a common plan, distinctive pattern or similarity, and such testimony was not admissible on the grounds that it would rebut an inference that such accomplice had a motive to accuse the defendant falsely.

- (ee) United States v. Sims, 588 F.2d 1145 (1978) (reversed and remanded for new trial as the trial court erred by allowing impeachment of defendant by two prior felony convictions more than ten years old).

Summary: Defendant was convicted of possession of a firearm as a previously convicted felon. The Court of Appeals held that district court abused its discretion by permitting government to impeach defendant by introducing evidence of two prior felony convictions which were more than ten years old.

- (ff) Hendron v. Cowan, 557 F.2d 575 (1977) (remanded, as the trial court should not have dismissed petition for writ of habeas corpus without hearing).

Summary: State prisoner filed petition for writ of habeas corpus. Siler, J. dismissed petition without hearing. The Court of Appeals held that where there was no evidentiary hearing before the district court and where the trial court record had never been reviewed by

either the magistrate or the district court, the case would be remanded for reconsideration of the due process issue by means of review of the state court record or conducting an evidentiary hearing.

- (gg) Getty v. Reed, 547 F.2d 971 (1977) (affirmed in part and reversed in part and remanded, as the trial court should have determined whether disbarment proceedings against attorney infringed his right to free speech).

Summary: Kentucky attorneys brought Civil Rights Act suits challenging Kentucky disciplinary statute and disciplinary rules of Kentucky court and seeking declaratory and injunctive relief for claimed federal due process violations. Siler, J. dismissed for want of jurisdiction. The Court of Appeals held that the district court had jurisdiction since instant complaints were original claims which alleged state law violations and were not merely proceedings seeking federal appellate review of state court decisions, that due process claims were so unsubstantial as to warrant dismissal by a single district judge, and that complaint that one attorney's rights to free speech had been curtailed merited further consideration.

- (hh) United States v. Lee, 581 F.2d 1173 (1978) (reversed and remanded, as the court erred by suppressing evidence after search and seizure).

Summary: The trial court suppressed evidence seized in a search conducted pursuant to a federal search warrant. The Court of Appeals held that participation in a federal search by state officer was not illegal, and there was probable cause to search the home.

- (ii) United States v. Shumake, Nos. 82-5166, 82-5183 (April 12, 1983) (unpublished opinion) (reversed, as the evidence was insufficient to support the convictions).

Summary: Defendants were convicted for the aggravated beating of an informant for federal law enforcement officers, in violation of 18 U.S.C. § 1510. The Court of Appeals held that even though the defendant accused the victim of "ratting" on him, there was no evidence that

the offender knew the informant had given information to a federal law enforcement official.

- (jj) Pierce v. Baker, No. 90-5357 (January 31, 1991) (unpublished opinion) (reversed and remanded, for the intervention of property owners to present proof on the issue of the divisibility of real estate).

Summary: In a suit to sell the real estate in a decedent's estate, the district court ordered the sale of the land and the distribution of the proceeds. On the third appeal, the Court of Appeals held that the Jones family should be allowed to intervene and to present proof on the issue of the divisibility of the property before the sale of it. In this protracted legal proceeding, the district court had held that the Jones family was late in attempting to intervene on the eve of the sale of the property, and declined to set aside the sale. However, the Court of Appeals held that this was error.

- (kk) United States v. White, No. 90-5873 (May 13, 1991) (to be published) (reversed conviction for possession of marijuana with intent to distribute).

Summary: The defendant was convicted for the possession of a patch of marijuana with intent to distribute. The Court of Appeals held that there was insufficient evidence to sustain a conviction, as there was no evidence that the defendant had ever been seen in the marijuana patch or that he owned the land on which the marijuana was located. The evidence at the trial showed that one patch of marijuana was within three feet of the back door of the defendant's trailer and the trailer contained several plastic buckets and fertilizer similar to that found in the marijuana patch.

(3) Significant Opinions on Constitutional Issues:

- (a) United States v. WRW Corp., 731 F. Supp. 237 (E.D. Ky. 1989).
- (b) United States v. Gorman Fuel, Inc., 716 F. Supp. 991 (E.D. Ky. 1989).
- (c) Timmy S. v. Stumbo, 537 F. Supp. 39

- (E.D. Ky. 1981), aff'd, 916 F.2d 312 (6th Cir. 1990).
- (d) Johnson Bonding Co. v. Kentucky, 420 F. Supp. 331 (E.D. Ky. 1978).
- (e) Lamb v. Sallee, 417 F. Supp. 282 (E.D. Ky. 1976).
- (f) Getty v. Reed, 413 F. Supp. 511 (E.D. Ky. 1976), vacated, 547 F.2d 971 (6th Cir. 1977).
- (g) Collis v. Reed, 413 F. Supp. 507 (E.D. Ky. 1976), aff'd, 547 F.2d 971 (6th Cir. 1977).
- (h) Hearing Aid Ass'n of Kentucky, Inc. v. Bullock, 413 F. Supp. 1032 (E.D. Ky. 1976).
- (i) Greaves v. Mills, 497 F. Supp. 283 (E.D. Ky. 1980), modified, 664 F.2d 600 (6th Cir. 1981).
16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.
- 1965-70, Whitley County Attorney, Williamsburg, KY (elected)
1970-75, U.S. Attorney for the Eastern District of Kentucky
(appointed)
17. Legal Career:
- a. Describe chronologically your law practice and experience after graduation from law school including:
1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
 2. whether you practiced alone, and if so, the addresses and dates;
 3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have

been connected, and the nature of your connection with each;

1963-64, Legal Intern (E. Barrett Prettyman Fellow), Georgetown University. In this program, I, along with several other young lawyers, represented indigents in the criminal courts in the District of Columbia under a program sponsored by Ford Foundation. While doing this work in the criminal courts, we obtained our Masters of Law.

1964-70, private law practice in Williamsburg, Kentucky, with my father, former Judge and Congressman Eugene E. Siler.

1965-70, Whitley County Attorney, Williamsburg, Kentucky. This is an elective position in which I was the county legal advisor and prosecutor. I held this job while practicing privately.

1970-75, U.S. Attorney for the Eastern District of Kentucky, Lexington, Kentucky

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

1963-65, criminal law (defense)

1965-75, criminal law (prosecution)

1964-70, general practice with emphasis on litigation.

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

Most of my typical former clients were individuals, and most were middle or lower class. However, I did represent a bank and the local newspaper. I cannot say that I specialized in any particular area.

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

Regularly.

2. What percentage of these appearances was in:
(a) federal courts; 90%
(b) state courts of record; 10%
(c) other courts. 0

3. What percentage of your litigation was:
(a) civil; 40%
(b) criminal. 60%

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

I cannot say, but it is well in excess of 100. I was sole counsel in about 50% of these, chief counsel in about 40%, and associate counsel in about 10% of the cases.

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

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

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

1) McCullah v. Holt, (unpublished) Civil No. 1426, U.S. District Court, Eastern District of Kentucky at London. (B.T. Moynahan, J.)

Trial date: April, 1965.

Co-counsel: Robert F. Stephens, Chief Justice, Kentucky Supreme Court, New Capitol Building, Frankfort, Kentucky 40601.
Phone: (502) 564-6753

Opposing Counsel: U.S. Attorney George Cline, AUSA Moss Noble (both deceased).

I represented the plaintiffs in a suit to set aside the Agricultural Stabilization and Conservation Service election in Whitley County. This case was significant because it was one of the first in the country to set aside such an election, and it was the first civil case that

I had ever tried in federal court. Judge Moynahan granted the relief requested, and my clients were successful in being named to the local A.S.C.S. Board. The defendants filed a notice of appeal, but later voluntarily dismissed it.

2) Lloyd v. Lloyd, 479 S.W.2d 623 (Ky. 1972).

Trial date: Approximately 1969.

Tried in the Whitley Circuit Court, Williamsburg, Kentucky before Judge Pleas Jones (later on the Kentucky Supreme Court).

Co-counsel: None.

Opposing Counsel: Paul Braden, 205 Executive Towers, Corbin, Kentucky. Phone (606) 528-6006.

I represented plaintiffs in a suit for injuries sustained while using a power lawn mower. This case was significant to me personally as a young attorney, because I was able to reverse a judgment notwithstanding the verdict by the trial court and also reversed it on the question of allowing a wife the right to recover for loss of consortium, which had not been allowed in Kentucky at the time the case was tried. My clients won on all issues and recovered damages.

3) United States v. Faulkner, 538 F.2d 724 (6th Cir.), cert. denied, 429 U.S. 1023 (1976).

Trial date: November-December, 1974.

Tried before Judge Mac Swinford, U.S. District Court for the Eastern District of Kentucky.

Co-counsel: AUSA James E. Arehart, 110 West Vine Street, Suite 400, Lexington, Kentucky 40507. Phone (606) 233-2661.

Opposing counsel: James L. Cobb, Jr., 213 E. 4th Street, Covington, Kentucky 41012. Phone: (606) 261-5777. B.H. Berg, Cincinnati, Ohio (believed to be deceased). Ralph F. Crisci, Second National Building, Cincinnati, Ohio 45202. Phone: (513) 721-0798.

This was a prosecution for violation of the Hobbs Act, 18 U.S.C. § 1951, against Deputy Chief of Police Faulkner, Capt. Wells and Patrolman

McClanahan of the Newport Police Department. I took the lead in the prosecution against these police officers in a lengthy trial. This case was significant because it was part of an overall program in the office of the U.S. Attorney to prosecute corrupt officials. Many issues were raised, but the most difficult part of the case was the handling at trial of accomplices, whose backgrounds were suspect. It was a successful prosecution.

4) United States v. Combs, 446 F.2d 515 (6th Cir. 1971), vacated and remanded, 408 U.S. 224 (1972).

Trial date: Approximately 1970.

Tried before: Judge Mac Swinford, U.S. District Court, Eastern District of Kentucky.

Co-counsel: AUSA Robert E. Rawlins, 110 West Vine Street, Suite 400, Lexington, Kentucky 40507. Phone: (606) 233-2661.

Opposing counsel: William F. Hopkins, Cincinnati, Ohio (believed to be deceased).

This was a prosecution for the receiving and concealing of cases of whiskey stolen from interstate shipment in violation of 18 U.S.C. § 659. The key issue in the case was the search of a shed at Hazard, Kentucky, under a defective search warrant. My office realized that the search warrant appeared to be defective on its face, but Judge Swinford, without argument by the prosecution, declared that the warrant was valid. An appeal was taken by the defendant after conviction, and my office then argued that the defendant did not have standing, inasmuch as the shed belonged to his parents, not to him. It was later remanded by the Supreme Court, for a hearing on the question of standing. However, upon remand, the defendant refused to admit that the shed or its contents belonged to him, and the prosecution was successful. I took the lead in the trial and participated also in the appeal.

5) United States v. Combs, 468 F.2d 1390 (6th Cir. 1972), cert. denied, 411 U.S. 948 (1973).

Trial date: Approximately 1971.

Tried before: Judge B.T. Moynahan, U.S.
District Court, Eastern District of Kentucky.

Co-counsel: None that I can recall.

Opposing counsel: Justice Dan Jack Combs,
Kentucky Supreme Court, New Capitol Building,
Frankfort, Kentucky 40601.
Phone: (502) 564-4169.

This case was significant because it was the
only case my office authorized as an appeal
in a criminal case from Judge Moynahan. He
granted a motion to suppress for the same
Combs involved in the case above, but this
time, it was a search of his automobile.
I took the lead in this successful prosecution for
the illegal possession of firearms. We were
able to convince the Court of Appeals that the
federal search warrant included vehicles, and
the affidavit was sufficient to uphold the
warrant issued for vehicles as well as buildings.

6) United States v. Hodges, 448 F.2d 1309
(6th Cir. 1971).

Trial date: Approximately 1971.

Tried before: Judge Mac Swinford, U.S. District
Court, Eastern District of Kentucky.

Co-counsel: AUSA Moss Noble (deceased).

Opposing counsel: Stephen T. McMurtry, 216 East
Fourth Street, Covington, Kentucky 41011.
Phone: (606) 431-2744.

This was a prosecution for causing LSD tablets
to be delivered by mail. Again, the significance of
this case is that this is the only appeal I
authorized from Judge Swinford, and we were
successful in overturning his granting of
the motion to suppress. The issue was whether
an illegal search and seizure occurred when
the mother of the defendant accepted a letter
for delivery to her son, opened the letter,
and then turned the contents over to local
authorities. Judge Swinford felt that the
Fourth Amendment protected the defendant,
but we were successful in convincing the
appellate court that the Fourth Amendment did
not apply to private searches. This was an
unusual case, because the defendant often
slept in a treehouse in the backyard, which

explained why his mother opened his mail. It was a successful prosecution after the district court was reversed.

7) United States v. Wright, 468 F.2d 1184 (6th Cir. 1972), cert. denied, 412 U.S. 938 (1973).

Trial date: Approximately 1971.

Tried before: Judge Mac Swinford, U.S. District Court, Eastern District of Kentucky.

Co-counsel: AUSA Robert M. Murphy, 110 West Vine Street, Suite 400, Lexington, Kentucky 40507. Phone: (606) 233-2661.

Opposing counsel: B.H. Berg, Cincinnati, Ohio (believed to be deceased). William J. Dammarell (further address unknown), Cincinnati, Ohio. Don Johnson, 20 N. Grand Avenue, Ft. Thomas, Kentucky 41075. Phone: (606) 441-3900.

This was a prosecution for conducting an illegal gambling business, 18 U.S.C. § 1955. The key issue in the case was the sufficiency of a search warrant for the New Plaza Lounge, a nightclub and gambling establishment in Newport, Kentucky. The warrant authorized the search of the New Plaza Lounge, but the gambling was conducted in an adjoining block building. This was a lengthy case in which I was the lead counsel in a successful prosecution of other racketeers in Newport.

8) United States v. Lewis, 504 F.2d 92 (6th Cir. 1974), cert. denied, 421 U.S. 975 (1975).

Trial date: Approximately 1973.

Tried before: Judge H. David Hermansdorfer, U.S. District Court, Eastern District of Kentucky.

Co-counsel: Eldon L. Webb, 2416 Forest Avenue, Ashland, Kentucky 41101. Phone: (606)324-2692.

Opposing counsel: Justice Dan Jack Combs, Kentucky Supreme Court, New Capitol Building, Frankfort, Kentucky 40601. Phone: (502)564-4169.

This was a successful prosecution for transporting stolen explosives in violation of 18 U.S.C. § 842(h). The significance of this

case is that we were able to clarify the law under Criminal Rule 18, so that the district court had the discretion to determine the proper place of trial. This was very important for our district, because the judges traveled from place to place, and had to conduct hearings in different locations, as was related in the opinion. I was not the lead counsel, but I was consulted as this case worked its way through trial and on the appellate level.

9) United States v. Ploeger, 453 F.2d 537 (6th Cir. 1972).

Trial date: Approximately 1970.

Tried before: Judge Mac Swinford, U.S. District Court, Eastern District of Kentucky.

Co-counsel: AUSA John M. Compton, 110 West Vine Street, Suite 400, Lexington, Kentucky 40507. Phone: (606) 233-2661.

Opposing counsel: Albert C. Hawes, 121 East Fourth Street, Covington, Kentucky 41011. Phone: (606) 491-5500.

This was a successful prosecution for bank robbery. This case was significant because it had been reversed for prejudicial error when it was prosecuted by my predecessor's office. I took the lead in this prosecution, which was made more difficult by the recantation of the statement by the co-defendant, Walter Dillinger. As can be seen from the record, after the second trial, Dillinger again recanted his testimony. The trial court correctly decided that a new trial was not appropriate, and this was upheld on appeal. This case is unusual in that Ploeger was later tried before me when I was a district judge, and I offered to step aside because of this prior prosecution. However, he declined to allow me to step aside, is still in prison and writes to me occasionally.

10) United States v. Dalpiaz, 494 F.2d 374 (6th Cir. 1974).

Trial date: Approximately 1973.

Tried before: Judge Mac Swinford, U.S. District Court, Eastern District of Kentucky.

Co-counsel: AUSA John M. Compton, 110 West Vine

Street, Suite 400, Lexington, Kentucky 40507.
Phone: (606) 233-2661.

Opposing counsel: U.S. Magistrate-Judge J. Gregory Wehrman, 301 Pike Street, Covington, Kentucky 41012.
Phone: (606) 261-8352.

This was a successful prosecution for attempting to board an aircraft with concealed deadly weapons. It was significant because it was one of the early airport search cases in which the defendant activated the magnetometer while trying to board an airplane. The search was upheld as reasonable under the circumstances. Although it would seem to be a routine case now, it enabled our office to refine the law for airport searches. I was the lead counsel in the case.

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

This is difficult to answer, because I have been out of the practice of law for more than fifteen years. However, some of the activities listed below are representative of things which I did.

I represented a group of rural landowners in Whitley County, Kentucky, against the City of Williamsburg, to enjoin the City from creating a nuisance on its dump by failing to bury refuse. We had a short hearing in court, and I prevailed on behalf of my clients.

I represented a client in a hearing before the State Agricultural Stabilization and Conservation Board when he was about to lose certain agricultural benefits. I was also successful in this administrative procedure.

I have been on the program for Continuing Legal Education events sponsored by the Kentucky Bar Association and have lectured on current cases from the federal courts and on ethics. Recently, I spoke on Civil Rule 11 to the Conference of Government Mining Attorneys in Knoxville, Tennessee, sponsored by the Department of the Interior, but attended by attorneys from many states.

I have sat on special assignment with the United States Court of Appeals for the Sixth Circuit almost annually since my original appointment in 1975. The only years

in which I did not sit with the Court of Appeals were those when we had a disabled judge in the Eastern District of Kentucky, and the judges from this district were not invited to participate on the Court of Appeals.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

None.

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

I will follow the Code of Judicial Ethics and the United States Code.

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

No.

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

Copies of my financial disclosure reports for 1990 and currently are attached.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).
6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Yes. I was campaign co-chairman in the Fifth Congressional District in Kentucky in 1966 for Representative Tim Lee Carter and Senator John Sherman Cooper. I, along with Tom Emberton (now a Judge on the Kentucky Court of Appeals) managed the campaign for re-election for Carter, and we managed the campaign only in the Fifth Congressional District for Cooper.

AO-1G
Rev. 1/91

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-504, November 30, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
Siler, Eugene E., Jr.	U.S. District Court, E&W/Ky.	6/21/91
4. Title (Article III judges indicate active or senior status; Magistrate Judges indicate full- or part-time) Judge (active)	5. Report Type (check appropriate type; <input checked="" type="checkbox"/> Nomination, Date 6/18/91 <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period 1/1/91 to 6/21/91
7. Chambers or Office Address 207 U.S. Courthouse London, Kentucky 40741		
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.		

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)POSITIONNAME OF ORGANIZATION/ENTITY

<input type="checkbox"/>	NONE (No reportable positions)
Executor	Estate of Eugene Siler (Father)
Trustee	Intervivos Trust of A.T. Siler (Grandfather)
Executor Director	Estate of Lowell Siler (Mother) Baptist Hospitals, Inc. (non-profit corporation)

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)DATEPARTIES AND TERMS

<input type="checkbox"/>	NONE (No reportable agreements)

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)DATE
(Honorary only)SOURCE AND TYPEGROSS INCOME
(yours, not spouse's)

<input type="checkbox"/>	NONE (No reportable non-investment income)	\$ _____
1	_____	\$ _____
2	_____	\$ _____
3	_____	\$ _____
4	_____	\$ _____
5	_____	\$ _____

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting Eugene E. Siler, Jr.	Date of Report 6/21/91
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IV. REIMBURSEMENTS and GIFTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of instructions.)

SOURCE	DESCRIPTION
<input type="checkbox"/> NONE (No such reportable reimbursements or gifts)	
1 <u>Baptist Hospitals, Inc.</u>	<u>Transportation, lodging and food for Hospital Medical</u>
2 <u>(non-profit corporation)</u>	<u>Staff and Trustee Conference at Palm Springs, CA</u>
3	<u>April 14-18, 1991</u>
4	
5	
6	
7	
8	

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of instructions.)

SOURCE	DESCRIPTION	VALUE:
<input checked="" type="checkbox"/> X NONE (No such reportable gifts)		
1		\$ _____
2		\$ _____
3		\$ _____
4		\$ _____

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of instructions.)

CREDITOR	DESCRIPTION	VALUE CODE*
<input type="checkbox"/> NONE (No reportable liabilities)		
1 <u>Bank of Williamsburg</u>	<u>personal loan</u>	<u>J</u>
2		
3		
4		
5		
6		
7		

* VALUE CODES: J = \$15,000 or less K = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
 H = \$250,001 to \$500,000 O = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting Eugene E. Siler, Jr.	Date of Report 6/21/91
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VII. INVESTMENTS and TRUSTS -- income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)

A. Description of Assets (including trust assets) Indicate, where applicable, owner of the asset by using the parentheses: (1) for joint ownership of report- er and spouse; (2) for (1) and separate ownership by spouse; (3) for tot ownership by dependent child.	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	If not exempt from disclosure				
	Amnt: (\$-K)	Type: (DIV, INT., or INT.)	Value: (\$-K-\$)	Value: Method: (2-3)	(1) Type (C-1), Date, Month, Year, Transac- tion)	(2) Date, Month, Day	(3)	(4)	(5) Identify of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
1 Bank of Williamsburg									
2 (A) common stock	A	DIV	J	U					
3 (B) NOW account	A	INT	J	T					
4 (C) IRA	A	INT	J	T					
5 (D) IRA (S)	A	INT	J	T					
6									
7 American Gen. Corp.									
8 (common)	A	DIV	J	T					
9									
10 First Amer. Corp.									
11 (common)	A		K	T					
12									
13 United Whitley Corp.									
14 (common)	A		J	U					
15									
16 1/3 undivided interest of about 40A of unimproved realty on Mt. Morgan in Williamsburg and Whitley Co. adjacent to home	A		K	S					
17									
18									
19									
20									
1 Income/Gain Codes: A=\$1,000 or less B=\$1,001 to \$2,500 C=\$2,501 to 5,000 D=\$5,001 to \$15,000 C=Cost D=Dividend C1 & D1 B=\$15,001 to \$50,000 F=\$50,001 to \$100,000 G=\$100,001 to \$200,000 H=\$200,001 to \$300,000 C2 & D2 E=\$50,001 to \$100,000 I=\$100,001 to \$200,000 J=\$200,001 to \$250,000 2 Value Codes: A=\$1,000 or less B=\$1,001 to \$10,000 C=\$10,001 to \$50,000 D=\$50,001 to \$100,000 (See Col. C1 & D1) E=\$10,001 to \$50,000 F=\$50,001 to \$100,000 G=\$100,001 to \$200,000 3 Value Method Codes: O=Appraisal N=Cost (real estate only) P=More than \$1,000,000 R=Assessment (See Col. C2) U=Book Value V=Other W=Estimated Z=Cash/Market									

Name of Person Reporting EUGENE SILER	Date of Report 6/21/91
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VII. INVESTMENTS and TRUSTS -- income, value, transactions.(Includes those of spouse and dependent children; see pages 18-27 of Instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period	C. Gross Value at end of reporting period	D. Transactions during reporting period
Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.	(1) (2) Amt. Code(s) (A-H) (e.g. div, rent, int.)	(1) (2) Value Code(s) (J-P) Match Code(s) (Q-V)	(1) (2) Type (e.g. sell, buy, recov., redem- ption) (3) Date/ Month/ Day (3) (4) Value Code(s) (J-P) Gain Code(s) (A-H)
Place "(X)" after each asset exempt from prior disclosure.	If not exempt from disclosure (5) Identity of buyer/ seller (if private transaction)		

<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
100 acres realty in Whitley									
Co. near Laurel Lake, Black									
Diamond and Sightop Roads	A	X	S						
The following holdings are in									
the Estate of my parents,									
Eugene Siler, Sr., who died									
in 1987, and Lowell Siler, who									
died in 1989. I am a									
beneficiary. The listings are									
the approximate value and									

Income/Gain Codes: A=\$1,000 or less (See col B1 & D4)	B=\$1,001 to \$2,500 F=\$50,001 to \$100,000	C=\$2,501 to \$5,000 G=\$100,001 to \$1,000,000	D=\$5,001 to \$15,000 H=More than \$1,000,000
<hr/>			
Value Codes: J=\$15,000 or less (See col C1 & D3)	K=\$15,001 to \$50,000 M=\$250,001 to \$500,000	L=\$50,001 to \$100,000 O=\$500,001 to \$1,000,000	N=\$100,001 to \$250,000 P=More than \$1,000,000
<hr/>			

Value Method Codes: Q=Appraisal (See column C2)	R=Cost (real estate only) U=Book Value V=Other	S=Assessment W=Estimated	T=Cash/Market
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Name of Person Reporting EUGENE BILER	Date of Report 6/21/91
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VII. INVESTMENTS and TRUSTS -- income, value, transactions.(Includes those of spouse and dependent children; see pages 18-27 of Instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period	C. Gross Value at end of reporting period	D. Transactions during reporting period						
If not exempt from disclosure									
Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.	(1) Amt. Code1 (A-H)	(2) Type (e.g. div, rent, int.)	(1) Value Code2 (J-P)	(2) Value Math/ Code2 (Q-W)	(1) Type (e.g.: buy, sell,mar- ket,red- emption)	(2) Date/ Math/ Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/ seller (if private transaction)
Place "(X)" after each asset exempt from prior disclosure.									

<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
Income of my beneficiary									
interest only.									
C&W Corp. (common stock) A DIV J T									
Ky. Mine Supply Corp. (common) A DIV J T									
Am. S.W. Finance (debenture) A INT J T									
Mobil Oil (common) A DIV J T									
GTE (common) A DIV X T									
Texas Utilities (common) R DIV X T									
Exxon (common) B DIV W T									
Am. Home Products (common) A DIV J T									

Income/Gain Codes: A=\$1,000 or less (See col B1 & D4)	B=\$1,001 to \$2,500 F=\$50,001 to \$100,000	C=\$2,501 to \$5,000 G=\$100,001 to \$1,000,000	D=\$5,001 to \$15,000 H=More than \$1,000,000
Value Codes: J=\$15,000 or less (See col C1 & D3)	E=\$15,001 to \$50,000 H=\$250,001 to \$500,000	I=\$50,001 to \$100,000 O=\$500,001 to \$1,000,000	M=\$100,001 to \$250,000 P=More than \$1,000,000
Value Method Codes: Q=Appraisal (See column C2)	R=Cost (real estate only) U=Book Value	S=Assessment V=Other	T=Cash/Market W=Estimated

Name of Person Reporting EUGENE SILVER	Date of Report 6/21/91
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VII. INVESTMENTS and TRUSTS -- income, value, transactions. (Includes those of spouse and dependent children; see pages 18-27 of Instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period	C. Gross Value at end of reporting period	D. Transactions during reporting period
(1) Amt. Code2 (A-E)	(2) Type (e.g. div, rent, int.)	(1) Value Code2 (J-P)	(1) Type (ex: buy, sell,mar- ket,red- emption)
(2) Date/ Month/ Day	(3) Value Code2 (Q-W)	(2) Date/ Month/ Day	(4) Gain Code2 (A-E)
Indicate, where applicable, owner of the assets by using the parenthetical "(X)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.			If not exempt from disclosure
Place "(X)" after each asset exempt from prior disclosure.			(5) Identity of buyer/ seller (if private transaction)

<input type="checkbox"/> NONE (No reportable income, assets, or transactions)								
SLM Govt. Securities Fund (mutual fund)	A	DIV	J	T				
Bank of Williamsburg (common)	A	DIV	J	U				
Bank of Williamsburg (CDS and NOW accounts)	A	INT	J	T				
Parents' residence	A		X	G				
Chevron (common)	A	DIV	J	T				
Arco (common)	A	DIV	J	T				
Ashland Oil (common)	A	DIV	J	T				

Income/Gain Codes: A=\$1,000 or less (See col B1 & D4)	B=\$1,001 to \$2,500 F=\$50,001 to \$100,000	C=\$2,501 to \$5,000 G=\$100,001 to \$1,000,000	D=\$5,001 to \$15,000 H=More than \$1,000,000
Value Codes: J=\$15,000 or less N=\$250,001 to \$500,000			
(See col C1 & D3) O=\$500,001 to \$1,000,000 P=More than \$1,000,000			

Value Method Codes: Q=Appraisal (See column C2)	R=Cost (real estate only) S=Assessment V=Other	U=Book Value	W=Estimated	X=Cash/Market
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FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
Eugene E. Siler, Jr.	6/21/91

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate section of Report.)

Check to affirm that differences in investments from those reported in prior year are exempt from disclosure.

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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.

Signature Eugene E. Siler, Jr.

Date June 21, 1991

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILLFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (28 U.S.C.A. APP. I, § 304, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:	
1. Mail signed original and 3 additional copies to:	Judicial Ethics Committee Administrative Office of the United States Courts Washington, DC 20544
2. Deliver one copy to the Clerk of the Court on which you sit or serve. (Judicial employees not associated with a specific court, such as employees of the Administrative Office and the Federal Judicial Center, need not file a copy with any court.)	TOTAL P 02

FINANCIAL STATEMENT SCHEDULES**Listed Securities**

152 shares Am. Gen. Corp. @ 38.625 =	\$5,871
1518 shares First Amer. Tenn. @ 12.125 =	18,406

Unlisted Securities

250 shares United Whitley Corp. @ 17.50 =	4,375
432 shares Bank of Williamsburg @ 26.16 =	11,301

Real Estate Owned Home - Williamsburg, Kentucky	150,000
1/3 undivided interest 40 A adjacent to home	16,467
1/3 undivided interest 100 A near Hightop Road, Whitley Co.	25,000
1/4 undivided interest in parents' home, Williamsburg, Kentucky	29,250

**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.

DATE: June 21, 1991

ASSETS

Cash on hand and in banks	\$23,959.00
U.S. Government securities - add schedule	
Listed securities - add schedule	\$24,277.00
Unlisted securities - add schedule	\$15,676.00
Accounts and notes receivable: Due from relatives and friends	
Due from others	
Doubtful	
Real estate owned - add schedule	\$220,717.00
Real estate mortgages receivable	
Autos and other personal property	\$30,000.00
Cash value - life insurance	
Other assets - itemize: Beneficial interest in parents' estates	\$345,000.00
Civil Service Retirement	\$ 5,000.00
Thrift Savings Plan	\$11,508.00
TOTAL ASSETS	\$676,137.00

CONTINGENT LIABILITIES

NONE

As endorser, comaker or guarantor
On leases or contracts
Legal Claims
Provision for Federal Income Tax
Other special debt

LIABILITIES

Notes payable to banks - secured	
Notes payable to banks - unsecured	\$12,000.00
Notes payable to relatives	
Notes payable to others	
Accounts and bills due	\$1,000.00
Unpaid income tax	
Other unpaid tax and Interest	
Real estate mortgages payable - add schedule (Home)	\$60,589.00
Chattel mortgages and other liens payable	
Other debts - Itemize:	
TOTAL LIABILITIES	\$73,589.00
NET WORTH	\$602,548.00
TOTAL LIABILITIES AND NET WORTH	\$676,137.00

GENERAL INFORMATION

Are any assets pledged? (Add schedule.)	NO
Are you defendant in any suits or legal actions?	NO
Have you ever taken bankruptcy	NO

III. GENERAL (PUBLIC)

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

In private practice, I represented many poor persons, and I never turned down a case because the client was unable to pay, if I thought it was meritorious. I represented several claimants before hearing examiners with the Kentucky Department of Human Resources in order to obtain welfare benefits. I also wrote a will for a retarded gentleman who wanted what little property he had left to his landlady, and I was the executor of his estate, which amounted to about \$200.00 after the funeral bill was paid.

When I was a member of the Optimist Club in Williamsburg, we sponsored youth sports activities. I even coached Little League baseball and basketball teams. I have also participated in our church's distribution of toys to the poor at Christmas.

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

I do not currently belong to any organization which discriminates. In college, I was a member of Pi Kappa Alpha social fraternity, which was restricted to white members only. We worked to have that clause changed, and, now, the fraternity does not discriminate.

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

There is no selection commission in this jurisdiction to recommend candidates for nomination to the federal courts.

I discussed the matter with Senator Mitch McConnell of Kentucky and was subsequently interviewed by several individuals in the United States Department of Justice, the Federal Bureau of Investigation and the American Bar Association.

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

No.

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

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

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

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

I have never been labeled as a judicial activist. If there is no jurisdiction in a case, I will not try to invent it. That means that if the parties do not have standing or if the case is not ripe, the court should not hear the matter. I do not take the case beyond the bounds of its own factual situation, so I do not believe that the orders of the court should extend beyond the issue of the case itself, except

insofar as the holding in the case may affect others.

Furthermore, if the question is one which should be decided by another branch of the government, the judicial branch should not decide it.

A judge should follow the Constitution. However, if a case can be resolved on some other basis, the interpretation of the Constitution should not resolve it. The original intent of the framers of the Constitution should be followed, if it can be determined. Obviously, one would have to follow the prior decisions of the Supreme Court in determining what that intent was.

WILLIAM G. BASSLER, J.S.C.

QUESTIONNAIRE FOR JUDICIAL NOMINEES**I BIOGRAPHICAL INFORMATION (PUBLIC)**

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

William G. Bassler

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

Office: Monmouth County Court House
Post Office Box 1266
Freehold, New Jersey 07728

Home: 480 River Road
Fair Haven, New Jersey 07704

3. Date and Place of Birth.

Butler, Pennsylvania - March 6, 1938

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

Spouse: Eileen Schilling Bassler.

Spouse's Occupation:

Co-owner of Meadow Flower Nursery School, Inc.
300 Ridge Road, Fair Haven, New Jersey 07704

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

St. Charles College Seminary
Catonsville, MD (1956 - 1958) A.A. 1958

St. Mary's College Seminary (9/58-11/58)
Paca St., Baltimore, MD.
Left without degree *

Fordham University College
New York City (1959-60) B.A. 1960

Georgetown University Law Center
Washington, D.C. (1960-1963) J.D. 1963

New York University Graduate School
New York City, New York (1964-1969) LL.M. 1969

* Upon graduating from high school, I attended St. Charles Seminary (a 2 year-college) as the first step in my formal studies towards ordination as a priest in the Roman Catholic Church. After completing 2-years of college at the "minor" seminary, I then continued my studies at St. Mary's "major" seminary at Paca Street, Baltimore, MD. in September 1958. In November 1958 I decided on a career change and left the seminary. The following January 1959 I attended Fordham College in New York City, where I completed my liberal arts studies.

Since becoming a New Jersey Superior Court Judge, I have taken the following judicial education courses:

American Academy of Judicial Education, Stanford University, Certificate for completion of Evidence Course (August 14-19, 1988).

National Judicial College Certificate for completion of General Jurisdiction Course at the University of Nevada (July 9 - August 4, 1989)

National Judicial College Certificate for completion of Judicial Writing Course for Judges, University of Nevada at Kirkwood, CA. (February 26 - March 2, 1990)

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

Summers 1956, 1957 and 1959	Sandlass Beach Club Sea Bright, New Jersey.
Summer 1958	Taught Summer School at Red Bank Catholic High School, 10 Peter's Place, Red Bank, New Jersey 07701.
Dec. 1958	After I left St. Mary's Seminary in November 1958, I taught English at Red Bank Catholic High School before starting college at Fordham University in January 1959.
Summer 1960	Monmouth County Highway Department Kozlowski Road & Center Freehold, New Jersey 07728

Summers 1961-1962	Law Clerk Parsons, Canzona Blair & Warren 18 Wallace Street Red Bank, New Jersey 07701
Summer 1963	Studying for the bar.
1960-1963	While attending Georgetown University Law Center, I had a part time job as a prefect. Georgetown University Washington, DC 20057.
1963-1964	Law Secretary to The Honorable Mark A. Sullivan, Appellate Division, New Jersey Superior Court. He later became a Justice of The New Jersey Supreme Court. He is now retired and resides at 36 Pitney Avenue, Spring Lake, New Jersey 07762.
1964-1970	Associate and Partner in the Law Firm of Parsons, Canzona, Blair and Warren, 18 Wallace Street, Red Bank, New Jersey 07701.
1970-1983	Partner in the Law Firm of Labrecque, Parsons & Bassler, Red Bank, New Jersey. Now known as Parsons and Cappiello, 612 River Road, Fair Haven, New Jersey 07704.
1983-1984	Partner in the Law Firm of Evans, Koelzer, Osborne, Kreizman & Bassler, Red Bank, New Jersey. Now known as Evans, Osborne & Kreizman, 180 White Road, Little Silver, New Jersey 07739.
1984-1988	Partner in the Law Firm of Carton, Nary, Witt & Arvanitis, 4001 Highway 66, Neptune, New Jersey 07712. Now known as Carton, Witt, Arvanitis & Bariscillo.
1988-date	Superior Court of the State of New Jersey, Court House, Freehold, New Jersey 07728.
While I practiced law, I served from March 1979 to December 31, 1987, as a Director of Farmers' Reliance Insurance Company, now designated American Reliance Insurance Company and American Reliance Insurance Group, 1000 Lenox Drive, Lawrenceville, New Jersey 08648.	

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

NO

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

Partial tuition scholarship from Cornell University Law School.

Full tuition scholarship from Georgetown University Law Center.

Staff member of the Georgetown Law Journal.

Fellow of The American College of Trust and Estate Counsel.

As a practicing attorney I received the highest Martindale-Hubbell Legal Rating: "AV."

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

Member of American Bar Association.

Member of New Jersey State Bar Association.

Member of Monmouth County Bar Association.

Member of Florida Bar Association.

Former Member of The Board of Consultors, Real Property, Probate and Trust Law Section of the New Jersey State Bar Association.

Former Member of the Editorial Board of the New Jersey State Bar Journal from 1969 to 1974 and Book Editor from 1972-1974.

Since becoming a Judge of the Superior Court of the State of New Jersey in January 1988, I have participated in the following judicial committees:

Committee on Model Civil Charges (1988-1990)

Case Processing Committee Members of Conference of Family Division of Presiding Judges (1989 to date).

Family Division Practice Committee (1990 to date).

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

NONE

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

1964	New Jersey and U.S. District Court, District of New Jersey.
1969	U.S. Tax Court.
1975	U.S. Court of Appeals, Third Circuit.
1976	Florida Bar.
1981	New York Bar.

In 1988 after I became a Judge of the Superior Court of the State of New Jersey, my membership in the Florida Bar lapsed due to non-payment of a membership fee. The fee was subsequently paid and I was later reinstated as a member in good standing of the Florida Bar.

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

NONE

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

Good.

My last physical examination was on March 23, 1991.

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 been a Judge of the Superior Court of the State of New Jersey since January 22, 1988. I was appointed by Governor Thomas H. Kean with the approval of the New Jersey Senate.

I was assigned by the Chief Justice to the Law Division in January 1988 to September 1988 and assigned to the Chancery Division, Family Part, September 1988 to date.

My responsibilities as a Judge of the Law Division included: jury trials, non-jury trials, settlement conferences, case management conferences, summary judgments and discovery motions, Special Civil Part (non-jury) trials, and prerogative writs, as assigned.

It is the policy of the Chief Justice to rotate the assignments of the newer judges. In accordance with that policy, I was assigned in September 1988 to the Chancery Division, Family Part. My responsibilities included the following: Dissolutions, early settlement panels, dissolution trials, dissolution motions, Division of Youth and Family Service cases, domestic violence, adoptions, juvenile delinquency, juvenile dispositions, custody/visitation, emergent matters, including juvenile detention hearings, juvenile/family crisis hearings, juvenile probable cause hearings, support bench warrants, domestic violence temporary restraining orders, non-dissolution show causes, hearing officer appeals, Rule 1:10-5, (contempt hearings), domestic violence contempt, initial appearances, juvenile delinquency probable cause hearings and arraignments.

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

Citations for the Ten Most Significant Written Opinions

PUBLISHED OPINIONS (copies attached as Schedule "A")

1. Northeast Custom Homes, Inc. v. Howell,
230 N.J. Super. 296
544 A.2d 387 (Law Div. 1988)

2. El Maksoud v. El Maksoud,
237 N.J. Super.
568 A.2d 140 (Ch. Div. 1989)
cited by Justice Scalia in Burnham v. Superior Court of California, Marin County U.S. ___, 109 L.E.2d 631, 110 S.Ct. 2105 at p. 2113.

3. Rosenfeld v. Rosenfeld
239 N.J. Super. 77
570 A.2d 1026 (Ch. Div. 1989)

4. Wajda v. Wajda
239 N.J. Super. 248
570 A.2d 1308 (Ch.Div. 1990)

5. Dilger v. Dilger,
242 N.J. Super. 380
575 A.2d 951 (Ch.Div. 1990)

6. Culp v. Culp,
242 N.J. Super. 567
577 A.2d 862 (Ch.Div. 1990)

UNPUBLISHED OPINIONS (copies attached as Schedule "B")

7. Diann Boms v. Carl Boms, Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. L52068-87, Decided July 18, 1990.

8. Levitt v. Greencourt Builders, Inc., Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L.52068-87, aff'd on appeal in an unpublished decision (A-1965-80 T5) January 15, 1990.

9. Murphy v. Saracino, Superior Court of New Jersey, Law Division, Monmouth County, Special Civil Part, Docket No. 87 D-11672, aff'd on appeal in an unpublished decision (A-151 80T3) May 18, 1989.

10. In The Matter of The Adoption of A Child by W.H.
Superior Court of New Jersey, Chancery Division, Family Part, Docket No. FA 13-96-89 decision aff'd. on appeal in unpublished decision (A-4991-89 T5) November 7, 1990.

(2) SUMMARY OF APPELLATE OPINIONS WHERE DECISIONS WERE REVERSED OR AFFIRMED (Copies Attached as Schedule C)

None of the following appellate opinions or trial decisions were officially reported.

1. Melissa Anghelone v. McDonald's, Anthony Marinello and Sassy Seat. Superior Court of New Jersey Appellate Division A-5179-87 T2 Decision March 10, 1989.

The plaintiff infant sought damages in a jury trial for an alleged injury resulting from a fall while at McDonald's. The co-defendant on its cross appeal appealed my ruling that it was not entitled to a dismissal at the conclusion of plaintiff's case. The Appellate Division affirmed my ruling that since defendants had cross-claimed against each other, the motion for dismissal had to be held in abeyance until the close of all of the evidence.

2. Bernard E. Czachowski v. Peter Allegra. Superior Court of New Jersey, Appellate Division A-61-88T3. Decided January 29, 1990.

The plaintiff, as the administrator of the Estate of Ronnie Townsend, sought damages from the jury in a legal malpractice action against an attorney who admittedly neglected to commence within time a wrongful death medical practice action against an emergency room physician.

Because of a question from the jury after my charge, I instructed the jury as to proximate cause and replaced the original interrogatory with one that reflected the total charge. The plaintiff appealed the jury's verdict of no damages arguing that I had erred in amending my charge and that I also had erred by not striking a comment by the defendant's attorney in his summation.

The Appellate Division affirmed my determination:

"Confronted by the jury's question, the judge correctly and commendably acknowledged that he had made a mistake when he acceded to the attorney's request to prevent the jury from resolving all the interrelated issues raised by the evidence."

"The judge properly amended his charge in response to the jury's question."

"The judge did not commit error much less plain error, by not striking defendant's attorney's comment."

3. Robin Hunter v. Anthony Bilotta, Superior Court of New Jersey, Appellate Division A-5702-88 T3. Decided April 10, 1990.

The defendant father sought to have the plaintiff mother contribute to the support of their child in his custody. After a plenary hearing I found that the parties had agreed in November 1985 that defendant would support the child and that the defendant did not demonstrate any changed circumstances from the time of the entry of the consent order in 1986 incorporating the agreement of the parties. The defendant appealed and the Appellate Division "affirmed substantially for the reasons given" by me in my oral opinion.

"We conclude that the issue was fully and carefully considered by the motion judge who reached an equitable solution to the matters in issue."

4. Kolody v. Kolody, Superior Court of New Jersey, Appellate Division A-3328-88 T5. Decided December 5, 1989.

The plaintiff father appealed from my decision imposing on him the responsibility of transporting the parties' son from and to defendant's residence for the purpose of effectuating his right of visitation.

The Appellate Division affirmed my decision noting that the "Chancery Division's order does not constitute a sharp departure from reasonableness so as to require its intercession".

"The issue from the perspective of an appellate court, is whether the course chosen is reasonable under the circumstances. Against that backdrop we cannot fairly say that the Chancery Division judge plainly missed the mark in imposing the burden of travel on plaintiff."

5. Steven M. v. Terri M. Superior Court of New Jersey, Appellate Division A-1998-89 T1. Decided April 20, 1990.

The plaintiff father sought the custody of the child who had been in the custody of the defendant mother. After a trial I concluded that there was substantial credible evidence that it was in the best interest of the child that the primary residence of the child be with his father.

The defendant appealed, contending that I had delegated my fact-finding duty to an inexperienced doctor.

In affirming my decision, the Appellate Division held that I had not abused my discretion in qualifying the doctor as an expert witness and that "our careful reading of the court's decision satisfies us that although the court gave attentive consideration to its expert's report,... that (t)he conclusions of Dr. Flescher are supported by testimony at the trial and (he) then reviewed the numerous instances of record which illustrated one way or another how the child's best interests would be discerned by continuing residential custody with the mother."

6. Metzendorf v. Metzendorf. Superior Court of New Jersey, Appellate Division A-1149-89 T1. Decided September 25, 1990.

In this case the plaintiff appealed my dismissal of his motion to terminate alimony payments. The plaintiff argued that I had erred in not affording him a plenary hearing and in considering the proceeds of a covenant not to compete in assessing his ability to meet his alimony payments.

The Appellate Division affirmed "substantially for the reasons expressed by Judge Bassler in his oral decision"

"The trial court articulated the operative facts and on that basis, stated its conclusions of law as required by court rule."

"The court fulfilled its obligation to make a determination as to whether it would be equitable and fair to bind the defendant to his prior agreement."

7. Arthur Morris and Barbara Morris v. Standard Breeder's Association of New Jersey, Inc. Superior Court of New Jersey, Appellate Division, A-120-88 T5. Decided May 16, 1989.

The plaintiff wife was injured in an auto accident. Her medical expenses were paid by her PIP carrier, State Farm Mutual Insurance Carrier. The damage suit was settled for \$290,000 and out of that amount she was obliged by the terms of her policy to repay State Farm its PIP medical expense outlays of \$32,000. The plaintiff, a member of the defendant association, then brought this action to recover the medical expense since the defendant provided self-funded health and major medical insurance for its members and their families.

I granted the defendant's motion for summary judgment on the ground that the plaintiff's suit was barred by their settlement with the tortfeasor because the settlement and release destroyed defendant's right of subrogation against the tortfeasor.

The plaintiff appealed and the Appellate Division reversed my grant of the summary judgment motion. The Appellate Division held that since the plaintiff had no right to recover medical expenses from the tortfeasor (having been paid by State Farm) defendant had no subrogation rights to recover the medical expenses and therefore wasn't prejudiced by the plaintiff's release of the tortfeasor.

8. Gary M. Prisand v. Donald Scherr, Superior Court of New Jersey Appellate Division A-6032-87 T3. Decided March 8, 1989.

Plaintiff filed a complaint seeking damages against the defendant for breach of a real estate contract. I granted the defendant's motion for summary judgment. The Appellate Division affirmed.

"We are in full agreement with the trial judge's conclusion, substantially for the reasons stated by him, that defendant was entitled to dismissal of the complaint. Obviously no action could be predicated either on the unexecuted lease or the unexecuted personal guaranty because of the statue of frauds.... Nor is there any question but that defendant was released from his contract obligation by reason of his inability to meet the terms of the mortgage contingency clause."

9. Dobrilla Rector v. Alexander Levchuk, Superior Court of New Jersey, Appellate Division A-3480-88TS. Decided February 2, 1990.

The plaintiff sued her former matrimonial lawyer alleging that he was negligent in failing to protect and secure her 20% interest in her husband's net recovery, if any, in the then pending litigation against the United States Army, and in failing to investigate her former husband's pension rights and to present evidence of those rights and their value in the matrimonial trial.

A jury awarded plaintiff damages for defendant's failure to protect plaintiff's share of the army litigation proceeds.

As to the plaintiff's pension claim, I entered judgment for the defendant at the close of the plaintiff's liability evidence on the ground that plaintiff had not established that she had been damaged by defendant's

failure to investigate and present evidence as to that claim.

I determined that in 1979 existing case law did not subject the husband's rights to retirement pay to equitable distribution.

In affirming the judgment, the Appellate Division found that in 1979 equitable distribution law regarding pension benefits was in a state of evolution and whether the husband's rights to retirement pay was subject to equitable distribution "was an open question." The plaintiff's expert had provided no testimony regarding the probability of success on the issue of includability of the pension nor any testimony regarding the probable disposition of that asset.

10. Renfrow v. Renfrow. Superior Court of New Jersey, Appellate Division A-1716-89 T2. Decided October 24, 1990.

After a trial of a contested divorce, I awarded one year rehabilitative alimony and child support based upon the defendant's income from his current employment.

The Appellate Division reversed and remanded the matter for a new trial. The Appellate Division held that "the determination of the trial judge is not in accord with the earning ability of the defendant, is not supported by sufficient credible evidence in the record, and further, that the judge's failure to award sufficient child support and rehabilitative alimony constitutes an abuse of discretion."

11. Weinisch v. Sawyer, Superior Court of New Jersey Civil Division, Monmouth County Docket No. L-059209-86. Decided February 22, 1988 (unpublished opinion) rev'd 237 N.J. Super 195 (App. Div. 1985), rev'd ___ N.J. _____. (1991)

The plaintiff was injured in an automobile accident and sued the driver, but settled for the policy limits of \$100,000. At the time the plaintiff was insured under Allstate Insurance Company automobile policy that provided for liability coverage of \$250,000 per person, \$500,000 per event and \$1,000,000 liability umbrella. However, his uninsured/underinsured (UM/UIM) motorist coverage was only \$15,000 per person or \$30,000 per event, the statutory minimum.

The plaintiff then sued Allstate and its agent Sawyer, contending that they breached their duty to inform him of the availability of optional higher limits of UM/UIM coverage. Because a motion judge had ruled that the

plaintiff was not entitled to a jury trial, the matter came before me for a bench trial. I determined that the plaintiff's testimony was contrived and that the plaintiff had received from Allstate sufficient information to inform him of the availability of increased UM/UIM coverage. Because the plaintiff had failed to establish that either Allstate or Sawyer was negligent, I entered judgment in favor of Allstate and Sawyer.

The Appellate Division reversed because the court was convinced that the plaintiff was entitled to bring an action directly against Sawyer for money damages and that the plaintiff was entitled to a jury trial.

The Supreme Court reversed the Appellate Division and reinstated the judgment dismissing the complaint.

(3) Opinions on Federal or State Constitutional Issues
(Copies Attached as Schedule D)

1. E1 Maksoud v. El Maksoud,
237 N.J. Super. 483
586 A.2d 140 (Ch. Div. 1989)
 cited by Justice Scalia in Burnham v. Superior Court of California, Marin County
U.S. ___, 109 LE 2nd 631, 110 S.Ct. 2105
(1990) at p. 2113.
2. J.H. v. E.D.H., Superior Court of New Jersey
Chancery Division, Family Part, Docket No. M15842-76
Decided February 2, 1990; reversed and remanded by the
Appellate Division Docket No. A-3591-89T3
Decided March 14, 1991.

(The trial and Appellate Opinions are unpublished).

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

I was elected to the Borough Council of the Borough of Fair Haven. The term of office was from 1979 to 1981. This was a contested election and I ran for the office in 1978 and was elected in the fall of 1978. The term of office began the following January 1979.

17. **Legal Career:**

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

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

I served as law secretary from 1963-1964 to the Honorable Mark A. Sullivan, who was then a judge of the Appellate Division of the Superior Court of the State of New Jersey. Subsequently, Judge Sullivan became a Justice of the New Jersey Supreme Court. He is now retired.

His address: Hon. Mark A. Sullivan
36 Pitney Avenue
Spring Lake, New Jersey 07762

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

No.

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

1964-1970 Associate, Partner
Parsons, Canzona, Blair & Warren,
Red Bank, New Jersey

1970-1983 Partner
Labrecque, Parsons & Bassler
Red Bank, New Jersey

1983-1984 Partner
Evans, Koelzer, Osborne, Kreizman &
Bassler
Red Bank, N.J. 07701

1984-1988 Partner
Carton, Nary, Witt & Arvanitis
4001 State Highway #66
Neptune, N.J. 07753

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

I was engaged throughout my legal career in the general practice of law. In the early years of my practice I was more involved in litigation, always non-jury, either in the Superior Court of New Jersey, Chancery Division or with prerogative writ litigation in the Superior Court of New Jersey, Law Division.

In the early years of my practice, I appeared in the New Jersey Superior Court, Appellate Division and argued several cases before the New Jersey Supreme Court.

When I first began to practice law, I had a few criminal cases as assigned counsel on a pro bono basis, but essentially I was engaged in the civil practice of law.

In the later years of my practice I was engaged primarily in office work and occasionally prerogative writ litigation in the Superior Court of New Jersey, Law Division. My practice eventually fell into four clusters:

- (1) Governmental work as general counsel for various local zoning and planning boards;
- (2) General Counsel for American Reliance Insurance Company, 1000 Lenox Drive, Lawrenceville, N.J. 08648 (1979 - 1987);
- (3) Real estate and representation of private developers before municipal agencies, and prerogative writ litigation;
- (4) Estate Planning/Wills, Trusts and Probate work.

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

(1) Municipalities and Municipal Agencies

1978-1987 The Borough of Red Bank.

1971-1973 Holmdel Township Planning Board

1970-1987 Zoning Board of Adjustment
Borough of Monmouth Beach

Middletown Township Planning Board

(2) American Reliance Insurance Group

1979-1987

(3) Real Estate Development

(4) Estate Planning

Areas of specialty: Federal Estate Tax Planning, Wills, Trusts and Estates; Municipal and Zoning Law.

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

I appeared in court occasionally.

When I was a partner in my own law firm, Labrecque, Parsons & Bassler (1970-1983), I appeared in the Superior Court of New Jersey, Monmouth County, Freehold, N.J. more frequently. This was due principally to the number of assignments from the then Chancellor, The Honorable Merritt Lane, Jr., now deceased. I was often in court as a guardian ad litem in probate accountings and other probate matters or as a receiver or assignee for the benefit of creditors.

2. What percentage of these appearances was in:

- (a) Federal courts;
- (b) state courts or record;
- (c) other courts.

Practically all of my appearances were in the New Jersey Superior Court. However, I did argue an appeal from a decision in the tax court before the Third Circuit Court of Appeals and shepherded a successful summary judgment motion through the Federal District Court. That case involved a novel conflicts of law issue. In addition, when I was an associate in the Parsons, Canzona firm, I assisted senior partners with litigation in the Federal Court and from time to time represented individual creditors in the Bankruptcy Court.

3. What percentage of your litigation was:

- (a) civil 100%
- (b) criminal.

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

For the past three years, I have been a judge of the Superior Court of the State of New Jersey. The

records of the cases that I litigated in private practice are no longer available to me and so I do not have an exact record of the number of cases actually tried to judgment. I can say in summary fashion that these cases probably were not more than one or two a year, that few exceeded a day of trial, and that they were all non-jury cases, tried either in the Superior Court of New Jersey, Chancery Division or the New Jersey Superior Court, Law Division.

5. What percentage of these trials was:

- (a) jury;
- (b) non-jury.

Except for several jury trials when I was first associated with the firm of Parsons, Canzona, Blair & Warren, (1964-1970), all of the cases I tried were non-jury cases.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and 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. Melcer v. Zuck, 95 N.J. Super. 252
 230 A.2d 538, (Ch.Div. 1967) aff'd 101 N.J. Super.
 577, 245 A.2d 61 (App. Div. 1968),
- (a) Argued February 13, 1968
 decided July 5, 1968.
 - (b) Superior Court of New Jersey, Appellate Division before
 Judges Edward Gaulkin, Arthur Lewis and Harold Kolovesky.
 - (c) Counsel for appellants
 Robert B. Silverman, Esq.
 601 East Kennedy Boulevard, Box 236, Lakewood,
 N.J. 08701 (609) 363-8900.

Co-counsel was my then partner Thomas J. Smith, Jr. Smith, Shaw, Smith & Oxley, 265 Monmouth Park Highway, West Long Branch, N.J. 07764 (908) 542-9025.

My partner, Thomas J. Smith, Jr., had successfully tried an action for specific performance of a real estate contract. The Superior Court, Chancery Division, rendered a judgment on behalf of our clients, the real estate purchasers, from which the vendors appealed. I wrote the briefs and argued the case before the Appellate Division. The point that I was trying to stress before the Appellate Division was that since the vendor could not give us marketable title due to the fact that he could not provide means of ingress and egress that the trial court was correct in requiring a sale with an abatement of the purchase price. However, the Appellate Division reversed the trial court and remanded the case.

The case established that specific performance cannot be required where a real estate contract guaranteed access from the main road to the property and provided that if title were unmarketable, the only obligation of the vendors was the return of the deposit; the purchaser is not entitled to specific performance with an abatement of the purchase price.

2. Chirichello v. Zoning Board of Adjustment, 78 N.J.
544 A.2d 646 (1979)

- (a) The trial lasted one day. I don't have the exact date.
- (b) The case was tried before Judge Merritt Lane, Jr., Superior Court, Law Division, Freehold, N.J.
- (c) Counsel for Mrs. Chirichello was Milton M. Breitman, Greenberg, Margolis, 3 A.D.P. Boulevard, Roseland, N.J. 07068 (201) 533-7262

During most of my legal career I acted as general counsel for the Zoning Board of Adjustment of the Borough of Monmouth Beach. In this case the Zoning Board of Adjustment denied a property owner a variance from the zoning code to permit her to build on an undersized lot. The owner filed a complaint in lieu of prerogative writ to review the correctness of the denial by the Board of Adjustment of the Borough of Monmouth Beach with respect to her application for a variance.

I tried the case before the Superior Court, Law Division and was the attorney on the appeal before the Appellate Division. However, one judge of the Appellate Division dissented and the plaintiff appealed as of right to the Supreme Court of New Jersey.

I was also responsible for preparing the briefs and arguing the case before the Supreme Court of the State of New Jersey. The Supreme Court of New Jersey reversed the Appellate Division and the trial court.

The Supreme Court enunciated the principle that the Zoning Board of Adjustment could condition denial of the variance contingent on the purchase of the land by adjoining property owners at a fair price.

The case was argued before Chief Justice Hughes, Justices Mountain, Sullivan, Pashman, Clifford, Schreiber and Handler.

3. Yacker v. Weiner, 109 N.J. Super. 351, 263 A.2d. 188, (Ch.Div. 1978) aff'd 114 N.J. Super. 526 277 A.2d 417 (App.Div.1971)
- (a) The case was tried in 1970. I argued the case before the Appellate Division on May 11, 1971 and it was decided May 20, 1971.
 - (b) The case was tried before Judge Merritt Lane, Jr. Superior Court, Chancery Division, Monmouth County. The case was argued in the Appellate Division before Arthur W. Lewis, Robert A. Matthews, and Nelson K. Mintz.
 - (c) At the trial, the plaintiff was represented by Ralph S. Heuser, Jr., 159 Main St., Box 386, Matawan, N.J. 07747 (908) 566-8900; the defendants were represented by Barry D. Keith, Keith & Keith, Main & LaReine Ave., Box 188, Bradley Beach, N.J. 07720 (908) 744-1212.

On appeal the case was argued for the appellants by Nestor A. Winters, now of the firm Keith, Winters & Wenning, Main & LaReine Avenue., Box 188, Bradley Beach, N.J. 07720 (908) 744-1212.

I became substituted attorney for Ralph S. Heuser in this case. I prepared the appellate brief and argued the case before the Appellate Division. This case involved an action by a receiver of an insolvent corporation against another corporation and the incorporators to recover money owed to certain creditors. The Superior Court, Chancery Division, held that the incorporators of a land owning corporation in forming a construction corporation and causing it to enter into the contract for construction of apartments for a sum that could not possibly have covered the cost of construction perpetrated a fraud upon the sub-contractors and caused the land owing corporation to participate in the fraud. Consequently the receiver was entitled to recover the amount of the claims of creditors who refused to settle for twenty-five cents on the dollar as other creditors had done.

The Appellate Division affirmed the decision of the trial court. The case is one of the leading creditors' rights cases in the State of New Jersey.

4. Borough of Highlands v. Davis, 124 N.J. Super. 217
305 A.2d 814 (Law Div. 1973)

- (a) The case was argued on May 23, 1973.
- (b) The case was decided on May 24, 1973 before the Honorable Merritt Lane, Jr., Superior Court of New Jersey Law Division.
- (c) Edward C. Stokes, of the firm of Stokes, Throckmorton, Cieri, 545 Bath Avenue, Long Branch, N.J. 07764 (908) 229-1600 argued the case for the plaintiff.

I represented Luke Penta, a councilman of the Borough of Highlands, who had moved to intervene in the action commenced by the borough mayor for declaratory judgment as to who was authorized to make appointments in the police department.

The case stands for the proposition that the ordinance of the Borough, which adopted the small municipality plan, but which had not adopted the civil service provisions, gave the council the right to appoint police officers and the chief of police, captain of police and one or more sergeants, and therefore the council's appointment of the policeman as sergeant was valid notwithstanding the mayor's claim of right to make promotions within the police department.

5. In Re App. of Jersey Cent. Power & Light Co., 130 N.J. Super.
394, 327 A.2d 437 (App.Div. 1974)

- (a) This case was argued on October 1, 1974 and decided October 9, 1974.
- (b) Superior Court of New Jersey, Appellate Division. The judges were Joseph Halpern, Francis X. Crahay, John A. Ackerman.
- (c) Robert M. Wood, 25 Abe Voorhees Dr. Manasquan, N.J. 08736 (908) 223-8484 argued the case for the property owners. Edward J. McNeill argued the case for Jersey Cent. Power & Light Co. I have not been able to locate his address. The firm of Labrecque, Parsons & Bassler, now Parsons & Cappiello, represented the Borough of Monmouth Beach. Theodore D. Parsons, 612 River Road, Fair Haven, N.J. 07704 (908) 842-6400.

The Kriegers appealed from orders of the Board of Public Utility Commissioners which granted permission to Jersey Cent. Power & Light Co. to erect an electrical substation in the Borough of Monmouth Beach.

The company had applied to the Zoning Board of Adjustment for a special exception use permit. After a full hearing at which time the Kriegers appeared, the company's application was denied.

Pursuant to statute the company then applied to the Board of Public Utility Commissioners to erect a substation at that location. At that hearing, I represented the Borough, and after negotiations between the company's engineers and the borough's representatives, the issues were resolved and the borough withdrew its appearance.

Subsequently the Board of Public Utility Commissioners granted the application to erect the substation. The Kriegers attempted to intervene in order to present their objections. The Board of Public Utility Commissioners denied the Kriegers' request to present any new evidence.

The Appellate Division held that there was no violation of due process because personal notice was not given to the appellants of the utility's permit application filed with the Public Utilities Board; that the appellants were not necessary parties to the application; and that there was no abuse of discretion in the Board's action in refusing to permit the appellants to intervene or to reopen the hearing.

6. Feder v. Oceanport, 57 N.J. 133 (1970)

- (a) This case was argued some time in 1969 or 1970.
- (b) The case was argued before Hon. Merritt Lane, Jr., Superior Court of New Jersey, Chancery Division, Monmouth County, Freehold, N.J. 07728
- (c) The borough was represented either by the firm of Parsons, Canzona, Blair & Warren, and is now represented by Rocco Ravaschiere of that firm, 18 Wallace St., Red Bank, N.J. 07701 (908) 741-5000. Or, by my own firm of Labrecque, Parsons & Bassler. Theodore D. Parsons, Jr. 612 River Road, Fair Haven, N.J. 07704 (908) 842-6400, is now the senior partner.

The name of the attorney for Maurice Feder, the plaintiff, escapes me, but I do know that he is now deceased.

This case involved an intriguing real property and municipal law question: When can a municipality accept an offer of dedication on property designated for public use on a filed map?

Many years prior to the litigation, the developer had designated certain property on a filed map for public use. With time the property had become extremely valuable and the successors in title to the property wished to terminate the Borough of Oceanport's potential interest in the property.

The property owner filed a notice of motion before Judge Lane and I wrote an extensive brief in opposition. The point that I sought to have the court adopt was that an offer of dedication is in fact irrevocable and that the municipality can elect to accept the offer and proceed to use it as a public park whenever it so elects.

Judge Lane disposed of the matter in favor of the borough on summary judgment. But I cannot locate the decision.

The case then was appealed to the Appellate Division which affirmed the decision of Judge Lane. I argued the case before the Appellate Division; the decision of the Appellate Division was then affirmed by the Supreme Court of the State of New Jersey at 57 N.J. 133 (1970).

7. Farmingdale Realty Co. v. Borough of Farmingdale, 107 N.J. Super. 313 (App. Div. 1969) A.2d 29, rev'd 55 N.J. 103 (1969) 259 A.2d 708

- (a) The case was tried in 1969 or 1970 and was argued before the Appellate Division December 16, 1968 and decided January 31, 1969. The matter was argued in the Supreme Court on October 7, 1969 and decided December 16, 1969.
- (b) The trial court was the Superior Court of New Jersey, Law Division. The case was appealed to the Appellate Division. The Appellate judges were: Sidney Goldman, Harold Kolovsky, and Lawrence A. Carton, Jr. The case was further appealed to the Supreme Court of the State of New Jersey. The Justices were: Joseph Weintraub, Nathan L. Jacobs, John J. Francis, Hayden Proctor, Frederick W. Hall, C. Thomas Schettino, and Vincent S. Haneman.
- (c) The defendant was represented by John W. O'Mara, 121 Monmouth Park Highway, West Long Branch, N.J. 07764 (908) 571-8718. The plaintiff was represented by my partner, John Warren, Jr. formerly a partner in the firm of Parsons, Canzona, Blair & Warren. His current address is Evans, Osborne, Kreizman, 180 White Road, Little Silver, N.J. 07739 (908) 741-9550.

The plaintiff filed a complaint against the Borough of Farmingdale seeking a tax refund because of alleged duplicate assessments on certain buildings. The Law Division dismissed the complaint; our client appealed and the Appellate Division affirmed. The Appellate Division held that although the assessor had twice evaluated the same property and placed a total figure which was mathematically incorrect on the tax duplicate, that this mistake was not "twice entered and assessed on the tax duplicate".

I was entirely responsible for the preparation of the briefs for the Appellate Division as well as the Supreme Court. The issue was one of statutory construction.

The Supreme Court reversed the Appellate Division and held that property under the statute in fact is "twice entered and assessed" without an actual verbatim duplication of the owner's name, lot and block number.

The decision provided a definitive interpretation for N.J.S.A. 54:4-54 which affects every municipality in the State of New Jersey.

8. Home Insurance Company v. GiGi Fashions, Inc. 267 F. Supp. 958 (1967)

- (a) The hearing in this matter took place in one day. It occurred some time in May 1967.
- (b) It was heard before Federal District Judge Reynier J. Wortendyke, Jr.
- (c) Counsel for each of the parties are as follows:
Feurstein & Saks for the plaintiffs, 80 Main St., West Orange, N.J. 07052 (201) 731-3400.

Norman Mesnikoff, pro se, as receiver in aid of execution of GiGi Fashions, Inc., 305 Bond St., Box 1037, Asbury Park, New Jersey 07712 (908) 775-0582.

Samuel Patterson of Patterson, Cooper & Coleman, counsel for Lofties Knitting Mills, Inc., 45 Main Ave., Ocean Grove, N.J. 07756 (908) 775-3100.

Novograd Sugarman and Introcaso for Therese Ahrens, et al.

Louis Tumen of Tumen & Tumen, counsel for GiGi Fashions, 3200 Sunset Ave., Box 2283, Ocean Township, N.J. 07712 (908) 775-0077.

Theodore Abeles of Lum, Biunno & Tompkins, Newark, N.J. pro se and for Richard R. Stout. Mr. Abeles is now with the firm of Sills, Cummis, Zuckerman, Radin, Tischman, One Riverfront Plaza, Newark, N.J. 07102 (908) 643-7000.

Solomon Tepper of Tepper & Goldberg, counsel for Ben Farber Corp., et al.

Peter J. Edwardson, for Flobert Company.

Harold Feinberg. I have not been able to locate Mr. Feinberg's address.

Our firm represented Joseph L. Muscarelle, a creditor who obtained a judgment against the bankrupt insured GiGi Fashions, Inc.

I was responsible for filing the brief and appearing before Judge Wortendyke.

The Court agreed that the date of levy entitled the client to priority payment of insurance policy proceeds after payment of the contingent fee agreement.

9. State, by State Highway Com'r v. Seaway, Inc.,
46 N.J. 376, 217 A.2d 313 (1969)

- (a) Argued before Supreme Court on October 26, 1965 and decided February 21, 1966.
- (b) The case was originally tried by my partner, Mr. John Warren, Jr. in the Superior Court of New Jersey, Law Division, Monmouth County, N.J. The case was appealed to the Appellate Division and argued before the Supreme Court of the State of New Jersey on October 26, 1965. The Justices were: Chief Justice Joseph Weintraub, Nathan L. Jacobs, John J. Francis, Hayden Proctor, Frederick W. Hall, C. Thomas Schettino and Vincent L. Haneman.
- (c) The deputy attorney general who argued the case for the appellant was Mr. William J. McCormack. My partner, John Warren, Jr.'s current address is: Evans, Osborne & Kreizman, 180 White Road, Little Silver, N.J. 07739 (908) 741-9550.

This involved a condemnation commissioner's award in favor of our client, Seaway, Inc. The Law Division had awarded a four percent interest rate on the commissioner's award from the day the State of New Jersey Highway Commissioner took possession of our client's property. The State appealed to the Appellate Division, but prior to argument the Supreme Court certified the cause to be heard before it.

I was responsible for preparing the briefs in this matter. The Supreme Court agreed with our client's position that when the State does not compensate the owner for the taking until after a substantial period of time has elapsed, interest must be awarded under the condemnation statute from the date that the State takes the property.

The Supreme Court stated that the constitutional requirement of just compensation, as well as equity demand that interest be awarded where the delay in payment by the state is inexcusable.

This case represents a significant decision under New Jersey Constitutional Law and the Law of Eminent Domain.

10. Jeffers v. Jeffers

- (a) The will contest aspect of this case was tried by me some time in 1979-1980. The balance of the case was handled during the same time frame.
- (b) The will contest was tried before the Honorable Merritt Lane, Jr., Superior Court of New Jersey, Chancery Division. After Judge Lane's death the Honorable Thomas L. Yaccarino, Superior Court of New Jersey, Chancery Division was the trial judge.
- (c) The defendant was represented by Thomas W. Cavanaugh, Jr., Chamlin, Rosen, Cavanaugh & Ulian, 268 Norwood Avenue., West Long Branch, N.J. 07764 (908) 229-3200.

Co-counsel was John N. Post, Irwin, Post, Polak, Goodsell & Mantell, 65 Livingston Ave., Roseland, N.J. 07068 (908) 994-1100.

With co-counsel John Post, I represented two young daughters. They had been estranged from their father most of their lifetime after their father divorced their mother and remarried.

Their father was in the middle of a divorce with his second wife when there was a deathbed reconciliation with his two children. He signed a will leaving everything to his children and attempted to leave his insurance proceeds or a portion of his insurance proceeds to his two daughters.

The widow challenged the will and after a one day trial, the will was validated.

The attempt by my clients to share in the insurance proceeds presented an extremely novel question under the law of the State of New Jersey. There was an oral revocation of beneficiary which under the law of New Jersey was not legally effective. The case involved several motions before Judge Yacarrino. In addition, the case involved a complicated analysis of several pension plans that the decedent father had with his employer, Exxon.

I was finally able to discover that there was an international pension fund which might have been available for the benefit of the two children. The matter was eventually settled and the children received a substantial share of the insurance or pension benefits.

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

From the standpoint of impact upon the public good over a sustained period of time I would have to say that my most significant legal activities comprised my representation of the Borough of Red Bank and also of local municipal agencies such as the Zoning Board of Adjustment of the Borough of Monmouth Beach and the Planning Boards of Holmdel Township and Middletown Township.

Although not a large municipality, the Borough of Red Bank was a microcosm of the problems challenging urban government everywhere. Providing the tax basis for the public education system, accommodating the rights of private developers with the public's environmental concerns, responding to the needs of its minority population, these and many other issues generated on a daily basis a variety of legal issues, issues that were often as complex as they were novel.

As the Borough Counsel, I was the chief legal officer responsible for advising the Mayor and Borough Council, the Borough Administrator and Chief Financial Officer. The legal advice included preparing borough ordinances, negotiating rights of way, conducting public hearings, insuring compliance with federal, state and county laws, representing the borough before state administrative agencies and tax appeals before the County Board of Tax Appeals.

During the six years I served as Borough Counsel, the Borough also successfully met challenges to its comprehensive zoning ordinance designed to tighten its residential requirements while providing for imaginative commercial regulations.

More than one dispute that could have erupted into an explosive law suit was diffused without the necessity of time-consuming and expensive litigation.

II FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

NONE other than publicly traded stock listed on schedules attached to Financial Net Worth Statement.

Withdrawal of contributions to State Retirement System.

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

Before becoming a Judge of the Superior Court of the State of New Jersey in January of 1988, I terminated all of my financial arrangements with my former law firm, Carton, Nary, Witt & Arvanitis.

Since becoming a Judge of the Superior Court of the State of New Jersey in January 1988 I have not experienced litigation that presented potential conflict-of-interest problems other than those cases where either I or a member of my former firms represented one of the litigants. In those cases, I recused myself from that case.

Since becoming a Judge in 1988, I have already severed all connections with any prior employers, business firms, business associations, or business organizations with which I formerly had contact.

As a federal judge I will follow guidelines of the Judicial Conference.

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

NO. However, I did indicate last May to the Dean of Rutgers Law School, in response to his inquiry, that I would be willing to teach a legal writing course without compensation.

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

See Attached Financial Disclosure Report.

I have not received in 1990 nor anticipate receiving in 1991 any gifts, rents, royalties, patents or honoraria and other items exceeding \$500 or more, or salaries other than those reflected above.

I have not received any interest or dividends in excess of \$500 or capital gains other than those in an IRA account at Merrill Lynch Pierce Fenner & Smith and my wife's IRA account at Merrill Lynch. See the attached net worth statement.

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

SEE ATTACHED: Appendix I

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

I was elected as a Republican Councilman to the Borough Council of the Borough of Fair Haven. The term of office was for 1979 to 1981. This was a contested election and I ran for the office in the fall of 1978 and was elected in November 1978. The term of office began the following January 1979.

In 1970 I served as treasurer for the congressional campaign of William F. Dowd, Esq. (90 Maple Street, Red Bank, New Jersey 07701)

In 1972, I again acted as the treasurer for the congressional campaign of William F. Dowd, Esq.

III GENERAL (PUBLIC)

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

I have always responded to requests from charitable organizations and educational institutions in the community to serve either as an advisor or legal consultant on a volunteer basis or at a substantially reduced billing rate. For example, I served on the President's Advisory Council for Brookdale Community College - an educational institution funded by Monmouth County to provide educational opportunities that would ordinarily not be available to many disadvantaged individuals. The year before I became a judge I also served on a very time consuming committee - the Trustee Search Committee.

Because of very stringent regulations governing judges of the Superior Court of the State of New Jersey restricting their participation in charitable and educational organizations, I had to resign as a trustee of Monmouth College, West Long Branch, New Jersey where I had been a member of the Board of Trustees since February 1984. As the 1980-1990 Report notes: "During the 1980s, the college began to consciously promote greater racial and ethnic representation in the student body and faculty, so that Monmouth would more accurately reflect society's rich cultural diversity. During the decade, the number of minority students attending Monmouth has risen from 5.1 percent in 1980 to 9.3 percent in 1989. The College hopes to increase the percentage of minority students to 15 percent during the next decade."

Last May, in response to an inquiry from Dean Simmons of the Rutgers Law School, Newark, I indicated that I would be willing to teach (gratuitously) a course in legal writing to a class consisting largely of minority students. The contributions of the law schools of Rutgers, The State University of New Jersey, to the disadvantaged in New Jersey is widely recognized.

I have also rendered legal services for the following charitable or non-profit corporations either on a pro bono basis or at a substantially reduced rate.

Monmouth Council of Girl Scouts

Monmouth/Ocean Development Council

The Junior League of Monmouth County

The Twin Lights Historical Society

In addition to being on the Board of Trustees of Monmouth College from 1984 to 1987 and my involvement with Brookdale Community College, I have also engaged in the following community service activities:

Former trustee of Monmouth County Arts Council, Red Bank, New Jersey.

Former trustee of Monmouth Conservation Foundation, Middletown Township, New Jersey.

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

No, other than the Root Beer and Checker Club, Red Bank, New Jersey.

I do not belong to any organization that discriminates through either formal membership requirements or the practical implementation of membership policies.

From 1964 to 1987 I was, however, a member of a men's luncheon club in Red Bank, New Jersey, The Root Beer and Checker Club. The club's by-laws precluded women from becoming members. Subsequently, the by-laws were amended to remove the exclusionary language. In November 1987, I resigned from the club.

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

There is no selection committee in this jurisdiction.

In May of 1990 I asked William F. Dowd, Esq. whom I should contact to express my interest in being considered for an appointment to the federal bench. Mr. Dowd is a long time personal friend and the Chairman of the Monmouth County Republican party. In response to his advice I sent a letter along with my resume to the United States Attorney General. Subsequently, I sent my resume to all members of the New Jersey Republican congressional delegation, expressing my interest in being considered for an appointment to the federal bench and welcoming an opportunity of speaking with the members individually. Subsequently, in December 1990 I met with Congressman Christopher Smith Jr. and later with Congressman Dean Gallo.

In February 1991, I had an interview with officials at the Department of Justice. At that time I also submitted a resume along with copies of my published opinions.

In March I was advised that I was under consideration for an appointment to the federal bench and was requested to complete a personal data questionnaire for submission to the American Bar Association Standing Committee on the Federal Judiciary, and to the Federal Bureau of Investigation. I was subsequently interviewed by representatives of both organizations.

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

NO

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

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

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

- a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

- c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Historically understood judicial restraint is a self-imposed limitation on the exercise of power by the judiciary itself. It springs from the recognition that the independence of judges, which is guaranteed by life tenure, imposes on judges a reciprocal responsibility: that they exercise their power cautiously.

Judicial restraint is also grounded in the acknowledgement that the resolution of individual conflict in the heat of adversarial combat is not the best forum for addressing problems extending beyond those of the litigants themselves.

A cautious exercise of judicial power reflects the insight that in the final analysis the recognition of its decisions as legally binding norms depends upon their acceptance by the litigants and the public at large and that acceptance depends on the public's confidence in the courts' integrity and independence. If the courts are perceived as nothing but pure political power and their decisions as victories in a partisan cause, no matter how just, it will not be long before their moral authority will be eroded and our legal system compromised.

Therefore the need for an independent judiciary and the limitations inherent in the judicial process mandate that the courts avoid deciding issues not necessary to the resolution of the immediate controversy and to defer to the political process. That deference to the political process should make the judicial branch hesitate in imposing broad, affirmative duties upon governments and society.

Judicial restraint is constitutionally implemented by the requirement that there be an actual case or controversy before the court. It also finds expression in the principle of stare decisis. The policy that a court follow precedent not only supports the virtues of stability and judicial economy but also serves to restrict the use and abuse of the exercise of judicial power. To the extent that "judicial activism" disregards the traditional limitations imposed by the doctrine of judicial restraint it should be rejected.

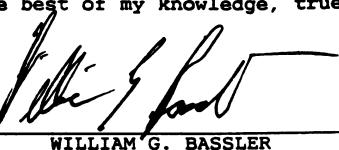
On the other hand judicial restraint should not be used as a rationalization for imposing the judge's own ideological preferences by interpreting statutes in an exiguous way to defeat congressional intent.

AFFIDAVIT

I, William G. Bassler, J.S.C., do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Jan 19

, 1991



WILLIAM G. BASSLER



SANDRA A. SCHWARZ
NOTARY

SANDRA A. SCHWARZ
Notary Public of New Jersey
My Commission Expires Aug. 26, 1995

NET WORTH

WILLIAM G. BASSLER, J.S.

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

ASSETS	Schedule	LIABILITIES	Schedule
Cash on hand and in banks	12,640	Notes payable to banks—secured	-0-
U.S. Government securities—add schedule		Notes payable to banks—unsecured	20,523 11
Listed securities—add schedule		Notes payable to relatives	1,250 12
Unlisted securities—add schedule		Notes payable to others	-0-
Accounts and notes receivable:		Accounts and bills due	-0-
Due from relatives and friends	-0-	Unpaid income tax	-0-
Due from others	-0-	Other unpaid tax and interest	
Doubtful	-0-	Real estate mortgages payable—add schedule	97,417 13
Real estate owned—add schedule	350,000	Chattel mortgages and other liens payable	-0-
Real estate mortgages receivable	-0-	Other debts—itemize:	2,000 14
Autos and other personal property	51,500		
Cash value—life insurance	-0-		
Other assets—itemize:			
Retirement Withdrawal	4,298		
Tucker Anthony 019 44667	47,888		
Merrill Lynch 819 88828	7,677	Total Liabilities	121,190
Merrill Lynch 819 81952	6,290	Net worth	365,103
Total assets	486,293	Total Liabilities and net worth	486,293
CONTINGENT LIABILITIES			
As endorser, comaker or guarantor	\$7,439	GENERAL INFORMATION	
On leases or contracts	\$7,461	Are any assets pledged? (Add schedule.)	NO
Legal Claims	-0-	Are you defendant in any suits or legal actions?	NO
Provision for Federal Income Tax	-0-	Have you ever taken bankruptcy?	NO
Other special debt	-0-		

Dated 6/13/91

APPENDIX I

SCHEDULE 1Cash on Hand and in Banks:

Cash Management Account Merrill Lynch Account No. 819-18947 Statement Period 5/31/91	\$1,640.00
First Fidelity Account No. 853 42 01075 Statement Date 6/91	\$6,000.00
Midlantic Bank Account No. 27050 2199-2 Statement Date 6/91	\$5,000.00
<hr/> TOTAL:	\$12,640.00

SCHEDULE 2

Phoenix Leasing Fund VII

(Purchase Price) \$6,000.00

SCHEDULE 3

Residence 480 River Road
 Fair Haven, New Jersey 07704
 Block 17, Lot 13
 on Tax Map

\$350,000.00

SCHEDULE 4Autos

1983 Volvo GLE \$ 4,000.00

1989 Ford Taurus S/W \$ 15,000.00

Sail Boat/Trailer \$ 2,500.00

Household Furnishing \$ 30,000.00

TOTAL: \$ 51,500.00

SCHEDULE 5

Judicial Retirement System
 Member: Contribution available for
 withdrawal upon termination of
 employment.

(6/30/90) \$4,298.34

TUCKER ANTHONY INCORPORATED

MEMBER OF NEW YORK AND OTHER LEADING EXCHANGES

 One World Financial Center
 200 Liberty Street
 New York, N.Y. 10281

 1 Beacon Street
 Boston, Mass. 02108

 Customer Accounts
 up to \$10,000,000

Period Ending	Investment Executive	For the Account of:	Account Number	I.D. No.
05/31/91	HARVEY TAPPEN	WILLIAM G BASSLER, IRA	019-44657	730
		TUCKER ANTHONY & RLD INC CUST		
Prev. Bal. Update	Investment Executive Phone Number		Social Security or I.D. Number	
04/25/91	201-758-1400			

Balance by Type	Cash Account	Margin Account	Income Account	Short Account	Conv. Bond Account	Other	Type of Accounts	Combined Accounts
Current Bal.	.80CR	.00	.00	.00	.00	.00	.00	.80CR
Current Adj.	11.80CR	.00	.00	.00	.00	.00	.00	11.80CR
Debit Interest Year-to-Date	Credit Interest Year-to-Date	Dividends This Month	Interest Year-to-Date	Bond Interest This Month	Municipal Bond Interest This Month	Estimated Total Equity	Current Est. Yield	Total Est. Income
		111.50	711.57	.00	.00	47,900	4.23 %	2,027

Accct. Type	Date Mo. Day	Balanc Recd or Long	Sale Bal. Shrt.	Description	Price or Entry	Amount	Market Value		Est. Annual Income Rate	Est. Amnt. Income Amnt.
							Debit	Credit		
*** DIVIDENDS - INTEREST ***										
1-D	0517		8	---FREEDOM-SHORT TERM WORLD INCOME FUND REINVESTED AT 10.11	REINVEST	76.50				
1-D	0517	DIV-ON		---FREEDOM-SHORT TERM WORLD INCOME FUND			76.50			
1-D	0530	DIV-ON		BRUNSWICK CORP W/RTS TO PUR P/STK UNDER CERT CIRCUMSTANCES	0.1100		11.00			
				CASH DIV ON 100 SHS REC 05/10/91 PAY 05/30/91						
*** MONEY FUND ACTIVITY ***										
1-D	0517		24	FREEDOM CASH MANAGEMENT FUND REINVEST	24.00					
1-D	0517	DIV-ON		FREEDOM CASH MANAGEMENT FUND MONTHLY DIVIDEND		24.00				
===== POSITIONS IN YOUR ACCOUNT =====										
1-D		5391		FREEDOM CASH MANAGEMENT FUND 1,000			5,391	.055	297	
1-D		100		AMERICAN HOME PRODUCTS CORP 59,125			5,913	2,300	230	
1-D		100		BRUNSWICK CORP 15,000			1,500	.440	44	
1-D		1027		---FREEDOM-SHORT TERM WORLD INCOME FUND 10.120			10,383	.912	937	
1-D		100		GANNETT CO INC 44.375			4,438	1,240	124	
1-D		32		INTL BUSINESS MACHINES CORP 106.375			3,404	4,840	155	
1-D		100		MIDLANTIC CORPORATION W/RTS TO PUR PFD STK UNDER CERT CIRCUMSTANCE	5.625		563			
1-D		50		W/RTS TO PUR P/STK UNDER CERT CIRCUMSTANCES	65.875			3,294	3,200	180
1-D		25		INTL BUSINESS MACHINES CORP 54,500				1,613	3,200	80
1-D		22000		MIDLANTIC CORPORATION W/RTS TO PUR PFD STK UNDER CERT CIRCUMSTANCE	51,723		11,379			
1-D		24		CATS SER M-COUPON-INT PMT ON 12.375% 2004-1/BD-05/15/99-REG DUE 05/15/1999						
				TEXACO INC PHOENIX LEASING FUND VII UNPRICED						

Account Serviced by:

 John Hancock Cleary Corp
 One World Financial Center
 200 Liberty St. NY, NY 10281

WE MUST BE ADVISED OF ANY ERRORS OR OMISSIONS

IMPORTANT INFORMATION ON REVERSE SIDE

SCHEDULE 6(a)

PAGE 1 OF 2

82489

TUCKER ANTHONY

INCORPORATED

MEMBER OF NEW YORK AND OTHER LEADING EXCHANGES

One World Financial Center
200 Liberty Street
New York, N.Y. 10261

1 Beacon Street
Boston, Mass. 02108



Customer Accounts
are protected up
to \$10,000,000

Period Ending Account Number I.E. No. Social Security or I.D. Number

WILLIAM G BASSLER, ■■■■■ 05/31/91 019-44867

730 ■■■■■

Acct. Type No	Date Mo/Day	Bought, Recd or Long	Sold, Del. or Short	Description	Price or Entry	Amount		Market Value	Est. Amend Income Rate	
						Debit	Credit		Rate	Amount
1-0				REIRETMENT ACCOUNTS	■■■■■					
1-0		30	870	CUSTODIAN FEE 1991 ROLLOVER CONTRIBUTION 1989						
				YOUR PRICED PORTFOLIO VALUE						
				TAX SUMMARY INFORMATION --- ----- TAXABLE DIVIDENDS & OTHER DIST.						
						THIS MONTH	YEAR-TO-DATE			
						111.50	711.57			
								47,888	■■■■■	

WE MUST BE ADVISED OF ANY CHANGES OR DIFFERENCES

INVESTMENT INFORMATION ON THE REVERSE SIDE

SCHEDULE 6(b)

PAGE 2 OF 2

B2490

**Merrill Lynch
Pierce, Fenner & Smith Inc.**
Member, Securities Investor Protection Corporation (SIPC)

**Statement of
Retirement Account**

ACCOUNT #	F/C #	PAGE #	SOCIAL SEC. #
819 88828	4064	1	[REDACTED]
STATEMENT PERIOD			EIN NUMBER
09/29/90 TO 12/31/90			00-0000000
FINANCIAL CONSULTANT		ACCOUNT TYPE	
ROGER J FITZSIMMONS		IRA	
{201) 530-3000			
OFFICE SERVING YOUR ACCOUNT		YR PLAN	
THREE HARDING RD.		EST	
RED BANK NJ	07701	1986	

MLPFB S CUST FPO
THE WILLIAM G BASSLER IRA
FBO WILLIAM G BASSLER
[REDACTED]

** 0701-0933

***** SUMMARY OF YOUR IRA PLAN *****

VALUATION OF PRICED PORTFOLIO	AS OF 12/31/89.	\$10,214.96	DIVIDEND/INTEREST	THIS PERIOD	\$89.76CR
	AS OF 12/31/90.	\$7,677.15		THIS YEAR	\$327.19CR

***** CONTRIBUTION INFORMATION *****

TAX YEAR 1989	TAX YEAR 1990
\$.00	\$.00

***** DISTRIBUTION INFORMATION *****

TAX YEAR 1989	TAX YEAR 1990
\$.00	\$.00

***** RETIREMENT RESERVES/GOVERNMENT RESERVES QUARTERLY DIVIDEND RECAP *****

MONEY FUND	OCTOBER	NOVEMBER	DECEMBER	CURR	30 DAY	Avg %
ML RETIREMENT RESERVES	\$3.69	\$4.55	\$4.52		7.98	

***** YOUR DAILY ACCOUNT ACTIVITY *****

DATE	TRANSACTION	DESCRIPTION	PRICE	AMOUNT
09 29	OPENING BALANCE			\$.10CR
12 07	*DIVIDEND	AMN RELIANCE GROUP INC HOLDING 700.0000		\$77.00CR
12 10	FUND DELIVERY	77 ML RETIRMT RESERVES		
12 10	SUBSCRIPTION	77 ML RETIRMT RESERVES		\$77.00
12 17	Fee	1990 CUSTODIAL FEE		\$35.00
12 18	RECEIVED	35 ML RETIRMT RESERVES		
12 18	REDEEMED	35 ML RETIRMT RESERVES		\$35.00CR
12 31	CLOSING BALANCE			\$.10CR

***** YOUR INVESTMENTS *****

INVESTMENTS IN YOUR ACCOUNT	CURRENT PRICE	MARKET VALUE	CURR. YIELD	EST. INCOME
700 AMN RELIANCE GROUP INC	10.000	\$7000	4.40	\$308
TOTAL MARKET VALUE OF PRICED INVESTMENTS		\$7000		\$308
MONEY FUND POSITIONS @ \$1.00 PER SHARE	OPENING BALANCE AS OF 09/29	CLOSING BALANCE AS OF 12/31	DIVIDENDS THIS PERIOD	DIVIDENDS YEAR TO DATE
ML RETIREMENT RESERVES	\$622.29	\$677.05	\$12.76	\$40.19

-000004761

DECEMBER, 1990

Please advise your Financial Consultant immediately of any discrepancies on your statement or if you require further information concerning your account. When making telephone calls, mention your account number and address all correspondence to the office serving your account. Please retain this statement for your tax records. See reverse side for explanation of key terms.

CODE 5029 (R 2/90)

SCHEDULE - 7

MS
MS Merrill Lynch

**Merrill Lynch
Piers, Fenner & Smith Inc.**
Member, Securities Investor Protection Corporation (SIPC)

**Statement of
Retirement Account**

ACCOUNT #	F/C #	PAGE #	SOCIAL SEC. #
819 88828	4064	2	152-30-7348

MLPF& S CUST FPO
THE WILLIAM G BASSLER IRA

IN CALCULATING MANDATORY DISTRIBUTIONS, OR FOR THE PURPOSE OF COMPLETING IRS FORM 8605, YOU MUST USE THE FAIR MARKET VALUE OF YOUR ACCOUNT AS OF 12/31/90. THIS VALUE SHOULD INCLUDE YOUR PRICED PORTFOLIO (CASH AND SECURITIES THAT WE ARE ABLE TO PRICE), AS WELL AS ANY SECURITIES THAT WE ARE UNABLE TO PRICE - MARKED UNAVAILABLE.

VALUATION OF PRICED PORTFOLIO AS OF 12/31/90 \$7,677.15

FOR IRA AND SEP/IRA ACCOUNTS, THIS FIGURE REPRESENTS THE VALUATION WE MUST FURNISH TO YOU AND THE INTERNAL REVENUE SERVICE AS PART OF IRS FORM 5498 REPORTING REQUIREMENTS.

ENJOY THE TAX-DEFERRED BENEFITS OF AN INDIVIDUAL RETIREMENT ACCOUNT.
REMEMBER TO MAKE YOUR 1990 IRA CONTRIBUTION BEFORE APRIL 15, 1991.

-000004761 END OF STATEMENT

DECEMBER, 1990

Please advise your Financial Consultant immediately of any discrepancies on your statement or if you
concerns about changing your address. When making inquiries, please, mention your account number and
address all correspondence to the office servicing your account. Please retain this statement for your tax
records. See reverse side for explanation of key terms.

CODE 5025 (R 2/90)

FAS
Merrill Lynch

**Merrill Lynch
Pierce, Fenner & Smith Inc.**
Member, Securities Investor Protection Corporation (SIPC)

**Statement of
Retirement Account**

ACCOUNT #	F/C #	PAGE	SOCIAL SEC. #
819 81952	4064	1	[REDACTED]
STATEMENT PERIOD		EIN NUMBER	
01/01/91 TO 03/28/91		00-0000000	
FINANCIAL CONSULTANT		ACCOUNT	
ROGER J FITZSIMMONS		TYPE	
		IRA	
OFFICE SERVING YOUR ACCOUNT		YR PLAN	
THREE HARDING RD.		EST	
RED BANK NJ	07701	1982	

MLPF& S CUST FPO
ETILEEN BASSLER IRA
FB0EILEEN BASSLER

** 07704-3033

***** SUMMARY OF YOUR IRA PLAN *****			
VALUATION OF PRICED PORTFOLIO		DIVIDEND/INTEREST	
AS OF 12/31/90.	\$5,862.66	THIS PERIOD	\$79.20CR
AS OF 03/28/91.	\$6,290.84	THIS YEAR	\$79.20CR

***** RETIREMENT RESERVES/GOVERNMENT RESERVES QUARTERLY DIVIDEND RECAP *****					
MONEY FUND	JANUARY	FEBRUARY	MARCH	CURR 30 DAY	AVG %
ML RETIREMENT RESERVES	\$.09	\$.07	\$.32	6.16	

***** YOUR DAILY ACCOUNT ACTIVITY *****				
DATE	TRANSACTION	DESCRIPTION	PRICE	AMOUNT
01 01	OPENING BALANCE			\$.99CR
01 25	FRAC QTY SALE	NEW ECONOMY FUND SBI 01/25 PRICE \$19.53000 QTY SOLD .7436		\$14.52CR
01 28	FUND DELIVERY	15 ML RETIRMT RESERVES		
01 28	SUBSCRIPTION	15 ML RETIRMT RESERVES		\$15.00
01 29	SOLD	242 NEW ECONOMY FUND SBI PRICE 19.160000		\$4634.37CR
01 29	BOUGHT	464 M L SHT TRM GLBL I FD B ID#910124000121 PROSPECTUS ENCLOSED AS OF 03/22 ACCOUNT SETTLES 01/29/91 PRICE 10.04		\$4660.91
01 29	RECEIVED	27 ML RETIRMT RESERVES		
01 29	REDEEMED	27 ML RETIRMT RESERVES		\$27.00CR
02 15	*DIVIDEND	ML SHT TRM GLBL I FD B		\$22.13CR
02 19	FUND DELIVERY	23 ML RETIRMT RESERVES		
02 19	SUBSCRIPTION	23 ML RETIRMT RESERVES		\$23.00
03 08	*DIVIDEND	AMN RELIANCE GROUP INC HOLDING 125.0000		\$13.75CR
03 11	FUND DELIVERY	13 ML RETIRMT RESERVES		
03 11	SUBSCRIPTION	13 ML RETIRMT RESERVES		\$13.00
03 22	*DIVIDEND	ML SHT TRM GLBL I FD B		\$42.84CR
03 25	FUND DELIVERY	43 ML RETIRMT RESERVES		
03 25	SUBSCRIPTION	43 ML RETIRMT RESERVES		\$43.00
03 28	CLOSING BALANCE			\$.69CR

***** YOUR INVESTMENTS *****				
INVESTMENTS IN YOUR ACCOUNT		CURRENT PRICE	MARKET VALUE	EST. YIELD INCOME
125 AMN RELIANCE GROUP INC		12.750	\$1593	3.45 \$55

-000007289

Please advise your Financial Consultant immediately of any discrepancies on your statement or if you
concerned changing your address. When making inquiries, please mention your account number and
address in correspondence to the office serving your account. Please retain this statement for your tax
records. See reverse side for disclaimer of key terms.

SCHEDULE 8 (a)

CODE 5029 (R 2/90)

Merrill Lynch

**Merrill Lynch
Pierce, Fenner & Smith Inc.**
Member, Securities Investor Protection Corporation (SIPC)

**Statement of
Retirement Account**

ACCOUNT #	F/C #	PAGE #	SOCIAL SEC. #
819 81952	4064	2	[REDACTED]

MLPF& S CUST FPO
EILEEN BASSLER IRA

		YOUR INVESTMENTS				
INVESTMENTS IN YOUR ACCOUNT		CURRENT PRICE	MARKET VALUE	CURR. YIELD	EST. INCOME	
464.7270	MERRILL LYNCH SHORT TERM GLOBAL INCOME FUND CL B	9.910	\$4605	9.51	\$438	
TOTAL MARKET VALUE OF PRICED INVESTMENTS			\$6198		\$493	
MONEY FUND POSITIONS @ \$1.00 PER SHARE	OPENING BALANCE AS OF 01/01	CLOSING BALANCE AS OF 03/28	DIVIDENDS THIS PERIOD	DIVIDENDS YEAR TO DATE		
ML RETIREMENT RESERVES	\$24.67	\$92.15	\$.48	\$.48		

A LITTLE PLANNING NOW MAY PRODUCE SIGNIFICANT TAX SAVINGS NEXT YEAR. SEE THE
ENCLOSED NEWSLETTER TO OBTAIN A COPY OF 16 TAX-SAVING STRATEGIES FOR 1991.

-88887289 END OF STATEMENT

MARCH, 1991

Please advise your Financial Consultant immediately of any discrepancies on your statement or if you
concerns regarding your address. When making inquiries, please mention your account number and
account name. Correspondence should be directed to your account. Please retain this statement for future
records. See reverse side for explanation of key terms.

SCHEDULE 8 (b) CODE 5029 (R 2/80)

 Merrill Lynch

SCHEDULE 9

Co-maker of auto loan for
 daughter Julia's car. She is
 responsible for making payments.
 Balance (2/91) \$7,439.00

SCHEDULE 10Contingent Liabilities.

Lease 1990 Ford Tempo
 \$257.37 x 29 \$7,461.41

SCHEDULE 11Notes Payable to Banks

First Fidelity Bank

Account No. 020-530-403-9000 409 4711
 (Co-signatory on son's car loan)
 \$109.12 x 17 \$1,855.04

Ford Motor Credit Co.

Account No. JBA 284 7IX3
 \$302.67 x 24
 (Wife's loan for station wagon) \$7,264.08

\$9,119.12

Loan for daughter's college education
 Dickinson/First Wachovia SFS, Inc.

Account No. 20140-152307348-01 \$4,410.49

Account No. 20140-142307348-01
 (3/10/91) \$6,992.69

\$11,403.10

TOTAL: \$20,522.22

SCHEDULE 12

Balance on loan from August E. Schilling (Father-in-Law)	\$1,250.00
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SCHEDULE 13Real Estate Mortgages Payable

1st Mortgage Fidelity N Mortgage # 20-00-405194-2 (6/91)	\$16,000.00
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2nd Mortgage New Jersey National Bank Account No. 504-021-80-0000-511687 (6/25/91)	\$81,417.00
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TOTAL:	\$97,417.00
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SCHEDULE 14

Sears Account #64,81614 26292 7	\$1,500.00
Roots	\$ 500.00

TOTAL:	\$2,000.00
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AD-10
REV. 1/81

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-505, November 30,
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (Last name, first, middle initial) BASSLER, WILLIAM G.	2. Court or Organization N.J. DISTRICT COURT	3. Date of Report 6/18/91
4. Title (Article III Judges indicate active or Senior Status; Magistrate Judges indicate full- or part-time) ARTICLE III Judge	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Remuneration, Date 6/14/91 <input checked="" type="checkbox"/> Initial Annual Final	6. Reporting Period 6/17/91
7. Chambers or Office Address New Jersey Superior Court Monmouth County Court House Freehold, New Jersey 07728		

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

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)POSITIONNAME OF ORGANIZATION/ENTITY

NONE (No reportable positions)

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)DATEPARTIES AND TERMS

NONE (No reportable agreements)

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)DATE
(Honaria only)SOURCE AND TYPEGROSS INCOME
(yours, not spouse's)

NONE (No reportable non-investment income)

¹ Current	N.J. Superior Court State of New Jersey	\$
² Employment	Annual Income	\$ 100,000
³		\$
⁴ Spouse	Co-owner of Meadow Flower Nursery School	\$
⁵		\$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting
William G. BasslerDate of Report
6/18/91**IV. REIMBURSEMENTS and GIFTS – transportation, lodging, food, entertainment.**

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

<u>SOURCE</u>	<u>DESCRIPTION</u>
<input checked="" type="checkbox"/> NONE (No such reportable reimbursements or gifts)	
1	
2	
3	
4	
5	
6	
7	
8	

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
<input checked="" type="checkbox"/> NONE (No such reportable gifts)		
1		\$ _____
2		\$ _____
3		\$ _____
4		\$ _____

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE*</u>
<input checked="" type="checkbox"/> NONE (No reportable liabilities)		
1 Dickinson/First Wachovia SFS, (J)	College Loan for daughter (J)	(J)
2		
3		
4		
5		
6		
7		

* VALUE CODES: J = \$15,000 or less K = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
 H = \$250,001 to \$500,000 O = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
WILLIAM G.BASSLER	6/18/91

VII. INVESTMENTS and TRUSTS – income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)

A. Description (including trust assets)	B. Type during reporting period	C. Value at end of reporting period		D. Transactions during reporting period					
		(1) Ast. Code: (A-B)	(2) Type (e.g., rent or int.)	(1) Value Code: (J-W)	(2) Value Method Code: (Q-W)	(1) Type (e.g., buy, sell, pay, rec'd, redem.)	(2) Date: Month/ Day	(3) Value Code: (J-P)	(4) Gain: Code: (A-N)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
(J) 1 CMA Account Merrill	A Int.	J	T						
2 Lynch #819-18947									
(J) 3 First Fidelity 1853421075	A Int.	J	T						
(J) 4 Midlantic BK 2705021992	A Int.	J	T						
5 -									
6 Tucker Anthony	B Div.	K	T						
7 019-44667		Int.							
8									
9 Merrill Lynch	A Div.	J	T						
10 819-88828									
11									
(S) 12 Merrill Lynch	A Div.	J	T						
13 819-81952									
14									
15									
16									
17									
18									
19									
20									

1 Income/Gain Codes: A=\$1,000 or less B=\$1,001 to \$2,500 C=\$2,501 to 5,000 D=\$5,001 to \$15,000 (See Col. B1 & D4) E=\$15,001 to \$50,000 F=\$50,001 to \$100,000 G=\$100,001 to \$150,000 H=\$150,001 to \$1,000,000 I=\$1,000,001 to \$10,000,000 J=\$10,000,001 to \$100,000,000 K=\$100,000,001 to \$500,000,000 L=\$500,000,001 to \$1,000,000,000 M=\$1,000,000,001 to \$250,000 N=\$250,000,001 to \$1,000,000,000 P=More than \$1,000,000,000

2 Value Codes: J=\$15,000 or less K=\$15,001 to \$50,000 L=\$50,001 to \$100,000 M=\$100,001 to \$250,000 N=\$250,001 to \$500,000 O=\$500,001 to \$1,000,000 P=\$1,000,001 to \$2,500,000 Q=\$2,501 to 5,000 R=\$5,001 to \$15,000 S=\$15,001 to \$50,000 T=\$50,001 to \$100,000 U=\$100,001 to \$250,000 V=\$250,001 to \$500,000 W=\$500,001 to \$1,000,000 X=\$1,000,001 to \$2,500,000 Y=\$2,501 to 5,000 Z=\$5,001 to \$15,000

3 Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market (See Col. C2) U=Book Value V=Other W=Estimated

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
William G. Bassler	6/18/91

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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.A. app. 7, § 501 et seq., 5 U.S.C. § 7333 and Judicial Conference regulations.

Signature

Date

June 19, 1991

NOTE: ANY INDIVIDUAL WHO KNOWLINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Jorge Antonio Solis

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

OfficeHome

350th District Court
Taylor County Courthouse
Abilene, TX 79602

2026 Richland
Abilene, TX 79603

3. Date and place of birth.

Date: May 1, 1951

Place: San Ygnacio, Zapata County, Texas

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

Married 12/20/71 to Rebecca Jimenez; homemaker and full time student at McMurry University

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

McMurry College - Bachelor of Arts Degree
Abilene, TX History/Political Science
1969-1973

University of Texas - Juris Doctor Degree
School of Law
1973-1976

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

Date: 1/89 to Present
Position: 350th District Court Judge
Employer: State of Texas

Date: 7/88 to 12/88
Position: Attorney at Law
Employer: Sole Practitioner
318 Chestnut
Abilene, TX

Date: 1/88 to 6/88
Position: Special Prosecutor-Narcotics Task Force
Employer: West Central Narcotics Task Force
400 Oak, Suite 401
Abilene, TX 79602

Date: 1/83 to 12/87
Position: Criminal District Attorney
Employer: Taylor County
300 Oak Street
Abilene, TX 79602

Date: 8/81 to 12/82
Position: Attorney at Law
Employer: Moore and Holloway
302 Chestnut
Abilene, TX 79602

Date: 11/76 to 7/81
Position: Assistant Criminal District Attorney
Employer: Lynn Ingalsbe, District Attorney
300 Oak Street
Abilene, TX 79602

Date: 8/76 to 10/76
Position: Law Clerk
Employer: Robinson, Hanna, Burke, Chappell & Moore
302 Chestnut
Abilene, TX 79602

Date: 1/75 to 8/76
Position: Clerk
Employer: Industrial Accident Board
200 E. Riverside Dr., 1st Floor
Austin, TX

Date: 1/75 to 5/75
Position: Law Clerk
Employer: Juarez & Rocha, Attorneys
1211 Parkway
Austin, TX 78703

Date: 9/79 to 12/90
Position: Instructor of Government - part time
Employer: McMurry College
Abilene, Texas

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

None.

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

None.

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

State Bar of Texas
Abilene Bar Association - Board of Directors (2 yrs.)
Abilene Young Lawyers Association - Secretary/
Treasurer (1977-78)
Texas District and County Attorneys Association
Texas District Committee on Admissions, District 14
Jan. 1990 to Present

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

Governor's Task Force on Drug Abuse, 1987 to present
(Drug Policy Subcommittee).

St. Vincent Pallotti Catholic Church (Member of Parish
Pastoral Council 1982-1985; 1989-present; member
Finance Committee 1984-86; Layreader, usher).

Board of Directors, HRC Drug Abuse Treatment Center of
Abilene, 1979 to Present (President of the Board
1982-1983).

Board of Directors, Meals on Wheels, 1984 - Present (Nominating Committee, Finance Committee and various other committees).

Board of Directors, Abilene Girls Home, 1985-Present (various committees - agency provides various type services for abused and neglected girls and for delinquent girls).

Abilene YMCA Juvenile Justice Committee, 1988-Present.

Abilene Community Justice Counsel, 1989-Present (An agency composed of various local leaders and officials created to study and implement feasible alternative punishment sanctions to criminal offenders).

Abilene Substance Abuse Commission, 1990-Present.

To my knowledge, none of the above listed Boards and Agencies are engaged in active lobbying before public bodies.

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

Texas Supreme Court
November 1, 1976

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

None.

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

Good. Last physical exam was on August 16, 1990.

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 presently am judge of the 350th District Court, a position I have held since January 1, 1989. I was elected to this position in November, 1988. The Court is the general jurisdiction trial court in the State of Texas. The Court has jurisdiction over felony criminal cases, misdemeanor cases, involving official misconduct, civil cases where the amount in controversy is \$500.00 or more, and any other type of lawsuit not specifically designated by law to be in other courts.

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

In Texas, state trial judges do not write opinions. However, in the 30 months I have been a state trial judge, I have handled hundreds of contested matters, both civil and criminal. I have also presided in 50 jury trials. Of these, 25 were civil cases and 25 were criminal cases.

While not all of the ten cases I have listed below can be considered significant, they give an indication of the type of cases I have heard.

- 1) State of Texas vs. John Glenn Moody, Cause No. 1220-D, a capital murder case where the defendant was assessed the death penalty. The case is presently on appeal.
- 2) State of Texas vs. Mason Staggs, Cause No. 1327-D, an attempted murder case where a sixteen year old high school student was charged and convicted of shooting a high school teacher at school. The case has been affirmed on appeal by an intermediate appeals court in Case No. 11-89-146-CR. The case was tried before a jury and the defendant was assessed 14 years in State prison.
- 3) Rail X Land & Cattle Co. vs. Winters State Bank, Case No. 2458-D, a lawsuit for fraud and deceptive trade practices brought against a bank. The case was tried before a jury and lasted two

weeks. The jury found fraud on the part of the bank and awarded the Plaintiff judgment for approximately \$300,000. The case is currently on appeal.

4) NCNB, Texas vs. Elm Creek Landing, Don Hanks and Don Wages, Cause No. 2731-D. This case was a suit on a promissory note of over \$300,000 and involved issues of enforceability of oral agreements with failed banks. I granted summary judgment for the plaintiff and the case is presently on appeal.

5) Welch vs. Texas State Bank & Trust, Cause No. 2320-D. This is a suit involving issues of promissory estoppel, foreclosure, and declaratory judgment in regards to notes with a bank, totalling over \$200,000. Judgment was rendered for the bank.

6) Snoody vs. Western Marketing, Inc., Cause No. 1739-D. This was a lawsuit for breach of an employment contract where the plaintiff-employee had been a vice-president for the defendant-employer. The plaintiff sought approximately \$200,000 in damages. Judgment was rendered for the employer.

7) Collins vs. City of Abilene, Cause No. 2284-D. This was a lawsuit involving claims against the City of Abilene under the Texas Tort Claims Act. Judgment was rendered for the City.

8) Wes-Tex Drilling vs. Petroil Development Co., Cause No. 1880-D. This was a lawsuit involving claims for breach of contract and claims under the Deceptive Trade Practices Act. Plaintiff was awarded over \$100,000 by the jury.

9) Grantham vs. M'System Food Store, Inc., Cause No. 2500-D. This was a lawsuit for claims of defamation, breach of an oral employment contract, and intentional infliction of emotional distress. Judgment was rendered for the Defendant.

10) Campbell vs. Allied Roofing Co., Cause No. 2591-D. This was a suit involving claims for Deceptive Trade Practices and invasion of privacy. Judgment was awarded for plaintiff for around \$16,000.

In the 30 months I have been a Judge, I have not had any cases reversed nor affirmed where my rulings have been critized.

There are no significant opinions on Federal or State Constitutional issues.

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

Yes. Assistant Criminal District Attorney for Taylor County, Texas, from November 1, 1976 to July 31, 1981. This was an appointed position.

Criminal District Attorney for Taylor County, Texas, from January 1, 1983 to December 31, 1987. I was elected to this position in 1982 and re-elected in 1986.

17. Legal Career:

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

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
2. whether you practiced alone, and if so, the addresses and dates;
3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

a. 1. No

a. 2. July 1988 through December 31, 1988
318 Chestnut
Abilene, TX

a. 3. August 1976 through October 1976
Law Clerk for Law Firm of Robinson, Hanna,
Chappell, Burke, & Moore
302 Chestnut

Abilene, TX

November 1, 1976 to July 31, 1981
Assistant Criminal District Attorney for Taylor County, Texas.

I began as a misdemeanor prosecutor, and in January, 1978, I was appointed First Assistant District Attorney, a position I held until I left the office. In that office I handled the prosecution of felony, misdemeanor and juvenile cases. I handled the dockets of the 42nd and 104th District Courts and served as legal advisor to the Taylor County Commissioner's Court, which is the governing body of the County.

August 1, 1981 to December 31, 1982
Private Practice of law with firm of Moore & Holloway in Abilene, Texas (while seeking election to office of Criminal District Attorney). I was engaged in general practice of law, civil and criminal.

January 1, 1983 to December 31, 1987
Criminal District Attorney for Taylor County, Texas.

As District Attorney, I was responsible for the administration of a staff of 20 persons. The office was responsible for the prosecution of felony, misdemeanor and juvenile cases. We represented the Department of Human Services and the Taylor County Child Welfare Department in child abuse and neglect cases. We served as legal advisors to the Taylor County Commissioner's Court and we represented Taylor County and County agencies, departments and officials in lawsuits. We were also responsible for appellate cases, writing briefs and arguing cases before appellate courts.

January 1, 1988 to June 30, 1988
Special Prosecutor for West Texas Narcotics Task Force.

I also served as project director and President of the Board of Governors for the Task Force. The Board of Governors is composed of the Sheriff from each of the 13 counties where the Task Force operates, along with a Chief of Police from each county. The board is the governing body over the Task Force and is responsible for setting policies and guidelines for Task Force activities. The

Task Force is a law enforcement unit headquartered in Abilene, Texas, but operating in a 13 county area in and around Abilene with major emphasis on narcotics trafficking and clandestine labs manufacturing illicit drugs. The Task Force is funded through the Criminal Justice Division, Office of the Governor, with funds made available under the Federal Anti-Drug Abuse Acts.

July 1, 1988 to December 31, 1988
Attorney in private practice of law (while seeking election to present position) and served as a Special Prosecutor for the State of Texas in State vs. James Edward Clayton, a capital murder trial which lasted eight weeks.

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

November, 1976 through July, 1981 - Prosecution of criminal cases and handling of county legal affairs. Prosecution of criminal cases both misdemeanor and felony. Prosecution of juvenile cases. Types of cases prosecuted included misdemeanor, driving while intoxicated cases and felony murder, aggravated robbery, burglary, aggravated rape, possession of drugs, and conspiracy cases.

August, 1981 through December, 1982 - General practice of law, civil and criminal. Represented persons accused of crimes, both felony and misdemeanor. Civil practice included some personal injury, family law, and other civil cases.

January, 1983 through June, 1988 - Prosecution of criminal cases and handling of county legal affairs.

July, 1988 through December, 1988 - Served as special prosecutor on two cases, a drug case and a capital murder case. Did a little private practice in civil law.

- c. 1. Did you appear in court frequently,

occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I have appeared in court regularly throughout my legal career.

2. What percentage of these appearances was in:

- (a) federal courts - 0%
- (b) state courts of record - 99%
- (c) other courts - 1%

3. What percentage of your litigation was:

- (a) civil - 1%
- (b) criminal - 99%

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

I have tried at least 150 cases to verdict or judgment in courts of record. I was chief counsel or sole counsel in over 95% of these cases and associate counsel in the remainder.

5. What percentage of these trials was:

- (a) jury - 90%
- (b) non-jury - 10%

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

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

1) State vs. James Edward Clayton, 9212-B, 104th District Court. Judge Billy John Edwards presided. The trial was from September 14, 1988 to November 4, 1988. I was chief counsel in the case appointed as special prosecutor by the trial judge after the District Attorney's office was disqualified. The case is presently on appeal and has not been reported. This was a capital murder case involving breaking into a young school teacher's house, kidnapping and killing the victim. Case was entirely circumstantial and took almost eight weeks to try. Death sentence was rendered against Defendant. Case involved issues of venue because the burglary and kidnapping occurred in one county, the body was found in another county and we were unsure where the killing occurred. Case involved use of ballistics and other trace evidence.

Co-Counsel: Mike Watson
3402 N. 1st, Suite 101
Abilene, TX 79603
(915) 676-2503

Opposing Counsel: Bobby Clark
104 Pine, Suite 716
Alexander Building
Abilene, TX 79601
(915) 673-7193
and
Kenneth Leggett
P. O. Box 3659
Abilene, TX 79604
(915) 673-8261

2) State vs. Agapito Avila, 9246-B, 104th District Court, Judge Billy John Edwards presided. Dates of trial from February 1, 1988 through February 12, 1988. I was chief prosecutor on the case. The case was affirmed on appeal in an unpublished opinion No. 11-88-033 CR, Eastland, Texas, Court of Appeals. First case tried in Taylor County, Texas, involving use of court-ordered wiretaps and video surveillance cameras. Case lasted two weeks and Defendant received a life sentence. Evidence involved drug trafficking organization in Abilene receiving drugs through Del Rio, Texas. Case involved over a million dollars worth of drugs brought to the Abilene area by the drug ring. Case concerned admissibility of wiretap obtained conversations and various other issues. Case was affirmed on appeal by Eastland Court of Appeals. Case No. 11-88-003CR.

Co-Counsel: Melissa Annis
U. S. Attorney's Office
Drug Task Force
515 Rusk
Houston, TX
(713) 220-2165

Opposing Counsel: Victor R. Garcia
301 E. Grenwood
Del Rio, TX 78840
(512) 775-7466

3) State v. Robert Cantu, No. 9320-B, 104th District Court, Judge Billy John Edwards presided. Dates of trial from April 25, 1988 through May 9, 1988. I was sole prosecutor on the case. The case was a companion case to the Agapito Avila case listed above. Mr. Avila was the supplier of the drugs out of Del Rio, Texas. Cantu was one of the principle figures in the drug ring in Abilene receiving the drugs. Cantu's phone was one of the phones that was wire-tapped pursuant to court order. Cantu received a life sentence and a fine of \$10,000. The case was affirmed on appeal in an unpublished opinion in Case No. 11-88-136CR, Eastland, Texas, Court of Appeals.

Opposing Counsel: Bobby Clark
104 Pine, Suite 716
Alexander Bldg.
Abilene, TX 79601
(915) 673-7193
and
Sharon Johnson
Asst. District Attorney
200 West Belknap St.
Ft. Worth, TX 76196
(817) 334-1620

4) State vs. William Joseph Kitchens, Cause No. 487-D, 350th District Court, Judge Bill Thomas presided. Dates of trial from August 18, 1986 through August 29, 1986. I was chief prosecutor on the case. The case was a capital murder case involving the abduction, rape, robbing and killing of a young woman. The Defendant received a death sentence. The case is presently on appeal and has not yet been reported.

Co-Counsel: Melissa Annis
U.S. Attorney's Office
Drug Task Force
515 Rusk

Houston, TX 77208
(713) 220-2165

Opposing Counsel: John McDurmitt
110 N. Main St.
Belton, TX 76513
(817) 939-0845
and
Randy Dale
809 Main St.
Georgetown, TX 78626
(512) 863-9562

5) State of Texas vs. Ray Hightower, Jr., Cause Nos. 353-D and 354-D, 350th District Court, Judge Bill Thomas presided. Dates of trial from July 14, 1986 through July 18, 1986. I was chief prosecutor in the case. Aggravated kidnapping of a 6 year old girl from her backyard and subsequent sexual abuse of child by kidnapper. Cases were tried together. Only reported case, as of yet, in Texas where child victim gave testimony through closed circuit video television. Defendant was assessed a life sentence in each case. Case was affirmed by Eastland Court of Appeals and appears at 736 S.W.2d 949 (TX App. -Eastland, 1987), and is presently under review by the State's highest appellate court.

Co-Counsel: Max Higgs
El Paso County Courthouse
500 E. San Antonio St., Rm. 103
El Paso, TX 79901
(915) 546-2161

Opposing Counsel: Lynn Ingalsbe
120 First State Plaza East
Abilene, TX 79602
(915) 673-8384

6) State vs. Richard Sherman Morgan, et al, Cause Nos. 14,723-A and 15,082-A, 42nd District Court, Judge Don Lane presided. Case began in 1984 and went into 1985. I was chief prosecutor on the case. This was the first wiretap investigation conducted in Abilene area. Cases involved wiretapping of some nine telephone numbers of suspected drug dealers. Under State law, the application for these intercept orders is to be made by the local District Attorney. The investigation resulted in the indictment of eleven persons and the breakup of a cocaine distribution ring and a methamphetamine manufacturing and distribution ring. Testimony at some of the hearings indicated the methamphetamine ring had manufactured over \$1.5 million

of methamphetamine in the two years preceding the arrests. All individuals were convicted and received prison sentences.

Co-Counsel: James Eidson
Criminal District Attorney
Taylor County Courthouse
Abilene, TX 79602
(915) 674-1261

Opposing Counsel: Stan Brown
P. O. Box 3122
Abilene, TX 79604-3122
(915) 677-1851

Ed Paynter
1059 South 3rd
Abilene, TX 79602
(915) 676-5375

Sam Moore
318 Chestnut
Abilene, TX 79602
(915) 676-5375

Brian McCombs
1541 N.W. 15th St. Rd.
Miami, Florida 33125
(305) 545-7822

7) State vs. Travis Ray Hughes, Cause Nos. 14,491-A and 14,492-A, 42nd District Court, Judge Don Lane presided. Dates of Trial August 13, 1984 through August 17, 1984. I was sole prosecutor on the cases. The cases were affirmed in unpublished opinions, Cause Nos. 11-84-240-CR and 11-84-239-CR, Eastland, Texas Court of Appeals. The cases involved the shooting deaths of two individuals by a security guard. A jury convicted the defendant of murder in one case and involuntary manslaughter in the other case. The defendant received a life imprisonment sentence in the murder case and a ten year sentence in the manslaughter case.

Opposing Counsel: Jim Parker
P. O. Box 762
Comanche, TX 76442
(915) 356-5262

8) State vs. Mark Shinners, Cause No. 14,224-A, 42nd District Court, Judge Don Lane presided. Dates of trial from May 21, 1984 through May 24, 1984. I was co-prosecutor on the case. The case was affirmed on appeal in an unpublished opinion in Case No.

11-84-00236-CR by the Eastland, Texas Court of Appeals. The case was a securities fraud case involving International Gold Bullion Exchange, a corporation out of Florida. IGBE was investigated by the State Attorney General in Texas and several other states for fraud in connection with the sale of precious metals. The defendant Shinners was sales manager in IGBE's Dallas office. The complainant in this case lost silver and money valued at around \$110,000 and none of it was ever recovered by the complainant. The Defendant was convicted by a jury of fraud in the sale of a security and sentenced to five years in prison and a fine of \$25,000.

Co-Counsel: Mike Watson
3402 North 1st, Suite 101
Abilene, TX 79602
(915) 676-2503

Opposing Counsel: Robert M. Jones
1701 North Market St., Suite 410
Dallas, TX 75202
(214) 748-0287

9) State vs. Roy Gene Sneed, Cause Nos. 13.922-A and 13,973-A, 42nd District Court, Judge Don Lane presided. Dates of trial February 14, 1983 through February 16, 1983. I was chief prosecutor on the case. The cases were affirmed in unpublished opinions by the El Paso, Texas Court of Appeals in Case Nos. 08-83-00038-CR and 08-83-00039-CR. These cases involved the shooting of two Abilene Police officers by the defendant after they arrested him on an armed robbery case. The defendant was charged and convicted of two counts of attempted capital murder. He was sentenced to two consecutive terms of life imprisonment.

Co-Counsel: Randy Dale
809 Main St.
Georgetown, TX 78626
(512) 863-9562

Opposing Counsel: Malcolm Schulz
309 Hickory
Abilene, TX 79601
(915) 672-2814

Celia Trimble
P. O. Box 356
Abilene, TX 79604-0356
(915) 672-8477

10) State vs. Albert Scott Woolridge, Cause No. 13,163-A, 42nd District Court, Judge Don Lane presided. The dates of trial were October 6, 1980 through October 9, 1980. The case was affirmed on appeal and appears at 653 S.W.2d 811 (TX Cr.App.1983). I was chief prosecutor on the case. The defendant was charged and convicted of capital murder. The case involved the rape and killing of a 12 year old girl. The defendant was a juvenile at the time of the offense, and under Texas law could not receive the death penalty. He was sentenced to life imprisonment.

Co-Counsel: Gerald Brantley
1150 Estates Drive, Suite C
Abilene, TX 79602
(915) 672-2635

Opposing Counsel: Larry Robertson
309 Hickory
Abilene, TX 79601
(915) 672-2814

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

While a prosecutor, I was involved in doing legal research on several 1983 Civil Rights Lawsuits brought against Taylor County.

I have taught in the government department at McMurry College in Abilene, Texas from 1979 through 1990. I taught courses on National Government, State and local government, Administrative law, corporation and other business entities law, and a course on litigation involving teaching of Federal and State Rules of Civil Procedure.

I also presently serve on the Abilene Community Justice Council. This is an agency created in 1989 composed of various local leaders and officials. The purpose of the agency is to study and implement feasible sanctions for criminal offenders as alternatives to incarceration in state prisons.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, opinions, 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 approximately \$11,000.00 in the Texas State Judges retirement plan.

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

I do not anticipate any conflicts of interest from financial arrangements or agreements. Any other conflicts of interests I will handle according to the appropriate rules of ethics and procedure as I have done in the past. I would not sit on any case in which I have an interest in the outcome or in which I have a close relationship with any party or material witness.

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

No.

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

See attached Financial Disclosure Report.

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

See attached net worth statement

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

I participated in telephone banks, distributing literature and yard signs in the following campaigns:

1976 - James McMillon campaign for Taylor County Judge
1980 - John Middleton campaign for Taylor County Sheriff
1984 - John Middleton campaign for Taylor County Sheriff
1986 - Roy Barrera campaign for State Attorney General
1990 - Jerry Harris campaign for local school board
1990 - Paul Vasquez campaign for local city council

I held no official title in any of these campaigns.

III. GENERAL (PUBLIC)

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

I have been active on several boards of civic and charitable organizations listed in Question 10 of Part I above. These include agencies doing anti-drug work, delivering meals to elderly, homebound, and disabled persons and working with abused and delinquent children. I have also coached in a youth basketball league, and have worked with high school students in preparation for mock trial contests. I have been active with the Abilene YMCA "Youth and Government" program for several years. I have spoken to elementary, middle and high school classes, and have spoken to "Just Say No" groups in our schools. I have also been involved in working with some of the "at risk" students in our schools.

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

No.

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

There is a selection committee which recommended me along with two other persons to Senator Phil Gramm. I sent Senator Gramm a letter on February 26, 1990, expressing an interest in this particular vacancy. I received a questionnaire from Senator Gramm's office which I completed and returned. I was then interviewed by the selection committee which forwarded my name to

Senator Gramm. I was then interviewed by Senator Gramm who also interviewed the other two persons recommended by the selection committee. I was later informed by Senator Gramm that he was submitting my name to President Bush. I was then interviewed by several officials with the Department of Justice and a local FBI agent. I have also been interviewed by a representative of the American Bar Association.

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

No.

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

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

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

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

I am generally of the opinion that the federal judiciary has become too "activist". I am of the view that courts should interpret the law, interpret the Constitution and decide disputes before them. I am also of the view that some of the remedies ordered by federal courts are beyond the scope of proper judicial power under our scheme of government considering concepts such as representative democracy, separation of powers, and popular sovereignty. I believe federal courts have the duty and responsibility to determine if institutions are being operated in a manner contrary to law or the constitution, but I believe the remedies should, whenever possible, be left to the other branches of government or the agency or institution involved. The court would then have the responsibility to determine if the remedies implemented satisfy legal and constitutional requirements. I do not believe that a federal court should impose itself upon an institution and assume control of the day to day operations. I do understand that district court judges are to be guided and are bound by precedent, and that cases should be reviewed for standing and ripeness.

**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	14,000	50	33,500
U.S. Government securities—add schedule	0		0
Listed securities—add schedule	0		0
Unlisted securities—add schedule	0		0
Accounts and notes receivable:			
Due from relatives and friends	0		
Due from others	0		
Doubtful	0		
Real estate owned—add schedule	80,000		
Real estate mortgages receivable			
Autos and other personal property	40,000		
Cash value—life insurance	2,500	00	
Other assets—itemize:			
Total assets	136,500	00	117,000
CONTINGENT LIABILITIES			GENERAL INFORMATION
As endorser, comaker or guarantor	0		Are any assets pledged? (Add schedule.)
On leases or contracts	0		
Legal Claims	0		Are you defendant in any suits or legal actions?
Provision for Federal Income Tax	0		Have you ever taken bankruptcy?
Other special debt	0		

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Answer:

James T. Trimble, Jr.

2. Address: List current place of residence and office addresses.

Answer:

Residence:

1415 Alvin Street
Lake Charles, LA 70601

Office:

921 Moss Street, Room 2530 or Post Office Drawer 2894
Lake Charles, LA 70601 Lake Charles, LA 70602

3. Date and place of birth:

Answer:

September 13, 1932 -- Bunkie, LA

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

Answer:

Married to Murel Elise Trimble, nee Biles. She is not employed outside the home.

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

Answer:

Southwestern Louisiana Institute (now University of Southwestern Louisiana), Lafayette, Louisiana, 9/50-5/52 (transferred to Louisiana State University to complete B.A. degree).

Louisiana State University, 9/52-6/55; B.A. degree.

Louisiana State University, 6/55-6/56; LLB (Juris Doctor).

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

Answer:

Began general civil practice in July of 1959 with the firm of Gist, Murchison & Gist, becoming a partner in 1962; thereafter continuing practice under the firm name of Gist, Methvin & Trimble from 1964 until December, 1978.

For a brief period (December, 1978 - July, 1979), member of the firm of Stafford, Trimble, Randow & Smith; then from 1979 to February 1, 1986, senior partner in the firm that began as Trimble, Randow, Smith & Wilson and until February, 1986 was Trimble, Percy, Smith, Wilson, Foote, Walker & Honeycutt.

From February 1, 1986 to present, I have held the position of full-time United States Magistrate Judge, United States District Court for the Western District of Louisiana, Lake Charles Division.

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

Answer:

Yes, 6/25/56 through 6/22/59; United States Air Force, Judge Advocate General's Dept.; First Lieutenant; AO3 051 938; honorable discharge.

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

Answer:

None.

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

Answer:

1977-1986 International Association of Insurance Counsel
1959-Present American Bar Association
1959-1986 Alexandria Bar Association (Secretary/Executive Committee)
1956-Present Louisiana State Bar Association
1986-Present Southwest Louisiana Bar Association
1969-1987 Louisiana Association of Defense Counsel
1986-Present National Council of U.S. Magistrates
1988-Present National Conference of Special Court Judges
1989-Present Louisiana Bar Foundation

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

Answer:

I belong to none which lobby. Presently belong to Lake Charles Kiwanis Club - Bd. of Directors 1987-1990.

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

Answer:

Louisiana State Supreme Court - June 12, 1956

United States District Court for the Western District of Louisiana - April 26, 1960

United States Fifth Circuit Court of Appeals - November 17, 1975

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

Answer:

None.

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

Answer:

Excellent - March 22, 1991.

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

Answer:

February, 1986 appointed as United States Magistrate Judge, Western District of Louisiana.

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

Answer:

- (1) Magistrate rulings and opinions are not customarily published. In accordance with the last sentence of this question, I am providing copies of 10 of the most significant opinions that I have written. I have included some Reports and Recommendations, as they are in many cases my "Opinions" even though they are not binding on the judge or the parties:

- (a) Guidry v. Calcasieu Parish School Board, et al - ruling granting summary judgment for defendants in 42 U.S.C. Section 1983 case involving right of free speech versus establishment of religion issues. Copy attached. Affirmed on alternative grounds at 897 F.2d 181.
- (b) Legros v. Panther Services Group - ruling determining that plaintiff was a "seaman" in a case where the issue of plaintiff's entitlement to maintenance and cure was referred for magistrate ruling. Copy of Ruling attached. Affirmed 863 F.2d 345. An en banc rehearing was granted and case portended to have far-reaching impact on the "seaman status" issue, but the case

was settled and dismissed prior to decision. See 874 F.2d 953.

- (c) Mesa Operating Limited Partnership v. U.S. Department of the Interior - dispute between gas producer and the Mineral Management Service, the former claiming royalties to MMS should be computed on value of gas at the wellhead and MMS claiming royalties on the value of gas after being put in marketable condition at the producer's cost. The district judge (Honorable Earl E. Veron) entered judgment in accordance with the attached Report and Recommendation. The Fifth Circuit affirmed on May 15, 1991. See 931 F.2d 318.
- (d) Seeney and Demeritt v. Citgo Petroleum Corporation - by consent of the parties, this case was referred to me for trial by jury. Plaintiffs were injured in an explosion at the Citgo Refinery in Lake Charles. Defendant's primary defense was that plaintiffs were statutory employees of Citgo, limited to claims for workmen's compensation benefits. After a jury verdict favorable to plaintiffs, defendant moved for judgment notwithstanding the verdict, which the undersigned granted. A copy of this Ruling is attached. The Court of Appeal affirmed at 848 F.2d 664.
- (e) Orthopedic and Sports Injury Clinic, et al v. Wang Laboratories, Inc. - plaintiffs claimed damages for problems with a computer manufactured and serviced by defendant. Plaintiffs claimed that during certain maintenance and/or repair work by Wang to the computer irreplaceable data was lost from one of the discs. Wang moved for summary judgment, which the undersigned recommended be granted. Judge Veron signed a judgment in accordance with that Report and Recommendation. The Fifth Circuit affirmed at 922 F.2d 220.
- (f) McIver v. Miller (Docket No. 88-0095, W.D.La.) - suit by plaintiffs to recover loss of income and damages for wrongful termination of an employment contract which defendant contended was a mere lease agreement. A copy of Ruling in favor of plaintiffs attached. There was no appeal.
- (g) The Hanover Insurance Company v. Tramonte (Docket No. 88-0153, W.D.La.) -suit by insurer for declaratory judgment that its personal catastrophe policy provided no coverage for

injuries to workmen at premises leased by named insured to workmen's employer. Copy of Ruling in favor of plaintiff insurer attached. There was no appeal.

- (h) U.S. v. Ted O'Neil (Criminal Action No. 88-60018, W.D.La.) - this was a prosecution for violation of various illegal drug importation and distribution statutes pursuant to a 31 count indictment naming 187 defendants in the Lafayette Division. The magistrate there disqualified herself as she had married a former Assistant United States Attorney who may have had some prosecutorial connection with the case. I volunteered to handle all of the motions, arraignments, detention hearings, and in essence, all pretrial matters within magistrate jurisdiction. Between 40 and 50 motions were filed on behalf of each of the some 95 defendants who were apprehended and arraigned. Attached is a copy of a Report and Recommendation considering a number of the motions to dismiss and strike on the various grounds mentioned. As far as I know, the trial judge (Hon. John Shaw) ruled on each as recommended.
- (i) Lavergne v. United States (Docket No. 87-1048, W.D.La.) - habeas corpus proceeding under 28 U.S.C. Section 2255, defendant seeking reversal of his conviction of embezzlement of funds from the labor union of which he was business manager. A copy of the Report and Recommendation rejecting the requested relief is attached. Judge Don Walter entered judgment in accordance with the recommendation.
- (j) Jones v. Tete (Docket No. 88-1004) W.D.La.) - civil rights action brought pursuant to 42 U.S.C. Section 1983. Plaintiff sought damages for injuries sustained when he was struck by fellow inmates, and for deprivation of his right to exercise. A copy of Ruling rejecting plaintiff's claims is attached. Also attached is a copy of the Court of Appeal opinion (unreported) affirming the Ruling.
- (2) I have been reversed in only one case, Harvey v. United States, 884 Fed.2d 857 (5th Cir. 1989). A copy of my Ruling granting summary judgment in favor of defendant is attached. Plaintiff sought to recover damages under the Federal Tort Claims Act for alleged medical malpractice committed upon him at a military hospital while he was on terminal leave but before being formally relieved from active duty. For reasons

stated in the Ruling, I felt that Mr. Harvey should have been deemed on active duty until his formal termination date (he was placed on medical hold for disability processing, received regular pay rather than retirement pay, and in fact signed a document indicating that he desired to remain in the military service (and was therefore precluded under the Feres doctrine from bringing suit against the government). The Fifth Circuit disagreed, holding that a service member on medical hold is not part of the active military force.

- (3) The Guidry v. Calcasieu Parish School Board case, the first case cited in response to the first portion of this question, is the only significant opinion of the undersigned involving constitutional issues. As noted, the decision was affirmed on alternative grounds. Aside from being dispositive of the rights of the litigants, the appellate court decision has made me very mindful of the policy of the courts to decide cases on other than constitutional grounds where possible. I am enclosing also a Report and Recommendation in U.S.A., et al v. Levy, which deals with resistance by the defendant to comply with an I.R.S. summons. Defendant's objection to compliance was predicated in part upon alleged Fourth and Fifth Amendment violations, and pages 10 through 23 of the Report and Recommendation discussed constitutional issues.

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

Answer:

None

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:
1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Answer:

Did not clerk, but I went into the Air Force about

three weeks after graduation from law school. Began general civil practice in July of 1959 with the firm of Gist, Murchison & Gist, becoming a partner in 1962; thereafter continuing practice under the firm name of Gist, Methvin & Trimble from 1964 until December, 1978. While in Air Force, served in the Judge Advocate General's Department, at Westover Air Force Base, Massachusetts and Sculthorpe Air Force Base, Norfolk County, England (1956-59), with duties including participation in summary, special and general court martial (alternating prosecuting and defense counsel on general and special courts), legal assistance, claims officer at both bases, handling military and civilian claims against Air Force at the initial stages, participation as legal advisor in administrative hearings, and rendering legal advice to commanding officers at all levels up to wing commander in the absence of the Staff Judge Advocate.

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

Answer:

Did not practice alone.

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

Answer:

From February 1, 1986 to present, I have held the position of full-time United States Magistrate Judge, United States District Court for the Western District of Louisiana, Lake Charles Division. My duties include the full spectrum of functions encompassed by 28 U.S.C. Section 636, including handling writs of habeas corpus, civil rights actions (42 U.S.C. 1983), employment discrimination cases, Social Security appeals, civil and criminal motions, and presiding at civil trials, both jury and bench, where the parties have consented to magistrate jurisdiction. In the criminal field, I conduct initial appearances, preliminary examinations, and arraignments in felony cases; conduct magistrate's court at Fort Polk, Louisiana which involves traffic violations, trespass, D.W.I., petty larceny, and the full gamut of misdemeanors; I also conduct court for those charged with federal game violations and violation of federal refuge regulations.

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

Answer:

Approximately the first ten years of practice could truly be described as a general practice involving personal injury trial work, some criminal (primarily through referral by the Indigent Defender Board), real estate, successions and, banking and commercial lending.

Beginning in approximately 1972, my practice consisted primarily of insurance company defense work, including review of files, legal research, preparation for trial through discovery and investigation, and trial of lawsuits. Where there was no conflict with firm insurance clients, I represented plaintiffs in claims for personal injury and property damage. I also handled a few domestic cases and successions in addition to the personal injury trial work.

11. a. Did you appear in court regularly, occasionally or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Answer:

I appeared in court on a regular basis throughout my career, but from 1972 through 1985 my primary work was in court or preparing for court appearances.

- b. What percentage of these appearances was in

Answer:

1) Federal court	--	4	%
2) State courts of record	--	95.5	%
3) Other courts	--	.5	%

- c. What percentage of your litigation was

Answer:

1) Civil	--	98	%
2) Criminal	--	2	%

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

Answer:

Estimate at least 350-400. I can remember only three cases where I was assisted by an associate. In all others I was sole counsel.

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

Answer:

Representative clients included Commercial Union Insurance Companies, Hartford Insurance Group, Royal Globe Insurance Companies, Security National Bank, Reliable Finance Company and Commercial Securities Company as well as several realtors. Specialties were in the field of insurance defense, real estate, banking and commercial lending law. As stated above, in about 1972, my work became almost exclusively personal injury and insurance litigation.

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

Answer:

I appeared in court on a regular basis throughout my career, but from 1972 through 1985 my primary work was in court or preparing for court appearances.

2. What percentage of these appearances was in:

Answer:

- | | |
|----------------------------|----------|
| (a) federal courts | -- 4% |
| (b) state courts of record | -- 95.5% |
| (c) other courts | -- .5% |

3. What percentage of your litigation was:

Answer:

- | | |
|--------------|--------|
| (a) civil | -- 98% |
| (b) criminal | -- 2% |

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

Answer:

Estimate at least 350-400. I can remember only three cases where I was assisted by an associate. In all others I was sole counsel.

5. What percentage of these trials was:

Answer:

(a) jury	-- 30%
(b) non-jury	-- 70%

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

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

Answer:

- (1) Panek v. Gulf Insurance Company, 341 So.2d 46 (3rd Cir. 1977). Personal injury action in which plaintiffs were injured (the wife quite seriously) when a wheel came off a chip trailer owned by Bodcaw Company and struck plaintiffs' oncoming Volkswagen van head-on. Defect in improperly torquing the jam nut holding the wheel was determined to be the cause of the accident. Under Louisiana law (C.C. 2317), as interpreted by the courts, the owner of a defective "thing" is strictly liable for any injury caused by such defect. As recognized by the Louisiana Supreme Court in the landmark case of Loescher v. Parr, 324 So.2d 441 (La. 1975), an owner could escape liability by proving the injury to have been caused by the fault of a third person. In this case, I represented Bodcaw, its insurer (Gulf), and its driver. I was sole counsel for these defendants and third party plaintiffs. We filed a third party demand against Fruehauf Corp. and its insurer, Continental Casualty, claiming indemnity and/or contribution. Fruehauf had sold the trailer to Bodcaw and performed the last maintenance relative to the wheels before the

accident. We were able to convince the court that the jam nut had not been properly tightened by Fruehauf personnel prior to the sale and that Bodcaw was not at fault in its maintenance during the period of its ownership prior to the accident. The trial judge rendered judgment in favor of plaintiffs and against Fruehauf, Bodcaw, and their insurers solidarily, but granted indemnity in favor of Bodcaw and Fruehauf. On appeal, we were able to persuade the appellate court that the third party fault of Fruehauf, under Loescher, totally absolved Bodcaw of any liability, as third party fault was deemed to be an absolute defense to owner strict liability. The judgment was amended accordingly. The case was important because if the indemnitor had been an insolvent and uninsured third party at fault, judgment of indemnity would have been worthless. The case was also important with respect to proof of third party negligence in a strict liability situation.

- a) Trial Period: 1975
- b) Court: 9th Judicial District Court, Rapides Parish, Louisiana
- Judge: Hon. Martin L. Laird, III

c) Counsel:

For plaintiffs:
 Bernard Kramer
 P. O. Box 447
 Alexandria, LA 71301
 (318) 445-5108

For Fruehauf and Continental:
 Grove Stafford, Jr.
 P. O. Box 1711
 Alexandria, LA 71309
 (318) 487-4910

For Pullman (original manufacturer of the trailer):
 David Lestage
 P. O. Box 880
 DeRidder, LA 70634-0880
 (318) 463-8692

- (2) Foster v. Marshall, 341 So.2d 1354 (2nd Cir. 1977), cert. denied March 31, 1977.

Plaintiff's wife was decapitated when a cotton trailer separated from one side of its towing yoke, causing it

to enter the opposing traffic lane and strike the oncoming vehicle being driven by plaintiff's wife. I represented Prior Products, Inc. and Southwest Wheel & Manufacturing Company, Inc., the manufacturer of the cotton trailer. Plaintiff claimed defective design and inadequate instructions regarding maintenance, it having been established by investigation of the occurrence that the cotter key holding the towing yoke bolting assembly together had failed, causing the accident. Also sued was Scott Truck & Tractor Company, which had made extensive repairs to the trailer shortly before selling same to defendant Billy R. Marshall, owner and user of the trailer at the time of the accident. Partly through the use of extremely competent and credible engineering experts, we were able to establish a record upon which the Court of Appeal ultimately decided that the fault of the accident was not in the original design, manufacture, or warnings, but rather in the failure of Scott as the reconditioner and Marshall as the owner to properly inspect, determine the condition of and replace the worn cotter key. The case is significant with respect to the degree of care that the law places upon a refurbisher of potentially dangerous equipment (almost equating same to an original manufacturer) and the owner to take reasonable steps to discover and remedy machinery defects. Also significant was testimony from Mr. Marshall and others establishing that the need for regular inspection and maintenance of parts such as the cotter key were matters of common knowledge in the industry, and that the manufacturer has no duty to warn knowledgeable purchasers of dangers of which they know or should be aware. The third important element in this case was the submission of evidence and the considerable weight given it that Prior had used the same design in building thousands of these trailers without any other known failures. The court distinguished relevance in such a case where design defect was claimed as opposed to where liability was premised upon defective manufacture.

- a) Trial Period: Fall of 1975
- b) Court: 6th Judicial District Court, Tensas Parish, Louisiana.

Judge: Hon. Cliff C. Adams

- c) Counsel:

For plaintiff:
Harvey J. Lewis
Suite 2615, 601 Poydras St.

New Orleans, LA 70130
(504) 588-1500

For Billy R. Marshall and American Employers
Insurance Company:
J. Michael Hart
P. O. Box 4768
Monroe, LA 71211
(318) 388-0100

For Scott Truck & Tractor:
Thomas W. Davenport, Jr. and
William G. Kelly, Jr.
P. O. Drawer 4787
Monroe, LA 71211-4787
(318) 387-6453

- (3) Doyle v. Employers Fire Insurance Company, 349 So. 2d 450 (3rd Cir. 1977), writ refused November 11, 1977.

The plaintiff in this case was a young woman who sustained a cervical disc injury that required surgery and forced her to leave her employment as a secretary at England Air Force Base. The accident happened at an Alexandria intersection when Ms. Doyle was driving on the favored street. My client, Mrs. Caplan, faced a stop sign as she entered the intersection, and the suit was predicated upon Mrs. Caplan's negligence in failing to stop at the stop sign. Mrs. Caplan claimed that she had stopped at the stop sign, looked both ways and saw no vehicles, then entered the intersection and did not see the Doyle car until it was almost upon her. The case appeared to be one of clear liability, but at the deposition of Ms. Doyle, she testified that she was about 1/2 of the block in which she was travelling away from Mrs. Caplan when she first saw her vehicle about 6 feet out in the intersection. She further testified that it was apparent to her at that time that Mrs. Caplan intended to proceed across the intersection. I had Ms. Doyle repeat this testimony 3 times at various intervals during the course of the testimony. Thereafter, I employed a surveyor to prepare a plat of the block in question and at least a block on each side of it. The survey showed the block to be 295 feet long with a 25 mph speed limit sign in the approximate center and facing the direction from which Ms. Doyle was travelling. An accident reconstruction expert was employed who established that going at a speed of up to 45 mph, Ms. Doyle should have been able to react and stop before a collision at the intersection. The collision was severe enough that both vehicles were totalled. The jury that heard the case found

unanimously that Mrs. Caplan was not negligent. The Court of Appeal affirmed the decision on the basis of at least contributory negligence (which at that time was a complete bar to recovery) on the part of Ms. Doyle, and the Supreme Court denied writs. The case was important from the standpoint of the very significant quantum involved in the event of an adverse judgment and the fact that the driver of a vehicle on an inferior street was absolved from liability in a case which initially appeared to involve only quantum issues. I represented Mr. and Mrs. Caplan and their insurer, Employers Fire Insurance Company as sole counsel.

- a) Trial period: 1976
- b) Court: 9th Judicial District Court, Rapides Parish, Louisiana
Judge: Hon. Martin L. Laird, III
- c) Counsel:
 - For plaintiff:
Eugene P. Cicardo
P. O. Box 1591
Alexandria, LA 71309-1591
(318) 487-4562
 - For plaintiff:
Donald M. Garrett
P. O. Box 1225
Alexandria, LA 71309-1225
(318) 443-8446
 - For plaintiff (on appeal):
Chris J. Roy
P. O. Box 1911
Alexandria, LA 71301
(318) 487-9537
- (4) Lachney v. Jones, 373 So.2d 595 (3rd Cir. 1979),
writ refused October 19, 1979.

In this suit before the amendment to the Louisiana Workmen's Compensation Statute, plaintiff sued executive officers of his employer corporation claiming negligence in furnishing him unsafe scaffolding upon which to perform his work as a carpenter. He suffered serious injury when he fell from the scaffold. After the jury returned a verdict for defendant executive officers, one of the jurors apparently reported to plaintiff's attorney that the fellow jurors had disregarded instructions of the

trial judge not to discuss the case among themselves prior to the time of their deliberation. Plaintiff and workmen's compensation intervenor moved for a new trial on the basis of alleged jury misconduct. I represented Robert Jones, James Jones, and Dan Durand (the executive officers), and Safeco Insurance Company (their liability carrier). A hearing was held regarding the jury misconduct allegations, at which I objected to any testimony of the jurors tending to impeach their verdict, whether same was during deliberation or prior thereto. The judge sustained the objection insofar as evidence during deliberation was concerned, but permitted testimony regarding pre-deliberation discussions. The judge ultimately held that there was no jury misconduct adversely affecting the verdict, and the Court of Appeal affirmed but held that the trial judge had erred in admitting pre-deliberation conduct testimony by the jurors at the hearing. I was sole counsel for defendants in the case.

- a) Trial period: 1979
 - b) Court: 9th Judicial District Court, Rapides Parish, Louisiana
 - Judge: Hon. Jules L. Davidson
 - c) Counsel:
 - For plaintiff:
Chris J. Roy
P. O. Box 1911
Alexandria, LA 71301
(318) 487-9537
 - For intervenor, Select Ins. Co.:
James A. Bolen, Jr.
P. O. Box 906
Alexandria, LA 71309-1190
- (5) Rapattoni v. Commercial Union Assurance Company, 278 So. 2d 953 (3rd Cir. 1979).

Plaintiff suffered disabling injuries when a slab of marble fell on his right foot as he was assisting maintenance employees of the Louisiana State Tourist Development Commission move same at the Hot Wells Health Resort. Plaintiff was an employee of United Tile Company, which had contracted to rework the terrazzo floor of the men's bathhouse. Plaintiff predicated his claim of liability on alleged negligence of the state employees whom he was assisting. I was sole counsel for the Tourist

Development Commission and its insurer, Commercial Union Assurance Company. I defended the case on several bases, including the contention that plaintiff was a statutory employee of the Commission, performing maintenance work which was part of the regular business of the Health Resort. That defense was rejected on the basis that the work called for was beyond ordinary maintenance, requiring special knowledge, skill, and tools not possessed by the Resort employees. However, both the trial court and the Court of Appeal agreed that res ipsa loquitur was not applicable, since Rapattoni himself was exercising partial control of the offending instrumentality. Absolving my clients from liability, the court found that plaintiff failed to establish negligence on the part of the Commission employees, and further found contributory negligence on the part of Mr. Rapattoni. Primary significance has to do with the discussion of independent contractor versus statutory employee status and applicability of the doctrine res ipsa loquitur.

- a) Trial period: 1978
- b) Court: 9th Judicial District Court, Rapides Parish, Louisiana
Judge: Hon. Martin L. Laird, III
- c) Counsel:

Attorneys for plaintiff:
Irving M. Greenberg
430 Lane Building
Shreveport, LA 71101, and
Jack H. Kaplan
619 Lane Building
Shreveport, LA 71101

Attorneys for Workmen's Compensation Intervenor:
Herschel E. Richard, Jr. and
Charles G. Tutt
P. O. Box 22260
Shreveport, LA 71120-2260

- (6) Ainsworth v. Bituminous Casualty Corp., 379 So.2d 1187 (3rd Cir. 1980), writs refused Mar. 21, 1980, consolidated with 79 So.2d 1192.

In these consolidated cases, plaintiffs attempted to recover for injuries sustained in an accident which occurred as the Ainsworth vehicle was struck by a truck operated by one Clyde Nichols as the Ainsworth

car attempted a left turn into a driveway. Bituminous Casualty was insurer of the Nichols vehicle, and I was sole counsel for Nichols and Bituminous. Mr. Nichols, who was alone in his truck, contended that Doshie Ainsworth slowed down and activated her right turn signal, at which time he began passing in the left lane as there were no oncoming vehicles. As he drew even with her, she turned left into his path. Doshie Ainsworth, Anita Ainsworth, and Anita's teenage daughter both contended that Doshie had activated the left turn signal, and had almost completed a left turn into the driveway when the Nichols truck struck. Anita Ainsworth sustained injuries requiring three operations involving both the cervical and lumbar spinal areas. Plaintiffs contended that Mr. Nichols was negligent in attempting to pass after a proper turning signal had been given and the turning maneuver almost completed, and further in failing to sound his horn prior to attempting to pass. The case is significant in that the jury accepted the testimony of Mr. Nichols over that of two adults and a teenager in absolving Nichols from liability. Also, the Court of Appeal determined that the last clear chance doctrine was not appropriate in a case unless both plaintiff and defendant were found negligent, and then should operate only in favor of the plaintiff. Inasmuch as defendant was found not negligent, there was no occasion to apply this doctrine.

- a) Trial period: 1979
- b) Court: 9th Judicial District Court, Rapides Parish, Louisiana
- Judge: Hon. Alfred A. Mansour

- c) Counsel:

For Anita Ainsworth:
William Henry Sanders
P. O. Box 1363
Jena, LA 71342
(318) 992-8251 and
J. P. Mauffray
P. O. Box 37
Jena, LA 71342
(318) 992-8286

For Doshie Ainsworth:
Speedy O. Long
P. O. Drawer P
Trout, LA 71371
(318) 992-6304

For: Insurer of Doshie Ainsworth's vehicle
 Edward E. Rundell
 P. O. Box 6118
 Alexandria, LA 71307-6118
 (318) 445-6471

John G. McLure
 P. O. Box 1525
 Alexandria, LA 71309-1525
 (318) 445-5317
 (I cannot remember his client, but it may
 have been U.M. carrier for Anita Ainsworth.

- (7) Ogaard v. Wiley, 325 So.2d 642 (3rd Cir. 1975),
 consolidated with Tanley, Polk, Meaux, Gunter & Dixon
v. Wiley (3rd Cir. 1976).

This was a tragic accident in which a truck loaded with grain literally ran over a pickup truck as it slowed to make a right turn. Twelve people in the pickup truck were killed and two were seriously injured. Mr. Wiley, driver of the truck, was hauling a load of grain owned by Alexandria Mill & Grain Elevator, Inc. I was sole counsel for the mill and its insurer, Hartford Accident & Indemnity Co. The owner of the truck and trailer operated by Wiley was Tommmy Robert. Saline Lake Farms, Inc. and its primary insurer (Travelers) and excess insurer (Mission Ins. Co.) were also made parties to the suit. This was a clear case of liability on the part of the grain truck driver, but there were serious issues of employment versus independent contractor relationship between the mill and the driver, and the relationship between the mill and Saline Lake Farms. The holding of the trial court, affirmed by the appellate court, was that Wiley was an employee of the mill at the time of the accident, creating vicarious liability on the part of the mill. At the same time, it held that the mill was Saline Lake Farms' alter ego, thereby bringing in the coverage of Travelers and Mission to satisfy the judgments in these cases. It was the only case in which I was ever successful in establishing an alter ego situation. While I questioned the correctness as to employee relationship between the mill and Wiley, we were able to establish in the alter ego issue that the mill assets were donated by the mill's principal officers who were major shareholders in Saline. The same officers operated both corporations. The primary purpose of the mill was to provide additional storage for Saline. Both corporations had the same post office box and funds were transferred between the two corporations without any evidence of indebtedness or charge for interest.

The alter ego finding gave the mill the benefit of primary and excess insurance available to Saline.

- a) Trial period: 1974
- b) Court: 9th Judicial District Court, Rapides Parish, Louisiana.

Judge: Hon. Martin L. Laird, III

- c) Counsel:

For Robert, Wiley, and their insurer:
Leo Gold (now deceased)

For Saline Lake Farms, Inc. and Travelers
John L. Pitts (now retired)

For Mission Insurance Company
Lewis O. Lauve, State District Judge
P. O. Box 1067
Alexandria, LA 71309
(318) 473-6760

Individual counsel for Tommy Robert:
Sam J. Friedman
P. O. Box 795
Natchitoches, LA 71457
(318) 352-8283

For plaintiffs:
Chris J. Roy
P. O. Box 1911
Alexandria, LA 71301
(318) 487-9537

For plaintiffs:
Roy Maughan
1755 Wooddale Blvd.
Baton Rouge, LA 70806
(504) 926-8533

For plaintiffs:
Edward A. Kaplan
P. O. Box 12386
Alexandria, LA 71315-2386
(318) 448-0831

For plaintiffs:
F. Jean Pharis
831 DeSoto St.
Alexandria, LA 71301
(318) 445-8266

For plaintiffs:
William P. Crews, Jr.
P. O. Box 226
Natchitoches, LA 71458-0226
(318) 352-2302

- (8) Harrington v. Nabisco, Inc., No. 80-1346-B on the docket of the 15th Judicial District Court, Lafayette Parish, Louisiana. Case was not appealed.

This was a case in which a 38 or 39 year old plaintiff, earning in excess of \$60,000 per year in a partnership engaged in repairing heavy equipment on offshore rigs, sustained permanently disabling back injuries in an automobile accident involving his pickup truck and a vehicle owned by Nabisco, Inc. and operated by one of its employees. The accident occurred on a highway which was under construction by L. H. Bossier, Inc., a road contractor out of Alexandria, Louisiana. I represented Bossier and its liability insurer, Reliance Ins. Co. This case required approximately 2-1/2 to 3 years in pretrial preparation in developing expert testimony regarding standard of care of road contractors, medical evidence, and evidence of economic loss. Nabisco settled with the plaintiff under an arrangement whereby it paid Mr. Harrington about \$750,000, with a further understanding that it would pay an additional \$200,000 if liability were not established on the part of Bossier. If Bossier's liability was established, and the judgment exceeded \$950,000, then Nabisco and its insurer would be reimbursed on some sort of pro rata basis. This arrangement, of course, was not revealed to the jury. The case was tried for approximately 1-1/2 weeks in Lafayette, Louisiana. I was sole counsel for Bossier and Reliance. The plaintiff and Nabisco were represented by excellent Lafayette attorneys. The issues involved the standard of care of road contractors with respect to establishing speed limits and providing adequate flag personnel along a lengthy major road construction project. The jury deliberated for approximately 3-1/2 hours, then rendered a judgment finding no fault whatsoever on the part of Bossier. The damage potential in this case was tremendous, as plaintiff's economist projected future loss of earnings alone to be in the neighborhood of 2 million dollars, and there was no real question about the fact that Mr. Harrington was totally and permanently disabled from ever returning to any type of heavy work following 3 unsuccessful attempts at lumbar spinal fusion. The case sets no precedent for other attorneys, because it was not appealed and reported. It is considered by me to be one of the most significant of my cases,

involving issues of the standard of care of a road contractor as well as the duty of motorists travelling in a construction zone. Special charges submitted in this connection were accepted by the trial judge and it is felt were important in the favorable verdict. It was especially satisfying to have a favorable verdict rendered in a jurisdiction where I had never tried a case before and where opposing counsel were so competent, professional, and well prepared.

- a) Trial period: Feb. 1983
- b) Court: 15th Judicial District Court,
Lafayette Parish, Louisiana.

Judge: Hon. Douglas J. Nehrbass

- c) Counsel:

For plaintiff:
Bob F. Wright
P. O. Box 3668
Lafayette, LA 70502-3668
(318) 233-3033

For Nabisco, Inc. and Liberty Mut. Ins. Co.:
Anthony M. Fazzio
P. O. Box 2636
Lafayette, LA 70502-2636
(318) 235-1111

- (9) Laborde v. Velsicol Chemical Corp., 474 So.2d 1320 (3rd Cir. 1985), writ denied 480 So. 2d 738 (1986).

In this case, the Labordes sued for alleged personal injury caused from pesticide poisoning. The most seriously injured, allegedly, was Mrs. Laborde, who claimed to have had her immune system virtually destroyed by various pesticides of which defendants were alleged to be either the applicator or manufacturer. There were multiple defendants as will be seen from the list of attorneys which follows. This case involved probably in excess of 200 pretrial depositions and was tried for a full 5 weeks, the entire month of July, 1984. I would estimate that some 75 medical doctors testified either personally or by deposition in the case, along with various toxicologists and chemists. The jury began deliberation at approximately 4:15 P.M. and returned at approximately 4:40 P.M. on the same day responding to the first interrogatory on the special interrogatories submitted for response that none of the plaintiffs was damaged by any of the pesticides applied to the Laborde home or property. I

represented Stephenson Chemical Company, a manufacturer and major supplier of some of the chemicals applied to eradicate pests at plaintiffs' residence. The major complaint of error urged by plaintiffs was the short length of time to return the verdict in view of the protracted trial. The appellate court held that jury misconduct could not be inferred from such a short deliberation, and a major factor permitting the jury to dispose of the case so quickly was the form of the special interrogatories. Defense counsel conferred at length regarding these, and agreed that the very first interrogatory should simply require the jury to decide whether or not any plaintiff in the case had been injured by the pesticides. Without causation, of course, there could be no liability, and it was unnecessary for the jury to consider all of the complicated questions relating to alleged defective chemicals, negligence of application of same, the defense of supersensitivity, etc. Where applicable, I have utilized the same type of instruction in jury trials which I have conducted as a magistrate.

- a) Trial period: July, 1984
- b) Court: 12th Judicial District Court,
Avoyelles Parish, Louisiana.

Judge: Hon. James N. Lee

- c) Counsel:

For plaintiffs:
William B. Baggett, Sr.
P. O. Drawer 7820
Lake Charles, LA 70606-7820
(318) 478-8888

For Ralph Bernard, d/b/a Pest Control Company
and Interstate Fire & Casualty Company:
Grove Stafford, Jr.
P. O. Box 1711
Alexandria, LA 71309
(318) 487-4910

For Velsicol Chemical Corp.:
Thomas M. Nosewicz
201 St. Charles Avenue
New Orleans, LA 70170-5100
(504) 582-8000

For Ciba-Geigy:
Thomas M. Bergstedt
P. O. Box 3004

Lake Charles, LA 70602
 (318) 433-3004

For Dow Chemical Company:
 David P. Spence
 P. O. Drawer 1791
 Alexandria, LA 71309-1791
 (318) 455-3631

For Mutual Fire, Marine & Inland Ins. Co.:
 Randy J. Fuerst
 810 One Lakeside Plaza
 Lake Charles, LA 70601
 (318) 433-0742

For Home Insurance Company:
 Steven W. Cook
 P. O. Box 1871
 Alexandria, LA 71309-1871
 (318) 448-1632

For National Union Fire Ins. Co.:
 E. Gregory Voorhies
 P. O. Box 3527
 Lafayette, LA 70502-2636
 (318) 235-1111

- (10) Mrs. Beatrice Atkins Williams v. Southern Farm Bureau Casualty Insurance Company, No. 14747 on the docket of the 5th Judicial District Court, Franklin Parish, Louisiana.

This case was also one that was not appealed. There was little involved in it financially from an attorney's standpoint, but this was one of the most satisfying cases that I ever handled. Mrs. Williams, who lived near Winnsboro in Franklin Parish, some 80 miles or more from Alexandria, came to my office on a Friday afternoon in 1973. She showed me that she had lost most of 3 fingers in an incident that occurred while she was chopping cotton on a large plantation in Franklin Parish. Mrs. Williams had been attacked by the foreman of the farm labor crew, who struck her with a hoe as she was holding her hoe, severing the 3 fingers. Mrs. Williams was a black lady, and her assailant was also black. She advised that she had attempted to obtain counsel in the area where she lived, but the plantation owner was an influential white farmer, and no one wanted to take the case. I do not recall how she was referred to me. It was obvious that she had been painfully and permanently injured and, if the incident were unprovoked as she related, she was entitled to workmen's compensation. At that time, the comp. rate was about \$35.00 per

week, with a maximum of 300 weeks for total permanent disability and 150 weeks for permanent partial disability. I agreed to take the case on the usual contingent fee basis for comp. cases, which as I recall at the time was 20% of the first \$5,000 awarded and 10% of any excess. I arranged to meet Mrs. Williams at her home in Franklin Parish at 8:00 A.M. the next morning, which was a Saturday, and I asked her to have all witnesses to the incident at her home so that I could record statements from them. I did that, had her evaluated by an orthopedist in Alexandria, determined the name of the farmer's insurer, and filed suit for comp. benefits. As I had anticipated, the company defended, claiming that Mrs. Williams was the aggressor in the incident and that the foreman was simply defending himself from her attack when she was accidentally injured. At the trial, at least half of the witnesses changed their stories because they depended on this farmer for seasonal employment. Fortunately, recorded statements were available for impeachment. The local judge, who was elected by our judicial selection process here in Louisiana, decided in favor of my client against the contentions of an influential local farmer who was in all likelihood one of his supporters, granting temporary total disability benefits as I recall. Since permanent partial disability benefits were greater, and I felt the medical justified that award, I negotiated further with opposing counsel and we settled on that basis. Mrs. Williams was a person of no means, and you would have thought that the check I presented her for about \$5,000.00, as I recall, was at least 20 times that much. She was so overcome with joy that she concluded her repeated words of thanks with an enthusiastic hug and kiss. This case has great significance to me as an example of the proper working of the justice system. There was a conflict in the testimony as to who was responsible for the confrontation, and it would unquestionably have been the politically expedient thing for the judge to have found in favor of the defendant. Instead, he followed the dictates of his conscience that the evidence preponderated in favor of the plaintiff, an ordinary citizen who came before him with nothing more than her claim to fair and impartial treatment at his hands. This case, of no particular precedential significance and involving minimal financial impact, renewed my faith in the fairness of our judicial process and the entitlement of persons of all races, occupations, and stations in life to be treated equally in a court of law.

- a) Trial period: June, 1974

b) Court: 5th Judicial District Court, Franklin Parish, Louisiana.

Judge: Hon. Benjamin I. Berry

c) Counsel:

For defendant:

W. D. Cotton, deceased, former senior partner in the firm of Cotton and Bolton in Rayville, Louisiana

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

Answer:

The most significant legal activities in which I was involved were the preparation for trial, and trial of lawsuits, generally involving defense of insurance companies. In some cases, where there were no conflicts with my clients, I represented plaintiffs against defendants. In addition to the Williams case, mentioned above, I represented a farm laborer in a suit against a farm implement dealer for injuries sustained when two side-mounted tanks filled with pre-emergent herbicide shifted forward pinning the man, who was operating the tractor on which the tanks were mounted, to the seat. In a non-jury trial in Avoyelles Parish, the judge awarded my client an amount that I was advised was, to that time, the largest judgment rendered in favor of a personal injury plaintiff.

With regard to settlements, there were probably at least 20 settlements of cases for every case that I tried. In 1985, I represented Entex (a retail supplier of natural gas) in connection with a suit by an individual who was seriously burned when one of Entex's gas transmission lines broke at a weld and the gas somehow followed along the line to the plaintiff's bathroom, causing an explosion and fire. The case involved multiple defendants and consultations with metallurgists, soil experts, etc., as well as numerous medical depositions. The case was settled in about November, 1985.

I also represented the insurer of an individual who owned a boat that was used in towing an inner tube on which the

plaintiff, a 17 year old high school athlete, was riding, when the young man was thrown from the tube as the boat made a sharp turn to avoid hitting the bank and struck his head on a protruding stump or cypress knee. He was left permanently paralyzed and, at least as of the date of the settlement two years or more later, was unable to speak.

I also represented the supplier of electricity (I cannot remember the name, but it was an insured of Hartford) in a case where a young man lost his leg while building a metal canopy over a gasoline pump island at a service station in Jonesville, Louisiana when a metal piece of the roof that he was holding came in contact with the energized line. In a similar case, I represented Beauregard Electric Co-op in a suit by a telephone lineman who was using an instrument known as a "beeper stick" to detect trouble on the telephone company's lines when that instrument came in contact with one of Beauregard's power lines, causing severe head, facial, and arm injuries. This type of list could go on interminably, but it will give you an idea of my primary legal pursuits.

Prior to about 1972, when I began to concentrate almost exclusively on litigation, I had developed a substantial collection business. I represented 7 or 8 Alexandria finance companies and had devised a system of forms to fit virtually every situation where we would be filing suit by either ordinary or executory process (this was before the days of computers), so we were able to get the suits prepared and filed in a matter of minutes after receiving the necessary information from the client. I also did a considerable amount of title work for the finance companies as well as for Security National Bank (now Security First National Bank) which we represented at the time in connection with real estate loans. I had several realtors who brought me both conventional and FHA loan closings, and in my early years of practice that constituted a fairly substantial part of my business. In about 1967 or 1968, the firm employed a young man who had worked in a firm in Baton Rouge doing mainly commercial work, and I gradually shifted this type of work to him.

I also handled a fair number of personal bankruptcies and I can remember one partnership bankruptcy, but this was not a major part of my practice. I also handled some domestic work (divorce, separation, child support, and alimony) as well as successions. I participated in representing indigent defendants in criminal cases, which will be explained in more detail in response to III, 1. hereinafter.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

Answer:

In response to this inquiry, I have an agreement between me, Michael Percy, David Smith, Alonzo Wilson, Elizabeth Foote, Gregory Walker, and John Honeycutt, Jr., my former law partners, entered into originally on January 12, 1986, and originally calling for payments to me of \$1,000.00 per month beginning March 1, 1986 for a period of 75 months in exchange for all my interest in the law firm to the remaining partners. By mutual agreement, this was amended effective February 1, 1991 to call for payments of \$500.00 per month for 32 months from and including February 1, 1991. The amount of the total payment will be the same (\$75,000). The monthly payment was reduced by one-half.

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

Answer:

Of course, I would disqualify myself from hearing and deciding any matter in which any of my former partners or their associates were involved. All of these individuals remain in practice in Alexandria, Louisiana, some 100 miles from Lake Charles. In the more than 5 years that I have been here, I am not aware of any case in which they have been involved in this court. Based upon my previous service here, I foresee minimal conflict-of-interest situations, but I will not hesitate to disqualify myself in any circumstance where the mode of conduct for United States Judges or the law requires my recusal or where there would be any appearance of impropriety, even though not specifically spelled out in the Canons or the law, if I continued to sit in the case.

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

Answer:

No.

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

Answer:

See attached copies of Financial Disclosures for reporting periods May 15, 1990 through June 1, 1991.

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

Answer:

See attached financial net worth statement.

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

Answer:

No.

III. GENERAL (PUBLIC)

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

Answer:

While a practicing attorney in Alexandria, Louisiana, I participated for years in pro bono defense of criminal defendants and in the free civil legal assistance program for those financially unable to retain counsel. This voluntary service was succeeded by the Indigent Defender Board (criminal) and Central Louisiana Legal Services, Inc. (civil), both government funded activities.

I cannot possibly recall all of the cases that I handled totally without compensation during my early years of practice. I do remember vividly the very first case that was assigned to me. The defendant was a young man named Lionel Speight accused of burglary. I was assigned the case for defense by Judge William Culpepper on a Thursday before the case was to go to trial the following Monday. I had previously scheduled a trip to Red River Parish on that Monday for the purpose of having the judge there approve a workmen's compensation settlement. There were no other members of our firm to do this. I went to the jail and found that Mr. Speight was charged not only with burglary, but he also had a pending charge (not scheduled for trial) of "bail jumping". I further learned that his wife had been killed in California, which was their home, and that he had some small children who were staying with relatives. He was very concerned about their welfare and wanted to get his case tried. While I had every right to a continuance, after looking into the case and interviewing some of the witnesses, I felt that we had a chance of winning and I did not want Mr. Speight to be separated from his children if we won an acquittal. We therefore went to trial as scheduled, which in fact necessitated my firm employing a lawyer outside the firm to go to Red River Parish in my place. The case went to trial, lasted a full 3 days, and Mr. Speight was indeed acquitted by the jury. I thereafter persuaded the district attorney to drop the "bail jumping" charge, and within a day or two after the trial Mr. Speight was on his way back to California.

I recall also being appointed to defend an individual whose name, I believe, was Maricle, who was charged with murdering an elderly man for his coin collection. He had

made a detailed confession. I had him psychiatrically evaluated, and the evaluation and sanity hearing revealed no indication of a possible insanity defense. Mr. Maricle was happy to plead to second degree murder, which did not carry the death penalty. I probably spent a total of 5 or 6 days in interviews with Mr. Maricle, moving for the psychiatric evaluation, attending the sanity hearing, reviewing the district attorney's file, and in talking to witnesses and the district attorney.

In another case, I was appointed to represent a young man with the U.S.A.F. at England Air Force Base who was charged with making obscene telephone calls. That case was tried for a day, after I spent approximately one day in preparation for trial, and resulted in an acquittal. The defendant was from Blytheville, Arkansas, and spoke with a decidedly hill country accent and manner of expression. Using reverse psychology on the victim of the phone calls, I asked her if the caller spoke with a "country" accent, to which she responded "oh no, he sounded like a very cultured man." Thereafter, when my client took the witness stand, after about two sentences, the judge was convinced he could not have been the perpetrator of the offense.

The only other case about which I have a specific recollection is a case which appears at 283 So.2d 463, styled "State v. Drumgo." The Reporter reflects that I was apparently the attorney for both defendants. In actuality I represented Joe Curtis, Jr., codefendant of Willie Drumgo, Jr. Mr. Drumgo was represented by James Gravel. I may very well have been the only one to sign the appellate brief, as I did review the pertinent portions of the transcript and personally prepared the brief without any assistance whatever from Mr. Gravel. This was the only case that I defended where I felt that my client may have been wrongfully convicted. In fact, I argued so forcefully with the district attorney that, during the trial, he agreed that if my client passed a polygraph examination, he would dismiss charges against him. Inasmuch as my client did not have to agree to let the results of the lie detector test in evidence as a condition for such an agreement, he did take the test, but unfortunately failed it miserably. I continued to have some lingering doubts about Mr. Curtis' guilt, but the jury did not take very long in deciding that both Mr. Drumgo and Mr. Curtis were guilty. This was a very serious armed robbery case. During the perpetration of the offense, an elderly pharmacist was shot and seriously wounded, though he subsequently recovered. This case was assigned to me for defense and we were supposed to be getting paid a very nominal amount (about \$20.00 per hour) if there were funds for payment. The system worked in such a way that nobody was paid until the end of the year, and then attorneys were paid on a pro rata basis depending upon how much time they

had spent on indigent defender work and how much money there was to be parcelled out. In the defense of Mr. Curtis, I am certain that I spent at least one week in trial preparation, interviewing witnesses that he named, filing pretrial motions and arguing same, reviewing information obtained from the district attorney, interviewing the police officers, etc. Trial of the case lasted one full week, and in order to complete the case, testimony was taken until 7 or 8 P.M. on several days. My recollection is that it was about 10 P.M. when the jury returned its verdict. Thereafter, I spent probably almost another week reviewing portions of the transcript, performing legal research, and preparing my appellate brief. I recall that my fee was approximately \$1,000.00.

In connection with the handling of civil matters on a pro bono basis, I recall several cases in which people who had no automobile liability insurance had been sued for damages on the basis of their negligence. I recall negotiating several of these cases, working out methods of payment within their means. These involved primarily property damage.

While a member of the various civic organizations mentioned herein, I was called upon from time to time to render free legal advice. In one instance, when the Alexandria YMCA built a new facility I researched the title to the property and prepared the documents (deed, mortgage, note, and title opinion) for acquisition of the new site and construction of the building. Also for the YMCA, I checked title to property in Grant Parish on which Camp Windywood was situated. This camp was owned and operated by the Alexandria YMCA. I do not remember whether the title examination was needed because the lender wanted additional security for the building project in Alexandria or whether the funds were needed for improvements at Camp Windywood. At any rate, several chains of title were involved and after 2 or 3 days of work, it was determined that title could not be approved because several parcels of land had been donated with reversionary rights in the donors if the property ever ceased to be a camp.

On March 15, 1989, I participated in a civil seminar of the Louisiana District Attorneys Association, discussing 42 U.S.C. Section 1983 litigation. An outline provided seminar participants was researched and dictated by me, and a copy of same, with a copy of a letter of appreciation from a representative of the organization are enclosed. No fees or reimbursement of travel expenses were paid to or expected by me. While this is not technically "serving the disadvantaged", it was quite time-consuming, but a worthwhile service to the profession.

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

Answer:

The Kiwanis Club, of which I have been a member since 1962 except for about 1-1/2 years. (1986-1987 following move to Lake Charles) was an all male organization. I was not even aware that was part of the national by-laws until about 3 years ago when we were advised locally that the by-laws had been amended to remove this discrimination.

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

Answer:

There is no selection commission in our jurisdiction. My experience in the selection process began in about mid-1988. It was announced that one of the district judges in Lafayette was being elevated to the Fifth Circuit, creating a vacancy in that Division. One of the district judges here in the Western District asked me if I were interested in seeking that position. I advised him that I would be very interested in doing so, but would like to discuss it with Judge Earl Veron, under whom I worked. Shortly thereafter, I discussed this with Judge Veron, and he encouraged me to seek the Lafayette position. His idea was that he very much wanted me to replace him when he took senior status, but he wanted to see me in a judgeship even if it meant leaving the Lake Charles area. He also advised that, if nothing else, I would be able to meet the people involved in the selection process and would have a head start when the position here became vacant. He advised that I should probably start by personally contacting Representative Clyde Holloway, the Republican Representative from the Eighth Congressional District. His

headquarters is in Alexandria, where I practiced law for 27 years. My recollection is that either shortly before or shortly after the swearing-in ceremony for Judge Duke, in about November of 1988, I met personally with Congressman Holloway at his office in Alexandria, advised him of my interest in the Lafayette judgeship, and asked him about the procedure for making application. I obtained from his office a list of the names and addresses of each member of the Louisiana Republican Patronage Committee, and it was recommended to me that I try to see each member personally.

After my meeting with Congressman Holloway, I prepared a resume, sent one to him, and personally met with each member of the Patronage Committee except Congressman Jim McCrery, whom I have never met. I met with Congressman Richard Baker in Baton Rouge; Congressman Bob Livingston in Metairie; Mrs. Virginia Martinez in Metairie; Mr. Billy Nungesser in New Orleans; and Mr. Haywood Hillyer in New Orleans. I furnished each member of the Patronage Committee with a copy of my resume, discussed with them my experience as a practicing attorney, and advised them of the scope of my work as a magistrate since February 1, 1986.

I was invited to an interview by members of the Republican State Central Committee at the home of Mr. Charles deGravelle in Lafayette on April 24, 1989. My interview was at about 7:30 or 8:00 P.M. This group was interviewing about 17 or 18 aspirants for the position in Lafayette. Sometime thereafter, I learned that another individual had been selected for consideration for the Lafayette position, and sometime after that, I believe in the summer of 1989, newspaper reports revealed that this individual was no longer being considered for the position. I did hear that there were four people selected for the "short list" for Lafayette, and I was not included.

In January or early February , 1990, Judge Veron advised me that he was thinking seriously of taking senior status. Shortly after that, I received official word from him that he had requested senior status effective February 15, 1990. This information became general knowledge in the legal community almost immediately, and I received a telephone call from a local attorney advising that he and 3 other local lawyers had been discussing the matter of Judge Veron's replacement and wondered if I were interested in the position. I advised that I was, and he asked if the group could meet with me. I told him I would be happy to meet with them, and we did meet either that same day or the following day. At this meeting, this group of attorneys (all of whom were from different firms here in Lake Charles) told me that they had talked to numerous lawyers in Lake Charles about Judge Veron's successor; that since coming to Lake Charles in 1986, I had impressed the local

subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

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

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

Answer:

The responsibility of a judge is to first determine whether he has before him a justiciable controversy which the plaintiff is entitled to assert, which has properly proceeded through other required avenues of relief before reaching the judiciary, and which is within the court's jurisdiction. If the case passes this threshold test, the duty of the judge is to identify the specific legal issues presented by the case under consideration, determine the facts pertinent to those issues, and apply the applicable law to those facts in order to arrive at a just decision. By "just decision", I mean a judgment tailored to the facts and law involved in the particular case, without consideration for what impact the decision may have on other pending or potential similar litigation. A judge should in no case let his opinion of what the law should be influence his decision when there is plain legislative and/or jurisprudential authority governing the case. After all, jurors not trained in the law are expected, and take an oath, to apply the law as it is given to them by the court without regard for their opinions of what the law ought to be. No less should be expected of judges.

If a court determines that either of the parties is entitled to a remedy, that remedy should be specific to the party or parties to the lawsuit. It is noted that the law is not silent on the subject of relief that encompasses multiple parties plaintiff or defendant. Rule 23 of the Federal Rules of Procedure provides for class actions by or against numerous parties provided well-defined class action prerequisites are met. This is the appropriate vehicle to be utilized by the judiciary in resolving disputes affecting numerous parties and thereby accomplishing the objective of judicial efficiency.

The Constitution of the United States is the supreme law of the land, and courts would be remiss in their duties if they did not carefully safeguard the human rights protected by it. A judicial decree issued in an appropriate case to correct a constitutional infraction and/or guard against a threatened one should be so fashioned as to unmistakably identify the responsibilities of the executive and/or legislative branches of government, either or both of which should have the primary duty of enforcing the safeguards. Courts should be vigilant to avoid usurping the powers of either of the other branches in rendering their judgments.

In summary, judges should scrupulously avoid using the tremendous power of their offices as a stepping stone for accomplishing broad reforms not sanctioned by the existing law, or not necessary in deciding the cases before them, regardless of how salutary the reform might be. To do otherwise would, in my opinion, violate both the letter and the spirit of Canon 3A(1) requiring a judge to "be faithful to the law" and "be unswayed by partisan interests, public clamor, or fear of criticism." Sir Francis Bacon, the English philosopher, put it about as directly and correctly as possible when he stated:

"Judges ought to remember that their office is jus dicere and not jus dare, to interpret law and not to make, or give law."

AO-10
Rev. 1/89**FINANCIAL DISCLOSURE REPORT**Annual Report Due by May 15 from Judicial Officers and
certain Judicial Employees (28 USCA App. I, §§ 301-09)

Person Reporting (Last name, first, middle initial) TRIMBLE, JAMES T. JR.		Court or Organization U. S. DISTRICT COURT	Date of Report 5-2-90
Title Magistrate, U.S. District Court Western District of Louisiana	Date of Entry/Nomination/Termination (only if initial or final report)		Reporting Period (Calendar year, or inclusive dates) 5-15-90
Home or office address P. O. Drawer 2894 Lake Charles, LA 70602			
<p>IMPORTANT NOTES: Please read the instructions accompanying this form. The report should include information pertaining to your spouse and dependent children, if any. Attach additional sheets if needed, identifying each attachment by showing your name, the date of the report, and the section(s) being completed. Complete all sections, checking the NONE box for each section where you have no reportable information. Compare and reconcile this report with last year's and list items in the same order as last year. Type or print clearly. Sign on last page.</p>			

I. POSITIONS. (Reporting individual only; see pp. 15-17 of Instructions.)POSITIONNAME OF ORGANIZATION/ENTITY

NONE (No reportable positions)

II. AGREEMENTS. (Reporting individual only; see p. 17 of Instructions.)DATEPARTIES AND TERMS

NONE (No reportable agreements)

January 12, 1986 Parties: James T. Trimble, Jr.; Michael Percy; David Smith; Alonzo Wilson; Elizabeth Fonte; Gregory Walker and John Honeycutt, Jr. - Terms: \$1,000.00 per month beginning March 1, 1986 for 75 months to Trimble in exchange for all interest in law firm to remaining partners.

III. NON-INVESTMENT INCOME. (Partial disclosure for spouse; see pp. 18-20 of Instructions.)

DATE
(Honoraria only)

SOURCE AND TYPEGROSS INCOME
(yours, not spouse's)

NONE (No reportable non-investment income)

1 U.S. Courts Salary \$ 74,712.92

2 Law Firm Percy, Smith, etc., pursuant to above agreement \$ 12,000.00

3 _____

4 _____

5 _____

- - 4 -

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	TRIMBLE, JAMES T. JR.	Date of Report
		5-2-90

IV. REIMBURSEMENTS and GIFTS--transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; see pp. 20-22 of Instructions.)

<u>SOURCE</u>	<u>DESCRIPTION</u>
<input checked="" type="checkbox"/> X NONE (No such reportable reimbursements or gifts)	
1	
2	
3	
4	
5	
6	
7	
8	

V. OTHER GIFTS. (Includes those to spouse and dependent children; see pp. 20-22 of Instructions.)

<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
<input checked="" type="checkbox"/> X NONE (No such reportable gifts)		
1		\$
2		\$
3		\$
4		\$

VI. LIABILITIES. (Includes those of spouse and dependent children; see pp. 22-24 of Instructions.)

<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE*</u>
<input type="checkbox"/> X NONE (No reportable liabilities)		
1 State National Life Insurance Co. Baton Rouge, LA	Mortgage on 15, 16, 17 Part VII	N
2 Lewis A. Laube, 3317 Parkway Dr. Alexandria, LA 71301	Mortgate on 14, Part VII	M
3		
4		
5		
6		
7		

* VALUE CODES:	J = \$0 to \$1,000	K = \$1,001 to \$5,000	L = \$5,001 to \$15,000	M = \$15,001 to \$50,000
	N = \$50,001 to \$100,000	O = \$100,001 to \$250,000	P = over \$250,000	

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting TRIMBLE, JAMES T. JR.	Date of Report 5-2-90
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VII. INVESTMENTS and TRUSTS--INCOME, value, transactions. (Includes those of spouse; partial disclosure for dependent children; see pp. 24-35 of Instructions.)

A. Description of Assets (including trust assets)	B. Income during period		C. Gross value at end of period		D. Transactions during period (Reporting individual and spouse)				
	Amt. Code ¹ (A-H)	Type (e.g., Div.)	Value Code ² (J-P)	Value Method Code ³ (Q-W)	Type (e.g., sold)	Date: Month- Day	Value Code ² (J-P)	Gain Code ¹ (A-H)	Identity of buyer/seller (if private transaction)
Place "X" after each asset exempt from prior disclosure.									
NONE (No reportable income, assets, or transactions)									
1 Fidelity Investments, P.O.Box 1284, Boston, MA 02104 (IRA)	B	Div.	M	T					
2 Affiliated Fund-DST, Inc., P.O. Box 1100, Kansas City, MO 64141	B	Div.	M	T	Sold	8-1	M	D	Shares redeemed
3 Evergreen Fund, P.O.Box 9021, Boston, MA 02205 (IRA)	B	Div.	L	T					
4 Security 1st Nat'l Bank, Alex. LA 71309 (Keogh Plan)	D	Div.	M	T					
5 Premier Bank, Lake Charles, LA 70602 (Checking Account)	B	Int.	L	T					
6 Calcasieu Fed. Employee Cred. U. Lake Charles, LA (Savings Acct)	D	Int.	N	T					
7 CASH Accumulation Trust N.Y., NY (Money Market)	A	Div.	K	T					
8 Calcasieu Marine Nat'l Bank (Jim Trimble & Muriel B. Trimble)(IRA)	B	Int.	K	T					
9 Calcasieu Marine Nat'l Bank Lake Charles, LA (Checking Acct)	B	Int.	K	T					
10 Raintree Associates, Ltd. Real Est. Partnership-P.O.Box 1137, Biloxi MS A			J	W	(Purchased 8-82)				
11 ½ Int. in 29 unimproved acres in Grant Parish, LA	A		L	W					
12 Note on residence at 511 Golden Rod, Alexandria, LA -	D	Int. & Cap. Gain	M	T					
13 Res. at 3104 Dawkins St. Alexandria, LA -Purchased 2-84	D	Rent	M	R	See Explanation in Part VIII				
14 Office Bldg. - 720 Jackson St. Alex., LA (1/3 Int.) Pur. 1/84	D	Rent	L	W					
15 Duplex - Paris St., Alex. LA (1/2 Int.)	D	Rent	I	W					
16 Duplex - Marye St., Alex. LA (1/2 Int.)	D	Rent	L	W					
17 Duplex - 19th St., Alex. LA (1/2 Int.)	D	Rent	L	W					
18 McNeil Real Estate Fund X, Ltd. Partnership- Pur. 1980	A	Div.	I	W					
19 U.S.Savings Bonds -Series E.	D	Int.	M	W					
20 Rymer Foods, Inc., Chicago, Ill. (Stock)	B	Div	E	U	Purchase	9/8	F	A	

1 Income/Gain Codes: A = exempt (\$0 to \$100)
B = \$101 to \$1,000
C = \$1,001 to \$2,500
D = \$2,501 to \$5,000
E = \$5,001 to \$15,000
F = \$15,001 to \$50,000
G = \$50,001 to \$100,000
H = over \$100,000
2 Value Codes: J = exempt (\$0 to \$1,000)
K = \$1,001 to \$5,000
L = \$5,001 to \$15,000
M = \$15,001 to \$50,000
N = \$50,001 to \$100,000
O = \$100,001 to \$250,000
P = over \$250,000
3 Value Method Codes: Q = Appraisal
R = Cost (real estate only)
S = Assessed value
U = Book value
V = Other
W = Estimated
T = Cash/market

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

TRIMBLE, JAMES T. JR.

Date of Report

5-2-90

VII. INVESTMENTS and TRUSTS—Income, value, transactions. (Includes those of spouse; partial disclosure for dependent children; see pp. 24-35 of Instructions.) PAGE 2

A. Description of Assets (Including trust assets) Place "X" after each asset exempt from prior disclosure.	B. Income during period		C. Gross value at end of period		D. Transactions during period (Reporting individual and spouse)				
	Amt. Code ¹ (A-H)	Type (e.g., div.)	Value Code ² (I-P)	Value Method Code ³ (Q-W)	Type (e.g., sold)	Date: Month- Day	Value Code ² (I-P)	Gain Code ¹ (A-H)	Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
21 Acadia Parish School Board District 5 - Bonds	A		L	U	Purchased	9/22	L	A	
22 Hammond, Louisiana Public Improvement Bonds	B	Int.	M	U	Purchased	12/27	M	B	
23 Exxon Corp. Stock	A		M	U	Inherited	12/15	M	A	
24 Note on residence at 3303 Parkway Dr., Alexandria, LA	B	Int.	M	T	Inherited	10/16	M	A	
25 N.Y. Life Insurance Co., N.Y., NY Universal Life	E	Int.	O	T	See Explanation in VIII				
26 Equitable Life, N.Y., NY Single Premium policy	B	Int.	L	T	See Explanation in VIII				
7									
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17									
18									
19									
20									

1 Income/Gain Codes: A = exempt (\$0 to \$100)

B = \$101 to \$1,000

C = \$1,001 to \$2,500

D = \$2,501 to \$5,000

E = \$5,001 to \$15,000

F = \$15,001 to \$50,000

G = \$50,001 to \$100,000

H = over \$100,000

J = exempt (\$0 to \$1,000)

K = \$1,001 to \$5,000

L = \$5,001 to \$15,000

M = \$15,001 to \$50,000

N = \$50,001 to \$100,000

O = \$100,001 to \$250,000

P = over \$250,000

T = Cash/market

3 Value Method Codes: Q = Appraisal

R = Cost (real estate only)

S = Assessed value

W = Estimated

D = Book value

V = Other

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
TRIMBLE, JAMES T. JR.	5-2-90

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate section of Report.)

Check to affirm that differences in investments from those reported
in prior year are exempt from disclosure.

13. Residence shown as Item 13 of Part VII purchased February, 1984 for \$31,500.

25. New York Life Policy on the life of Murel B. Trimble purchased July 1, 1987.

26. Equitable Life Policy on the life of James T. Trimble, Jr. converted to a single premium policy in approximately 1984.

These items were inadvertently omitted from previous reports and said reports should be amended accordingly. The undersigned has decided no cases or motions involving either company since assuming the position of magistrate on 2/1/86.

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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.

Signature

JAMES T. TRIMBLE, JR.

Date 5-2-90

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (28 U.S.C.A. APP. I, § 304, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

- | | |
|--|---|
| 1. Mail signed original and 3 additional copies to: | Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544 |
| 2. Deliver one copy to the Clerk of the Court on which you sit or serve. (Judicial employees not associated with a specific court, such as employees of the Administrative Office and the Federal Judicial Center, need not file a copy with any court.) | |

Rev. 1/791

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Adm'n. Act of 1978, Pub. L. No.
101-194, November 30, 1980;
(3 U.S.C.A. App. 6, 93101-112)

1. Person Reporting (Last name, first, middle initial) TRIMBLE, JAMES T. JR.	2. Court or Organization U.S. DISTRICT COURT	3. Date of Report 6-1-91
4. Title (Article III judges indicate active or senior status; Magistrate judges indicate full-time/part-time) Full-time Magistrate Judge	5. Report Type (check appropriate type) <input type="checkbox"/> Nomination, Date _____ <input checked="" type="checkbox"/> Initial <input checked="" type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period 5-15-90 through 6-1-91
7. Chambers or Office Address Room 2530, 921 Moss Street, Lake Charles, LA 70601 P. O. Drawer 2894, Lake Charles, LA 70602		
<p>IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.</p>		

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

<u>POSITION</u>	<u>NAME OF ORGANIZATION/ENTITY</u>
<input checked="" type="checkbox"/> NONE (No reportable positions)	_____
_____	_____
_____	_____

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

<u>DATE</u>	<u>PARTIES AND TERMS</u>
<input type="checkbox"/> NONE (No reportable agreements)	_____

January 12, 1986 Parties: James T. Trimble, Jr.; Michael Percy; Alonzo Wilson; Elizabeth Foote; Gregory Walker and John Honeycutt, Jr. - Terms: \$1,000.00 per month beginning March 1, 1986 for 75 months to Trimble in exchange for all interest in law firm to remaining partners. Amended to call for payments of \$500.00 per month from February 1, 1991 for 32 months.

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

<u>DATE</u> (Honoria only)	<u>SOURCE AND TYPE</u>	<u>GROSS INCOME</u> (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income)	_____	_____
<u>1</u> U.S. Courts	Salary	\$ <u>79,804.32</u>
<u>2</u> Law Firm	Percy, Smith, etc. pursuant to above agreement	\$ <u>12,000.00</u>
<u>3</u>	_____	\$ _____
<u>4</u>	_____	\$ _____
_____	_____	_____
_____	_____	_____

III - ✓

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
TRIMBLE, JAMES T. JR.	6-1-91

VII. INVESTMENTS and TRUSTS - income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)

A. Description of Assets (including trust assets)	B. Income received during reporting period		C. Value at end of reporting period		D. Transactions during reporting period			
	(1) Accts. (\$000)	(2) Type: Int., rent, etc.	(1) Value: (\$000)	(2) Value: (\$000)	(3) Type: Sale, Purchase, etc.	(2) Value: (\$000)	(3) Value: (\$000)	(4) Identify: if previous transaction
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)								
(J) ¹ Fidelity Investments, P.O.Box 1284, Boston, MA 02104 (IRA)	A	Div.	K	T				
(J) ² Evergreen Fund, P.C.Box 9021, Boston, MA 02215 (IRA)	A	Div.	J	T				
(J) ³ Security 1st Nat'l Bank, Alex. CA 91309 (Keogh Plan)	C	Div.	K	T				
(J) ⁴ Premier Bank, Lake Charles, LA 70602 (checking account)	A	Int.	J	T				
(J) ⁵ Calcasieu Fed. Emp. Cred. Union, Lake Charles, LA (Savings Acct.)	C	Int.	I	T				
(J) ⁶ CASH Accumulation Trust, NY, NY (Money Market)	A	Div.	J	T				
(J) ⁷ Calcasieu Marine Nat'l Bank (Jim Trimble & Muriel R. Trimble) (IRA)	A	Int.	J	T				
(J) ⁸ Calcasieu Marine Nat'l Bank, Lake Charles, La (Checking Acct.)	A	Int.	J	T				
(J) ⁹ Raintree Associates, Ltd. Real Est. Partnership-P.O.Box 1137, Biloxi MS A			J	W				
(J) ¹⁰ Kmt. in 29 unimproved acres in Grant Parish, LA	A	Int.	J	W				
(J) Note on residence at 511 Golden Rd., Alexandria, LA	C	Int. & Cap.Gain	K	T				
(J) ¹² Res. at 3104 Dawkins St., Alexandria, LA	C	Rent	K	R				
(J) ¹³ Office Bldg.-728 Jackson St., Alexandria, LA (1/3 Int.)	C	Rent	J	W				
(J) ¹⁴ Duplex-Paris St., Alexandria, LA (1/2 Int.)	A	Rent	J	W				
(J) ¹⁵ Duplex - Many St., Alexandria, LA (1/2 Int.)	A	Rent	J	W				
(J) ¹⁶ Duplex - 19th St., Alexandria, LA (1/2 Int.)	A	Rent	J	W				
(J) ¹⁷ McNeil Real Estate Fund X, Ltd. Partnership -	A	Div.	J	W				
(J) ¹⁸ U.S. Savings Bonds - Series E and EE	C	Int.	L	W				
(S) ¹⁹ Kimer Foods, Inc., Chicago, IL (Stock)	A	Div.	J	U				
(S) ²⁰ Acadia Parish School Board District 5 - Bonds	A		J	U				

1 Income/Gain Codes: A=\$1,000 or less B=\$1,001 to \$2,500 C=\$2,501 to 5,000 D=\$5,001 to \$15,000
 (See Col. B1 & D4) E=\$15,001 to \$50,000 F=\$50,001 to \$100,000 G=\$100,001 to \$100,000,000 H=More than \$1,000,000
 2 Value Classes: I=\$1,000 or less J=\$1,001 to \$2,500 K=\$2,501 to \$5,000 L=\$5,001 to \$100,000 M=\$100,001 to \$250,000
 N=\$250,001 to \$500,000 O=\$500,001 to \$1,000,000 P=\$1,000,001 to \$2,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting TRIMBLE, JAMES T. JR.	Date of Report 6-1-91
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IV. REIMBURSEMENTS and GIFTS – transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCE	DESCRIPTION
X NONE (No such reportable reimbursements or gifts)	
1	
2	
3	
4	
5	
6	
7	
8	

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCE	DESCRIPTION	VALUE
X NONE (No such reportable gifts)		
1		\$
2		\$
3		\$
4		\$

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical " (S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITOR	DESCRIPTION	VALUE CODE*
<input type="checkbox"/> NONE (No reportable liabilities)		
1 State National Life Insurance Co. Baton Rouge, LA	Mortgage on 15 & 16, Part VII	N
2 Lewis O. Lauve, 3317 Parkway Dr. Alexandria, LA	Mortgage on 13, Part VII	K
3 Central State Life Ins. Co. Alexandria, LA	Mortgage on 14, Part VII	J
4		
5		
6		
7		

* VALUE CODES: * = less than \$1000 F = \$1000 to \$10,000 M = \$10,000 to \$50,000 H = \$50,000 to \$100,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

TRIMBLE, JAMES T. JR.

Date of Report

6-1-91

VII. INVESTMENTS and TRUSTS – income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)

A. Description of Assets (including trust assets)		B. Income during reporting period		C. Value at end of reporting period		D. Transactions during reporting period				
(1) Asset Code ¹ (A-H)	(2) Type (e.g., div., rental or int.)	(1) Value ₂ Code ³ (J-P)	(2) Value ₂ Code ³ (O-W)	(1) Type (e.g., buy, sell, margin, redemp- tion)	(2) Date: Month- Day	(3) Value ₂ Code ³ (J-P)	(4) Gain Code ¹ (A-H)	(5) Identify of Buyer/sellr for this private transaction		
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)										
(S) ²¹ Hammond, Louisiana Public Improvement Bonds	A	Int.	K	U						
(S) ²² Exxon Corp. Stock	A		K	U						
(S) ²³ Note on residence at 3303 Parkway Dr., Alexandria, LA	A	Int.	K	T						
(S) ²⁴ N.Y.Life Ins. Co., N.Y., NY Universal Life	D	Int.	M	T						
(J) ²⁵ Equitable Life, N.Y., NY Single Premium Policy	B	Int.	J	T						
7										
8										
9										
10										
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14										
15										
16										
17										
18										
19										
20										
1 Income/Gain Codes: A=\$1,000 or less (Same Col. B1 & D4) E=\$15,001 to \$50,000		B=\$1,001 to \$2,500 F=\$50,001 to \$100,000	C=\$2,501 to 5,000 G=\$100,001 to \$1,000,000	D=\$5,001 to \$15,000 H=More than \$1,000,000						
2 Value Codes: J=\$15,000 or less		K=\$15,001 to \$50,000	L=\$50,001 to \$100,000	M=\$100,001 to \$150,000	N=\$150,001 to \$250,000	O=\$250,001 to \$350,000	P=\$350,001 to \$500,000	Q=\$500,001 to \$1,000,000		

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
TRIMBLE, JAMES T., JR.	6-1-91

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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.A. app. 7, § 501 et seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature James T. Trimble Date _____

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.A. APP. 6, § 104, AND 18 U.S.C. § 1001)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

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	161	400	37
U.S. Government securities—add schedule	83	104	48
Listed securities—add schedule	83	683	93
Unlisted securities—add schedule	31	187	00
Accounts and notes receivable:			
Due from relatives and friends			
Due from others			
Doubtful			
Real estate owned—add schedule	355	500	00
Real estate mortgages receivable	74	121	52
Autos and other personal property	50	000	00
Cash value—life insurance	134	870	72
Other assets—itemize:			
Gov. Thrift Savings Plan	55	659	56
Total assets	1,029	527	58
CONTINGENT LIABILITIES	NONE		
As endorser, comaker or guarantor			
On leases or contracts			
Legal Claims			
Provision for Federal Income Tax			
Other special debt	-		
GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)		NO	
Are you defendant in any suits or legal actions?		NO	
Have you ever taken bankruptcy?		NO	

LISTED SECURITIES

(1)	Fidelity Investments - Mutual Fund43,113.60
(2)	Evergreen Fund	8,098.33
(3)	Exxon Corp. (Stock)23,972.00
(4)	Rymer Foods, Inc. (Stock)	<u>8,500.00</u>
		\$83,683.93

UNLISTED SECURITIES

: (1) Acadia Parish School Board District 5 bonds	\$ 14,306.00
(13) Hammond, Louisiana Public Improvement Bonds	<u>.16,881.00</u>
	\$ 31,187.00

REAL ESTATE:

	<u>Value</u>
(1) Residence - 1415 Alvin Street Lake Charles, LA 70601	\$200,000.00
(2) Raintree Associates, Ltd., Limited Real Estate Partnership P. O. Box 1137 Biloxi, MS	-0-
(3) 1/2 Int. in 29 unimproved acres in Grant Parish, LA.	15,000.00
(4) Residence at 3104 Dawkins St. Alexandria, LA.	30,000.00
(5) Office Building at 728 Jackson St. Alexandria, LA (1/3 Int.)	55,000.00
(6) Duplex - Paris Street Alexandria, LA (1/2 Int.)	17,500.00
(7) Duplex - Marye Street Alexandria, LA (1/2 Int.)	9,250.00
(8) Duplex - 19th Street Alexandria, LA (1/2 Int.)	23,750.00
(9) McNeal Real Estate Fund X, Limited Partnership.	5,000.00
Total Real Estate . . . \$355,500.00	

REAL ESTATE MORTGAGES - PAYABLE

- (1) Mortgage on property at 728 Jackson St., Alexandria, LA to Lewis O. Lauve, 3317 Parkway Dr., Alexandria, LA 71301
Total Balance -- \$82,589.19
Respondent's 1/3 interest . . . \$ 27,529.73
- (2) Mortgage on 1802 Marye St., Alexandria, LA, to State National Life Ins. Co., Baton Rouge, LA (Loan No. 02-257)
Total Balance -- \$27,120.67
Respondent's 1/2 interest . . . 13,560.34
- (3) Mortgage on 707-709 19th St., Alexandria, LA, to State National Life Ins. Co., Baton Rouge, LA (Loan No. 02-256)
Total Balance -- \$51,238.35
Respondent's 1/2 interest . . . 25,619.18
- (4) Mortgage on 2118 Paris St., Alexandria, LA, to Central State Life Ins. Co., Alexandria, LA (Loan No. 810006)
Total Balance -- \$29,732.92
Respondent's 1/2 interest . . . 14,866.46
- Total Liabilities . . \$ 81,575.71

CONFIRMATION HEARING ON: MICHAEL R. HOGAN, SHELBY HIGHSMITH, HARVEY BARTLE III, AND WILLIAM H. YOHN, JR.

MONDAY, JULY 29, 1991

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

The committee met, pursuant to notice, at 3:47 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Edward M. Kennedy presiding.

Present: Senators Kennedy, Thurmond, and Specter.

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. The committee will come to order.

The Constitution divides between the President and the Senate the responsibility to ensure that only well-qualified men and women serve on the Federal bench. We have few more important responsibilities, as Senators, for the persons whom we confirm serve for life and their decisions will determine, in large measure, the quality of justice in America.

By and large, the members of the committee have worked together in a spirit of bipartisan cooperation to expedite the confirmation process. But speed is not as important in making nominations or in confirming them, as quality is. As Justice Potter Stewart wrote in another context, "There's more to swift justice than just swiftness." All of us should bear that in mind in considering judicial nominations.

Today's nominees are fortunate to have distinguished Members of the Senate here to introduce them, and I look forward to the introductions and to their testimony.

I recognize our friend and colleague from Pennsylvania, if you would like to make any comments.

Mr. SPECTER. Thank you very much, Mr. Chairman.

Thank you for scheduling these hearings today. We have some outstanding nominees today, too, from Pennsylvania. I will reserve the introductions until the arrival of our colleagues who doubtless have other business, and I will be staying for the hearing, so I will yield to Senator Hatfield, Senator Packwood, and Senator Mack.

Senator KENNEDY. All right. We welcome Senators Hatfield and Packwood to introduce Magistrate Michael Hogan to the committee. We will hear first from our good friend and colleague in the Senate, Senator Hatfield.

**STATEMENT OF HON. MARK O. HATFIELD, A U.S. SENATOR FROM
THE STATE OF OREGON**

Senator HATFIELD. Thank you, Mr. Chairman.

Mr. Chairman and Senator Specter, it is a privilege to be here in company with my colleague Senator Packwood to introduce to the committee for a Federal judgeship in Oregon, a gentleman, Mike Hogan, whom I have known for many years. In fact, Mr. Chairman, I think it was about 1968 that a young man appeared on my doorstep here and indicated he wanted to go to law school at Georgetown, but he needed a job to help finance his education, and I think, I suppose, in introducing him, I could give you the highest rank of achievement in his life.

He became a Capitol policeman, and during that time he helped protect you and the rest of the Senate, as the Capitol policemen do. He worked his way through law school here, and then went back to Oregon to be a clerk at the Federal district level for Federal District Judge Belloni. After a year of that experience, he joined one of the most prestigious law firms in Portland, where he practiced law, and then 2 years out of law school, he became a part-time magistrate and a part-time bankruptcy judge.

A few years later, he became a full-time magistrate, which position he has held with great recognition and accolades from the Federal judges, State judges, all the others who have had contact with his court.

Mr. Chairman, I could on with such biographical data, but I think it is more important to also get the measure of this candidate by meeting his family. For the record, you have already met them, but I would like to introduce again his mother, Mrs. Maxine Hogan, and his wife, Mrs. Christine Hogan, his daughter, Michelle Hogan, and his son, Matthew Hogan, and his son, Joshua Hogan.

I would only say that his activities on the bench and in the magistrate role have also been matched by his community service, his community involvement. He has been very much involved in the effort to bring the judicial process as understanding and knowledge to the community at large, and he has participated in seminars and in other activities which transmit this information and make the public more aware of how the judicial branch of government truly functions.

He has also participated at the ninth circuit level in other kind of seminar work. He has been very active in the local bar, the State bar, and the Federal bar. So, here is a professional man who has had many years of experience for his young age, a man who I am very proud to introduce as a friend and has the nomination to fill a Federal district courtship, a judgeship in the State of Oregon.

Senator KENNEDY. Thank you.

Senator Packwood.

**STATEMENT OF HON. BOB PACKWOOD, A U.S. SENATOR FROM
THE STATE OF OREGON**

Senator PACKWOOD. Thank you, Mr. Chairman.

Mr. Chairman, Senator Thurmond, and Senator Specter, in addition to what Senator Hatfield has said about Magistrate Hogan, I think I can say this without qualification: Never have Senator Hat-

field and I presented a nominee that has had such extraordinary accolades from lawyers, both winners and losers, who have practiced before him. We have letters of endorsement from people who have lost cases. You almost have a sense that if you were a defendant and were tried for murder and you were sentenced to hang by Magistrate Hogan, you would feel you had had a fair trial, which is probably the ultimate that can be said.

He has, in addition, handled a large civil caseload and has assumed the responsibility for nearly all of the habeas corpus cases in the Oregon system. And if there is a hotter topic going at the moment than these kinds of cases, plus all the section 1983 present civil rights cases, I do not know of a harder topic in the current Federal law today.

The man is qualified beyond belief. He is liked beyond compare, and we will be delighted, I cannot say as a full-time judge, but we, in essence, have had him as a full-time judge. We have simply called him magistrate, and now we are going to change the title, but I think we are going to work him just as hard as we did before, Mr. Chairman.

Senator KENNEDY. Well, Mr. Hogan, you are off to a flying start here. We will see whether you land the same way. I am sure you will.

We thank our colleagues and excuse them, and ask you, Mr. Hogan, if you would be kind enough just to step down, and we will hear from some of the other Senators and then come back to you.

Senator THURMOND. I want to thank you very much for appearing. You have got two of the ablest Senators here endorsing you.

Mr. HOGAN. Thank you, sir.

Senator KENNEDY. I would ask our colleague, Senator Mack, to introduce Mr. Shelby Highsmith to the committee.

STATEMENT OF HON. CONNIE MACK, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator MACK. Mr. Chairman, before we begin, I would also like to have Shelby introduce his family who are with him today.

Senator KENNEDY. Please.

Mr. HIGHSMITH. Respectfully, Mr. Chairman, this lady right here, the blond, is my wife, Mary Jane. Seated next to her is my daughter, Holly Highsmith Abrams, recently married right close to the District of Columbia here, and my sister-in-law, Joan Cann, who is a Virginia resident.

Senator KENNEDY. Very fine. We are glad to welcome them to the committee.

Senator Mack.

Senator MACK. Mr. Chairman, let me at the outset say to the entire committee how much I appreciate your holding this hearing today. It is with great pleasure that I introduce to the Senate Judiciary Committee, Shelby Highsmith, nominee for the U.S. District Court in the Southern District of Florida.

I wish to thank the committee for holding this hearing on Shelby Highsmith's nomination. Shelby will fill one of five vacancies in the southern district of Florida. As I indicated to the committee during Donald Graham's recent hearing, the southern district of

Florida has one of the highest criminal caseloads in the country, so Shelby will be fast at work, upon his confirmation and swearing in.

I feel as if I am a regular here. I am now before this committee on the fourth judicial vacancy of 10 Federal judicial vacancies in Florida. Again, I appreciate the committee's prompt attention to Florida's judicial needs.

I would now like to take a few moments of the committee's time to express my unequivocal support for Shelby Highsmith. After graduating from Georgia Military College Preparatory School, Shelby Highsmith served in the Korean war, in the 1st Cavalry Division of the United States Army. During his tenure, Shelby received numerous honors, including the Bronze Star Medal, the Silver Battle Star, and a Presidential unit citation.

After serving in the Army, Shelby attended the University of Missouri, where he received a bachelor of arts degree. While in law school at the University of Missouri, Shelby was a member of the Bench and Robe and the Torch and Scroll Honor Societies. When Shelby graduated from law school, he was honored as the outstanding law senior, graduating No. 1 in his class.

Following graduation, Shelby spent over 10 years in private practice in Missouri and later in Florida. In 1970, Shelby was appointed to a State circuit court judgeship in Dade County, FL, where he was known as a very capable and fair jurist.

After serving over 4 years as a judge, Shelby Highsmith stepped down from the bench and formed his own law firm in Miami. Shelby presently is a senior partner in his well-respected law firm, where he has a general trial practice, with a special emphasis on plaintiff and defense civil litigation.

In addition to being a dedicated advocate and jurist, Shelby Highsmith has served his community as the special council to the War on Crime Program and as a member of the Interagency Law Enforcement Planning Council. One of his most notable cases was when he represented the State executive branch before Senate select committees of the State of Florida, involving allegations of corruption of public officials.

Shelby Highsmith enjoys an excellent reputation in his community and is highly regarded by the local bar. I have received numerous letters in strong support of Shelby Highsmith. These letters were written by those who have appeared before him and worked beside him, the very people most qualified to evaluate Shelby's competency, disposition, and overall judicial demeanor.

Recently, Shelby and I had the chance to sit down and discuss his aspirations to become a Federal judge. I found him to be uniquely qualified for the position of U.S. judge, based upon his prior judicial experience and his outstanding career as a legal advocate.

I trust each of you will examine his exemplary judicial and legal background. The simple facts reveal that Shelby Highsmith will be an outstanding addition to the U.S. District Court's Southern District. I urge you to vote favorably on his nomination.

I might just say, in conclusion, Mr. Chairman, I think we are very fortunate to have an individual of the quality, the capability, the experience, and the background of Shelby Highsmith to come

forward to take on this very difficult task in a very important district in our country.

Thank you, Mr. Chairman.

Senator KENNEDY. Thank you very much, Senator. We welcome you to the committee and appreciate your taking the time to make this presentation.

Our friend and colleague Senator Graham very much wanted to be here; but he is unable to be here and wanted me to add his strong support for the nominee, which I am glad to do.

So, we will just excuse you temporarily.

Senator THURMOND. I want to congratulate you, too, on having this very able Senator here endorse you. That means a lot to us.

Senator KENNEDY. I would ask if Harvey Bartle and William Yohn, would be good enough to come forward.

Harvey Bartle is nominated to be a district judge for the eastern district of Pennsylvania, and William Yohn is also nominated to be a U.S. judge for the eastern district of Pennsylvania.

Senator SPECTER. Mr. Chairman, might I suggest that you proceed with the other two judges, because I am going to remain, and when they come forward, I would be pleased at that time to make the formal introductions.

Senator KENNEDY. All right. Mr. Hogan, would you come back?

I would ask you if you would be good enough to let me swear you in.

Mr. HOGAN. Yes, sir.

Senator KENNEDY. Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. HOGAN. I do.

TESTIMONY OF MICHAEL R. HOGAN, OF OREGON, TO BE A U.S. DISTRICT JUDGE FOR THE DISTRICT OF OREGON

Senator KENNEDY. Are there any comments that you would like to make?

Mr. HOGAN. I am pleased and honored to be here and welcome your questions, Mr. Chairman.

Senator KENNEDY. Very good. In the case of *Anderson v. United Finance Company*, the plaintiff, a woman, sued under the Equal Credit Opportunity Act, alleging that a violation occurred when the finance company required her husband to cosign a note, even though she qualified on her own for the loan and had applied in her own name. You rejected Ms. Anderson's claim, because you found that, although the finance company had technically violated the act, the violation did not result in discrimination.

The ninth circuit reversed your decision, ruling that the finance company's conduct was precisely the kind prescribed by the statute and the operative regulations. Those regulations specifically barred lenders from requiring the signature of an applicant-spouse of a joint applicant, if the applicant qualified under the credit standards or credit worthiness.

You found that, while the finance company was justified in requiring the plaintiff's husband's signature on the security agreement, to perfect a lien on household goods, there was no justifica-

tion for requiring his cosignature on the promissory note, since the plaintiff had qualified for the loan on her own.

What was the basis for your conclusion that the violation did not result in any discrimination?

Mr. HOGAN. My reasoning was based on the fact that the application was made only in the plaintiff's name, only her credit was investigated, and inquiries into her credit later only were responded in her name. In addition, it was a case that I believed lacked damages.

On reflection, I believe that there was a policy that should have been changed and at least injunctive relief and attorney fees may have been appropriate. What I am glad about is that when we got the case settled a few weeks after the mandate from the ninth circuit, it was settled on those grounds, those bases.

Senator KENNEDY. As I understand it, the Equal Credit Opportunity Act is designed to assure that the lenders impose no greater burdens on women, particularly married women, on account of their gender. Requiring women to have their spouses cosign notes, when they are independently qualified for the loan is discrimination. That was abundantly clear in the Anderson case, since the plaintiff's husband was unemployed, permanently disabled, and on public assistance.

So, there are those that believe that requiring him to sign the note seems to be nothing but discrimination.

Now that you have given this matter some additional thinking, where you would come out?

Mr. HOGAN. I agree with the opinion of those who decide, the Federal Reserve Board implementing regulations make that clear, as well as opinion letters from the Comptroller of the Currency.

Senator KENNEDY. OK. Can you tell us, with a good deal of your experience as a magistrate, can you offer any suggestions to the committee on how to improve the magistrate's current role in the judicial system?

Mr. HOGAN. Oregon was there early and maybe with the most, with regard to efficient use of magistrates. In Oregon, magistrates are in the regular civil wheel, along with the district judges, so that a magistrate receives the case, as well as a district judge.

I think getting the magistrate involved in the case early is very important in building a real effective system for use of magistrates.

Senator KENNEDY. And did that make a difference in your own effectiveness?

Mr. HOGAN. No question about that. In my situation, the only time we actually checked the records, there were consents of the parties to have me sit as the district judge in civil cases in 95 percent of the cases that we checked for the preceding 6-month period for the southern division of Oregon.

Senator KENNEDY. Senator Thurmond, do you have any questions?

Senator THURMOND. Thank you, Mr. Chairman.

Judge Hogan, I notice you served, according to your record, as a part-time U.S. magistrate and a part-time bankruptcy judge. Did you serve in those positions at the same time?

Mr. HOGAN. Yes, I did, Senator.

Senator THURMOND. And then you served altogether about 18 years as a magistrate and a bankruptcy judge?

Mr. HOGAN. Yes, sir.

Senator THURMOND. Which work did you like best?

Mr. HOGAN. I liked the magistrate work better.

Senator THURMOND. The trial work?

Mr. HOGAN. Yes, I had the option of going either way, frankly, and I liked the broader jurisdiction of the district court.

Senator THURMOND. I see.

Now, some judges have become known as very activist judges and have taken over running prisons and hospitals and school districts and other places, which really falls out of that category. A judge's job is to interpret the law, just like ours is to make the law, and the executive branch is to administer the law. How do you feel about that?

Mr. HOGAN. I agree with you, Senator.

Senator THURMOND. I think you have a very good record, from all I have heard about you, and I will be very pleased to support you.

Mr. HOGAN. Thank you, sir.

Senator KENNEDY. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Hogan, I note your excellent record, as well. I see that you got into the judging business very early in your career with relatively little time as a practicing lawyer. I would be interested in your observations as to whether—as I say this, I think your confirmation is not in doubt—I would be interested as to whether you think a little more time practicing law might be helpful to someone who is to become a bankruptcy judge or a magistrate or especially a U.S. district court judge.

Mr. HOGAN. I have had the chance to learn as part of the court and feel prepared in that regard, but there is no question that a good understanding, which can come from years of practice can be—

Senator SPECTER. Have you ever answered any of the interrogatories?

Mr. HOGAN. Excuse me.

Senator SPECTER. Have you ever answered any of the interrogatories, taken depositions?

Mr. HOGAN. Yes, sir.

Senator SPECTER. Have you done that?

Mr. HOGAN. Yes, sir. I was very fortunate, when I applied with the large law firm, I really did not think I would get the job, because I told them I wanted to do trial work, rather than work in the library, and they were awfully good to me about allowing me to have meaningful roles in the cases I worked on.

Senator SPECTER. One other question, which is somewhat tangential, but I would be interested in your observations, having been a bankruptcy judge, a magistrate, and now a district court judge: Do you believe those other judicial positions might not benefit from having the same kind of procedures, with confirmation by the U.S. Senate, and recommendations, say, by the U.S. Senators from the district?

Mr. HOGAN. I can perhaps answer in this way: My wife, Christine, and I have commented to each other in recent days that we have somewhat greater respect now for those who have been through the process, because it is such a careful process, and the care that is brought to it I think is to its credit.

Senator SPECTER. Well, the magistrates do work which is assigned to them by the district judge, really, in many aspects, the equivalent of a district judge's work, and the bankruptcy judges have greater authority and powers, as well. One of the thoughts which has been on my mind for some time has been the desirability of elevating consideration for those very important judicial positions to the kind of review which is passed on for district court judges. Would you think that advisable?

Mr. HOGAN. I think it has much to be said for it. I will tell you that I know that, in recent days when magistrate positions are advertised, we often find 80 to 100 top-quality applicants, and so wonderful lawyers and judges are applying for those jobs, with the jurisdiction that this body has seen fit to bestow on it.

Senator SPECTER. We might even get more applications than that for U.S. district court judge. Well, I think you present very good credentials and you have a very strong recommendation by two of our most distinguished U.S. Senators. One complimented you by saying that even the recipient of the death penalty would be for you, and the other obviously knows you very well, to recite without notes the names of your entire family, your children, so I think you come very, very highly recommended.

Thank you, Mr. Chairman.

Senator KENNEDY. Thank you very much, Mr. Hogan, and I look forward to supporting your nomination, as well. Thank you very much.

Mr. HOGAN. Thank you, Mr. Chairman.

Senator KENNEDY. Mr. Shelby Highsmith, and I will ask our other nominees if they would be good enough to stand, as well.

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

Mr. HIGHSMITH. I do.

Mr. BARTLE. I do.

Mr. YOHN. I do.

Senator KENNEDY. Let the record show that all three nominees, Mr. Highsmith, Mr. Bartle, and Mr. Yohn have taken the oath.

TESTIMONY OF SHELBY HIGHSMITH, OF FLORIDA, TO BE A U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA

Senator KENNEDY. Mr. Highsmith, in your questionnaire, you mentioned several pro bono cases you handled during your career in private practice. As we all know, the ABA'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. Do you believe that it is appropriate to require nominees to the Federal bench to have performed some form of pro bono or other community service?

Mr. HIGHSMITH. Most assuredly, Mr. Chairman. If I can, I would like to just add a caveat to that. Quite candidly, it disturbed me

somewhat to have to answer a question of that nature. At the risk of appearing too modest, as I indicated in my response, this is a very personal matter and I do not like to praise myself.

The cases that I listed and discussed in my questionnaire were cases that meant a great deal to me, from a personal standpoint, but I want the committee to be aware of my feelings that these matters are a matter of conscience and not necessarily something that I memorialize or keep track of, in order to be able to brag.

I think we are approaching the problem the right way, and I think pro bono work has been and will be a part of the legal profession throughout its entire existence.

Senator KENNEDY. Well, that is a very impressive response. Modesty is not a quality we find around here very much, at least in this institution. We appreciate your involvement. It is obvious that judges have a very important position in the community; they are respected and highly regarded, and their involving themselves in the community is something that I think enhances their ability to bring justice.

I appreciate your response on this. I am particularly interested in this aspect, and I think people who have been and are involved in these kinds of activities develop perhaps some additional sensitivity when they are rendering justice, which I think is useful.

If confirmed, Mr. Highsmith, you will be presiding in a district which has a severe docket backlog and is inundated with criminal cases, in particular.

Last month, the Senate passed an amendment that would impose high minimum mandatory sentences in the Federal system for crimes committed with handguns. The Judicial Conference has opposed this amendment, because it will increase an already heavy burden on the Federal courts. What do you believe is the proper allocation of criminal law enforcement responsibilities between the State and Federal courts?

Mr. HIGHSMITH. Well, essentially, it is my philosophy, if you will, Mr. Chairman, that the State has, if you will, the primary responsibility for the safety of the citizens of that State and should address itself to those crimes which are of particular interest to the State. I am talking about financial institutions, the crimes insofar as assault and battery, murder, rape, and what-not are concerned.

I think a great deal depends upon the geographical location of the State, unfortunately. Florida is one of those where that particular consideration is of primary importance. I submit that the State cannot and does not have the arsenal that the Federal Government has to fight the particular problems peculiar to the States that are on the borders, particularly of the southern coast of the United States of America.

Senator KENNEDY. Well, I believe we will be getting back into what the reaction is of the administration, the Judicial Conference, and judges, generally, on these mandatory minimums, because Senator Thurmond, myself and other members of the committee have been very interested in the establishment of sentencing reforms, and there is a good deal of concern, I know, by those who are involved in the Sentencing Commission and by the Judicial Conference about the Congress putting in place or supporting the mandatory minimums.

Certainly, they have the power to do this, but the question is on the policy level and what is happening, in the court system is something that we ought to be sensitive to, as well. We have seen certain places where, with those mandatory minimums, it has changed very much the prison population, in many instances letting people out of prisons that pose some real danger to the community, so I was interested in your views on this.

I did not give you an opportunity to make any opening comments, I do not know if there is anything else that you would like to say.

Mr. HIGHSMITH. I can only echo my colleague who preceded me here. I am deeply honored to be here. I am obviously in somewhat of awe of the majesty of this proceeding. Aside from that, I, as he did, welcome your questions.

Senator KENNEDY. Very fine.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Judge, I notice you were born in Florida, you went to school in Georgia and Kansas, and now you are back in Florida.

Mr. HIGHSMITH. Yes, sir.

Senator THURMOND. Have you tried other places and like Florida best, do you not?

Mr. HIGHSMITH. Yes, Senator.

Senator THURMOND. I notice you had 7 years in the Army.

Mr. HIGHSMITH. Just 6½, to be precise, Senator Thurmond.

Senator THURMOND. 1955, you were there during the Korean war?

Mr. HIGHSMITH. Yes, sir.

Senator THURMOND. Were you in Korea?

Mr. HIGHSMITH. Yes, sir.

Senator THURMOND. I observe that you practiced law with a firm, and then you became a judge and then you went back to practicing law.

Mr. HIGHSMITH. Yes, sir.

Senator THURMOND. How did you enjoy your service as a judge on the judicial circuit?

Mr. HIGHSMITH. It was one of the finest—

Senator THURMOND. Is that a trial court?

Mr. HIGHSMITH. Yes, sir, it's the highest court—

Senator THURMOND. It is the highest trial court?

Mr. HIGHSMITH [continuing]. In Florida, yes, sir, it is the circuit court. It was an experience I would not take anything for. It was a great experience. Unfortunately, I think, as a complete response to the question as you phrased it, Senator Thurmond, I was appointed to that bench at a relatively early age.

It immediately followed the work that I had done for better than a year with regard to traveling the State of Florida and advising the Governor and the private agents in the war on crime and in trying cases of removal before senate select committees. I had very little, when I went on the bench. Florida was not noted at that time for the pay of its trial judges. I met and married my wife while I was on the bench, and, very candidly, I could not afford to continue, so I had to resign. I am happy to report that that is not a problem at this time.

Senator THURMOND. Now, that experience, though, is similar to the Federal judgeship, the trial court—

Mr. HIGHSMITH. Yes, sir.

Senator THURMOND [continuing]. And then to be a district judge in the Federal court.

Mr. HIGHSMITH. Yes, Senator.

Senator THURMOND. That experience ought to be very beneficial to you.

Mr. HIGHSMITH. Hopefully.

Senator THURMOND. In South Carolina, our highest trial courts are called circuit courts, too, and I was on that court for 8 years, and served about half of that in World War II.

You heard about what I said about judicial activism?

Mr. HIGHSMITH. I did.

Senator THURMOND. Judges ought to interpret the law—

Mr. HIGHSMITH. Absolutely.

Senator THURMOND [continuing]. And let Congress make the law and the executive branch enforce the law.

Mr. HIGHSMITH. I am dedicated to that doctrine.

Senator THURMOND. Now, I have seen some judges, in Federal courts, especially, who have all the power in the world, who have embarrassed lawyers and jurors and witnesses and so forth, and in my opinion there is no excuse for that, to yell out or say things to embarrass people.

Mr. HIGHSMITH. I am in full agreement with that.

Senator THURMOND. A judge has all the power he or she needs and more, too. Now, how do you feel about that?

Mr. HIGHSMITH. I agree with you 100 percent. If I had to, Senator Thurmond, go through the attributes one would desire in a Federal judge or any trial judge, judicial temperament would be at the top of the list.

Senator THURMOND. Well, you have a fine record and I will be very pleased to support you.

Mr. HIGHSMITH. Thank you, Senator Thurmond.

Senator KENNEDY. Senator Specter.

Senator SPECTER. Judge Highsmith, I would be interested in just a little more information about your resignation and your views on judicial salaries. We have the tough job from time to time on voting on judges' salaries, and there are some of us who are concerned about raising judicial salaries in the context of so many other Federal needs.

Speaking as the Senator from Pennsylvania, we have a large number of very well-qualified men and women who make a lot more than Federal judges who are anxious to be Federal judges. We have only had one who resigned from the Federal bench since 1960, to my knowledge, at least in Philadelphia. I would be interested to know what the salary was when you were a judge on the Florida State court.

Mr. HIGHSMITH. When I started that job, it was \$32,500 a year, and after the retirement pension was taken out, I took home \$1,600 a month. The salary had been increased when I left the bench to \$37,500.

Senator SPECTER. Had the salary been \$125,000, would you have resigned from that position?

Mr. HIGHSMITH. No, sir.

Senator SPECTER. Senator Thurmond has noted that you were in Kansas. I am not so sure about that. You might have been in Missouri when you left. Which was it?

Mr. HIGHSMITH. It was Kansas City, MO, Senator Thurmond and Senator Specter. I went to what was then known as the University of Kansas City, in Kansas City, MO. Subsequently, it became the University of Missouri at Kansas City.

Senator SPECTER. Well, I am sure if it had been Kansas, you never would have left, Judge Highsmith. [Laughter.]

I say that, because I am a native Kansan. I just wanted to be sure where you left from. Having left Missouri, I am very much more sympathetic toward your nomination, which I will be pleased to support.

Mr. HIGHSMITH. Thank you, sir.

Senator SPECTER. Thank you, Mr. Chairman.

Senator KENNEDY. Thank you very much. I, too, look forward to supporting the nomination. Congratulations.

Mr. HIGHSMITH. Thank you, Mr. Chairman.

Senator KENNEDY. Mr. Bartle and Mr. Yohn, would you be good enough to come forward?

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

Senator SPECTER. Mr. Chairman, I am very pleased to recommend the two nominees from Pennsylvania.

Harvey Bartle is a very distinguished Pennsylvanian, whose only blemish, perhaps, is that he was a law partner of mine for several years at Dechert, Price & Rhoads, in Philadelphia.

Mr. Bartle, as Judge Yohn, has an extraordinary academic record, a cum laude from Princeton, a cum laude at the University of Pennsylvania Law School, an editor on the Law Review, a clerk to a Federal judge, insurance commissioner of Pennsylvania, and then attorney general of the Commonwealth of Pennsylvania, and he has a well-rounded background and brings outstanding credentials to the Federal bench.

My only other comment about Mr. Bartle is that I would like to have seen him as a political candidate a few times, before he moved onto the bench at his relatively early age.

Judge Yohn is a very distinguished common pleas judge now from Montgomery County, a suburban county in Philadelphia, which has a very, very heavy trial load. And Judge Yohn has an extraordinary academic record, as well, again, Princeton magna cum laude, Phi Beta Kappa, and a Yale Law School graduate from 1960, and then he had extensive experience in practice, first as a partner with Wells, Campbell, Beynier & Yohn, and during that period, for some 10 years, was an assistant district attorney in Montgomery County, which I think there is no job which gets better with experience. I think perhaps the chairman would agree with that, having been an assistant DA himself.

He then served in the house of representatives in Pennsylvania, went back to practicing law, and has been a trial judge in the

Montgomery County Court of Common Pleas for a decade, and brings really impeccable and outstanding credentials.

I know both of these nominees personally. They will come to a district court which has an extraordinarily heavy backlog, heavier today than yesterday, because the eastern district of Pennsylvania has just been the recipient of 26,639 new cases from 89 district courts around the country on asbestos litigation.

Senator Thurmond had asked me how many vacancies there were in Pennsylvania, and at least noted two vacancies from the eastern district, and we are going to need considerable additional help for a court which is an outstanding court and is very, very heavily burdened, and these two young men will be wonderful additions to that court.

Thank you, Mr. Chairman.

Senator KENNEDY. Thank you very much.

Mr. Yohn, we will excuse you just temporarily here, while we question Mr. Bartle.

Do you wish to introduce your family?

**TESTIMONY OF HARVEY BARTLE III, OF PENNSYLVANIA, TO BE
A U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENN-
SYLVANIA**

Mr. BARTLE. I am here by myself today. Thank you, Mr. Chairman.

Senator KENNEDY. Is there anything you would like to say, initially?

Mr. BARTLE. I am very honored to be here and am ready and willing to answer any questions you may have.

Senator KENNEDY. Last August, the committee unanimously adopted a resolution expressing its view that it was inappropriate for judicial nominees to be members of clubs where business was conducted, if those clubs discriminate on the basis of race, sex, or religion in their membership policies or practices.

I notice that you are a member of the Philadelphia Cricket Club, which up until last year, did not grant women members full voting privileges, and which currently has no black members. I know that you have discussed these issues previously with the committee staff, but I would like to get your responses on the record.

First, has the Philadelphia Cricket Club ended its practice of having separate membership status for women members?

Mr. BARTLE. Yes, it did. Last fall, Mr. Chairman, it did so without much debate. I think it was the feeling of all club members or virtually all that there should be equal membership for both men and women. In the past, women had complete access to the athletic and dining facilities, and it was just a case of their paying lower dues, but not having the vote. The club thought that was totally inappropriate and that has now been changed, and I supported that change.

Senator KENNEDY. Well, you should be commended for that. It is this kind of initiatives that we hope will be both observed and supported, and I think the record ought to indicate the activities that you undertook to try and deal with that situation.

Do you know why the club has no black members?

Mr. BARTLE. I do not, Mr. Chairman. The bylaws of the club provide that it does not discriminate on the basis of race, religion, color, national origin, or gender. I suspect none has applied.

I have talked both to the president of the club and the chairman of the admissions committee, and they assure me that the club does not discriminate, and if I thought for one moment that it did discriminate, I would resign, if I were unable to change the policy expeditiously.

Senator KENNEDY. Let me go to a different area. The People-to-People trip, there was some criticism in the press for your agreeing, while Pennsylvania Insurance Commissioner in the spring of 1980, to lead a group of insurance industry executives on a trip to Eastern Europe, organized by People-to-People, a group organized to foster goodwill between East and West. You obtained the approval of the Governor's office for the trip and you apparently went to some lengths to ensure that your fare would not be paid by industry executives.

Mr. BARTLE. That is correct.

Senator KENNEDY. But you later learned that, if a certain number of people agreed to participate, it was possible that you would receive a free ticket. In mid-May 1980, you were nominated to serve as the Pennsylvania Attorney General, and since you are no longer insurance commissioner, the trip was canceled, as I understand it.

The committee investigators have asked you about this, but I think it probably important that we have your responses on the record on this issue.

Mr. BARTLE. Mr. Chairman, you summarized it accurately. I was asked by People-to-People, which was a well-known organization, at least in the early 1980's, which sponsored good-will trips abroad by government officials. The Governor's office and I thought at the time it was a good idea to try to foster good relations between people of West and East, at a time before perestroika and glasnost.

I had been advised that the industry would not be paying for my trip, but I later learned that the way these groups work, that if so many people signed up, then I would be getting a free trip. The trip was canceled, I never went on the trip, and never accepted any trip or any remuneration whatsoever for doing so.

I believe that both President Eisenhower and President Kennedy had been honorary chairmen of the People-to-People program. It was highly respected and well recognized at the time.

Senator KENNEDY. It seems like an excellent program, as far as I can ascertain. If you are confirmed as a judge, you will be obligated to avoid even the appearance of impropriety or conflict of interest. Do you agree that it would have been an appearance of such a conflict, if, as insurance commissioner, you had accepted a free trip to Eastern Europe with insurance industry executives?

Mr. BARTLE. I think if I had to do it over again, Mr. Chairman, I would do it quite differently.

Senator KENNEDY. I note that, although you were appointed as Pennsylvania Attorney General, that office is normally filled by election, as are the seats of the Pennsylvania State judiciary. If you are confirmed as a Federal judge, you will have life tenure, without

the need to stand for election. I would be interested in your own opinion about the wisdom of electing judges or appointing judges.

We have in my own State appointed judges, but I think we are one of the few. I did not know whether you had formed any opinion on that or not.

Mr. BARTLE. Pennsylvania has an elective system for its State judiciary, and I am a firm believer in the appointive system, and so I would certainly advocate that for Pennsylvania.

Senator KENNEDY. Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

I notice you were insurance commissioner just 1 year. Were you appointed by the legislature, or how were you selected?

Mr. BARTLE. I was appointed insurance commissioner by the Governor of the Commonwealth. In Pennsylvania, the insurance commissioner is part of the Governor's Cabinet, and the reason my tenure was so short is that the Governor appointed me to fill a vacancy in the position of attorney general of Pennsylvania, so I moved from one spot to the other.

Senator THURMOND. You were insurance commissioner 1 year and appointed by the Governor?

Mr. BARTLE. Yes, Senator.

Senator THURMOND. And then the Governor appointed you attorney general?

Mr. BARTLE. That is correct, Senator Thurmond.

Senator THURMOND. Now, why did you serve only 1 year as attorney general?

Mr. BARTLE. My footnote to history is that I was the last appointed attorney general in Pennsylvania. Two years before, the Pennsylvania Constitution had been changed to provide for an elected attorney general 2 years into Governor Thornburgh's first term, and I filled out the last 8 or 9 months of the term of the appointed attorney general that he had appointed when he took office.

Senator THURMOND. And then they were elected by the people?

Mr. BARTLE. That is correct.

Senator THURMOND. I see. Now, what do you feel would be your most rewarding aspect of serving as a Federal district judge?

Mr. BARTLE. I think the most rewarding aspect would be doing justice under law.

Senator THURMOND. I believe your experience has mostly been of a civil nature, has it not?

Mr. BARTLE. That is correct, Senator Thurmond.

Senator THURMOND. Would you anticipate any trouble in handling the criminal cases, or what have you done to prepare yourself for that?

Mr. BARTLE. Senator Thurmond, I do not anticipate any trouble. I will study and work very hard at that area of the law. I have already begun studying the "Federal Rules of Criminal Procedure," manuals on the sentencing guidelines, and have had extensive discussions with one of my partners who is a former first assistant U.S. attorney in the eastern district of Pennsylvania, so I have begun my work in that area.

Senator THURMOND. We have three branches of Government, and this is the judicial. You heard what I had to say about judicial activism. Are you in accord with that thinking?

Mr. BARTLE. I am in very much in accord with it, Senator.

Senator THURMOND. I will be glad to support you. I think it would be unsafe to be around here with this distinguished member who recommended you and not supporting you.

Thank you very much.

Mr. BARTLE. Thank you.

Senator SPECTER. As usual, I agree with everything Senator Thurmond says. [Laughter.]

Senator KENNEDY. Senator Specter.

Senator SPECTER. I would only add one note, Mr. Bartle, because I know you very well, and I would say this in the presence of Judge Yohn, as well: Senator Thurmond in 1982, during the confirmation proceedings of Judge Caldwell and Judge Mansman, articulated what I thought was a very important statement, and he has sort of paraphrased it today earlier, when he asked a nominee if the nominee would be courteous, and then Senator Thurmond said, "The more power a person has, the more courteous that person should be." I think that is a very, very, very profound statement.

When I repeated it to Judge Niegard on the third circuit, when he was at his confirmation proceedings, Senator Thurmond was not present, and then Judge Niegard made a major point of it on his investiture, which was held in Erie later that year.

There is a certain leavening process with Senators who stand for election every 6 years, a lot of travel, a lot of concern—it is different, and Federal judges, especially, have lifetime tenure, and you have been in court a lot, and I have been in court a fair amount, and I have seen many instances of judicial behavior which is far from adequate, where judges belittle people who were in front of them.

I was in a Federal court not long ago and somebody called the Chief Judge the "president judge," not exactly a major infraction, but I heard a lot about it. I would just add what Senator Thurmond has said. I feel a little more responsibility for you and Judge Yohn than I do for others on the bench, and I know Senator Heinz—and I am very sorry Senator Heinz could not be here today—and I know Senator Wofford would like to have been here, but he could not be here, either.

But Senator Heinz was very interested in your nominations, and I just wanted to add that, but in stronger terms than the decibel level of my voice.

Mr. BARTLE. Thank you.

Senator SPECTER. Thank you very much, Mr. Chairman.

Senator KENNEDY. Thank you very much. I look forward to supporting your nomination, as well.

Mr. BARTLE. Thank you very much, Mr. Chairman.

Thank you, Senator Specter.

Senator KENNEDY. We have a statement in support of your nomination from Senator Wofford which, without objection, will be made a part of the record.

[The prepared statement of Senator Wofford follows:]

HARRIS WOFFORD
PENNSYLVANIA

ENVIRONMENT AND PUBLIC WORKS
FOREIGN RELATIONS
SMALL BUSINESS

United States Senate

WASHINGTON DC 20510-3603

STATEMENT
TO THE SENATE JUDICIARY COMMITTEE
REGARDING THE NOMINATION OF HARVEY BARTLE, III

Mr. Chairman and members of the Senate Judiciary Committee, I would like to express my support for the nomination of Harvey Bartle, III, Esquire, to the appointment of Federal Judge in the United States District Court for the Eastern District of Pennsylvania.

Mr. Bartle would bring to the federal court a long history of legal and public service. He has served as Pennsylvania's Insurance Commissioner and later as the Attorney General of the Commonwealth of Pennsylvania. In addition, he has some twenty three years of litigation experience as a practicing attorney for Dechert, Price & Rhoads in Philadelphia.

I believe Mr. Bartle will be a distinguished federal judge.



Senator KENNEDY. Judge Yohn.

Judge Yohn, do you want to introduce your family?

**TESTIMONY OF HON. WILLIAM H. YOHN, JR., OF PENNSYLVANIA,
TO BE A U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF
PENNSYLVANIA**

Judge YOHN. Yes, Mr. Chairman.

I would like to introduce my wife, Jean, who is here with me today, without whose support I would not be here.

Senator KENNEDY. We are delighted to have her here.

Are there any opening comments that you would like to make?

Judge YOHN. No, I do not think so, Senator, except to say I am very honored to be here today and I appreciate very much the opportunity to appear before your committee.

Senator KENNEDY. Judge Yohn, I note that while serving on the court of common pleas, you have been active in seeking to improve the procedures used by the court. Could you tell the committee about the changes that you instituted?

Judge YOHN. Yes, sir. The present judge of our court appointed a committee, a case management committee, to try to improve the method by which we were handling cases, and I was instrumental in helping to combine our civil and family divisions, so that we could accomplish a number of objectives. Most importantly, we were moving it toward a single-judge system, in that all pretrial matters in a single case thereafter went to the same judge, which had not been the practice before that, and all family matters involving the same family also then went to the same judge, which had not been the practice before. So, we felt that improved the system substantially, in terms of the quality of the justice rendered, and also it enabled us to move cases more expeditiously.

Senator KENNEDY. Do you have any thoughts about steps that this committee might take to improve the procedures used in the Federal courts?

Judge YOHN. I would hesitate to suggest anything in that regard at this time. I do not think that I am intimately involved enough with the Federal system, that at this point I would want to make any suggestions in that regard. I did this in the common pleas court, after serving there a number of years, and with the knowledge that you acquire through intimate experience like that, and I do not think that I would have the background necessary to make suggestions to my brethren who have been on the bench for some time already.

Senator KENNEDY. Before joining the State bench, Judge Yohn, you served for 12 years as a member of the Pennsylvania House of Representatives. How, if at all, has your approach to judicial decisionmaking been affected by the time you spent as a legislator?

Judge YOHN. I think there are probably a couple of things I might mention in that regard. One is I think it helps to interpret legislation, having had the experience in the legislative branch, so I think that I am perhaps better qualified on occasion to understand and interpret the legislation that has been passed and enacted into law.

The other thing perhaps touches on something Senator Specter mentioned a few minutes ago, an that is that going back to the electorate every 2 years is always a somewhat humbling experience, and I think that helps a lot in terms of understanding the power of the office as a judge and maintaining civility and respect for the people that appear before you.

Senator KENNEDY. What is your impression about how good a job judges do in construing statutes?

Judge YOHN. Mr. Chairman, I guess I would have to say that in Montgomery County, PA, which is the area that I am most familiar with, I think we do a pretty good job. I do not know that I could comment beyond that, particularly in the Federal system, where I do not see all the cases that are decided by the judges, so I do not think I would go beyond that. Certainly, in our county, we stick very close to what the legislature has enacted.

Senator KENNEDY. Thank you very much.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

I notice you finished at Princeton and then Yale Law School.

Judge YOHN. Yes, sir.

Senator THURMOND. You went to two very fine institutions and certainly have an excellent education. Do you feel you would have any difficulty in the transition from the State court to the Federal district court?

Judge YOHN. I do not think so, Senator. Obviously, it is going to take a lot of hard work in the beginning to accommodate to the new procedures and new practices. I have discussed it already with two of my brethren who went from the State system to the Federal system, and they have indicated to me that the transition from private practice to judge is a more difficult transition than from State to Federal system, so I do not anticipate any great trouble, but I know that it will be a lot of hard work, particularly in the beginning.

Senator THURMOND. Judge, Montgomery County Court of Common Pleas, does that cover criminal, as well as civil cases?

Judge YOHN. Yes, we are a general jurisdiction trial court, and basically I do civil trials, criminal trials, and family court matters.

Senator THURMOND. Do you feel that a district court judge should assume direct control over complex issues and cases, in order to avoid delays in the management of such cases?

Judge YOHN. Yes, I think that is essential. We do not do that in the State system nearly enough, and that was one of the reasons that I was interested through the case management committee to try to improve the contact of a judge and the involvement of a judge with each particular case. I think with the Federal system, where you do take control, I will be much happier and I think it is essential to move those cases along.

Senator THURMOND. I want to congratulate you upon your appointment by the President and also by being backed by a very able member of this committee here and a Member of the Senate. We all have great respect for the distinguished Senator from Pennsylvania, Senator Specter.

Judge YOHN. Thank you very much, Senator.

Senator THURMOND. I will be glad to support you.

Judge YOHN. Thank you.

Senator KENNEDY. Senator Specter.

Senator SPECTER. Thank you very much, Senator Thurmond, for those very generous comments.

I welcome you to the hearing today, Judge Yohn. I should add only one thing: There will be a lot of people in Montgomery County and otherwise who will be very pleased with the conclusion of this proceeding, and many in Pennsylvania and some of us here in Washington, including me.

Judge YOHN. Thank you very much, Senator.

Senator KENNEDY. I notice that in your civic activities, you worked in a drug abuse prevention program.

Judge YOHN. That is correct.

Senator KENNEDY. Could you tell me just a little bit about it? I am chairman of the Labor and Human Resources Committee, and we deal with most of those preventive aspects of our substance abuse war, and I was just interested in what you did there and whether you drew any conclusions about that work.

Judge YOHN. Well, this was a program that we originated actually in our community; a group of us got together and got it started. We raised some money privately, we hired an executive director who came from Chicago to be with us, and eventually then was appointed subsequent to that by the Governor of Pennsylvania to handle the State drug abuse program, so he was a very good quality person.

We were basically an educational program, and we developed programs for the school districts in our area, where we offered these programs to go out to the school districts and helped treat—not treat, but educate young people to the dangers of drug use and drug abuse.

The program was very successful.

There was also a treatment program in the area, and eventually, after about 8 years it merged into that program.

Senator KENNEDY. So, it was really just a private program that you were involved with when it was initiated?

Judge YOHN. It was completely private. We started it and it—

Senator KENNEDY. And now it is in some relation or the follow-on program is in some relationship with the general State program?

Judge YOHN. Yes, the program it merged into eventually is known as Alternatives, and that was a treatment program, and that is basically a program that is funded largely through contracts with the State, and in Pennsylvania those contracts were administered through the county.

Senator KENNEDY. Have you formed any opinion about the demand side and the supply side of the war on drugs?

Judge YOHN. Well, as a sitting judge, I have not been in criminal court for the last 2 years. I just went back to criminal court the 1st of July, but I still handle on a routine basis all of the probation and parole violations that come from those individuals that I sentenced while I was in criminal court; 90 percent of them involved drug use, and it is a very serious problem. There seems to be some indication that at least, among those persons who are not hardcore addicts, that there is lessened use, but many of those that we see

are hardcore addicts. They get treatment programs through it. We have them available through the county, but it is a difficult row to hoe for many of them.

Senator KENNEDY. I gather you assume that there is a role for trying to deal with the demand side, as well as the supply side?

Judge YOHN. Oh, absolutely.

Senator KENNEDY. Well, that is an additional insight into something which obviously is of concern to many, many families in this country.

I congratulate you and look forward to supporting your nomination.

Judge YOHN. Thank you very much, Mr. Chairman.

Senator KENNEDY. I have a statement in support of your nomination from Senator Wofford which, without objection, will be made a part of the record.

[The prepared statement of Senator Wofford follows:]

HARRIS WOFFORD
PENNSYLVANIA

ENVIRONMENT AND PUBLIC WORKS
FOREIGN RELATIONS
SMALL BUSINESS

United States Senate

WASHINGTON, DC 20510-3803

STATEMENT
TO THE SENATE JUDICIARY COMMITTEE
REGARDING THE NOMINATION OF WILLIAM H. YOHN

Mr. Chairman and Members of the Senate Judiciary Committee,
I hereby recommend Judge William H. Yohn, Jr. to the position of
Federal Judge in the United States District Court for the Eastern
District of Pennsylvania.

Judge Yohn has distinguished himself as a Judge in the
Montgomery County Court of Common Pleas since he was elected in
1981. Legal peers and litigants alike have found William Yohn to
be patient, courteous, and fair in carrying out his judicial
responsibilities.

Judge Yohn would bring to the Federal Court system not only
his experience as a State Court Trial Judge, but also that of an
Assistant District Attorney and former member of the Pennsylvania
House of Representatives. This, in addition to over twenty years
in an extensive and varied private law practice, clearly
demonstrates Mr. Yohn's comprehensive legal experience and
worthiness for the federal appointment.

Therefore, I urge the distinguished Members of the Senate
Judiciary Committee to grant a favorable decision and appoint
Judge Yohn a Federal Judge in the United States District Court
for the Eastern District of Pennsylvania.

✓ ✓ ✓ ✓
Harris Wofford

Senator KENNEDY. Thank you all very much.

The committee stands in recess.

[Whereupon, at 4:47 p.m., the committee was adjourned.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Michael Robert Hogan

2. Address: List current place of residence and office addresses.

Residence: 3954 Southridge Drive
Eugene, Oregon 97405

Office: 211 East 7th Avenue, Room #240
Eugene, Oregon 97401

3. Date and place of birth.

September 24, 1946; Oregon City, Oregon

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

Married to Christine Diane (Campbell) Hogan
Housewife and mother - substitute teacher for special
education classes with the 4J School District/state
of Oregon

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

University of Oregon, 1964-68, B.A., Honors College
Georgetown University Law Center, 1968-71, Juris
Doctor

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

1968-71 - Capital police force, Washington D.C.

1971-72 - Law clerk to Honorable Robert C. Belloni, United States District Court, District of Oregon, Portland, Oregon

1972-73 - Associate attorney for law firm of Miller, Anderson, Nash, Yerke & Wiener (now Miller, Nash, Wiener, Hager & Carlson), Portland, Oregon

1973-80 - Part time bankruptcy judge and part time magistrate for the United States District Court for the District of Oregon, Eugene, Oregon

1980-present - United States Magistrate Judge, United States District Court for the District of Oregon, Eugene, Oregon

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

No

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

Recipient of the Individual Dispute Resolution Award at the Fifth Annual Conference on Dispute Resolution at Willamette University School of Law, 1988.

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

Judicial Conference of the United States
-Committee on the Administrative Office, 1986-present

Roland K. Rodman Inn of Court (American Inn #95)
-Founder and President, 1990-present

National Council of United States Magistrates
-Chairman, Legislative Committee, 1977-78
-Treasurer, 1977
-Second Vice President, 1978
-First Vice President, 1979
-President, 1980-81
-Convention Chairman, 1987

Magistrates Association for Ninth Circuit
-First Chairman, 1980-81
-Executive Committee, 1982-83

University of Oregon School of Law
-Board of Visitors, 1988-present

Oregon State Bar Association, 1971-present
-Procedure and Practice Committee, 1971-74
-Uniform Jury Instruction Committee, 1976-78

Lane County Bar Association, 1973-present
-Committee on Federal Courts/Practice and Procedure,
1987-present

American Bar Association, 1987-present

Federal Bar Association, 1987-present

Oregon Federal/State Judicial Council
-Chairman, Committee on habeas corpus/death penalty cases,
1987-present

Ninth Circuit Judicial Conference
-Magistrate representative, 1977-present
-Executive committee, 1982-83

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

None active in lobbying before public bodies

American Leadership Forum, Oregon Chapter, 1987-present

Campus Life of Eugene, Oregon
-Board of Directors, 1977-present

Rotary, 1973-present

Myrtle Lodge #78 AF & AM, 1970-present

Western Conservative Baptist Seminary
-Board of Directors, 1978-89

Calvary Baptist Church
-Board of Directors, 1973-85

Gideon Society, 1977-83

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

Supreme Court of the State of Oregon, 1971

United States District Court for the District of Oregon, 1971

United States Court of Appeals for the Ninth Circuit, 1971

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

ABA Publication, THE BRIEF, "Drawing the Line on Civil Rights Fees" (Winter, 1988) - copy attached

Willamette Law School, LAW REVIEW, "Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation" (Summer, 1991) - copy attached

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

Excellent. May, 1988.

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.

1973-80 - Part time bankruptcy judge and part time magistrate for the United States District Court for the District of Oregon, Eugene, Oregon. Appointed by the district judges for the District of Oregon. The jurisdiction of the United States Bankruptcy judges is set forth at 28 United States Code § 157.

1980-present - United States Magistrate Judge for the United States District Court for the District of Oregon, Eugene, Oregon. Appointed by the district judges for the District of Oregon. The jurisdiction of the United States Magistrate judges is set forth at 28 United States Code § 636.

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

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

It is difficult to select the ten "most significant" opinions I have issued as a United States Magistrate Judge. I have selected the ten attached as exhibits to this questionnaire in part for their diversity.

Attachment #1: In Re Mendenhall, 4 B.R. 127 (1980)
This bankruptcy opinion is included as representative of six years service as a United States Bankruptcy Judge. It determined an aspect of exemption law in Oregon for approximately ten years.

Attachment #2: Rogue River Raft Trips, Inc. v. United States Department of Agriculture, U.S.D.C. Civil No. 83-6241-ME (1984)

This Freedom of Information Act proceeding, decided on the consent of the parties, involved construction of exemption 6 of the Act for personnel, medical, or "similar" files.

Attachment #3: United States of America v. Larry R. Miller, et al., U.S.D.C. Criminal No. 84-60013 (1984)
Resolution of the motions in this major methamphetamine conspiracy involved many issues of federal search and seizure law. Defendants entered guilty pleas after issuance of the Findings and Recommendation.

Attachment #4: Reimers v. State of Oregon, et al., U.S.D.C. Civil No. 83-6559-E, Ninth Circuit Court of Appeals Case No. 86-4366 (opinion May 13, 1988)
This inmate civil rights action, decided on the consent of the parties, involved freedom of religion issues. Affirmed in a published opinion of the Ninth Circuit Court of Appeals (Judges Hall, O'Scannlain, and Keller).

Attachment #5: Pryor, et al. v. Shiley, Inc., U.S.D.C. Civil Nos. 87-6575-E, 87-6576-E, 88-6039-E, 88-6040-E, 88-6042-E, 88-6044-E, 88-6056-E, 88-6045-E, 88-6047-E,

88-6043-E, 88-6041-E, 88-6057-E, 88-6065-E, Ninth Circuit Court of Appeals Case No. 89-35549 (opinion October 18, 1990)

These negligence and product's liability actions, decided on the consent of the parties, involved whether a plaintiff must allege "physical harm" under Oregon law. Affirmed in a unanimous memorandum opinion of the Ninth Circuit Court of Appeals (Judges Fletcher, Ferguson, and Fernandez).

Attachment #6: Earley v. Texaco Refining and Marketing, U.S.D.C. Civil No. 89-6367-E (1990)

This action by a gasoline dealer under the Petroleum Marketing Practices Act, tried on the consent of the parties, involved the definition of "bona fide" customer complaints required to justify termination. On appeal.

Attachment #7: Hunter v. United States of America, U.S.D.C. Civil No. 86-6032-C (1987)

This Federal Tort Claims Act action, decided on the consent of the parties, involved the death of a nine year old boy as a result of his being struck by a forest service vehicle while waiting for a school bus.

Attachment #8: Rupnick v. Medford School District 549C, et al., U.S.D.C. Civil No. 88-6430-ME (1990)

This civil rights and employment action, decided on the consent of the parties, involved whether a federal court action is appropriate where a plaintiff has already recovered in state proceedings substantially what was lost in an improper discharge. On appeal.

Attachment #9: Graham v. Curry County, U.S.D.C. Civil No. 88-6265-E (1989)

This constitutional action, decided on the consent of the parties, involved regulation of federally licensed amateur radio facilities.

Attachment #10: Dettmer, et al. v. Oakridge Inn Partnership, et al., U.S.D.C. Civil No. 85-6168-E (1987)

This action involved the relationship between and interpretation of the Housing and Community Development Act of 1974, the Civil Rights Act and the Sherman Anti-Trust Act. The findings and recommendation (Attachment #10) dated July 10, 1987, was adopted by United States District Court Judge Helen Frye on August 5, 1987, and the findings and recommendation (Attachment #10A) dated December 21, 1987, was adopted by United States District Court Judge Malcolm Marsh on March 11, 1988.

- (2) a short summary of and citations for all appellate opinions where your decisions were reversed or

where your judgment was affirmed with significant criticism of your substantive or procedural rulings:

State of Oregon, etc. v. Riverfront Protection Ass'n, 672 F.2d 792 (1982)

The state of Oregon filed an action seeking a declaratory judgment that a disputed stretch of a river was navigable when Oregon was admitted to the Union. The court held that the river was not navigable, and therefore, the title to the riverbed did not vest in the state. The Ninth Circuit reversed and remanded, relying in part on a case decided five weeks after the court's opinion.

Anderson v. United Finance Company, 666 F.2d 1274 (9th Cir. 1982)

Plaintiff sued a lender under the Equal Credit Opportunity Act. The court denied relief on the basis of lack of proof of damages. The Ninth Circuit reversed and remanded for additional findings as to damages and attorneys fees. The action was settled prior to any further court action.

Jeldness v. Watson, 857 F.2d 1478 (9th Cir. 1988)

Plaintiffs prevailed in part in this civil rights prison conditions action. The Ninth Circuit reversed and remanded in part on procedural grounds. The case was retried and plaintiffs' application for prevailing party attorneys fees is now before the court.

Haines v. Continental Insurance Co., 852 F.2d 1289 (9th Cir. 1988)

The court granted defendant summary judgment in this property damage insurance coverage action. The Ninth Circuit reversed after interpreting the insurance contract differently.

Casey v. Emery, 879 F.2d 865 (9th Cir. 1989)

Plaintiff prevailed overall in this conversion of cattle diversity action and was also awarded punitive damages, although defendant was granted a set off. The court granted defendant's motion for judgment notwithstanding the verdict to the extent that punitive damages were set aside on the ground there was insufficient evidence of aggravating circumstances. The Ninth Circuit reinstated the punitive damage award and affirmed in all other respects.

Reed v. Hoy, 891 F.2d 1421 (9th Cir. 1989)

Plaintiff brought this civil rights excessive force action against a police officer and a county. Defendant prevailed before the jury. The Ninth Circuit reversed and remanded acknowledging that the court had correctly

applied Ninth Circuit case law when instructing the jury, but recognizing the intervening Supreme Court decision of Graham v. Conner, 109 S.Ct. 1865 (1989), which held that the Fourth Amendment rather than the Fourteenth Amendment applies to an excessive force claim in the context of an arrest. A petition for certiorari is now pending before the United States Supreme Court.

Zamsky v. Hansell, ____ F.2d ____ (1991), U.S. District Court Civil No. 86-6592-HO, U.S. Court of Appeals Case No. 89-35281 (Opinion May 17, 1991)

Plaintiff alleges in this civil rights action that the Oregon Land Conservation and Development Commission violated his constitutional rights under the equal protection, due process and takings clause in a rezoning decision. The court found that defendants were immune from liability for damages because they were acting in a legislative capacity. The Ninth Circuit reversed and remanded, finding that defendants were acting in an executive capacity.

- (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions:

My opinions on constitutional issues have not been particularly significant in terms of constitutional interpretation, but instead have primarily involved instructing juries on Ninth Circuit case law about constitutional issues so the juries can resolve discreet issues concerning past or present harm or damage to specific parties.

I have also recommended decisions for habeas corpus and inmate condition cases, applying settled case law to the issues raised by the parties.

The cases involving constitutional issues that have been considered by the Ninth Circuit Court of Appeals are those mentioned earlier in this answer and the following:

Setty v. State Board of Higher Education, 852 F.2d 572 (9th Cir. 1988)

Davis v. City of Culver, Oregon, 703 F.2d 574 (9th Cir. 1983)

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

None

17. Legal Career:

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

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

Law clerk for the Honorable Robert C. Belloni,
United States District Court for the District of
Oregon, Portland, Oregon, 1971-72.

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

Did not practice as a sole practitioner.

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

Associate attorney with the law firm of Miller, Anderson, Nash, Yerke & Wiener (now Miller, Nash, Wiener, Hager & Carlson), 111 SW 5th Avenue, Suite 3400, Portland, Oregon 97204 - 1972-73

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

My practice at Miller, Anderson, Nash, Yerke & Wiener in 1971-72 was general litigation, primarily consisting of providing a defense in civil litigation, with some plaintiff's civil litigation and federal court criminal defense representation.

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

My former clients included insurance companies, shipping companies, banking institutions, private individuals, and federal criminal defendants.

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

Frequently

2. What percentage of these appearances was in:
(a) federal courts - 80%
(b) state courts of record - 20%
(c) other courts - 0%
3. What percentage of your litigation was:
(a) civil - 90%
(b) criminal - 10%
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.
I tried four cases to verdict - three as sole counsel and one as associate counsel.
5. What percentage of these trials was:
(a) jury - 66%
(b) non-jury - 33%

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

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

My brief experience in the private practice of law was as an associate with the above noted Portland, Oregon law firm in 1972-73. Neither the firm nor I retained records of my

work. All of my trial experiences were successful. They included:

(1) Defense of First National Bank of Oregon as associate counsel for a multi-million dollar antitrust action involving the method utilized by the bank to compute interest on a series of commercial loans. My responsibilities included witness preparation, presentation of evidence at trial and writing the several extensive memoranda submitted for the bank. This case was tried to United States District Judge Otto R. Skopil (now Senior United States Ninth Circuit Judge). Chief counsel for the bank was Frederik R. Yerke (deceased). One of the other defendants was represented by Jack Kennedy (2600 Pacwest Center, 1211 SW 5th Avenue, Portland, Oregon 97204, phone number (503) 228-6191).

(2) My first trial as sole counsel was in a civil contract action tried to the court before then Multnomah County Circuit Court Judge William R. Dale (now United States Magistrate Judge for the District of Oregon). My principal witnesses included Dean DeChaine and Richard Edwards, partners in the law firm for which I worked as an associate.

(3) Though I served as both sole and associate counsel in several other cases, none of which were significant except to the parties, much of my work was to handle federal and state court calls and motions for the litigation department of the firm. Our federal district court employed a master calendar system administered by Judge Gus J. Solomon and it was my weekly responsibility to appear for the master calendar calls and motion calendars in both state and federal courts.

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

I have been serving as a Magistrate Judge in the District of Oregon for approximately eighteen years. As the only judicial officer in the southern division of the district for most of that time, I was delegated administrative responsibility for approximately thirty percent of the civil and criminal cases in the district. The parties consented to trial before a Magistrate Judge in approximately ninety percent of the civil cases, for which I then sat as a district judge, with any appeal taken directly to the circuit. I tried 203 cases on the

taken directly to the circuit. I tried 203 cases on the consent of the parties and issued 2,938 opinions and findings and recommendations deciding dispositive matters in the ten year period from 1981 through 1990.

I have also provided a settlement forum with the court. I preside at approximately 100 settlement conferences each year, of which about 95 percent result in settlement. There has been a broad acceptance of these conferences by the bar in Oregon and the requests for this service far exceed the days available to provide it. These settlement conferences have provided a tangible, alternate method of encouraging the fairest, least expensive and most timely delivery of dispute resolution services to the citizens of Oregon.

In 1978 and 1979, I represented the United States Magistrate Judges in the successful effort to amend the jurisdictional statute pertaining to magistrate judges (28 U.S.C. § 636). I had the opportunity to work closely with legislative staff in developing the legislation, testify before the Senate Committee on the Judiciary, and was invited to and did attend staff conference meetings with Senate and Congressional representatives after each body had passed a version of the legislation.

In 1990, I founded an American Inn of Court chapter in Eugene, Oregon, which has been well received by the bar and is contributing to the excellence and civility of trial practitioners in southern Oregon.

I serve as the only magistrate judge member of the Administrative Office Committee of the United States Judicial Conference. This committee serves a policy-making and liaison function for the Administrative Office of the courts.

I serve as chairman of the committee of Oregon State/Federal Judicial Council, appointed by the Chief Judge of the District Court of Oregon and the Chief Justice of the Oregon Supreme Court, on the subject of habeas corpus/death penalty cases, to communicate about and coordinate policy of those courts and promote fairness and efficiency in handling those cases.

I organized the Magistrates Association for the Ninth Circuit in 1980 at the request of Chief Judge James R. Browning. That association continues to provide a liaison to the circuit court.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

None.

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

I will recuse myself from any case where I have a conflict of interest. If the conflict is only apparent, not actual, I will notify the parties and recuse myself upon the request of any party. Judges should avoid the appearance of impropriety, as well as actual impropriety, in all activities.

I will continue to follow the guidelines promulgated in this regard by the Judicial Conference of the United States.

I am not aware of any potential conflicts of interest during my initial service as a district judge.

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

No

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

A copy of the financial disclosure report follows:

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

Completed schedule attached.

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

No

Rev. 1/91

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1993, Pub. L. No.
103-264, November 30, 1993
(5 U.S.C.A. App. 6, 65151-152)

1. Person Reporting (last name, first, middle initial) MOGAN, MICHAEL R.	2. Court or Organization United States District Court District of Oregon	3. Date of Report 5/15/91
4. Title (Article III judges indicate active or full-time status; magistrates to judges indicate full or part-time) United States Magistrate Judge Full time	5. Report Type (check appropriate type) ___ Nomination, Date _____ ___ Initial <input checked="" type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period 5/15/91- 1990
7. Chambers or Office Address 211 East 7th Avenue, Eugene, Oregon 97401		
<p>IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.</p>		

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITION	NAME OF ORGANIZATION/ENTITY
<input checked="" type="checkbox"/> NONE (No reportable positions)	_____
_____	_____
_____	_____
_____	_____

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATE	PARTIES AND TERMS
<input checked="" type="checkbox"/> NONE (No reportable agreements)	_____
_____	_____
_____	_____
_____	_____

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATE (Temporary only)	SOURCE AND TYPE	GROSS INCOME (Yours, Not spouse's)
<input checked="" type="checkbox"/> NONE (No reportable non-investment income)	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting
BOGAN, MICHAEL R.Date of Report
5/15/91**REIMBURSEMENTS and GIFTS – transportation, lodging, food, entertainment.**
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCE	DESCRIPTION
<input type="checkbox"/> NONE (No such reportable reimbursements or gifts)	
1 The Foundation	Lodging at 3-day conference at \$99 + tax per night
2	
3	
4	
5	
6	
7	
8	

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCE	DESCRIPTION	VALUE
<input checked="" type="checkbox"/> X NONE (No such reportable gifts)		\$ _____
2		\$ _____
3		\$ _____
4		\$ _____
5		\$ _____
6		\$ _____
7		\$ _____

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITOR	DESCRIPTION	VALUE CODE
<input checked="" type="checkbox"/> X NONE (No reportable liabilities)		
1		
2		
3		
4		
5		
6		
7		

VALUE CODES: J = \$15,000 or less K = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
B = \$250,001 to \$500,000 D = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting
HOGAN, MICHAEL R.Date of Report
5/15/91

II. INVESTMENTS and TRUSTS - income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period					
	(1) Act. Code: (A-E)	(2) Type (e.g., rent or int.)	(1) Value Code: (J-P)	(2) Value Method Code: (Q-S)	(1) Buy, sell, redeem- ption	(2) Date: Month Day	(3) Value Code: (J-P)	(4) Date: Month Year	(5) Ident. if private transaction	
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)										
1 Timberland in Coos County (purchased 1973 for \$17M)	A	M	Q							
one third interest in approx. 150 acres, located on Fairview Route										
9 units of aptments in Coos Bay, Oregon (six units located in Myrtle Point, Or., and three units located in Bandon, Oregon)	E	Rent	M	W						
345 shares stock in Bank of Myrtle Point (Oregon)	A	J	T	sold	1/91	J	A	Western Bank		
1 single family bldg. lot in Springfield, Oregon, located on South 70th Street	A	J	W							
1/2 interest in 5-plex lot in Springfield, Oregon, located on 43nd Street	A	K	W							
"Hills" timberland in Coos Bay, Oregon - one third interest in approximately 1/40 acres, located on Lamp Mountain Road	A	J	Q							
Note receivable from Bank of Myrtle Point, Oregon	C	L	T	redemption	1/91	L	E	Western Bank		
17										
18										
19										
20										

1 Income/Gain Codes: A=\$1,000 or less B=\$1,001 to \$2,500 C=\$2,501 to 5,000 D=\$5,001 to \$15,000
 (Same Col. B1 & D4) E=\$1,000 or less F=\$1,001 to \$100,000 G=\$100,001 to \$1,000,000 H=More than \$1,000,000
 2 Value Codes: I=\$1,000 or less J=\$1,001 to \$100,000 K=\$100,001 to \$1,000,000 L=\$1,000,001 to \$250,000
 (Same Col. C1 & D1) M=\$250,001 to \$500,000 N=\$500,001 to \$1,000,000 O=\$1,000,001 to \$2,500,000
 P=\$2,500,001 to \$5,000,000 Q=\$5,000,001 to \$15,000
 3 Value Method Codes: (A=Accts Recd) R=Net Book Value S=Assessed V=Other T=Market
 (Same Col. C2) U=Book Value W=Other X=Retained

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

HOGAN, MICHAEL R.

Date of Report

5/15/91

III. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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.A. app. 7, § 501 et seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature

Mahan/R.H. Hogan

Date 5/15/91

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.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

AO 1791

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-554, November 30, 1989
(5 U.S.C. App. 6, 88101-112)

1. Person Reporting (last name, first, middle initial) HOGAN, MICHAEL R.	2. Court or Organization United States District Court District of Oregon	3. Date of Report 5/31/91
4. Title (Article III Judges indicate active or senior status; Magistrate judges indicate full- or part-time) United States Magistrate Judge Full time	5. Report Type (check appropriate type) ____ Nomination, Date _____ ____ Initial <input checked="" type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period 1/1/91 to 6/1/91
7. Chambers or Office Address 211 East 7th Avenue, Eugene, Oregon 97401		

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

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

<u>POSITION</u>	<u>NAME OF ORGANIZATION/ENTITY</u>
<input checked="" type="checkbox"/> NONE (No reportable positions)	_____
_____	_____
_____	_____

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

<u>DATE</u>	<u>PARTIES AND TERMS</u>
<input checked="" type="checkbox"/> NONE (No reportable agreements)	_____
_____	_____
_____	_____

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

<u>DATE</u> (Honors only)	<u>SOURCE AND TYPE</u>	<u>GROSS INCOME</u> (yours, not spouse's)
<input checked="" type="checkbox"/> NONE (No reportable non-investment income)	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____
_____	_____	\$ _____

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

BOGAN, MICHAEL R.

Date of Report

5/31/91

I. REIMBURSEMENTS and GIFTS – transportation, lodging, food, entertainment.
 (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCE	DESCRIPTION
<input checked="" type="checkbox"/> X NONE (No such reportable reimbursements or gifts)	
1	
2	
3	
4	
5	
6	
7	
8	

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCE	DESCRIPTION	VALUE
<input checked="" type="checkbox"/> X NONE (No such reportable gifts)		\$ _____
1		\$ _____
2		\$ _____
3		\$ _____
4		\$ _____

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical " (S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITOR	DESCRIPTION	VALUE_CODE*
<input checked="" type="checkbox"/> X NONE (No reportable liabilities)		
1		
2		
3		
4		
5		
6		

* VALUE CODES: J = \$15,000 or less K = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
 B = \$250,001 to \$500,000 C = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting
BOGAN, MICHAEL R.Date of Report
5/31/91

INVESTMENTS and TRUSTS - Income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of instructions.)

A. (Description of Assets) <small>Indicate where applicable, owner of the asset. Check appropriate box: (1) "I" for individual ownership; (2) "J" for joint ownership of report- ing individual and spouse; (3) "P" for joint ownership by spouse; (4) "D" for ownership by dependent child. Put ownership by dependent child in separate column by spouse (D). Place "(X)" after each asset exempt from prior disclosure.</small>	B. Income dates reporting period		C. Gross value dates reporting period		D. Transactions during reporting period					
	(1) Amt.; Code (A-E)	(2) Type; Soc. or rent Int.	(1) Value; Code* (J-P)	(2) Value; Method; Code* (J-P)	(1) Type (e.g., Buy/Sell, Merge, Redem- ption)	(2) Date; Month; Day	(3) Value; Code* (J-P)	(4) Gain; Code (A-E)	If not exempt from disclosure	
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)										
1. Timberland in Coos County (purchased 1973 for #17M) one third interest in approx. 150 acres, located on Fairview Route 9 units of aptms in Coos Bay, Oregon (six units located F in Myrtle Point, Or., and three units located in Bandon, Oregon single family bldg. lot in Springfield, Oregon, located South 70th Street	A	M	Q		*See paragraph VIII					
2. interest in 5-plex lot in Springfield, Oregon, located on 42nd Street	A	K	W							
"Hills" timberland in Coos Co., Oregon - one third interest in approximately 163 acres, located on Lampa Mountain Road	A	J	Q		*See paragraph VIII					
3. 1% interest in Hogan Family Partnership	A	N	W							
4.										
5.										
6.										
7.										
8.										
9.										
10.										
11.										
12.										
13.										
14.										
15.										
16.										
17.										
18.										
19.										
20.										
<small>Income/Asset Codes:</small>		<small>B=\$1,000 or less</small>		<small>B=\$1,000 to \$2,500</small>		<small>C=\$2,501 to 5,000</small>		<small>D=\$5,001 to \$15,000</small>		
<small>I=Interest S=Sale R=Rent U=Use</small>		<small>I=\$1,001 to \$25,000</small>		<small>S=\$1,001 to \$25,000</small>		<small>C=\$2,501 to \$50,000</small>		<small>D=\$50,001 to \$250,000</small>		
<small>J=Joint P=Joint D=Dependent Child</small>		<small>J=\$1,001 to \$25,000</small>		<small>P=\$1,001 to \$25,000</small>		<small>D=\$50,001 to \$250,000</small>		<small>H=\$100,001 to \$250,000</small>		
<small>Value Codes:</small>		<small>G=Appraised V=Book Value</small>		<small>H=Market V=Other</small>		<small>S=Abnormal W=Estimated</small>		<small>T=Cost/Market</small>		

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
HOGAN, MICHAEL R.	5/31/91

III. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

My interest in two parcels of timberland was placed in the Hogan Family Partnership in May, 1991, along with funds from the Shelter Trust established by my father, Robert G. Hogan, deceased. I now own an 11% interest in that partnership with Maxine Hogan, my mother, and Walter Hogan, my brother, which owns several family investments, which include real estate, dairy cattle, stocks, bonds, and certificates of deposit.

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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.A. app. 7, § 501 et seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature Michael E. Hogan Date 5/31/91

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.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington DC 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	2,000.00	Notes payable to banks—secured
U.S. Government securities—add schedule	* 260.00	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 tax and interest
Doubtful		Real estate mortgages payable—add schedule
Real estate owned—add schedule	** 360.000.00	* * 66,500.00
Real estate mortgages receivable		Chattel mortgages and other liens payable
Autos and other personal property	40,000.00	Other debts—itemize:
Cash value—life insurance		Credit cards 2,000.00
Other assets—Remain:		Note payable to family
1/2 interest in Hogan		Partnership 6,500.00
Family Partnership	490,000.00	Total Liabilities 75,000.00
		Net worth 815,260.00
		Total Liabilities and net worth 890,260.00
Total assets	890,260.00	
 CONTINGENT LIABILITIES		
As endorser, co-maker or guarantor	None	Are any assets pledged? (Add schedule)
On leases or contracts	None	No
Legal Claims	None	Are you defendant in any suits or legal actions?
Provision for Federal Income Tax	None	No
Other special debt	None	Have you ever taken bankruptcy?
		No

SCHEDULES TO CONFIDENTIAL FINANCIAL STATEMENT*** SECURITIES**

20 shares Del Webb, Inc.	\$ 260.00
TOTAL: \$260.00	

**** REAL ESTATE OWNED**

Coos County, Oregon Apartments (nine units)	\$140,000.00
3954 Southridge Drive (residence)	200,000.00
Springfield, Oregon building lot	10,000.00
Half-interest in 5-plex lot	10,000.00

TOTAL: \$360,000.00

***** REAL ESTATE MORTGAGES PAYABLE**

Freedom Federal Savings and Loan for 3954 Southridge Drive	\$ 50,000.00
Western Bank for apartment units in Coos County, Oregon	16,500.00

TOTAL: \$66,500.00

III. GENERAL (PUBLIC)

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

I have presided as settlement judge at the request of the parties in several state cases where interests such as significant community benefit, the function of the state courts, the organization and cooperation of the bar, and grievous loss to individuals have been at issue.

I have often served as organizer and speaker for law related seminars, including those for private citizens. Specifically, I have sponsored an annual seminar on Federal Court law and practice for southern Oregon bar associations. I have also spoken to private citizen Law Day seminars, and visited school classrooms, service clubs and organizations, and professional and business associations as a speaker on topics concerning the judiciary and matters which come before the courts.

I have spoken to inmate groups in various institutions on topics such as constitutional law and practical litigation tips. I also instituted the practice of holding regular court proceedings at the various correctional facilities in Oregon so that inmate litigants have the opportunity to argue their positions in person, rather than only on paper or by telephone.

I have supported community service projects through membership in the Rotary Club and youth service efforts as a board member of Lane County Campus Life. For example, I have chaired the Disadvantaged Youth Committee of the local Rotary Club and have supported the initiation of youth counseling services to the local juvenile correctional facility through the Lane County Campus Life.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementa-

tion of membership policies? If so, list, with dates of membership. What have you done to try to change these policies.

I have been a member of the Downtown Eugene Rotary Club since 1973. I expressed my objection to the lack of women members in that club, and it was among the first to receive women into membership after that was approved by Rotary International. A substantial number of women have been members of that club for approximately four years.

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

Yes. Past presidents of the Oregon State Bar Association were engaged by the Oregon United States senators to submit a list of three to ten judicial candidates for the senators' review. This commission recommended me as the pre-eminent candidate for nomination, and named six other candidates as qualified, in alphabetical order. Both senators submitted this list to the President and endorsed the commission's recommendation. I was interviewed at the Justice Department approximately one year ago. I have also been interviewed by representatives of the Federal Bureau of Investigation and the American Bar Association Standing Committee on Federal Judiciary.

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

No

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

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

levels of government.

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

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

The federal judiciary should function as an independent co-equal branch of government but exercise the judicial restraint to decide only those disputes for which Congress has clearly authorized jurisdiction and only those issues the parties have specifically submitted for resolution. Federal judges should follow traditional concepts of standing and mootness and decide the actual cases and controversies of the parties before the court on only the grounds necessary for the decision.

As a trial judge on the District Court for the District of Oregon, I would follow judicial precedent of the Ninth Circuit Court of Appeals and the Supreme Court of the United States.

QUESTIONNAIRE FOR JUDICIAL NOMINEES**I. BIOGRAPHICAL INFORMATION (PUBLIC)**

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

Shelby Highsmith - Isaac Shelby Highsmith, Jr. [As a child I was referred to as my father's "junior"; Isaac Shelby Highsmith, Jr. It was not until June, 1945, when I secured a copy of my birth certificate, that I realized my legal name was Shelby Highsmith. Birth Certificate attached.]

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

Residence: 7575 Schoolhouse Road
Miami, FL 33143

Office: Highsmith, Strauss, Glatzer & Deutsch, P.A.
3370 Mary Street
Coconut Grove, (Miami) FL 33133

3. Date and place of birth.

January 31, 1929, Jacksonville, Florida.

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

Married to Mary Jane Zimmerman. Realtor Associate; Byrne-Rinehart and Company, 5830 S.W. 73rd Street, South Miami, FL 33143.

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

Georgia Military College (High School and Junior College) Milledgeville, Georgia, 1945 to 1949; awarded Associate Degree in June, 1949.

University of Kansas City, Missouri (now the University of Missouri at Kansas City), 1955 to 1958; awarded a liberal arts degree in history and government on June 1, 1958.

University of Kansas City School of Law, 1955-1958; awarded LLB Degree on June 1, 1958. Subsequently, awarded Juris Doctor Degree from the University of Missouri at Kansas City, retroactive degrees to June 1, 1958.

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

1958-1959 - Associate with the law firm of McElhern & Formby, Waltower Building, Kansas City, Missouri.

1959-1962 - Associate with the law firm of Sams, Anderson, Alper, Meadows and Spencer, Miami, Florida.

1962-1970 - Partner with the law firm of Highsmith & Ezzo (subsequently, Highsmith, Ezzo & Nelson; subsequently, Highsmith and Nelson, Miami, Florida).

1975-Present - Highsmith, Strauss & Nelson, P.A. (subsequently, Highsmith & Strauss, P.A.; subsequently, Highsmith, Strauss & Glatzer; presently, Highsmith, Strauss, Glatzer & Deutsch, P.A.)

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

Yes. December 24, 1948 to April 28, 1955, United States Army. Served to Captain, serial number 02014623. Honorable discharged.

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

I graduated from law school "with distinction" (top student scholastically), Who's Who in American Colleges and Universities, Torch and Scroll Honor Society, Bench and Robe Honor Society, Omicron Delta Kappa. During the Korean War I was awarded the Bronze star. I am listed in Who's Who in America and Who's Who in the World. Additionally, I have received numerous citations from area civic organizations in recognition of my endeavors.

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

Missouri Bar Association, Florida Bar Association, American Bar Association, Dade County Bar Association and the International Society of Barristers.

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

Lobbying - None.

Phi Alpha Delta Legal Fraternity.

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

I was admitted to practice before the Supreme Court of the State of Missouri and all subordinate courts in 1958. Likewise, I was admitted to practice before the Supreme Court of Florida and all subordinate courts in 1958.

United States District Court, Western District of Missouri, 1958-1959.

United States District Court, Southern District of Florida, 1960 - present.

United States Middle District Court of Florida, 1989 - present.

United States Court of Appeals, Fifth Circuit, 1981 - present.

United States Court of Appeals, Eleventh Circuit, 1981 - present.

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

None.

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

Excellent. May 22, 1991.

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 of the Eleventh Judicial Circuit in and for Dade County, Florida; 1970-1975. This is Florida's highest trial court and exercises appellate jurisdiction over county courts and administrative bodies.

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

- 1) i. Opinion rendered in Jemco Mastercraft Homes, Inc., v. Metropolitan Dade County, (Circuit Court, Dade Co., 1971) 38 Fla. Supp. 111.
 - ii. Brickell Townhouse v. Tax Assessor, et al (Circuit Court, Dade Co., 1972) 38 Fla. Supp. 15.
 - iii. Womack, et al. v. Dade, et al. (Circuit Court, Dade Co., 1973) 38 Fla. Supp. 118.
- 2) i. Modern Wood Industries, Inc. v. Village Royale, Inc., 327 So.2d 899 (3rd DCA, 1976).

Appeal was taken by plaintiff from an order of the Circuit Court, Dade County, Judge Highsmith, granting defendant's motion for judgment on the pleadings to recover for work done and materials furnished. The District Court of Appeal held that summary final judgment which, while entered in favor of defendant on claim as set forth in complaint, was without prejudice to right of plaintiff to seek recovery as to fabrication and installation of kitchen cabinets became law of case once it was affirmed on appeal and, in subsequent suit wherein plaintiff sought to recover on claim for furnishing and installation of kitchen cabinets, entry of a judgment on the pleadings against claim was error.

REVERSED and remanded.

- ii. Thomas Donald Olson v. Mary Jane Olson, 321 So.2d 899 (3rd DCA, 1975).

An ex-husband sought review of that provision of a divorce decree entered by the Circuit Court, Dade County, Judge Highsmith, awarding the ex-wife the marital residence. The District Court of Appeal held that the wife had not made contributions to the acquisition of the home which were above and

beyond the performance of ordinary marital duties' when she loaned her husband \$4,500 for private training because both parties desire that he become an airline pilot.

REVERSED and remanded.

iii. Joel Mallin v. Sunshine Kitchens, Inc., 314 So.2d 203 (3rd DCA 1975).

From an order of the Circuit Court for Dade County, Judge Highsmith denying motion to quash service, an appeal was taken. The District Court of Appeal, per curiam, held that process served upon defendant who entered jurisdiction for purpose of discussing settlement was invalid where after representatives of plaintiff had procured undertaking by defendant to come to jurisdiction, they proceeded to file complaint, caused process to issue and arranged to have it served during good-faith settlement conference.

REVERSED and remanded with directions.

iv. Bruce A. Bob v. Juliet Bob, 312 So.2d 798 (3rd DCA, 1975).

After remand, 310 So.2d 328, the Circuit Court, Dade County, Judge Highsmith, entered order directing husband to pay \$250.00 attorney fees to wife's attorney on postjudgment motion for nonpayment of alimony provided in final judgment of dissolution of marriage, and husband took interlocutory appeal. The District Court of Appeal, Third District, held that award of attorney fees was improper.

Order REVERSED.

v. Martha Gilbert v. Robert Gilbert, 312 So.2d 511 (3rd DCA, 1975).

Wife appealed from an order of the Circuit Court, Dade County, Judge Highsmith, modifying settlement agreement entered into by the parties. The District Court of Appeal held that the agreement under which wife received valuable property, (including marital home), husband covenanted to maintain insurance policy on his life in wife's favor and make her the owner thereof, parties released claims to property of each other, and wife acknowledged that benefits received by her under agreement were accepted in lieu of all claims for support was a property settlement not subject to modification.

REVERSED.

vi. Harrison M. Solomon v. Harrison Solomon, 311 So.2d 385 (3rd DCA, 1975).

Father moved to modify and delete child support provision of divorce decree requiring him to provide child support until son reached age of 21 on ground that son had reached age of 18, the age of majority under state law. The son

moved to intervene. The Circuit Court for Dade County, Judge Highsmith, denied motion to intervene and entered order eliminating support requirement, and appeals were taken. The District Court of Appeal held that father's obligation to provide support for 18-year-old son under divorce decree requiring him to pay child support until son reached age of 21 was not affected by statute establishing age of 18 as age of majority.
 REVERSED and remanded with directions.

- vii. Tiffany Realty, Inc. v. William R. Alvin, 311 So.2d 832 (3rd DCA, 1975).

Appeal was taken from judgment of the Circuit Court, Dade County, Judge Highsmith, that seller was entitled to retain deposit and accrued interest on unexecuted mortgage under real estate sales contract. The District Court of Appeal, Judge Nathan, held that where written real estate sales contract does not refer to any obligation of a purchaser to pay seller interest on mortgage from stated date of closing until extended closing date, the mortgage was not executed, and where sales contract provided that interest in taxes were to be prorated at time of closing, purchaser was not liable to seller for additional interest and, where seller refused to sell because the property increased in value prior to the extended closing date, when purchaser sought specific performance, purchaser did not forfeit its deposit.
 REVERSED and remanded with directions.

- viii. Ernesto Marquez v. Ernesto Mederos and Fernando Mederos, 307 So.2d 873 (3rd DCA, 1975).

Driver of automobile brought action against driver of following automobile for property damage sustained in rear-end collision, and on his own behalf and as next friend for his son, who was injured in the accident. A jury returned a verdict awarding no damages to the son, and \$1,800 to the father driver on his derivative claim. The Circuit Court, Dade County, Judge Highsmith, rendered judgment for the defendants, and subsequently granted plaintiff's motion for new trial. Defendants appealed. The District Court of Appeal, Charles Carroll, Associate Judge, held that where the son suffered no permanent injury, the father could not recover on a derivative claim; and that where no evidence was presented to support the property damage claim, grant of a new trial in relation thereto was inappropriate.
 REVERSED and remanded.

- ix. Paul R. Young and Irene A. Young v. Max B. Charnack, 295 So.2d 665 (3rd DCA, 1974).

Action to foreclose first mortgage encumbering real estate. The Circuit

Court, Dade County, Judge Highsmith, entered summary judgment in favor of plaintiff for foreclosure of first mortgage, entered summary judgment in favor of cross claimant bank for foreclosure of its junior mortgage lien, and entered summary judgment in favor of defendant holder of superior mortgage lien directing payment, and defendant mortgagor appealed. The District Court of Appeal, Judge Carroll, held that prior judgment lienholders were not entitled to "foreclosure" lien in absence of showing that legal execution on the prior judgment would not be effective, and that bank's cross claim to foreclose junior mortgage raised substantial fact issues precluding summary judgment. Affirmed in part, REVERSED in part, and remanded.

- x. Gustavo E. Mustelier and Amelia C. Mustelier, his wife v. Consolidated Mutual Insurance Company, 296 So.2d 634 (3rd DCA, 1974).

Appeal by insurers from a final judgment of the Circuit Court for Dade County, Judge Highsmith, reforming a homeowner's policy to limit coverage to \$500 for jewelry losses due to theft. Insurance company had asserted the right to equitable reformation of the insurance policy as the amendments were intended to reduce its liability for theft under the policy. District Court of Appeal, Judge Pearson, held that absent showing that policyholders were ever made aware of the intended limitations on insurer's liability for theft under the homeowner's policy, mistake was not mutual and policy could not therefore be reformed.

REVERSED and remanded.

- xii. Food Fair Properties, Inc., v Leonora Snellgrove and John Snellgrove, 292 So.2d 66 (3rd DCA, 1974).

The Circuit Court, Dade County, Judge Highsmith, entered judgment pursuant to a jury verdict which exonerated other defendants and held one defendant liable for plaintiffs' injuries. Defendant appealed. The District Court of Appeal held that liability appeared under facts of case, but that assessment of entire costs of proceeding against single defendant found liable was improper.

Affirmed in part, REVERSED in part and remanded.

- xiii. James D. Reedus vs. Bert Friedman, 287 So.2d 355 (3rd DCA, 1974).

Mandamus proceeding to compel court reporter to furnish petitioner with an original typewritten transcript of notes of testimony and proceedings of trial at statutory rate of 50 cents per page for the original of each page. The Circuit Court, Dade County, Judge Highsmith, dismissed petition, and petitioner appealed. The District Court of Appeal held that petitioner was

entitled to be furnished by court reporter with an original typewritten transcript of notes and testimony in proceedings of trial at statutory rate of 50 cents per page for the original of each page, and that the Supreme Court was not without power to promulgate rule providing that judges of circuit court by a majority vote may set fees to be charged by court reporters in all courts in territorial jurisdiction of circuit court.

REVERSED and remanded with directions.

- xiii. Dade County v. Ethel M. Womack, 285 So.2d 441 (3rd DCA, 1973).

Appeal was taken from an order of the Circuit Court for Dade County, Judge Highsmith, requiring county to pay cost of publication for indigent parent who wished to change names of minor children and could not obtain personal service of process of the missing parent. The District Court of Appeal held that county was not required to pay such costs.

REVERSED and remanded with directions.

- xiv. Harry Kendl v. City of Miami, 281 So.2d 566 (3rd DCA, 1973).

Interlocutory appeal from Circuit Court, Dade County, Judge Highsmith, entering partial summary judgment which held counterdefendants liable under ordinance providing for a license fee. The District Court of Appeal, Judge Pearson, held that entry of partial summary judgment as to validity of ordinance was not improper on ground that issue had been laid to rest by affidavit supplementing minutes of city commission.

REVERSED.

- xv. Marvin Mathis v. Adolphus L. Lambert, 274 So.2d 601 (3rd DCA, 1973).

Action for injuries sustained by 12-year-old retarded boy when struck by defendants' automobile. The Circuit Court for Dade County, Judge Highsmith, entered final judgment in favor of defendants based on a directed verdict previously granted but withheld, and plaintiffs appealed. The District Court of Appeal, Judge Hendry, held that evidence that 12-year-old retarded boy was struck by automobile as he had almost finished crossing street, and that defendant motorist testified that he knew children were in area returning from school but that he did not see boy until impact, presented question for jury as to motorist's negligence.

REVERSED with directions.

- xvi. Max Raskin v. Arthur C. Otten and Margaret Otten, his wife, 273 So.2d 433 (3rd DCA, 1973).

Suit was brought against judgment creditors of mortgagor by mortgagees who sought to quiet title or, in the alternative, to reforeclose their second mortgage. An interlocutory appeal was taken by defendants from a judgment of the Dade County Circuit Court, Judge Highsmith, granting plaintiffs' petition for rehearing and then authorizing reforeclosure of the property. The District Court of Appeal, Judge Haverfield, held, *inter alia*, that since it was not the intention of second mortgagees, who settled their foreclosure suit prior to the time judgments were rendered in favor of defendants against the mortgagor, to cancel their mortgage as to the defendants, said mortgagees could not be estopped from exercising their right to eliminate defendants as junior lien holders.

Affirmed in part and REVERSED in part.

xvii. Ford Motor Credit Company v. Milton R. Waters, 273 So.2d 96 (3rd DCA, 1973).

Buyer of automobile brought suit for compensatory and punitive damages for conversion of personal property contained in automobile repossessed by agent of seller and for wrongful repossession of the vehicle itself. The Circuit Court for Dade County, Judge Highsmith, rendered judgment for compensatory and punitive damages for conversion of the personal property but vacated award for wrongful repossession of the automobile, and seller appealed from award of the punitive damages and buyer cross-appealed. The District Court of Appeal, Judge Hendry held that where seller had repossessed buyer's automobile without warning for having defaulted on payments and seller's agent had inventoried personal property in the vehicle and had returned the property to the automobile contrary to procedure seller had shown wanton disregard of rights of buyer in and to his personal property, which he never recovered, and award of punitive damages for conversion of personal property was not abuse of discretion, and that seller's past acceptance of late payments set up a pattern of conduct entitling buyer to notification of the change of such conduct before repossession.

Affirmed in part and REVERSED in part.

xviii. Rosa Lee Rankin vs. George D. Rankin, 268 So.2d 573 (3rd DCA, 1972).

Proceeding on motion of divorced wife for contempt order based on husband's failure to comply with final divorce judgment and for clarification to establish financial responsibility of the parties as to real properties held in common. The Circuit Court, Dade County, Judge Highsmith, entered order discharging motion for contempt and requiring wife, as occupant of former home, to pay expenses of maintenance and upkeep, and wife appealed. The District Court of Appeal, Judge Pearson, held that alimony was not classifiable as ordinary

debt for purpose of entitling husband to setoff because wife had received more income than husband from farm constituting one of the properties parties held in common. In addition, the Court held that in absence of showing of change in circumstances, Court was without jurisdiction to require wife, as cotenant, to assume all expenses of upkeep and maintenance of former residence.

Affirmed in part, REVERSED in part, and remanded.

- xix. Jack Carmel v. Lumidor Industries, Inc., 262 So.2d 911 (3rd DCA, 1972).

Complaint alleging that manufacturing creditors' committee was negligent or had been negligent in accomplishment of its duties under agreement. The Circuit Court, Dade County, Judge Highsmith, issued temporary injunction without requiring bond and interlocutory appeal was taken. The District Court of Appeal held that the temporary injunction should not have been issued without requiring plaintiffs to post bond where they advanced no sufficient reason as ground for court to dispense with bond and where sole basis upon which injunction was sought was alleged failure of defendant committee to furnish plaintiffs with current accounting of its collection and disbursements, and where trial court retained jurisdiction during appeal and either required or could have required under rules for discovery, production of information about collections and disbursements, basis for temporary injunction enjoining committee from paying or disbursing any funds in its possession was insufficient.

REVERSED.

- xx. Sylvia Kay Zeller v. Peoples Gas System, Inc., 258 So.2d 835 (3rd DCA, 1972).

Plaintiff brought action against gas company and others seeking damages for personal injury to herself and for wrongful death of her husband, and under the Survival Act in her capacity as administratrix. The Circuit Court for Dade County, Judge Highsmith, granted summary judgment for defendants, and plaintiff appealed. The District Court of Appeal held that summary judgment was improperly granted where record disclosed a number of material issues of fact including issue as to whether gas supplied had been treated to give off identifying or warning odor as required.

REVERSED and remanded.

- xxi. C. O. Barnard v. Dennis S. Overstreet, 259 So.2d 517 (3rd DCA, 1972).

Action for declaratory judgment in which the Circuit Court of Dade County, Judge Highsmith, entered an order vacating prior judgment of dismissal of

complaint with prejudice and the defendants appealed. The District Court of Appeal, Judge Carroll, held that where motion to set aside prior dismissal of complaint with prejudice did not present any of the grounds enumerated in rule as grounds for seeking relief of judgment and motion merely represented an effort to have successor judge reverse final judgment of dismissal with prejudice which had been entered by his predecessor on the court and nothing new was presented by motion, motion was inappropriate and vacating prior judgment of dismissal was error.

REVERSED.

xxii. The Aetna Casualty and Surety Company v. Thomas E. Enright, 258 So.2d 472 (3rd DCA, 1972).

Action by uninsured motorist insurer for declaratory judgment. The Circuit Court, Dade County, Judge Highsmith, rendered judgment from which insurer appealed. The District Court of Appeal, Judge Pearson, held that Florida public policy against "other insurance" or "excess coverage" clauses in uninsured motorist policies did not extend to void such clause in policy issued in New York to New York resident injured in Florida.

REVERSED and remanded.

xxiii. Ruth Silvern v. Stanley Silvern, 252 So.2d 865 (3rd DCA, 1971).

Divorce action. The Circuit Court for Dade County, Judge Highsmith, rendered final decree and the wife appealed. The District Court of Appeal held that where trial judge before whom cause was heard did not reduce decision and final judgment to writing until after he had resigned from Circuit Court, successor judge had no authority to sign judgment which had been reduced to writing by trial judge after his resignation even though trial judge executed affidavit stating that his decision had been made prior to effective date of his resignation.

REVERSED and remanded.

xxiv. John C. Riley v. Alfred Gustinger, 252 So.2d 583 (3rd DCA, 1971).

Proceeding on interlocutory appeal from post-judgment order of the Circuit Court for Dade County, Judge Highsmith, denying motion for relief from adverse foreclosure judgment. The District Court of Appeal held that where, in action for malicious prosecution, trial court fixed fees due withdrawing counsel and entered judgment for such amount, and prior to reversal, on ground that claim for fee was a matter to be prosecuted in separate action by attorney against client, attorney had obtained foreclosure judgment on

mortgage given to secure payment of fees and had bid in property at foreclosure sale, client was entitled to have foreclosure sale set aside and foreclosure judgment vacated.
REVERSED and remanded.

- 3) None.
16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

In 1968 I was the Republican candidate in the November general election for the office of State Attorney for the Eleventh Judicial Circuit of Florida. I was defeated by the Democratic incumbent, Richard Gerstein. In 1974, I was an unsuccessful candidate for a seat on the Florida Supreme Court.

17. **Legal Career:**
- a. Describe chronologically your law practice and experience after graduation from law school including:
1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Not applicable.
 2. whether you practiced alone, and if so, the addresses and dates;

Not applicable.
 3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

See response to number 6, above.

In addition to the foregoing, I served as special counsel to Florida's War on Crime program from January 1967 to July 1968, at the request of then governor Claude Kirk. I also served as a member of Florida's Inter-Agency Law Enforcement Planning Council from 1968 to 1970. During that same period I served as special counsel to the Florida Racing Commission.

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

Throughout my professional career I have been principally engaged in a general trial practice with the great majority devoted to civil litigation. Until 1970 my practice was plaintiff-oriented. Since leaving the bench in 1975, my practice has become, increasingly, civil-defense-oriented.

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

From 1959 to 1970 my typical client was someone who had been injured and/or damaged as a result of another's negligence. After leaving the bench in 1975 my practice was, again, plaintiff-oriented. However, over the years my trial practice has become more defense-oriented with clients such as liability insurers and self-insured clients such as Avis Rent A Car System, Inc., Smith & Wesson and Clark Equipment Company.

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

Frequently.

2. What percentage of these appearances was in:

- (a) federal courts:

5 -10%

- (b) state courts of record:

85 - 90%

- (c) other courts:

Less than 5%

3. What percentage of your litigation was:

(a) Civil:

96%

(b) Criminal:

4%

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

I have tried approximately 40 cases as sole counsel; as chief or lead counsel, approximately 67 cases; and as associate counsel, approximately 14 cases.

5. What percentage of these trials was:

(a) jury:

93%

(b) non-jury:

7%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give the 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 deposition 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, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

The following litigated matters were selected on the basis of either personal, community or, in a few instances, legal significance. Finally, the files and records on several of the matters listed, hereafter, have been destroyed, expunged or placed in computers or on microfilm and, accordingly, certain particulars such as case numbers are unavailable.

(1) Nelson v. City of Miami

Court: Circuit Court, 11th Judicial Circuit of Florida.

Judge: Lucien Proby

Counsel for Plaintiff: Shelby Highsmith

Counsel for Defendant: John S. Lloyd, assistant City Attorney. Mr. Lloyd has since retired and his address and telephone number are unknown to the undersigned.

Trial Dates: A period of five days in 1964.

Citation on Appeal: City of Miami v. Nelson (3rd DCA, 1966) 186 So. 2d 535

Summary: J.C. Nelson, a 15-year-old black male, and his mother, Clara, brought suit against the City of Miami for the shooting and wounding of the minor by city police. The youth was shot in the back as he jumped from the roof of one building to another after being ordered to "come down" by one of the officers who had surrounded the building. He was left a paraplegic. At the time he resembled the description of a person suspected of an attempted breaking and entering.

The suit alleged assault without justification and, alternatively, use of excessive force. The trial resulted in a verdict of \$234,000.00 which was thereafter reduced to judgment. Upon appeal, the judgment was reversed and remanded with directions to enter judgment for defendants.

(2) State of Florida v. Ellis and Irene Rubin

Court: Criminal Court of Record of Dade County, Florida.

Judge: Murray Goodman (deceased).

Counsel for the State: Gordon G. Oldham, State Attorney for the Fifth Judicial Circuit of Florida, Tavares, Florida; telephone, 904-343-9878. Mr. Oldham was assisted by members of his own staff as well as members of our local state attorney's staff. Their names cannot be recalled.

Counsel for Defendants: Shelby Highsmith, assisted by James O. Nelson, Esquire, One Biscayne Tower, Suite 2628, 2 South Biscayne Boulevard, Miami, Florida 33131, telephone, 305-371-6611.

Trial Dates: A period of six days in August, 1969.

Summary: This case arose during the rather turbulent Dade County days of 1969. Mr. Rubin, a flamboyant and sometimes controversial trial attorney was charged (together with his wife, Irene) by information with the crimes of perjury by affidavit (Ellis Rubin only), conspiracy to commit grand larceny and grand larceny.

This was a highly publicized case and required two months of intensive preparation by the undersigned. It was felt that the charges, while supported by some circumstantial evidence, were largely motivated by political considerations arising out of Mr. Rubin's defense of two persons (Diamond and Edwards) who had been indicted by the grand jury for "criminal libel" relating to then state attorney Richard Gerstein. The case was tried to a jury and resulted in the acquittal of both defendants on all charges.

Comment: According to the local legal historians at the time, this was the first instance of the trial of a "public figure" without first submitting the matter to a grand jury.

(3) State of Florida v. Diamond.

Court: Criminal Court of Record of Broward County, Florida, case no.: 69-17110.

Judge: Russell E. Seay, Jr.

Counsel for State: Warner S. Olds, assistant county solicitor, Broward County, Florida, 3051 N.E. 47th Street, Fort Lauderdale, FL 33308, telephone, 305-772-7346.

Counsel for Defendant: Shelby Highsmith, assisted by Michael Gora, at the time an assistant public defender.

Trial Dates: December 9 - 11, 1969

Summary: Mike Max Diamond was a service station operator in Broward County. In 1968, he corroborated an affidavit of one Howard Edwards involving the alleged bribery of the then Dade State Attorney.

The grand jury investigated the allegation and concluded its investigation by indicting Diamond and Edwards for "criminal libel." They were defended by Ellis Rubin and acquitted by a jury in the fall of 1969. Subsequently, Diamond and Edwards were charged by information in Broward County with the crimes of conspiracy to commit perjury and perjury.

Attached, hereto, is a letter from Mr. Diamond to the Governor of Florida, dated November 7, 1969, together with a memo to the undersigned from the governor's legal aid, both of which are self-explanatory. These documents are attached to explain, in part, my involvement in this case.

Upon inquiry, I satisfied myself that there was some validity to Mr. Diamond's claim and, accordingly, agreed to represent him. In the interim, Mr. Rubin withdrew and Mr. Gora, assistant public defender, took over the case. Of course, I moved for a continuance, since the trial date was less than a week away. However, the court required Mr. Fora to remain in the case in order to assist me. I don't believe I have ever "crammed" so much into so little time. In any event, Mr. Diamond was acquitted.

Comment: I think one has to review both the Rubin and the Diamond case to appreciate the personal significance these cases held for me. Both cases were handled without compensation and at substantial cost. I undertook the defense in each instance because I was convinced, both professionally and intellectually, that some abuse of power or office underlay both prosecutions. The results served to shore up a rather shaken faith in our judicial process. It reaffirmed my belief that the right result is reached - most of the time.

(4) State of Florida v. Mary Christine Newby and William R. Farr

Court: Circuit Court, Dade County, Florida, case no.: 75-2423.

Judge: Gene Williams.

Counsel for the State: Stephen Goldstein, assistant state attorney. (Present address and telephone unknown.)

Counsel for Defendants: Shelby Highsmith for Mary Christine Newby. Dennis Dean, 2212 Biscayne Blvd., Miami, Florida, telephone, 305-576-7512, for William R. Farr.

Trial Dates: Three days in 1975.

Summary: In February, 1975, William Farr an eighteen year police veteran of the Metropolitan Public Safety Department, was charged with conspiracy to extort and extortion. Also charged with the same crimes was Mary Newby. It appeared that the complaining witness was the live-in boy friend of the sister of the Chief of the North Miami Beach Police Department. The complaining witness was, also, the former suitor of Mary Newby.

During his courtship of Newby, the complaining witness talked her into mortgaging her home in order to loan him a substantial sum of money. Thereafter, he refused to repay the loan. Farr, a friend of Newby's contacted the complaining witness about the loan. The complaining witness went to the North Miami Beach Police Chief who, in turn, contacted Metro police.

Mary Newby received a call from the complaining witness advising her that he had the money and to pick it up that night. Newby was afraid to go alone and enlisted Farr to escort her. Upon arrival Newby and Darr were escorted to the study, which was "bugged" and staked out by police. The money was given to Newby, she counted it and gave a receipt, previously prepared by her, to the complaining witness.

She and Farr were promptly arrested. After arraignment, the undersigned was advised by the assistant state attorney that the charges would be dropped against Newby if she would testify that Farr was trying to "shake-down" the complaining witness. Obviously, Newby refused. Thereafter, the case was dismissed as to Newby on a sworn motion to dismiss, which the state failed to traverse. The charges were refiled against Newby and the case proceeded to trial.

Following conclusion of the state's case-in-chief, Judge Williams directed a verdict of acquittal as to Newby. Farr was subsequently acquitted by the jury.

Comment: Personal satisfaction. It was another example of abuse of power. In its attempt to convict Farr, the public safety department, with assistance from the state attorney, was willing to proceed inappropriately against Newby. The county subsequently paid Mary Newby \$20,000.00 for her troubles.

- (5) George v. Ramkissoon-Maharaj

Court: Circuit Court, Broward County, case no.: 75-10656.

Judge: George W. Tedder, Jr.

Counsel for Plaintiffs: Shelby Highsmith, assisted by Howard Todd Jaffe, Esquire, 1915 Harrison Street, Hollywood, Florida, telephone 305-920-9110.

Counsel for Defendants: John E. Donahoe, Esquire, 303 S.E. 17th Street, Ft. Lauderdale, Florida, telephone 305-523-0527.

Trial Dates: June 21-28, 1976.

Summary: Plaintiff was attempting to clean tar residue from the body of his truck. He drove to the Defendant's service station where he had earlier observed a "steam jenny," used for cleaning automobile engines and bodies. He approached one of the station attendants, purchased a container of gasoline and arranged for the use of the steam cleaner.

While the attendant was starting up the steam cleaner, the plaintiff used some rags and the gasoline he had purchased to dissolve the tar in the bed of the truck. As he was engaged in this process, the attendant approached with the steam cleaner and directed a burst of steam into the bed of the truck. There was a sudden ignition of the gasoline and fumes. The plaintiff suffered severe burns on his arms and face.

I was brought into the case rather late. Before I assumed primary responsibility for the preparation and trial of the case, both counsel for plaintiff and defendant were assuming that the steam had caused ignition; an assumption without foundation. I retained a professor from Pittsburgh University who ultimately testified that the creation of steam also created a by-product of static electricity which, because the steam-jenny was not properly grounded, gave off a spark sufficient to ignite the gas fumes when the metal steam nozzle came into close proximity with the bed of the truck.

After a six-day trial, the jury returned a verdict of \$225,000.00, finding the plaintiff and defendant equally negligent.

Comment: While it was apparent only to those who actually participated in the trial, this case vividly demonstrated that attorneys engaged in trial work cannot afford the luxury of indulging in "attractive, obvious or appealing" assumptions.

(6) Royal Typewriter Company v. Xerographic Supplies Corporation, et al.

Court: United States District Court, Southern District of Florida, case no.: 76-440-CIV-ALH

Counsel for Plaintiff: Several firms in the Miami area represented Royal Typewriter during the course of litigation. A great deal of the preparation and discovery was handled by Robert Edwards and Richard Arnold (now a member of Kenny, Nachwaltor & Seymour, 400 Edward Ball Building, 100 Chopin Plaza, Miami Center, FL 33131, telephone 305-358-8151), 799 Brickell Avenue, Suite 900 Brickell Centre, Miami, FL 33131, telephone, 305-358-5460.

The final preparation and trial was predominately handled by Karl V. Hart and Phillip Sheehe, of the firm of Shutts and Bowen, 1000 S.E. First National Bank Building, Miami, FL 33131, telephone, 305-358-6300. Mr. Sheehe is now at One Biscayne Tower, Suite 3699, Miami, FL 33131, telephone, 305-358-7447.

Counsel for Defendants: Shelby Highsmith, assisted by Philip Glatzer, 3370 Mary Street, Miami, FL 33133, telephone, 305-443-4040.

Trial Dates: March 10 to May 30, 1980.

Appellate Citation: Royal Typewriter Company v. Xerographic Supplies Corporation, et al. 719 F.2d 1092 (11th Circuit 1983)

Summary: XSC was recruited as a private dealer for Royal products, particularly the RBCI plain paper copier, in 1973. The RBCI plain paper copier, in 1973. The RBCI was actually manufactured by Konishiroku in Japan. After becoming a dealer, XSC was under constant pressure to buy more and more copiers and utilize them in a leasing program designed to saturate south Florida. In its effort to market the copier, Royal even arranged credit. Over a period of three years, XSC purchased 193 of the machines.

During this period of time, it became increasingly apparent that there was something seriously wrong with either the program or the copier itself. There were high mortality parts which were unavailable for resupply. Paper would become stuck and fires would break out. More and more reports were circulated of persons receiving electrical shocks while using the machine.

In January, 1976, XSC refused to make further payments on its various purchases. Royal brought suit on the notes signed by XSC and guaranteed by the individual defendants. XSC and the individual defendants counterclaimed, alleging breach of express and implied warranties, malicious interference with advantageous business relations, fraud and deceitful false representations.

Depositions were taken throughout the United States and Japan. Literally tens of thousands of documents were received. Machines were inspected and tested by numerous experts on both sides. Six full days were devoted to preparation of the bilateral pretrial stipulation. The case had overtones of anti-trust litigation. The trial commenced with six jurors and two alternates. It concluded with six jurors and two alternates. On May 30, 1980, the jury found for the defendants on all issues and awarded \$1,750,000.00 compensatory and \$3,250,000.00 punitive damages on defendants' counterclaim. Judgment was entered on the verdict and appeal ensued.

On November 14, 1983, the Eleventh Circuit reversed and remanded the case for new trial.

Comment: The most discussed error was the failure of the trial judge to submit special interrogatories to the jury. Both sides had submitted special verdict interrogatories but neither side would agree to the submission of the special verdict prepared by the other side. The trial judge thereupon announced that, since the parties could not agree upon the interrogatories, he would submit the issues on a general verdict.

The appellate court did not discuss the appropriateness of either special verdict prepared by the parties, although it was suggested in one brief that the offering of special interrogatories, 240 in number, was so ridiculous as to constitute an invited error. Nevertheless, the thrust of the opinion on this point was to the effect that counsel for the parties may cavalierly abdicate from this important function and cast the entire burden upon the trial judge.

- (7) William and Ruth Keller v. K-Mart Enterprises of Florida, Inc.

Court: Circuit Court, Eleventh Judicial Circuit, case no.: 79-17539(06)

Judge: Joseph J. Gersten

Counsel for Plaintiff: Shelby Highsmith, assisted by Joseph and Jack

Headley, 1999 S.W. 27th Avenue, Miami, Florida, telephone, 305-856-4156.

Counsel for Defendant: Gerald E. Rosser, 412 Biscayne Building, Miami, Florida 33130, telephone, 305-371-7220.

Trial Dates: August 10-12, 1981.

Appellate Citation: K-Mart Enterprises of Florida, Inc. v. Keller, (3rd DCA 1983) 439 So. 2d 283, Cert. denied by S. Ct., of Fla., May 7, 1984.

Summary: William Keller, a Miami Springs police officer, responded to a call involving an armed man holding hostages at a Miami Springs residence. Other officers were also present. Keller made his way to the garage and secreted himself therein. The offender, Robert Knuck, suspecting someone was in the garage, fired through the kitchen door which connected with the garage and wounded Keller. His weapon was a .30-.30 rifle which had been purchased six weeks earlier by his brother, William Knuck, from a K-Mart store.

The clerk who sold William the rifle failed to ask him the questions contained in the Firearms Transaction Record form 4473, provided to firearm retailers by the Bureau of Alcohol, Tobacco and Firearms to facilitate compliance with 18 U.S.C. section 922 (d). That section forbids a dealer to sell a firearm to any person known to be an unlawful user of or addicted to marijuana or to any person known to be under indictment for any crime punishable by imprisonment for a term exceeding one year. Thus, two of the questions on the form ask for such information. At the trial, William Knuck testified that he would have answered the questions to the effect that he was charged with a felony and was a user of marijuana.

On the day of the shooting, William loaned Robert the rifle, although he knew Robert was both an ex-heroin addict who was taking pills and an alcoholic who had been drinking heavily and was drunk at the time. Keller filed suit against K-Mart initially alleging that the sale was contrary to Florida law because William Knuck was a minor.

My entry of appearance and participation in the case did not begin until approximately two weeks prior to trial. All discovery had been completed. It became apparent to me that, because of the law lowering the age of majority in Florida, the theory of sale to a minor was completely unsupported. Accordingly, the case was tried upon the violation of federal law mentioned above. The jury returned a verdict

for William Keller in the sum of one million dollars and a damage award to Mrs. Keller of "0" dollars.

The defective verdict was waived by the Kellers and judgment was entered for William Keller on the jury award. The Third District affirmed.

Comment: Obviously the most critical issue was proximate or "legal cause." I must confess that throughout the appellate process, including the application for certiorari, I was anything but completely confident. It was the kind of appellate decision which could go either way and could easily turn upon the personal philosophies of the panel judges. In any event, I daresay the case will be cited many times in the future when a claim of remoteness is made.

(8) Morris v. United Sanitation Services

Court: Circuit Court, Eleventh Judicial Circuit, case no.: 78-11158 (CA19)

Judge: Jack M. Turner

Counsel for Plaintiff: Shelby Highsmith, assisted by Peter Gruber, who, at the time, was an associate of my firm; now located at 7955 N.W. 54th Street, Miami, FL, telephone, 305-592-7298.

Counsel for Defendant: William Flynn, Ingraham Building, 25 S.E. 2nd Avenue, Miami, FL, telephone, 305-374-3103.

Trial Dates: February 16-19, 1982.

Appellate Citation: Morris v. United Sanitation Services (3rd DCA 1983) 432 So. 2d 104

Summary: Eugene Morris was a professional running back for the Miami Dolphins. In 1974, he suffered a nondisplaced compression fracture of one of his cervical vertebrae. He made an uneventful recovery and was in good health until he was involved in a motor vehicle collision with a truck owned by defendants in March of 1976. He sustained a fracture of his left index finger and what appeared to be soft tissue injury to his neck. During the 1976 season he was required to play with a protective splint on his finger. He continued to play the rest of the season but when it came time to report for training in 1977, he decided to stop playing football because of

continued pain and problems with his neck, which he and two physicians attributed, at least in part, to the accident.

During his playing years his contracts called for part of his annual salary to be withheld and paid to him in later years. This was referred to as deferred compensation. At the trial his professional contracts were introduced into evidence in order to demonstrate that the income he received in 1977, 1978, and 1979, was, in fact, income earned in prior years and to show that his contracts would have continued for said years had he been able to play.

The jury returned a verdict for one million dollars and found Morris guilty of 50 percent of the negligence. The trial judge ordered a new trial on the issue of damages only and this decision was affirmed by the Third District. Subsequently, the case was settled.

Comment: One of the reasons recited by the trial judge for ordering a new trial on damages was the "the court erred in permitting the jury to consider lost earnings from plaintiff's not playing professional football in the 1977, 1978 and 1979 seasons as a result of the accident of March, 1976." While the appellate decision did not directly address this issue, it did recite with approval the foregoing language. It certainly appears to me that this decision can be used in the future as persuasive authority for the proposition that "deferred compensation" received after injury should, at least, reduce the lost earnings claim.

(9) Garmas v. Avis Rent A Car System, Inc. and Scott Lawrence

Court: Circuit Court, 16th Judicial Circuit, Monroe County, FL, case no.: 81-578-CA-10

Judge: M. Ignatius Lester

Attorney for Plaintiff: Donald Feldman and David Magidson, Suite 800, Brickell Centre, 799 Brickell Plaza, Miami, FL 33131, telephone, 305-377-4526.

Attorney for Defendants: Shelby Highsmith for Avis. Carol Riordan Seiderman, Suite 730, Ingraham Building, 25 S.E. Second Avenue, Miami, FL 33131, telephone 305-358-7777, for Scott Lawrence.

Trial Dates: May 24-May 27, 1982

Appellate Citation: *Avis Rent A Car System, Inc. v. Garmas*, 440 So. 2d 1311 (Fla. App. 3 Dist. 1983)

Summary: Scott Lawrence and his friend, Laird Ferguson, appeared at an Avis rental office desiring to rent a car for a trip to Key West, Florida. Lawrence had a major credit card but no driver's license in his possession (unknown to Avis, the license has been suspended). Ferguson possessed a valid driver's license but no credit card. The Avis clerk rented the car using Lawrence's credit card and Ferguson's driver's license. As an added precaution she wrote on the rental contract, "Laird Ferguson, only driver" and required both to sign this agreement. Subsequently, the car was involved in a serious accident just outside Key West, Florida, while being operated by Scott Lawrence. Plaintiffs sued Lawrence and Avis seeking both compensatory and punitive damages.

At the trial, Ferguson testified that both he and Lawrence understood that Lawrence was not to operate the car. He further testified that on the day of the accident he had left the car keys on a table while he was taking a nap. When he awoke, the keys, the car and Lawrence were gone. He never gave Lawrence permission to drive the car.

On special interrogatories, the jury found that Lawrence was not a "renter" of the vehicle; that Avis was not negligent; and therefore, returned a verdict against Lawrence for both compensatory and punitive damages.

The trial judge set aside the verdict and judgment and granted a new trial to plaintiffs on the issues of both liability and compensatory damages, but refused to allow a new trial on punitive damages. The Third District affirmed the action of the trial judge in all respects and went on to note (but not to order) that a directed verdict on Avis' liability probably should have been granted, holding that Avis could not restrict its liability by the language it wrote in on the contract, citing *Susco Rental System of Florida v. Leonard*, 112 So.2d 832 (Fla. 1959). The case is presently awaiting retrial.

Comment: It appears to me that this application of the *Susco* doctrine to the circumstances of this case extends the dangerous instrumentality doctrine even further. Here, there would be no question that Avis would fall under the *Susco* decision if Ferguson had given Lawrence permission to operate the car. However, Ferguson did not. Thus, Avis specifically told Lawrence not to operate the car and Ferguson did not consent. Certainly, a species of conversion.

(10) Ashcroft v. Calder Race Course.

Court: Circuit Court, Eleventh Judicial Circuit, Dade County, Fla., case no.: 81-20544

Judge: Edward H. Swanko (by designation)

Counsel for Defendant: Gene Kubicki and Aubrey L. Talburt, 701 National Bank Building, 25 West Flagler St., Miami, FL telephone, 305-374-1212.

Trial Dates: August 30-September 10, 1982.

Summary: David Ashcroft was a professional jockey riding at Calder Race Course in October, 1981. He had been at Calder for about six weeks and had ridden several races, including one win while mounted on the horse, Kentucky Edd, that was involved in the incident out of which this litigation arose.

On October 31, 1981, as the horses came out of the chute in a six furlong race, Kentucky Edd suddenly swerved left toward the "exit gap" unseating Ashcroft. A following horse stepped on Ashcroft, breaking his neck and leaving him a quadriplegic.

During the several months preceding this incident there had been six almost identical incidents causing injury to one jockey and death of one horse. The jockeys had complained to the management that the horses were bolting toward the "exit gap" in attempts to return to the stable area. Some trainers had also complained and advised Calder officials that the "exit gap" was located in a dangerous position. Calder acknowledged the problem and promised to move the gap as soon as its reconstruction of the chute could be completed.

The "exit gap" was an opening in the rail which was used by the horses to return to their stables after each morning's exercise and training schedule. It was the only exit used by the horses for this purpose.

Ashcroft sued Calder alleging negligence in the placing position and maintenance of the "exit gap." At trial there was testimony from thoroughbred experts that horses were creatures of habit, that the gap was on the "perception" side of the horses as they left the chute, and constituted a dangerous invitation to the horses to "go home" rather

than race. There was also expert testimony from a review of the films taken of the race that Kentucky Edd was, in fact, swerving toward the "exit gap."

The jury returned a special interrogatory verdict finding Calder negligent; Ashcroft not negligent; Ashcroft's awareness of the condition (assumption of risk) complained of; and assessing his damages in the sum of ten million dollars.

The trial judge entered judgment for Ashcroft in the verdict amount but after post trial motions ordered a remittitur of five million dollars, or in the alternative, a new trial on the issues of liability and damages.

Ashcroft appealed. Calder cross-appealed assigning error in the refusal of the trial judge to enter judgment for Calder on the basis of express assumption of risk. The Third District Court of Appeal reversed the judgment for Plaintiff and ordered entry of judgment for Defendant. 464 So.2d 1250 (Fla. App. 3rd District 1985). On certiorari, the Florida Supreme Court ordered the decision of the Third District vacated and further ordered entry of judgment for Ashcroft in the amount of the verdict. 492 So.2d 1309 (Fla. 1986).

Comment: From a trial standpoint it was a "first" experience for me to have the entire sequence of events surrounding the accident, out of which the litigation arose, on film. From a legal standpoint it further "refined" the doctrine of assumption of risk.

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

Until 1966, Dade County was fairly typical of most if not all counties in the State of Florida. Each county had an elected Sheriff, who in most instances was the most powerful local political figure. There was no statewide law enforcement agency except what was known as the Sheriff's Bureau. However, the Sheriff's Bureau (being composed of Florida's Sheriffs) had no authority to send investigators into the respective counties absent the knowledge and permission of the county sheriff. Obviously, this system led to considerable abuse and corruption.

In 1965, there were allegations of corruption and abuse involving the Dade County Sheriff and his department. One member of the department, Colonel Charles Zmuda, Chief of Central Services, was not only a highly respected law enforcement

officer but also respected by the general community. He attempted to expose the problems in the department and, instead, was accused of larceny, among other things, and suspended from his position. At the time the executive assistant to the Dean of the University of Miami Law School was one William Reed (later to be appointed as head of Florida's first statewide law enforcement agency). He and one Hank Messick, a crime reporter for the Miami Herald, visited me and asked me to represent Col. Zmuda in his attempt to clear his name and be reinstated. I agreed. There followed months of legal skirmishing, administrative hearings and public confrontations. Without going into detail the final results were in part the abolition of the elected sheriff's position in Dade County, Florida; the collapse of the sheriff's power structure; the appointment of a public safety director who, generally, "cleaned house"; and the reinstatement of Charles Zmuda, now deceased. The foregoing events led to my meeting Mr. George Wackenhet and Governor Claude Kirk in early 1967 and my subsequent involvement in what was known as Florida's War on Crime program. I became legal advisor and special counsel to Governor Kirk, George Wackenhet and the Wackenhet special agents who operated throughout the state. My principal activity was the review of the "fruits" of specific investigations and advice to the Governor relative to executive action. This activity continued until the Florida legislature enacted a law creating Florida's first statewide agency, the Florida Bureau of Law Enforcement. Thereafter, I continued to advise the Governor, his aides and Commissioner William Reed in the transition from the private effort to the new agency's effort.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

I anticipate that I shall receive periodic payment on a pay-out plan from the professional association, of which I am presently a member. The pay-out will represent my interest in accounts receivable, business machines, furniture, library, and other property owned by the firm. The amount due will be determined by the firm's accountants as of the date of my resignation from the firm. The details of the pay-out have not been worked out at this time because of the uncertainty of my status. I have no other expectation of future payments for past endeavors except my interest in the pension plans, which are independently managed, mentioned in my net worth statement attached, hereto.

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

I will follow guidelines of the Judicial Conference.

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

No.

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

See copy of AO-10 Form attached.

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

Attached.

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

Yes, but only as a candidate for the offices mentioned above; i.e., State Attorney of the Eleventh Judicial Circuit (1968) and the Florida Supreme Court (1974).

III. GENERAL (PUBLIC)

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

While I have never made an effort to catalog or memorialize each instance of service to the disadvantaged over my many years of private practice, I can recall several specific examples. Mike Diamond was such an example. His case is described in some detail in response to Number 18, above. In addition to considerable out-of-pocket expenses, I devoted approximately 130 hours to his case. I handled his case without fee or reimbursement of expenses. Likewise, I represented Charles Zmuda (see response to number 19, above) without fee and devoted approximately 250 hours to his defense. I have financially supported the "pro bono" program of the Dade County Bar Association over the past several years. Most recently, I had the occasion to represent, without fee, a lady from Texas charged with shoplifting. She was visiting her daughter in Miami, Florida, and quite innocently set off a merchandise alarm. She was a Christian lady of very modest means and could ill afford a fee of several thousand dollars. The efforts of myself and my firm resulted in the case being dismissed and her record being expunged.

I have also participated in the past in a Christmas program established by Circuit Judge Adele Faske in about 1971, whereby each Christmas I would "adopt" a family in need and provide presents for the children, as well as food and clothing.

I have also participated in educational programs for such organizations as the Florida Association of Legal Secretaries. From 1963 to 1968 I was a member of The Optimist Club of Kendall and from 1971 to 1990 was a member of the South Miami BPOE. For a number of years I contributed to the "Highlands Children In The Arts" program, which provided an after school arts program to the children of Highlands, North Carolina. In addition, I have participated as a judge in the annual Moot Court program of The University of Miami.

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

No.

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

Yes, there is such a commission and its members did recommend my nomination. Having determined to submit my name as a candidate for appointment, I submitted an application, which essentially consisted of a questionnaire much like the Senate Committee's. Thereafter, I was interviewed by the commission referred to above. Following the commission's recommendation, I was interviewed by Senator Connie Mack and, subsequently, by members of the Justice Department. I have since been interviewed by two agents from the Federal Bureau of Investigation and representatives of the American Bar Association.

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

No.

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

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

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

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

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

As a student of history, trial lawyer and trial judge, I have developed a deep personal commitment to the maintenance and support of the separation of powers doctrine. Throughout the years I have always been professionally uncomfortable with the premise that "judicial legislation" is occasionally justified. Neither have I been intellectually comfortable with the many attempts to precisely define "judicial legislation" within the framework of my understanding of our judicial system. From the perspective of the trial judge, state or federal, it would seem to me that statute construction and constitutional interpretation is generally a relatively easy process. In the vast majority of cases legislative history resolves most statutory ambiguities and precedent (through appellate and supreme court decisions) resolves constitutional interpretation. I might add that I am also somewhat uncomfortable with labels. Nevertheless, if "judicial activism" includes "legislating", then it is inappropriate; if it includes the extension of a judge's personal philosophy into judicial decree, then it is inappropriate; and, if it includes the intrusion of irrelevant considerations into the judicial process in any given case - however noble, notable or laudatory the underlying motive - then it is, likewise, inappropriate judicial conduct.

FINANCIAL DISCLOSURE REPORT

Report Required By the Ethics
Bureau, 2d Circuit, Pub. No.
101-194, November 30, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
Highsmith, Shelby	United States District Court Southern District of Florida	6/28/91
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 (Active)	<input checked="" type="checkbox"/> Nomination, Date Initial _____ Annual _____ Final _____	January 1 1990 June 28, 1991
7. Chambers or Office Address Current office address: 3370 Mary Street, Miami, Florida 33133		

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

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITION	NAME OF ORGANIZATION/ENTITY
<input type="checkbox"/> NONE (no reportable positions)	
Partner	Highsmith, Strauss, Glatzer and Deutsch, P.A.
Partner	J and M Properties

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATE	PARTIES AND TERMS
<input checked="" type="checkbox"/> NONE (no reportable agreements)	Highsmith, Strauss, Glatzer and Deutsch, P.A.

Note: The Accountant for Highsmith, Strauss, Glatzer and Deutsch, P.A. is in the process of determining the value of my interest (fixed assets) in the firm for the purpose of a lump sum payout.

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATE (Honors only)	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/> NONE (no reportable non-investment income)		
1 1/1-12/31/90	Highsmith, Strauss, Glatzer and Deutsch, P.A.	\$ 406,000.00
2 1/1-06/28/91	Highsmith, Strauss, Glatzer and Deutsch, P.A.	\$ 120,482.21
3 1/1/90-06/28/91	Byrne-Rinehart and Company, Real Estate (s)	\$ _____
4		\$ _____
5		\$ _____

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting
Highsmith, ShelbyDate of Report
6/28/91**IV. REIMBURSEMENTS and GIFTS -- transportation, lodging, food, entertainment.**

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

<u>SOURCE</u>	<u>DESCRIPTION</u>
<input type="checkbox"/> NONE (No such reportable reimbursements or gifts)	
1 Exempt	
2	
3	
4	
5	
6	
7	
8	

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
<input type="checkbox"/> NONE (No such reportable gifts)		
1 Exempt		\$ _____
2		\$ _____
3		\$ _____
4		\$ _____

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE*</u>
<input type="checkbox"/> NONE (No reportable liabilities)		
1 Commercial Bank of Florida	Mortgage, Office Building, Miami, FL	M
2 Cherokee Federal Savings	Mortgage, Investment Property, Ellijay, GA	K
3		
4		
5		
6		
7		

* VALUE CODES: J = \$15,000 or less K = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
 B = \$250,001 to \$500,000 O = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Highsmith, Shelby

Date of Report

6/28/91

VII. INVESTMENTS and TRUSTS – income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of instructions.)

Description of Assets (including trust assets) Indicate, where applicable, owner of the asset: (1) as to the parenthetical (J) for joint ownership, (1)(P) for individual and spouse, (1)(D) for individual owned by dependent child; for ownership by business entity, (B).	Income during reporting period		Gross value at end of reporting period		Transactions during reporting period				
	(1) Ass't. Code, (A-B)	(2) Type (S), rep't. for Int.)	(1)	(2)	(1) Type (S), key, sell, redeem, retention)	(2) Date/ Day	(3)	(4)	(5) Identify of transaction (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									*****Exempt*****
¹ Coral Gables Federal (J)	D	Int	M	T					
² Coral Gables Federal	B	Int	J	T					
³ Coral Gables Federal (S)	D	Int	L	T					
⁴ Coral Gables Federal (DC)	B	Int	K	T					
⁵ NCNB (J)	B	Int	K	T					
⁶ Financial Federal (J)	C	Int	L	T					
⁷ Financial Federal (DC)	B	Int	K	T					
⁸ American Savings and Loan (J)	B	Int	K	T					
⁹ Coconut Grove Bank	D	Int	M	T					
¹⁰ First National of South Miami (J)	D	Int	K	T					
¹¹ First National of South Miami (DC)	A	Int	J	T					
¹² Fidelity Investment Company (J)	C	Div	L	T					
¹³ Fidelity Investment Company (DC)	B	Div	K	T					
¹⁴ Pru-Bache Investments (S)	D	Div	L	T					
¹⁵ Twentieth Century Investments (J)	A	None	J	T					
¹⁶ Quaker Oats Common Stock (DC)	A	Div	J	T					
¹⁷ Occidental Petroleum (J)	B	Div	J	T					
¹⁸ Cipsco Common Stock (S)	A	Div	J	T					
¹⁹ Note Receivable from Capt. John Watson (loan)		Discharge of Debt	J	T					
²⁰ Prudential Insurance Annuity	D	Int	M	T					

1 Income/Gain Codes: A=\$1,000 or less
 (See Col. B1 & B2) B=\$1,001 to \$10,000
 C=\$10,001 to \$100,000 D=\$100,001 to \$1,000,000 E=\$1,000,001 to \$10,000,000 F=\$10,000,001 to \$100,000,000 G=\$100,000,001 to \$1,000,000,000 H=\$1,000,000,001 to \$10,000,000,000 I=\$10,000,000,001 to \$100,000,000,000 J=\$100,000,000,001 to \$1,000,000,000,000 K=\$1,000,000,001 to \$10,000,000,000,000 L=\$10,000,000,001 to \$100,000,000,000 M=\$100,000,000,001 to \$1,000,000,000,000 N=\$1,000,000,001 to \$10,000,000,000,000 O=\$10,000,000,001 to \$100,000,000,000,000 P=\$100,000,000,001 to \$1,000,000,000,000,000 Q=\$1,000,000,001 to \$10,000,000,000,000,000 R=\$10,000,000,001 to \$100,000,000,000,000,000 S=\$100,000,000,001 to \$1,000,000,000,000,000,000 T=\$1,000,000,001 to \$10,000,000,000,000,000,000 U=Cont (real estate only) V=Estimated W=Estimated X=Cash/Market Y=Other

ADDENDUM

Shelby Highsmith

6/28/91

VII. Investments and Trusts

21.	Kemper Insurance Annuity	D	Int	L	T
22.	Office Building, Miami, Florida	L	Rent	O	S
23.	Cabin/Acreage, Ellijay, Georgia	A	None	L	R
24.	Chase Federal Savings and Loan	C	Int	J	T
25.	Highsmith, Strauss, Glatzer and Deutsch, P.A. (stock, see attached Financial Statement)	A	None	J	L
26.	Highsmith, Strauss, Glatzer and Deutsch, P.A. (Pension Plan)	D	Int	M	T
27.	Highsmith, Strauss, Glatzer and Deutsch, P.A. (Defined Benefits Plan)	D	Int	M	T

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
Highsmith, Shelby	6/28/91

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

Section 7, Item 22: Office Building is appraised by Dade County for tax purposes at \$ 697,070.00 . Using the local rule of thumb that assessments are 70% of value, this would make the building worth \$ 995,814.00 .

Item 23: Purchased 5/30/86 for \$80,000.00

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicative function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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 is 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.A. app. 7, § 501 et seq., 5 U.S.C. § 7333 and Judicial Conference regulations.

Signature

Date 6-28-91

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.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

STATEMENT OF FINANCIAL POSITION
HIGHSMITH, STRAUSS, GLATZER & DEUTSCH, P.A.
May 31, 1991

ASSETS**CURRENT ASSETS**

Cash	\$59,313	
Client advances	34,077	
Due from partnership	7,445	
Due from shareholder	51,202	
Other	500	
	TOTAL CURRENT ASSETS	\$152,537
PROPERTY AND EQUIPMENT		
Furniture and equipment	250,302	
Leasehold improvements	116,658	
Transportation equipment	123,512	
	490,472	
Less accumulated depreciation	367,320	123,152
OTHER ASSETS		22,691
		\$298,380

LIABILITIES AND SHAREHOLDERS' EQUITY**CURRENT LIABILITIES**

Notes payable to bank	\$14,772	
Notes payable to others	0	
Payroll taxes payable	0	
Income taxes payable	10,439	
Due to employee benefit plans	80,000	
Due to shareholder	3,959	
	TOTAL CURRENT LIABILITIES	\$109,170

SHAREHOLDERS' EQUITY

Common stock (\$1.00 per value)	1,001	
Paid-in capital	1,481	
Retained earnings	209,648	
	212,130	
Less treasury stock (2,000 shares)	22,920	189,210
		\$298,380

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	433082 -	Notes payable to banks—secured	
U.S. Government securities—add schedule		Notes payable to banks—unsecured	
Limited securities—add schedule	174660 -	Notes payable to relatives	
Unlimited securities—add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends	11000 -	Unpaid income tax	
Due from others		Other unpaid tax and interest	
Doubtful		Real estate mortgages payable—add schedule	561 00 -
Real estate owned—add schedule	1,415000 -	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts—itemize:	
Autos and other personal property	276000 -		
Cash value—life insurance	45000 -		
Other assets—Kemper			
Pension-profit sharing	273280 -	Total Liabilities	561000 -
Defined benefits plan	268662 -	Net worth	2,549 84 -
Prudential annuity	156000 -	Total Liabilities and net worth	3,110 584 -
Kemper annuity	56000 -		
Total assets	3,110 584 -		
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, co-maker or guarantor	NO	Are any assets pledged? (Add schedule)	no
On leases or contracts	NO		no
Legal Claims	NO	Are you defendant in any suits or legal actions?	
Provision for Federal Income Tax	NO		
Other special debt	NO	Have you ever taken bankruptcy?	no

SCHEDULE
FINANCIAL STATEMENT of SHELBY HIGHSMITH
June 1, 1991

ASSETS**Listed securities**

Prudential-Bache Investments	\$ 84,700.00
Fidelity Investments	77,800.00
Quaker Oats	5,460.00
Occidental Petroleum	6,700.00
	<u>174,660.00</u>

Real estate owned

Residence-Miami, Fl.	\$495,000.00
Residence-Highlands, N.C.	280,000.00
Timberland-Milton, Fl.	26,000.00
Office-Miami, Fl. (1/2 interest)	600,000.00
Acreage-Ellijay, Ga. (1/2 interest)	40,000.00
	<u>\$1,441,000.00</u>

LIABILITIES**Real Estate Mortgages Payable**

Coral Gables Federal S & L	\$ 232,000.00
BankAtlantic	88,000.00
Commercial Bank of Fla.	220,000.00
Cherokee Federal	21,500.00
	<u>\$ 561,500.00</u>

QUESTIONNAIRE FOR JUDICIAL NOMINEES
(for Senate Judiciary Committee)

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Harvey Bartle, III

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

Home: 100 W. Moreland Avenue
Philadelphia, PA 19118

Office: Dechert Price & Rhoads
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793

3. Date and place of birth.

June 6, 1941
Bryn Mawr, PA

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

Married to Elizabeth Ward Bartle

Real Estate Agent Baxter & Drinker 84 Bethlehem Pike Philadelphia, PA 19118	Substitute Teacher Chestnut Hill Academy 500 W. Willow Grove Avenue Philadelphia, PA 19118
--	---

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

Princeton University

(1958-1962)

Received A.B. Degree, Cum Laude, in 1962

University of Pennsylvania Law School

(1962-1965)

Received LL.B. Degree, Cum Laude, in 1965

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

Central-Penn National Bank (Summers, 1962 and 1963)
Broad and Walnut Streets
Philadelphia, PA 19107

Rawle & Henderson (Summer, 1964)
211 S. Broad Street
Philadelphia, PA 19107

Law Clerk to The Honorable (1965-1967)
John Morgan Davis, Judge of
the U.S. District Court for
the Eastern District of
Pennsylvania

Active Duty, U.S. Army, (July-November, 1967)
Ft. Leonard Wood, Missouri

416th Civil Affairs Co. (1966-1972)
U.S. Army Reserves
1020 Sandy Hill Road
Norristown, PA 19401

Dechert Price & Rhoads Associate (1967-1973)
4000 Bell Atlantic Tower
1717 Arch Street Partner (1973-1979;
Philadelphia, PA 19103-2793 1981 to present)

Insurance Commissioner (1979-1980)
Commonwealth of Pennsylvania
13th Floor, Strawberry Square
Harrisburg, PA 17120

Attorney General (1980-1981)
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

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

416th Civil Affairs Company
U.S. Army Reserves
1020 Sandy Hill Road
Norristown, PA 19401
(1966-1972)
Honorably discharged as Captain in 1972
Serial No. 0203346863

I received Basic Training and Advanced Individual Training at Ft. Leonard Wood, Missouri between July and November, 1967

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

I was graduated Cum Laude from both Princeton University and the University of Pennsylvania Law School. I was one of the Editors of the University of Pennsylvania Law Review.

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

Philadelphia Bar Association (formerly a member of the Executive Committee of the Young Lawyers' Section)

Pennsylvania Bar Association

American Bar Association (member of the Life Committee of the Torts & Insurance Practice Section)

Chairman, Pennsylvania Appellate Court Nominating Commission (1981-1985) (appointed by Governor Thornburgh)

Bankruptcy Judge Merit Selection Panel (1985-1986) (appointed by the U.S. Court of Appeals for the Third Circuit)

I have also recorded a program and co-authored an outline for the Pennsylvania Bar Institute on administrative practice before the Pennsylvania Insurance Department.

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

As far as I know, none of the organizations to which I belong is active in lobbying before public bodies.

Chestnut Hill Community Association (former Director and Secretary)

Consensus Investment Club (Co-Secretary and former President)

Friends of Independence National Historical Park, Inc.

Friends of the Wissahickon, Inc. (former Vice President)

Germantown Republican Club (Trustee)

Hillside Child Care, Inc. (Trustee)

Informal Club of Germantown

Pennsylvania Historical Society (former Director and Vice President)

Pennsylvania Horticultural Society

Pennsylvania Society of Sons of the Revolution

Philadelphia Cricket Club

Princeton Club of Philadelphia

St. Thomas' Church, Whitemarsh (Member and Clerk of the Vestry and former Church School teacher)

Springside School (Trustee)

U.S. Squash Racquets Association

Wissahickon Skating Club

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

U.S. Supreme Court, 1978

U.S. Court of Appeals for the Third Circuit, 1969

U.S. Court of Appeals for the Fifth Circuit, 1989

U.S. District Court for the Eastern District of Pennsylvania, 1965

U.S. District Court for the Eastern District of Michigan, 1982

U.S. District Court for the Middle District of Pennsylvania, 1984

Pennsylvania Supreme Court, 1965

Pennsylvania Superior Court, 1965

Pennsylvania Commonwealth Court, 1970

Court of Common Pleas of Philadelphia County, 1965

Orphans' Court of Philadelphia County, 1965

County Court of Philadelphia County, 1966

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

Note, Use of Crimes to Affect Credibility and Penalty in Pennsylvania, 113 University of Pennsylvania Law Review 382 (1965)

Case Comment, Partial Distribution of Incompetent's Estate Approved to Reduce Contemplated Taxes on His Death, 112 University of Pennsylvania Law Review (1964)

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

Excellent.

December, 1990 by T. Rogers Kyle, M.D., 8200 Flourtown Avenue, Wyndmoor, PA 19118

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

None.

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

Not applicable.

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

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

Pennsylvania Insurance Commissioner, 1979-1980 (appointed by Governor Dick Thornburgh)

Pennsylvania Attorney General, 1980-1981 (appointed by Governor Dick Thornburgh)

Pennsylvania Commissioner, National Conference of Commissioners on Uniform State Laws, 1980-1987 (appointed by Governor Dick Thornburgh)

Republican Committeeman, 9th Ward, City of Phila., 1968-1979 (elected)

Alternate Delegate, Republican National Convention, 1976 (appointed)

Presidential Elector for Reagan-Bush, 1984 (elected)

I was unsuccessful in an election for delegate to the Republican National Convention in 1976.

17. Legal Career:

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

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

Law Clerk to The Honorable John Morgan Davis,
Judge of the U.S. District Court for the Eastern
District of Pennsylvania (1965-1967)

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

No.

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

Associate (1967-1973) and then partner (1973-1979, 1981 to the present) with law firm of:

Dechert Price & Rhoads
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793

Insurance Commissioner (1979-1980)
Commonwealth of Pennsylvania
13th Floor, Strawberry Square
Harrisburg, PA 17120

Attorney General (1980-1981)
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

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

My practice has been generally in the area of insurance and commercial litigation. I have typically represented insurance companies and other corporate clients. I have usually, although not always, represented defendants.

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

Regularly. In addition to trying cases, I have appeared in court on numerous motions and at numerous settlement and other pretrial conferences.

2. What percentage of these appearances was in:
(a) federal courts; 75%
(b) state courts of record; 25%
(c) other courts. 0

3. What percentage of your litigation was:
 (a) civil; 100%
 (b) criminal. 0
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.
 Approximately 20, in which I was sole or chief counsel.
5. What percentage of these trials was:
 (a) jury; 25%
 (b) non-jury. 75%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
- (a) the date of representation;
 - (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
 - (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

The Trustees of the University of Pennsylvania v. Lexington Insurance Company, et al., 815 F.2d 890 (3d Cir. 1987)

I represented the plaintiff Trustees of the University of Pennsylvania in a suit against its excess malpractice insurer which had refused to pay its share of a settlement of a serious malpractice claim against the Hospital of the University of Pennsylvania and one of its employed physicians.

The case was tried before Judge Joseph L. McGlynn, Jr. and a jury for 14 trial days in February and March, 1985 in the United States District Court for the Eastern District of

Pennsylvania. The jury returned a verdict in favor of the Hospital for \$5,556,438, including \$500,000 in punitive damages. The Court also awarded my client its counsel fees and costs. The Court of Appeals, in a twenty page opinion written by Judge Becker, affirmed except as to the award of punitive damages. In its opinion, the Court decided for the first time a number of important points of insurance law, including the propriety of a "two-tier" settlement (where plaintiff agrees to take less in settlement if defendant's insurance carrier is not obligated to pay) and the award of counsel fees under the circumstances of this case.

Counsel for Lexington Insurance Company was Robert Korn of Korn, Kline & Kutner, 1845 Walnut Street, 21st Floor, Philadelphia, PA 19103 (215-751-0500).

Ford Motor Company, et al. v. Insurance Commissioner, et al., 672 F. Supp. 841 (E.D. Pa. 1987), aff'd in part, rev'd in part 874 F.2d 926 (3d Cir. 1989)

I served as counsel to Ford Motor Company and certain of its insurance and savings and loan subsidiaries in a lawsuit my client instituted in the U.S. District Court for the Eastern District of Pennsylvania against the Pennsylvania Insurance Commissioner.

Ford sought declaratory and injunctive relief against the Insurance Commissioner to prevent her from enforcing §641 of the Pennsylvania Insurance Department Act. That statute prohibits the affiliation between insurance companies and banking institutions. Ford's insurance subsidiaries faced loss of their right to do business in Pennsylvania because of Ford's savings and loan affiliate, First Nationwide. Judge Robert Kelly of the District Court issued the injunction Ford sought, holding that §641 violated the Supremacy and Commerce Clauses of the U.S. Constitution. In addition to the constitutional issues, Ford defeated an effort by the Insurance Commissioner and intervenor agents to have the federal court abstain from hearing the case. On appeal, the case was consolidated for argument with United States Automobile Ass'n. et al. v. Muir. On May 5, 1989, the Court of Appeals, in an opinion by Judge Higginbotham, affirmed the District Court as to my clients on the basis of the Supremacy Clause argument.

Counsel for the Insurance Commissioner was Maria Parisi Vickers, Office of the Pennsylvania Attorney General, 206 State Office Building, Broad and Spring Garden Streets, Philadelphia, PA 19130 (215-560-2402). Counsel for the insurance agents were William Balaban of Balaban & Balaban, 27 North Front Street, Harrisburg, PA 17108 (717-234-3282) and Jonathan B. Sallet of Miller, Cassidy, Larroca & Lewin, 2555 M Street, N.W., Suite 500, Washington, DC 20037 (202-293-6400).

McMillan, et al. v. State Mutual Life Assurance Company and Trans World Airlines, Inc., U.S. Court of Appeals for the Third Circuit, Nos. 90-1462 and 90-1463, decided December 28, 1990

I represented defendants State Mutual Life Assurance Company and Trans World Airlines, Inc. This was a suit to recover death benefits of a TWA employee under a group life insurance policy purchased by her employer. The employee, an office supervisor, had been murdered by her estranged husband as she was leaving the building where she worked after her shift had ended. The "subtle and novel question," as the Court of Appeals characterized it, was whether she was "on the authorized business" of her employer at the time of her death, under the terms of the policy and Pennsylvania "civil code" to which the policy referred.

Cross-motions for summary judgment were filed before Chief Judge Louis Bechtle of the Eastern District of Pennsylvania. On June 11, 1990, Judge Bechtle granted plaintiffs' motion and denied defendants'. On December 28, 1990 the Court of Appeals (Rosenn and Hutchinson, C.J.J.) affirmed, with Judge Stapleton dissenting.

Counsel for plaintiffs was Michael-John Goodnow, Sidney H. Black, Ltd., Suite 1625, 1528 Walnut Street, Philadelphia, PA 19102 (215-732-3886).

Richhart, et al. v. Metropolitan Life Insurance Company, U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 89-1725

In 1989-1990 I was counsel for the defendant Metropolitan Life Insurance Company in this purported class action under the Racketeer Influenced and Corrupt

Organizations Act and various pendant state law causes of action. Plaintiffs alleged that Metropolitan had defrauded them and others similarly situated into purchasing duplicative policies. Metropolitan moved to dismiss the Amended Complaint on a number of grounds, including the ground that the McCarran-Ferguson Act exempted insurance from federal regulation and that RICO did not apply to conduct of insurance companies under the circumstances of this case. Judge James McGirr Kelly agreed with Metropolitan's position and dismissed the Amended Complaint on March 30, 1990. As far as I know, this was the first time any federal court had dismissed a case on this basis. The Court's opinion was not reported, except in Lexis. No appeal was taken.

Counsel for the plaintiffs was Laurence S. Berman of Levin, Fishbein, Sedran and Berman, Suite 600, 320 Walnut Street, Philadelphia, PA 19106 (215-592-1500).

Canavati v. Southland Corporation, U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 90-5986

I represented the defendant Southland Corporation in 1990 in an action brought in the Delaware County Common Pleas Court by a 7-Eleven store franchisee to enjoin Southland, the franchisor, from terminating the franchise. I removed the case to the U.S. District Court for the Eastern District of Pennsylvania. The case involved the interpretation of Southland's standard franchise agreement. After a preliminary injunction hearing in October, 1990, Judge Joseph McGlynn denied plaintiff's motion for a preliminary injunction. My client thereupon took control of the store. No appeal was taken.

Counsel for the plaintiff were Robert Holber and Shelly Dugan, 334 W. Front Street, Media, PA 19063 (215-565-5463).

Korn v. Avis Rent-A-Car, C.P., Phila., March Term, 1975 No. 1670, 8 D.&C.3d 640 (C.P. Phila. 1977)

This was a state court class action against a number of the national car rental companies. I represented Avis. Plaintiffs claimed that the collision damage waiver ("CDW") offered under car rental contracts was actually insurance.

Since the contracts were not approved or regulated by the state, plaintiffs alleged the CDW was being offered illegally. Plaintiffs sought the return of all monies paid by customers for the waiver option. I was lead counsel in preparing and arguing a motion for judgment on the pleadings on the ground that the CDW was not insurance (a term not defined in the Pennsylvania Insurance Code). Judge Jacob Kalish of the Court of Common Pleas of Philadelphia County granted defendants' motion.

Herbert B. Newberg, 227 S. Sixth Street, Suite 200, Philadelphia, PA 19106 (215-922-4740) was counsel for the plaintiffs.

E. Barclay Cale, Jr. of Morgan, Lewis & Bockius, 2000 One Logan Square, Philadelphia, PA 19103 (215-963-5425) was counsel for National Car Rental System, Inc.

Dennis R. Supplee of Schnader, Harrison, Segal & Lewis, 1600 Market Street, Suite 3600, Philadelphia, PA 19103 (215-751-2068) was the attorney for the Hertz Corporation.

Seymour I. Toll of Toll, Ebby & Langer, 1760 Market Street, 6th Floor, Philadelphia, PA 19103 (215-567-5770) was attorney for Econo-Car International, Inc.

G. David Rosenblum of Astor, Weiss & Newman, The Bellevue, Sixth Floor, Broad and Walnut Streets, Philadelphia, PA 19102 (215-790-0100) was attorney for Budget Rent-A-Car.

In re: Reapportionment Plan for the Pennsylvania General Assembly, 442 A.2d 661 (1981)

I represented pro bono a Philadelphia community group known as the Committee to Save the 199th Legislative District in one of the several dozen appeals to the Pennsylvania Supreme Court challenging the 1980 reapportionment of the legislature. We argued that the Reapportionment Plan did not meet the mandate of Article II, Sec. 16 of the Pennsylvania Constitution which requires that no political subdivision such as a ward should be divided in forming a legislative district unless absolutely necessary. The Supreme Court affirmed the Plan 4 to 3. The appeal I handled was one of only 3 or 4 to merit specific discussion in one of the dissents.

Opposing counsel, who represented the Legislative Reapportionment Commission, was Thomas N. O'Neill, Jr., now a Judge of the U.S. District Court for the Eastern District of Pennsylvania. His address and phone number are 14613 U.S. Court House, 601 Market Street, Philadelphia, PA 19106 (215-597-2750).

Judge v. Allentown and Sacred Heart Hospital and The Hartford Insurance Group, 487 A.2d 817 (1985)

I represented Thomas Judge, Director of the Pennsylvania Medical Professional Liability Catastrophe Loss Fund ("CAT Fund") in an appeal to the Pennsylvania Supreme Court, after the Commonwealth Court had dismissed my client's complaint for failure to state a cause of action. The CAT Fund, a statutory excess insurer for health care providers in Pennsylvania, had settled a malpractice claim and then sued the primary carrier for the money the latter had refused to pay, allegedly in bad faith, as part of the settlement. The Supreme Court, in a case of first impression, reversed the Commonwealth Court and held that the CAT Fund had a cause of action against the primary carrier under such circumstances.

Counsel for the defendant Allentown and Sacred Heart Hospital was Frank A. Baker, III of Butz, Hudders, Tallman, Stevens & Johnson, 740 Hamilton Mall, Allentown, PA 18101-2488 (215-439-1451).

Counsel for The Hartford Insurance Group, the primary carrier, was Robert H. Holland of Holland, Taylor and Sorrentino, 561 E. Market Street, Bethlehem, PA 18018 (215-865-2644).

Metropolitan Property and Liability Insurance Company v. Insurance Commissioner and Edgar Miller, 537 A.2d 53 (Pa. Commw. 1988) rev'd 580 A.2d 300 (Pa. 1990)

I served as counsel for Metropolitan Property and Liability Insurance Company in this case that began as an administrative action in the Pennsylvania Insurance Department.

It involved the issue whether my client could rescind ab initio a homeowner's policy for fraud in the application or whether the Pennsylvania Unfair Insurance Practices Act limited the company's remedy to prospective cancellation. This was a case of first impression. Metropolitan had rescinded this policy after the insured had had a fire loss, when the company first learned of several previous fires that the insured had not disclosed in his insurance application. Upon complaint by the policyholder and after a hearing in June, 1986, Insurance Commissioner George Grode held that prospective cancellation was the only proper remedy. He ordered the company to reinstate the policy it had rescinded and to pay the intervening claim. The Commonwealth Court affirmed the reinstatement in 1988. The Pennsylvania Supreme Court, granting allowance of appeal, reversed in 1990. It held that the statute had not abolished the common law remedy of rescission ab initio of an insurance policy for fraud.

Counsel for the Insurance Commissioner was Arthur Selikoff, Pennsylvania Insurance Department, 13th Floor, Strawberry Square, Harrisburg, PA 17120 (717-787-2567).

Scibal, et al. v. Lincoln National Life Insurance Company, et al., Docket No. C-4611-85E, Superior Court of New Jersey, Chancery Division, Atlantic County

I represented Lincoln National Life Insurance Company, one of its affiliates, a regional manager, and some agents in this 6 day trial for injunctive relief and damages in December, 1985 in Superior Court of Atlantic County, New Jersey before The Honorable Marvin N. Rimm. A group of former agents brought this complex action involving tax-sheltered annuities, various New Jersey insurance statutes, and the common law of tortious interference with contract. Millions of dollars were potentially at stake for my clients. The court entered a two page order, dismissing certain of plaintiffs' claims and granting plaintiffs only very limited and narrow relief. Ultimately, the Court awarded the plaintiffs \$250,000. No appeal was taken. The case is not reported.

Counsel for plaintiffs was Salvatore Perillo of Perillo & Hundertmark, Suite 810, One South New York Avenue, Atlantic City, NJ 08401 (609-348-2100).

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

Village Improvement Association of Doylestown, PA a/k/a
Doylestown Hospital v. Dow Chemical Co., et al.:

During the period 1988-1989, I was lead counsel for plaintiff Doylestown Hospital in this case which was instituted in the Court of Common Pleas of Bucks County, Pennsylvania (C.A. No. 84-2663).

It involved a claim against Dow Chemical Company ("Dow") and several other defendants for defective brick panels on the facade of the hospital. Dow had manufactured a product known as sarabond, used in the mortar of the prefabricated panels. As a result of sarabond, metal pins, embedded in the mortar and used to attach the panels to the steel frame, corroded and caused the panels to crack. The hospital was forced to remove all the paneling and reclad the exterior at a cost of millions of dollars. The case was settled prior to trial. The settlement amount is confidential.

Meritor Savings Bank v. Ford Motor Credit Company:

I served as lead counsel for defendant Ford Motor Credit Company ("Ford") in a case instituted by Meritor Savings Bank ("Meritor") in 1990 in the United States District Court for the Eastern District of Pennsylvania (E.D., Pa., Civil Action No. 90-1993). Ford had purchased a subsidiary of Meritor and had refused to pay \$5 million of the purchase price under the holdback provision of the agreement, due to alleged breaches by Meritor. The case involved a number of complex accounting issues. After much discovery, the case was settled. The amount of the settlement is confidential.

Eastern Paralyzed Veterans Association of Pennsylvania,
Inc., et al. v. Sykes, et al.:

I represented Southeastern Pennsylvania Transportation Authority (SEPTA) in this purported class action in 1986-1989 in the U.S. District Court for the Eastern District of Pennsylvania (Civil Action No. 86-6797). Plaintiffs alleged that SEPTA was in violation of various federal statutes requiring disability access to buses, and commuter train and subway stations. After unsuccessfully attempting to have the case dismissed, a settlement was reached and approved by the SEPTA Board and the Court.

Block, et al. v. TRA Travel, Inc., et al.:

I was lead counsel in 1988 and 1989 for one branch of the Rosenbluth family in a dispute which another branch over corporate governance in and benefits due from the Rosenbluth Travel business. After the institution of litigation in the Court of Common Pleas of Montgomery County, Pennsylvania (No. 88-01144) and extensive discovery, a complicated settlement agreement was worked out.

I served as chair of the Pennsylvania Appellate Court Nominating Commission (1981-1985).

The U.S. Court of Appeals for the Third Circuit appointed me as a member of the Bankruptcy Judge Merit Selection Panel (1985-1986) to recommend candidates for vacancies in the Eastern District of Pennsylvania.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

I anticipate that my capital, share of profits, Keogh retirement plan, and any compensation due from Dechert Price & Rhoads will be paid to me upon my resignation. I will have no continuing interest in the firm.

Dechert Price & Rhoads ("DP&R") is a tenant under a July 29, 1988 lease in an office building located at 1717 Arch Street, Philadelphia, PA 19103 owned by its landlord, Bell Atlantic Properties, Inc. The lease grants DP&R certain rights in the financial results of the premises as set forth in the lease ("Participation Right"). The Participation Right will be assigned to an irrevocable trust, to be created in May, 1991, by DP&R as settlor for the benefit of those partners who have borne or will bear a share of the rent and other expenses under the lease during its 15 year base term. I am one of those beneficiaries. No income has become payable by the landlord as of this date, and it is not possible at this time to determine what my pro rata share, if any, will be in the future. Provident National Bank, Philadelphia, PA is the trustee.

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

I will disqualify myself from any matter involving a conflict of interest or involving the appearance of a conflict of interest where it could reasonably be said that such an appearance exists.

Specifically, I will recuse myself for the foreseeable future from any case where Dechert Price & Rhoads represents a party. I will also recuse myself from any matter where High, Swartz, Roberts & Seidel represents a party, so long as my brother, Paul B. Bartle, is a partner in that law firm and will disqualify myself from any case involving Montgomery County, Pennsylvania so long as my brother is a County Commissioner.

I would not hear any case involving a party in which I or my wife owns stock. I will resign from participation in the Consensus Investment Club, a small club of some fourteen social friends which invests in common stocks, so as to minimize conflicts of interest.

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

No.

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

See Financial Disclosure Report, attached hereto as pp. 19(a)-19(g).

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

See Net Worth Statement and schedule, attached hereto as pp. 19(h)-19(i).

AC-10
Rev. 1/91

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-504, November 30, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting; (last name, middle initial): BARTLE, Harvey, III	2. Court or Organization: U.S. District Court for the Eastern District of Pennsylvania	3. Date of Report: May 15, 1991
4. Title (Article III, § 1, does not require title or full or part-time):	5. Report Type (check appropriate type): <input checked="" type="checkbox"/> Nomination date May 15, 1991 <input checked="" type="checkbox"/> Initial Annual Final	6. Reporting Period: January 1, 1990 - April 30, 1991

7. Chambers or Office Address
Dechert Price & Rhoads
4000 Bell Atlantic Tower, 1717 Arch Street
Philadelphia, PA 19103-2793

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

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITION NAME OF ORGANIZATION/ENTITY

<input type="checkbox"/>	NONE (No reportable positions)
Partner	Dechert Price & Rhoads
Trustee	Chestnut Hill Hospital Healthcare, Inc.
Trustee	Springside School
Trustee	Hillside Child Care, Inc.
Secretary	Consensus Investment Club

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATE PARTIES AND TERMS

<input checked="" type="checkbox"/>	NONE (No reportable agreements)

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

<u>DATE</u> (Honoraria only)	<u>SOURCE AND TYPE</u>	<u>GROSS INCOME</u> (yours, not spouse's)
<input type="checkbox"/>	NONE (No reportable non-investment income)	
1	1/90 - 4/30/91 Dechert Price & Rhoads (Partner in Law Firm)	\$ 469,243.45
2	1/90 - 4/30/91 Baxter & Brinker (Real Estate Sales) (S)	\$
3	1/90 - 4/30/91 Chestnut Hill Academy (Substitute Teacher) (S)	\$
4		
5		

-19(a)-

FINANCIAL DISCLOSURE KEEFART (cont'd)

Name of Person Reporting:
BARTLE, Harvey, IIIDate of Report:
May 15, 1991**IV. REIMBURSEMENTS AND GIFTS** -- transportation, lodging, food, etc., to spouse
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reimbursable amounts and gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCE	DESCRIPTION
<input type="checkbox"/> NONE (No such reportable reimbursements or gifts)	
1 Exempt	
2	
3	
4	
5	
6	
7	
8	

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCE	DESCRIPTION	VALUE
<input type="checkbox"/> NONE (No such reportable gifts)		
1 Exempt		\$ _____
2		\$ _____
3		\$ _____
4		\$ _____

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.15-16 of Instructions.)

CREDITOR	DESCRIPTION	VAL. CODE*
<input checked="" type="checkbox"/> X NONE (No reportable liabilities)		
1		
2		
3		
4		
5		
6		
7		

* VALUE CODES: J = \$15,000 or less S = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$150,000
 R = \$150,001 to \$250,000 P = More than \$250,000

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FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting
BARTLE, Harvey, IIIDate of Report
May 15, 1991

VII. INVESTMENTS and TRUSTS -- income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of instructions.)

A. Description of Assets (including trust assets; Indicate where applicable, owner of the asset by using the parenthetical (i) for joint ownership, (s) for individual ownership, (b) for separate ownership by spouse, (p) for for the benefit of dependents) Place 'X' in prior 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) Acct. Code (A-B)	(2) Type (A-B, rent or int.)	(1) Value Code (J-P)	(2) Value Code (Q-W)	(3) Type buy, sell, redeem, etc.)	(2) Date: Day	(3) Value Code: (J-P)	(4) Code (A-B)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)							EXEMPT			
1 Eastman Kodak (Com.)	A Div.	J T								
2 General Motors (Com.)	A Div.	J T								
3 IBM (Com.)	A Div.	J T								
4 Xerox (Com.)	A Div.	J T								
5 DuPont (S) & (DC) (Com.)	A Div.	J T								
6 Consensus Investment Club	B Div. & Cap.Gain	K T					(See attachment)			
7 Penn Venture, Ltd. (J) pp.	A --	K W								
8 Maritran's Partners L.P. (S) pp.	A Int.	J W								
9 Germantown Savings Bank Philadelphia, PA (J)	C Int.	L T								
10 Phila. Savings Fund Society Philadelphia, PA (J)	C Int.	K T								
11 Provident National Bank Philadelphia, Pa. (S)	A Int.	J T								
12 Corestates First Pa. Bank Philadelphia, PA (J)	A Int.	K T								
13 Manufacturers Life Ins. Co. Single Premium Annuity	D Int.	L T								
14 Mutual Assurance Co. (Deposit in perpetual fire ins. cc.)	A Div.	J T								
15 Phila. Contributionship (Deposit in perpetual fire ins. co.) (J)	A Div.	J T								
16 Dechert Price & Rhoads H.R. 10 Retirement Plan	A --	M T								
17 City of Philadelphia (Municipal Bond)	A Int.	J W								
18 School Dist. of Phila. (Municipal Bond)	B Int.	J W								
19 Pa. Higher Educational Facilities Auth. (Mun. Bond)	A Int.	J W								
20 Municipal Auth. of West- moreland Cty, PA (Mun. Bond)	A Int.	J W								

1 Income/Gain Codes: A=\$1,000 or less
(See Col. B & D) B=\$1,001 to \$2,500
C=\$2,501 to 5,000
D=\$5,001 to 10,000
E=\$10,001 to 25,000
F=\$25,001 to \$50,000
G=\$50,001 to \$100,000
H=\$100,001 to \$250,000
I=\$250,001 to \$500,000
J=\$500,001 to \$1,000,000
K=\$1,000,001 to \$2,000,000
L=\$2,000,001 to \$5,000,000
M=\$5,000,001 to \$10,000,000
N=\$10,000,001 to \$25,000,000
P=More than \$25,000,000

2 Value Codes: J=\$1,000 or less
M=\$250,001 to \$500,000
(See Col. C & D) N=\$500,001 to \$1,000,000
O=\$1,000,001 to \$2,000,000
P=\$2,000,001 to \$5,000,000
Q=\$5,000,001 to \$10,000,000
R=\$10,000,001 to \$25,000,000
S=\$25,000,001 to \$500,000
T=\$500,000,001 to \$1,000,000
U=\$1,000,000,001 to \$2,000,000
V=\$2,000,000,001 to \$5,000,000
W=\$5,000,000,001 to \$10,000,000
X=\$10,000,000,001 to \$25,000,000
Y=\$25,000,000,001 to \$500,000
Z=\$500,000,000,001 to \$1,000,000

3 Value Method Codes: Q=Appraisal
(See Col. C) R=Cost (real estate only)
S=Assessment
U=Book Value
V=Other
W=Estimated
X=Cash/Market

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting
BARTLE, Harvey, IIIDate of Report
May 15, 1991VII. INVESTMENTS and TRUSTS -- income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)
(CONT'D)

A. Description of Assets (including trust assets)		B. Income during reporting period		C. Value as end of reporting period		D. Transactions during reporting period					
(1)	(2)	(1)	(2)	(1)	(2)	(1)	Type (e.g., div., rental, etc.)	(2)	(3)	(4)	(5)
Amount (A-B)		Value (J-P)	Method (Q-W)	Value (J-P)	Method (Q-W)	Date: Month Day	Buyer/ Seller or Other transaction	Value (J-P)	Gain/ Loss (J-P)	Ident. of Buyer/Seller or Other transaction	(A-B)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)						EXEMPT					
21	Garage - 100 W. Moreland Ave., Phila., PA (J) Rental	A	Rent	J	W						
22	Trust to be established by Dechert Price & Rhoads 5/91	(See	VIII - Additional information or Explanations)								
23	T.I.R.A. with Provident Nat'l Bank, Philadelphia, PA (S)	A	Int.	J	T						
4											
5											
6											
7											
8											
9											
10											
11											
12											
13											
14											
15											
16											
17											
18											
19											
20											
1 Income/Gain Codes: A=\$1,000 or less B=\$1,001 to \$2,500 C=\$2,501 to 5,000 D=\$5,001 to \$15,000 E=\$15,001 to \$1,000,000 H=More than \$1,000,000 2 Value Codes: J=\$1,000 to \$10,000 K=\$10,001 to \$50,000 L=\$50,001 to \$100,000 M=\$100,001 to \$1,000,000 N=\$100,001 to \$250,000 3 Value Method Codes: O=Appraisal P=Cost (real estate only) S=Assessment T=Cash/Market (See Col. C1 & D1) R=\$250,001 to \$100,000 V=Other W=Estimated											

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FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting BARTLE, Harvey, III	Date of Report May 15, 1991
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VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

VII(6) - The list of securities held by the Consensus Investment Club as of 4/30/91 is attached.

VII(22) - Dechert Price & Rhoads ("DP&R") is a tenant under a July 29, 1988 lease in an office building located at 1717 Arch Street, Philadelphia, PA 19103 owned by its landlord, Bell Atlantic Properties, Inc. The lease grants DP&R certain rights in the financial results of the premises as set forth in the lease ("Participation Right"). The Participation Right will be assigned to an irrevocable trust, to be created in May, 1991, by DP&R as settlor for the benefit of those partners who have borne or will bear a share of the rent and other expenses under the lease during its 15 year base term. I am one of those beneficiaries. No income has become payable by the landlord as of this date, and it is not possible at this time to determine what my pro rata share, if any, will be in the future. Provident National Bank, Philadelphia, PA is the trustee.

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee of Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicator function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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.A. app. 7, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature Harvey Bartle

Date May 15, 1991

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.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

**ATTACHMENT TO FINANCIAL DISCLOSURE REPORT
OF HARVEY BARTLE, III**



BURKE, LAWTON, BREWER & BURKE

INVESTMENT SECURITIES DIVISION

04/30/91

CONSENSUS INVESTMENT CLUB
c/o GEORGE W HEMPHILL
101 ATWOOD RD
BETHLEHEM PA 19118

ACCOUNT NO: CO11042

SECURITY	DATE OF PURCHASE
.....

CORTLAND -GENERAL 09/00/00

CATEGORY TOTALS:

AMERICAN EXPRESS CO 01/05/90
01/04/91

COLLINS INDUSTRIES
INC 06/09/89
08/04/89
06/12/90

CORESTATES FINANCIAL
CORP 01/04/91

CORNING INC 03/07/88
11/04/88

DISNEY WALT 11/15/90

EASTMAN KODAK 11/15/86
11/15/87
11/15/88
11/15/91

FEDERAL NATL MTG
ASSN 01/14/91

P.O. BOX 100 • 926 BETHLEHEM PIKE • FLUSHING, PENNSYLVANIA 19031 • TEL: 215-836-7200 • FAX: 215-836-1098
-19(f)-



**BURKE, LAWTON, BREWER & BURKE
INVESTMENT SECURITIES DIVISION**

04/30/91

CONSENSUS INVESTMENT CLUB
c/o GEORGE W HEMPHILL

ACCOUNT NO: C011042

SECURITY	DATE OF PURCHASE
GENERAL MOTORS CORP	01/05/90 04/05/91
GREENWICH PHARMACEUTICALS INC	04/05/91
HEWLETT PACKARD CO	04/12/90 02/08/91
INTL BUSINESS MACHINES CORP	05/11/81 09/06/85
ITT CORPORATION	03/09/90
PFIZER INC	02/08/91 03/15/91
REPLIGEN CORP	03/15/91
UNOCAL	02/18/90 10/13/90
WASTE MGMT INC	12/28 12/28
WESTERN DIGITAL CORP	07/15/91

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-19(g)-

CONFIDENTIAL FINANCIAL STATEMENT
NET WORTH

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

Harvey Bartle, III

S.S. #203-34-6863

ASSETS		LIABILITIES	
Cash on hand and in banks	147,400	Notes payable to banks—secured	
U.S. Government securities—add schedule		Notes payable to banks—unsecured	
Listed securities—add schedule	24,043	Notes payable to relatives	
Unlisted securities—add schedule	62,900	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 tax and interest	
Doubtful		Real estate mortgages payable—add schedule to Atlantic Financial	27,000
Real estate owned—add schedule	375,000	Chattel mortgages and other liens payable	
Real estate mortgages receivable		Other debts—itemize:	
Autos and other personal property	65,000	Auto loan to Bryn Mawr Trust Co. (spouse)	9,000
Cash value—life insurance	73,695		
Other assets—itemize: Dechert Price & Rhoads: Capital	77,816		
Keogh Retirement Plan	218,000	Total Liabilities	36,000
1990 Undistributed Profits	16,641	Net worth	1,027,295
IRA-Provident Nat'l Bank	2,800	Total Liabilities and net worth	1,063,295
Total assets (spouse)	1,063,295		
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (Add schedule.)	
On leases or contracts		Are you defendant in any suits or legal actions?	
Legal Claims		Have you ever taken bankruptcy?	
Provision for Federal Income Tax			
Other special debt			

**CONFIDENTIAL FINANCIAL STATEMENT
NET WORTH**

Harvey Bartle, III

S.S. #203-34-6863

Schedule - Listed Securities

150 shs. Eastman Kodak	\$ 6,225
75 shs. General Motors	2,878
75 shs. I.B.M.	7,941
50 shs. Xerox	2,867
65 shs. DuPont (spouse)	2,827
30 shs. DuPont (children)	1,305

Schedule - Unlisted Securities

Municipal Bonds:

\$ 5,000 City of Philadelphia	\$ 2,500
\$10,000 School District of Philadelphia	8,000
\$ 5,000 Pennsylvania Higher Educational Facilities Authority	4,000
\$ 5,000 Municipal Authority of Westmoreland County, Pennsylvania	4,000

Limited Partnerships:

22 Units of Penn Venture, Ltd. (a limited real estate partnership)	\$ 20,000
Maritrans Partners L.P. (spouse)	1,000

Investment Club:

Consensus Investment Club	\$ 18,900
---------------------------	-----------

Perpetual Fire Insurance:

Mutual Assurance Company Deposit	\$ 2,500
Philadelphia Contributionship Deposit	2,000

Schedule - Real Estate

100 W. Moreland Avenue Philadelphia, PA 19118	\$375,000
--	-----------

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

I have contributed money and worked informally for a number of Republican candidates and political campaigns over the last 25 years.

I served as a Republican Committeeman in the 9th Ward of the City of Philadelphia (1968-1979) and was an Alternate Delegate to the 1976 Republican National Convention, having lost an election for Delegate.

III. GENERAL (PUBLIC)

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

In 1981 and 1982 I represented pro bono a community group challenging the 1980 Reapportionment Plan for the Pennsylvania legislature. I met with community members, did legal research, prepared the brief, and argued the case in the Pennsylvania Supreme Court. In re: Reapportionment Plan for the Pennsylvania General Assembly, 442 A.2d 661 (1981). I devoted approximately 180 hours to this matter.

From 1984 to 1989 I represented pro bono an inmate named John Amato who was seeking a commutation of his life sentence before the Pennsylvania Board of Pardons. I argued his case twice before the Board and twice the Board recommended commutation. The second time Governor Casey granted the petition. My work involved interviewing Mr. Amato in prison, preparing and updating his petition, arguing his case in Harrisburg before the Board of Pardons, and counselling him on his release. The amount of time devoted to this matter was approximately 42 hours.

In recent years, I have served on the Board of Trustees of Chestnut Hill Hospital and its parent Chestnut Hill Healthcare. This involved several hours a month on average.

I am currently serving on the Board of Trustees of Springside School, including service as the Board Secretary, member of its Executive Committee, and Chair of its Nominating Committee. I am also on the Board of its affiliate, Hillside Child Care, Inc. which is working on a child care program for pre-school children with working parents. The work for Springside related matters has involved as much as 8 or 9 hours a month.

In addition, I am a member and Clerk of the Vestry of St. Thomas' Church, Whitemarsh and have previously taught in the Church School and chaired the Adult Forum Committee. I also

provide legal advice to the Church when the occasion warrants. Currently, this involves about 3 to 4 hours a month.

In 1989 through 1991 I have represented pro bono the Chestnut Hill Community Association and some near neighbors in a zoning appeal and the subsequent settlement negotiations. The time spent on this matter was approximately 60 hours.

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

I do not currently belong to any such organization.

I belonged to the Union League of Philadelphia between approximately 1963 and 1978, when I resigned. At that time, it did not admit women to membership. That policy has since changed.

I belonged to the Philadelphia Club between February, 1982 and October, 1989 when I resigned. It did not, and as far as I know, still does not admit women.

I have belonged to the Philadelphia Cricket Club since June, 1967. Up until late 1990, it had a restricted membership for women. They paid lower dues than men and did not have a vote, but did have use of the dining and athletic facilities. The by-laws have now been amended to permit current female members to become full voting members at their option. New female members will now be full voting members with the same dues structure and privileges as men.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process,

from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

A selection committee established by Senators John Heinz and Arlen Specter recommended my nomination to the Senators.

The committee advertized the holding of interviews for current vacancies. I submitted a detailed application and was interviewed by three members of the committee. I was then invited back for a meeting with the entire committee later the same day. Senators Heinz and Specter subsequently interviewed me in Washington, DC. In October, 1990 I received a phone call from Senator Specter and from the office of Senator Heinz advising me that they were recommending me to the President for nomination.

Thereafter, I was interviewed by officials of the Justice Department, an F.B.I. agent, and a representative of the American Bar Association Standing Committee on Federal Judiciary. President Bush advised me on May 15, 1991 that he was sending my nomination to the Senate.

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

No.

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

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

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

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

I believe that the role of a federal judge is to interpret the law and not to usurp the function of Congress in making the law.

The federal courts, under the Constitution, can only adjudicate specific cases and controversies. While decisions in particular matters can have far-reaching effects, the courts do not have the powers available to Congress in trying to solve complex political and social problems. The courts do not have the broad investigative powers, the appropriation function, or other expertise needed to study and resolve many of those issues.

The courts must always enforce and vigilantly guard the individual's constitutional and civil rights. The lower federal courts, of course, must follow the law as interpreted by the U.S. Supreme Court. No judge should allow his or her personal, political, or social views to influence the decisions he or she renders.

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

William H. Yohn, Jr.

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

Office: Montgomery County Courthouse
Swede and Airy Streets
Norristown, PA 19404

Home: Crestwood Drive
Pottstown, PA 19464

3. Date and place of birth.

Pottstown, PA. November 20, 1935

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

Married. Jean Louise Kochel Yohn
Spouse is not currently employed; however, she has
occasionally worked as a substitute teacher for the Pottsville
School District, Kaufman and Buchert Roads, Pottstown, PA.

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

Princeton University,
Princeton, New Jersey
September 1953 - June 1957
Bachelor of Arts, Magna Cum Laude, Phi Beta Kappa

Yale Law School, New Haven, Connecticut
September 1957 - June 1960
Juris Doctor
Edward John Noble Leadership Grant

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

FULL-TIME

Wells, Campbell, Reynier & Vohn, Partner, 1961-1971
 635 High Street, Pottstown, PA 19464

Binder, Vohn & Kalis, Partner, 1971-1981
 13 Armand Hammer Boulevard, Pottstown, PA 19464

Commonwealth of Pennsylvania, Judge, 1981-present
 Montgomery County Court of Common Pleas
 Courthouse, Norristown, PA 19404

PART-TIME

District Attorney's Office, Assistant District Attorney for
 Montgomery County, 1962-1965
 Montgomery County Courthouse, Norristown, PA 19404

Hon. Lee A. Donaldson, Jr., Legislative Counsel, 1967-1968
 Majority Leader, Pennsylvania House of Representatives
 Main Capitol Building, Harrisburg, PA.

Pennsylvania House of Representatives, Member, 1968-1980
 Main Capitol Building, Harrisburg, PA 17120

Pepperidge Farms, Inc., Market Surveyor, Summer 1958
 Route 1, Westport, CT
 U.S. Senator John Sherman Cooper, Research Assistant, Summer 1959
 Senate Office Building, Washington, DC.
 American Institute of Banking, Instructor, 1963-1966
 Commercial Law and Negotiable Instruments

NON-PROFIT

Pottstown Memorial Medical Center (non-profit community
 hospital), Board of Directors
 Chairman, 1984-present, Member, 1974-1984
 1600 High Street, Pottstown, PA 19464
 Pottstown Healthcare, Inc. (parent corporation of Pottstown
 Memorial Medical Center), Director
 Chairman, 1985-present
 1600 High Street, Pottstown, PA 19464
 Montgomery Bar Association, Director, 1967-1970
 Norristown, PA
 Greater Pottstown Drug Abuse Program, Inc. (INSIGHT)
 Chairman and Member of Board of Directors, 1970-78
 Progress Pottstown, Inc., Director, 1979-81

American Cancer Society, Pottstown Area Unit, Director, 1977-81
Pottstown Historical Society, Director, 1974-77
Pottstown Symphony Association, Director, 1974-77
Pottstown Area Young Republican Association, Chairman,
1963-65
Montgomery County Young Republican Federation, Chairman,
1965-66

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

U.S. Marine Corps Reserves, active duty.
August, 1960 - February, 1961.
Private and Private first class, 1852719.

U.S. Marine Corps Reserves, weekend and summer reserve duty.
February, 1961 - August, 1965,
Lance Corporal and Corporal, 182719

Honorable discharge at end of enlistment.

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

Pottstown School District Alumni Honor Roll, Charter Member,
1986.
Pottstown Jaycees, Standing Young Man of the Year, 1968.
Pottstown High School, Valedictorian and Class President, 1953.
Commencement Speaker, 1978..
Princeton University, Phi Beta Kappa, Magna Cum Laude, 1957.
Woodrow Wilson School of Public and International Affairs.
Yale Law School, Edward John Noble Leadership Grant, 1960.
USMCR, American Spirit of Honor Medal, 1960-

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

Montgomery Bar Association (1961-present)
Director, 1967-1970
Chairman, Continuing Legal Education Committee, 1966
Bench-Bar Committee, 1982-1984
Federal Courts 200, Inc., 1988-1989

Pennsylvania Bar Association (1961-present)
Member of various committees

American Bar Association (1988-present)
Member of various committees

Pennsylvania Conference of State Trial Judges (1981-present)
Economics and Finance Committee
Civil Procedures Committee

Montgomery County Court of Common Pleas
Legislative Liaison
Clerk of Courts Liaison
Court Budget Committee
Case Management Committee

As a member of this committee I conceived the idea of combining our civil and family court divisions. This concept was accepted by the Committee and the Board of Judges and has been in use for the past two years. As a result of these changes, all of the various types of marital litigation involving a particular family are now handled by the same judge. In addition, when a hearing begins on one of these matters it is now carried through to a conclusion. This is contrary to the prior practice. In non-family civil matters, all pre-trial motions, petitions, etc. are also now handled by the same judge, contrary to the prior practice. Finally, all assignments of matters to judges are made anonymously so that lawyers cannot attempt to manipulate the selection of the judge before whom they will appear.

Judicial Coordinator, Judicial Training Program of Supreme Court of Pennsylvania, Villanova Law School, January 1988.

National Judicial College, University of Nevada at Reno, General Jurisdiction Course, 1981.

Pennsylvania College of the Judiciary - Annual Sessions since 1981.

Panelist, Pennsylvania Bar Institute.
Effective Use of Real Evidence at Trial, 1986.
Examining The Expert Witness, 1987.
Fundamentals of Civil Practice and Procedure, 1991.

Panelist for Regional Arguments of National Moot Court Competition, 1990.

Panelist, Montgomery Bar Association, Voices of the Constitution, 1987.

Harold R. Medina Seminar for Judges on Law and the Humanities, Princeton University, June 17-20, 1990.

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

The Pennsylvania Conference of State Trial Judges - occasionally lobbies Pennsylvania Legislature.

Please list all other organizations to which you belong.

None.

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

U.S. District Court for the District of Columbia - February 1961.

Montgomery County Court of Common Pleas - November 1961.

Supreme Court of Pennsylvania - April 1965.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited.

None.

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

My present health is excellent. My last physical examination was conducted by Joseph D. Krantzler, M.D., 1591 Medical Drive, Pottstown, PA 19464 in January of 1991.

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

I was appointed as a judge of the Montgomery County Court of Common Pleas by the Governor of Pennsylvania on May 13, 1981 and elected to a ten-year term of office on November 3, 1981. The court is a general jurisdiction court and I have served on an annual rotating basis in the civil, criminal and family divisions of the court.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written;
- (a) Lynch v. McStome and Lincoln Plaza Associates.
46 D. & C. 3d, 115 (1988), aff'd, 378 Pa. Super.
430, 548 A.2d 1276 (1988).
Negligence action resulted in jury verdict for the defendants. Unique issues involved duty after sale of manufacturer to retrofit escalator with subsequent improvements. Affirmed by Superior Court.
- (b) Incollingo v. Maurer, 123 Montg. Co. L.R. 299 (1989),
aff'd, 394 Pa. Super. 352, 575 A.2d 939 (1990).
alloc. denied, ___ Pa. ___, 584 A.2d 318 (1991).
Injured plaintiff successfully litigated his arbitration claim against a "phantom driver" under his uninsured motorist coverage and was paid. He then sued the driver of the other vehicle and the court granted summary judgment for that driver because the plaintiff had recovered the full amount of his damages as determined by the arbitrators. Affirmed by Superior Court.
- (c) McShane v Shashikumar, 120 Montg. Co. L.R. 257 (1988).
Appeal quashed, March 3, 1988.
Parents' claims of negligent infliction of emotional distress and loss of consortium due to injury to child were dismissed.
- (d) Downing v. Harleysville, 125 Montg. Co. L.R. 266 (1990),
Pa. D.& C. 4th ___ (1991).
Plaintiff seeks first-party benefits under the Pennsylvania Motor Vehicle Financial Responsibility Law. In a complicated and unique factual scenario the court allowed recovery after determining that he was an "occupant" of the vehicle under the statutory definition and case law. Appeal pending in Superior Court.
- (e) Penn Title Insurance Co. v Intercounty Abstract, Ltd.
31 Pa. D.& C. 3d 635 (1984).
Declaratory judgment action between title insurance company and its agent with reference to the effective date of the entry of a judgment lien. No appeal.

- (f) Commonwealth v. Loach, 124 Montg. Co. L.R. 230 (1990). aff'd, memorandum opinion, June 14, 1990, alloc. denied, November 19, 1990. Defendant convicted by a jury of third degree murder. Issues raised concerned identification procedures, voir dire questions and numerous evidentiary matters. Affirmed by Superior Court.
- (g) Commonwealth v. Paolino, 122 Montg. Co. L.R. 211 (1989). aff'd, memorandum opinion, September 13, 1989, alloc. denied, August 14, 1990. Doctor convicted by a jury of theft for kiting checks. Issues raised concerned attorney-client privilege and search and seizure of bank records. Affirmed by Superior Court.
- (h) Commonwealth v. Wildonger, 360 Pa. Super. 627, 517 A.2d 205 (1986), alloc. denied, 515 Pa. 579, 527 A.2d 540 (1986). Defendant convicted by a jury of rape and involuntary deviate sexual intercourse. Issues raised concerned evidence of motive and bias and evidence of age of victim and defendant. Affirmed by Superior Court.
- (i) Commonwealth v. Weidenmoyer, aff'd, memorandum opinion, August 16, 1988, alloc. denied, 522 Pa. 583, 559 A.2d 527 (1989). Defendant convicted of possession of methamphetamine with intent to deliver. Issues raised included constructive possession and effect of circumstantial evidence. Affirmed by Superior Court.
- (j) Commonwealth v. Efrain Fernandez
Aff'd, 333 Pa. Super. 279, 482 A.2d 567 (1984). P.C.H.A. petition dismissed, aff'd, 367 Pa. Super. 647, 528 A.2d 256 (1987); alloc. denied, 517 Pa. 621, 538 A.2d 875 (1987). First degree murder case assigned within three months of first becoming a judge. Conviction affirmed on appeal. Subsequent PCHA Petition dismissed, also affirmed on appeal.

(2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and

During the course of my ten years as a judge, approximately 155 cases have been appealed. I have been reversed by the appellate courts on four occasions, three of which involve decision made during the first two years of my tenure.

- (a) John J. Herrmann v. Civil Service Commission of the Borough of Jenkintown, 112 Montg. Co. L.R. 81 (1983), rev'd, 84 Pa. Commw. 211, 478 A.2d 961 (1984). Police officer was suspended indefinitely by borough council. On appeal the civil service commission found that only some of the charges were substantiated and reduced the penalty. Both sides appealed. This court sustained the decision of the civil service commission with reference to the substantiation of the charges but modified the penalty. The Commonwealth Court reinstated the penalty imposed by the civil service commission.
- (b) Jerome Goldstein v. Helene Goldstein, rev'd, 354 Pa. Super. 490, 512 A.2d 644 (1986). Husband filed a partition action involving a jointly owned savings account. Wife filed a divorce action requesting equitable distribution. This court sustained preliminary objections to the partition complaint on the basis that partition actions were preempted by the equitable distribution provisions of the new Divorce Code, 23 P.S. §101 et seq. In a case of first impression, the Superior Court reversed and established directions for trial courts to follow thereafter.
- (c) Commonwealth of Pennsylvania v. James Engro, rev'd, memorandum opinion, March 15, 1985. Defendant was charged with burglary and criminal trespass. He was found guilty of criminal trespass but not of burglary. The Superior Court held that the evidence was insufficient to support the verdict.

(d) Richard J. Dougherty v. The Boyertown Times, vacated, 377 Pa. Super. 462, 547 A.2d 778 (1988). Plaintiff sued a newspaper for the publication of a "letter to the editor" critical of the plaintiff. During the course of the trial, the court determined that certain of the alleged defamatory statements were opinions based on disclosed facts and therefore not actionable, that plaintiff had not presented sufficient evidence to meet its burden of proving certain other statements of public concern were false and that certain of the other statements were not capable of a defamatory interpretation. As a result, the court granted a compulsory non-suit. On appeal, the Superior Court held that plaintiff had presented sufficient evidence to raise a jury question as to some portions of the letter and therefore remanded for a new trial.

(3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

- (a) Commonwealth v. Loach, 124 Montg. Co. L.R. 230 (1990), aff'd, memorandum opinion, June 14, 1990, alloc. denied, November 19, 1990.
- (b) Commonwealth v. Paolino, 122 Montg. Co. L.R. 211 (1989), aff'd, memorandum opinion, September 13, 1989, alloc. denied, August 14, 1990.
- (c) Commonwealth v. Wildonger, 360 Pa. Super. 627, 517 A.2d 205 (1986), alloc. denied, 515 Pa. 579, 527 A.2d 540 (1986).
- (d) Commonwealth v. Weidenmoyer, aff'd, memorandum opinion, August 16, 1988, alloc. denied, 522 Pa. 583, 559 A.2d 527 (1989).
- (e) Commonwealth v. Efrain Fernandez, aff'd, 333 Pa. Super. 279, 482 A.2d 567 (1984). P.C.H.A. petition dismissed, aff'd, 367 Pa. Super. 647, 528 A.2d 256 (1987); alloc. denied, 517 Pa. 621, 538 A.2d 875 (1987).

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

Pottstown Police Civil Service Commission, Secretary
Appointed 1961-1962.

District Attorney's Office, Assistant District
Attorney for Montgomery County, Appointed 1962-1965.
Montgomery County Courthouse, Norristown, PA 19404

Hon. Lee A. Donaldson, Jr., Legislative Counsel,
Appointed 1967-1968.
Majority Leader, Pennsylvania House of Representatives
Main Capitol Building, Harrisburg, PA.

Pennsylvania House of Representatives, Member, Elected
1968, 1970, 1972, 1974, 1976, 1978.
Main Capitol Building, Harrisburg, PA 17120

Chairman, Finance Committee, 1980.
Chairman, Insurance Committee, 1979-1980.
Chairman, Ethics Committee, 1979-1980,
1973-1974.
Vice-Chairman, Ethics Committee, 1975-1978.
Member, Judiciary Committee, 1969-1978.
Minority Chairman, Sub-Committee on Courts,
1977-1978.

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

None.

17. Legal Career:

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

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

No.

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

No.

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

FULL-TIME

Wells, Campbell, Reynier & Yohn, Partner,
1961-1971
635 High Street, Pottstown, PA 19464

Binder, Yohn & Kalis, Partner, 1971-1981
13 Armand Hammer Boulevard, Pottstown, PA 19464

Commonwealth of Pennsylvania, Judge, 1981-present
Montgomery County Court of Common Pleas
Courthouse, Norristown, PA 19404

PART-TIME

District Attorney's Office, Assistant District
Attorney for Montgomery County, 1962-1965
Montgomery County Courthouse, Norristown, PA 1940

Hon. Lee A. Donaldson, Jr., Legislative Counsel,
1967-1968
Majority Leader, Pennsylvania House of
Representatives
Main Capitol Building, Harrisburg, PA.

Pennsylvania House of Representatives, Member,
1968-1980
Main Capitol Building, Harrisburg, PA 17
Chairman, Finance Committee, 1980.
Chairman, Insurance Committee, 1979-1980.
Chairman, Ethics Committee, 1979-1980,
1973-1974.
Vice-Chairman, Ethics Committee, 1975-1978.
Member, Judiciary Committee, 1969-1978.
Minority Chairman, Sub-Committee on Courts,
1977-1978.

American Institute of Banking, Instructor,
1963-1966
Commercial Law and Negotiable Instruments,

Joint State Government Task Force on Decedents'
Estates Law, Member, 1972-1980.

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

Throughout my twenty years as a lawyer, I was engaged in the general practice of law in all fields, including whatever litigation arose in any case that I handled. I served as an assistant district attorney for Montgomery County from 1962 through 1965. I practiced before the courts of common pleas of Montgomery County, Chester County and Berks County as well as all Pennsylvania appellate courts, and the U.S. District Court for the Eastern District of Pennsylvania. In addition, I represented clients before juries of view in Montgomery, Chester and Berks Counties, the Board of Assessment Appeals in Montgomery and Berks Counties, the Election Board and County Commissioners of Chester County, and the Register of Wills of Montgomery County. The offices with which I was associated represented various municipalities, school districts and authorities in our area. Although I was not the principal attorney assigned to any of these municipal bodies, I periodically handled some of the legal matters involved for each. In addition, I appeared on numerous occasions before the governing bodies and/or zoning hearing boards of more than thirty municipalities in Montgomery, Chester and Berks Counties. Finally, I also represented clients before worker's compensation referees and the Workmen's Compensation Appeal Board, the Delaware River Basin Commission and the Internal Revenue Service.

My law practice included all of the following areas of the law: municipalities and zoning, corporations, real estate, domestic relations, negligence, wills and estates, criminal, eminent domain and commercial. During the initial years while I was an assistant district attorney I spent approximately 50-60% of my time in the field of criminal law. Thereafter, I was involved in few criminal cases until becoming a judge and my practice expanded in the other areas which are listed above.

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

I conducted a general practice of law in a relatively small town environment and represented a wide variety of clients. These clients included small businesses, financial institutions, municipalities, realtors, developers and builders. Our firm was local counsel for several large business entities. I also represented individuals in the full gamut of their legal needs including real estate transactions, domestic relations, negligence claims, wills, estates, property disputes and condemnation actions. I conducted all of the litigation that was required on behalf of all of these clients. From 1962 through 1965 while I was an assistant district attorney in Montgomery County my practice emphasized criminal trials; however, thereafter I did not do a significant amount of criminal work until I was assigned to criminal court as a judge in 1981.

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

Throughout my legal career, I appeared in court whenever the interests of my clients required. I did not refer cases to other attorneys in or outside of my firm. In the years when I was an assistant district attorney I was in court very regularly. Thereafter, I appeared in court whenever the case required. I estimate that 30-40% of my legal practice involved matters under litigation so that I appeared in court regularly but not exclusively.

2. What percentage of these appearances was in:

- (a) federal courts - 3%
(b) state courts of record - 87%
(c) other courts - 10%

3. What percentage of your litigation was:

- (a) civil - 90%
(b) criminal - 10%

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

I was sole counsel in all but a handful of the cases which were tried to verdict or judgment. I would estimate that the number of such cases was approximately 200.

5. What percentage of these trials was:

- (a) jury - 35%
(b) non-jury - 65%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases you cited 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, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

In 1964, as an assistant district attorney for Montgomery County I was the prosecutor in the case of the *Commonwealth of Pennsylvania v. Dennis Novitski*. I was sole counsel in the case but the ultimate disposition had to receive the approval of the district attorney, the Honorable Richard S. Lowe. Defense counsel was George C. Corson, Jr., Esquire, Suite 500, One Montgomery Plaza, Norristown, PA (215-279-6700). The charge against the defendant was that of murder and other related offenses arising out of the shooting death of a young girl (approximately 15) by the defendant who was also a relatively young man (approximately 19). Defendant was romantically smitten by her; however, his interests were not reciprocated. The case was particularly significant to me because it was the first murder case which I handled. The important issues involved included the mental health of the defendant, psychiatric

evaluations and testimony, marshaling of the circumstantial evidence of guilt and the appropriateness of the sentence due to the age of the defendant and his immaturity. After final preparation for trial the defendant elected to plead guilty to murder in the second degree and was sentenced to a term of years in prison rather than life in prison. The case was heard by the Montgomery County Court of Common Pleas at No. 303 April Term 1964, before the Honorable Frederick B. Smillie. It was unreported in view of the guilty plea.

In 1964, as an assistant district attorney for Montgomery County, I served as the prosecutor in two separate trials against Michael Warner and James Nick Peetros for robbery, burglary and related charges. I was the sole prosecutor during each of the 5-7 day trials for these defendants. The cases were tried in the Montgomery County Court of Common Pleas before the Honorable David E. Groshens at No. 4 April Term 1964. Both defendants were convicted and sentenced to serve a term of years in prison. Werner was represented by the Honorable Vincent A. Cirillo, now Judge of the Superior Court of Pennsylvania, 2106 Robert N.C. Nix, Sr. Federal Building, 9th and Chestnut Streets, Philadelphia, PA (215-560-5822) and Peetros was represented by Harry E. Sablosky, Esquire, Suite 610, One Montgomery Plaza, Norristown, PA 19401 (215-272-5201). These cases involved a residential burglary in Jenkintown, the theft of a valuable stamp collection and beatings of the victims. Although not part of the trial, there were indications that the defendants were part of an organized crime ring and the case received considerable publicity in the Philadelphia media, which was unusual at the time. The case had particular significance for me because of the length of the trials so early in my career and the quality of counsel for the defendants.

In 1963 I represented Hilda Heimbach, Administratrix of the Estate of Harold Heimbach, in connection with a worker's compensation claim arising from Mr. Heimbach's death. I was sole counsel for the claimant and was successful before the worker's compensation referee and the Workmen's Compensation Appeal Board so that Mrs. Heimbach received full compensation benefits. I do not recall the name of defense counsel or the worker's compensation referee

at the time and the records in my prior law office have been destroyed. The case was unique because it involved a claim for death as the result of a heart attack while at work. At that time the Act did not allow such claims unless it could be demonstrated that some activity at work caused the heart attack. I was successful in demonstrating that Mr. Heimbach had been fighting a fire in an oil drum just shortly before his heart attack and that the exertion from the same, together with his inhalation of smoke from the fire, caused his heart attack. The case was of particular significance to me at the time because it was the first worker's compensation claim that I litigated and it involved one of the most difficult issues in worker's compensation law at that time. As such it required considerable legal research to support the claim along with the medical research needed to become knowledgeable on the mechanisms of a myocardial infarction.

In 1965 I represented the Executor of Mae Wells in the Orphans' Court of Montgomery County as sole counsel. The case was unusual because of the nature of the will. Mrs. Wells had authored a hand-written will on one side of a sheet of paper. She then cut out her signature from a pre-existing will which had been prepared by an attorney and pasted that signature at the bottom of the reverse side of the piece of paper, apparently having read somewhere that a will must be signed at the end. The Register of Wills of Montgomery County, the Honorable Mayme B. Rothenberger required a hearing to determine whether the will had been properly executed. After hearing and submission of a brief, the Register accepted the will for probate. The Register issued an opinion which substantially incorporated the contents of my brief. 15 Fiduciary Rep. 557 (1965), *Fiduciary Review*, November 1965, p.3. The case was of particular significance because of the unique method by which the holographic will was executed.

In 1969-70 I represented the Honorable Robert G. Mull, now District Justice in Chester County, in connection with the recount of votes in an election in which he conducted a write-in campaign on paper ballots for the office of district justice. I was sole counsel for Judge Mull in the proceedings before the Election Board of Chester County and the Board of Commissioners of Chester County and the litigation before the Chester County Court of Common Pleas. I

do not recall the name of opposing counsel and no longer have records available from which I can refresh my recollection. I am also not certain of the judge; however, it may have been the Honorable Thomas A. Pitt, Jr., 213 W. Miner Street, West Chester, PA (215-692-4622) before whom I appeared several times in various matters. At the conclusion of the litigation Judge Mull was certified as the winner. The case was unusual because Chester County at that time primarily used paper ballots and Judge Mull was conducting a write-in campaign. The results of the election were extremely close and it was necessary to preserve each of his votes in the numerous different forms and manner in which his name was written in. In addition to involving me in a new area of the law, which was extremely complicated and somewhat contradictory at the time, the case permitted me to assist someone to be elected who has now served as a judge with great distinction for more than 20 years.

In 1974-75 I was sole counsel for Charles E. Brinkley in connection with his claim against Allegheny Corporation, Jones Motor Division for damages arising out of his firing after a verbal contract to employ for a specified term. The case was tried before a jury and the Honorable John W. Hart, Judge of the Chester County Court of Common Pleas at No. 191 May Term 1974. Opposing counsel was Richard E. McDevitt, Esquire, Montgomery, McCracken, Walker & Rhoads, Three Benjamin Franklin Parkway, 20th Floor, Philadelphia, PA (215-563-0650). The case was of particular significance to me because it involved a claim in the emerging area of contracts of employment. In addition, prior to trial the Judge urged me and my client to settle the claim for a nominal value as having little possibility of success and the jury found in my client's favor for the full amount of his damages, approximately \$25,000. Post-trial motions were filed but the decision was not appealed thereafter.

In 1971-72 I was sole counsel for James J. Lennon, et al as defendants in an equity action brought by the Ringing Hill Fire Company in the Montgomery County Court of Common Pleas at No. 71-02733. The case was tried before the Honorable Vincent A. Cirillo, then Judge of the Montgomery County Court of Common Pleas. Opposing counsel was Matthew S. Santangelo, Esquire, 224 King Street, Pottstown, PA (215-323-3306). The fire company owned a landlocked

parcel of ground and was attempting to establish an easement by express grant or an easement of necessity across the ground of the four defendants. My clients were successful in defeating this claim after a full trial. The case was of particular significance because of the extensive amount of title work that had to be done and the fact that through that title work I was able to demonstrate the chronological sequence of numerous conveyances in the area which proved that the fire company's ground became landlocked as a result of conveyances of parcels on the other side of its property by its predecessors in title so that an easement existed in that direction rather than across the property of my clients.

In 1976-1977 I was sole counsel for Paul R. Hafer in his equity action to enjoin New Hanover Township and Douglas Township from claiming that a private road over his ground known as Shenkel Road was in fact a public road. The case was litigated before the Honorable Horace A. Davenport of the Montgomery County Court of Common Pleas at No. 72-5625 and was appealed to the Commonwealth Court of Pennsylvania 38 Pa. Commw. 327, 394 A.2d 635 (1978). Counsel for the townships were Sherwood Vergey, Esquire, 1129 High Street, Pottstown, PA (215-323-1400) and Ronald H. Reynier, Esquire, 424 King Street, Pottstown, PA (215-323-7500). The case involved the townships' claim that the road was a public road under Section 1105 of the Second Class Township Code (53 P.S. §66105) by virtue of public usage and township maintenance or by prescription. The case held particular significance because of the fact that it involved an unusual area of the law and also involved the necessity of seeking witnesses with knowledge of the facts over a 30 year period. We were successful in maintaining the private nature of the road both in the Common Pleas Court and on appeal to the Commonwealth Court.

In 1976 I served as co-counsel with Thomas C. Sadler, Jr. then of the Philadelphia firm of Morgan, Lewis & Bockius, (now at 22 North Seventh Street, Allentown, PA 215-439-1800) representing Citizens Utilities Home Water Company before the Delaware River Basin Commission at Docket No. D-73-14 CP. Counsel for the protestants was James Dunworth, Esquire, 1122 Kimberton Road, Phoenixville, PA (215-935-2700). The case involved an adversary proceeding to limit

the authorized withdrawal by Citizens Utilities Home Water Company from a well in East Vincent Township, Chester County used to service the public in that general area. Various individuals in the area who had private wells objected to the authorized withdrawal because of their concerns that it would affect their wells. The water company agreed to drill new wells for each of those homeowners so that their water supply would not be threatened as to quality or quantity. The water company was successful in obtaining permission from the Delaware River Basin Commission for its required withdrawal from the well. The case was particularly significant because it involved an area of the law that was unique to me and participation with counsel from a large Philadelphia law firm. It also required balancing the interests of the individuals who had private wells against the interests of the greater number of persons who needed a public water supply through the water company and arriving at an accommodation of those interests that would meet the reasonable needs of all.

From 1971 through 1975 I represented Edward R. Moore and Katherine L. Moore as sole counsel in an eminent domain proceeding. The County of Montgomery condemned a portion of the 16 acre tract on which their home was located. The case was first tried before a Board of View and the County then appealed that decision to the Montgomery County Court of Common Pleas (No. 72-5625). After a five day trial before the Honorable Vincent A. Cirillo, now Judge of the Superior Court of Pennsylvania, the jury awarded damages in the same amount as the Board of View, approximately ten times the original offer of estimated just compensation. Opposing counsel was the Honorable Joseph A. Smyth, now Judge of the Montgomery County Court of Common Pleas. The County then appealed the decision to the Commonwealth Court of Pennsylvania which affirmed (22 Pa.Comw. 262, 348 A.2d 762 (1975)). The case was of particular significance because a public road separated the parcel condemned from the balance of the homeowner's tract. The County maintained that the severance by the public road meant that compensation was due only for the parcel taken. I was successful on behalf of my clients in introducing sufficient evidence to establish a unity of use between that tract and the balance of the homeowner's tract on which their

residence was located so that depreciation damages to the remaining ground and residence could also be considered by the jury.

In 1975-76 I represented Stanley Swinehart, et al in connection with the condemnation by the Borough of Pottstown of a six acre tract of land owned by my clients. As sole counsel for the condemnees I represented them at a hearing before the Board of View and, after appeal by the Borough and my clients, in a non-jury trial before the Honorable Robert W. Honeyman, Judge of the Montgomery County Court of Common Pleas. Opposing counsel was Leo H. Eschbach, Esquire, 535 High Street, Pottstown, PA (215-323-2900). After trial the court rendered a decision in the approximate amount of \$250,000. The major issue in the case was the highest and best use of the ground. We contended that the highest and best use was an apartment project; whereas, the Borough contended that under the zoning ordinance the tract could only be used for manufacturing purposes. The case was unique because the provisions of the zoning ordinance that applied to the parcel were quite unusual and the Borough contended that the language of its own ordinance was unconstitutional. The court did not accept the Borough's contention and the damages were fixed at an even greater amount than that set by the Board of View. There was no further appeal.

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

In addition to the matters set forth in response to Question No. 18., I also handled many other matters not including litigation. A substantial portion of my law practice involved appearances before or on behalf of numerous municipalities, zoning hearing boards and planning commissions. In connection with one particular subdivision application, I represented the developer of a tract of ground located in two counties and two municipalities. It was serviced by the water distribution system of a third municipality and the sewage collection system of a joint

authority. In the course of securing approval, of this subdivision which required the approval of all of these bodies, I eventually had to attend a total of 47 separate meetings of the various entities.

As a member of the legislature I was also active in various areas of importance to the law. As chairman of the Ethics Committee I drafted the first financial disclosure bill which was approved by the House of Representatives and was the basis for the bill which was eventually enacted into law. I was also active in drafting the original no-fault insurance act and later amendments to it. Finally, as chairman of the Insurance Committee I was active in public hearings on proposed legislation to codify product liability law in Pennsylvania which passed the House but was never approved by the Senate.

Person Reporting (full name, last, middle initial) JOHN, JR., WILLIAM H.	Court or Organization U.S. District Court for Eastern District of Pennsylvania	Date of Report June 13, 1991
Title Judge	Date of Entry/Nomination/Termination (any if annual or final report; June 13, 1991)	Reporting Period (Calendar year, or inclusive dates)
Home or office address Crestwood Drive Pottstown, PA 19464	January 1, 1990 to June 10, 1991	
<p>IMPORTANT NOTES: Please read the instructions accompanying this form. The report should include information pertaining to your spouse and dependent children. If any other additional sheets is needed, identify by such statement by checking yes/no, the date of the report, and the section(s) being completed. Complete all sections, checking the NONE box for each section where you have no reportable information. Compare and reconcile this report with last year's and list items in the same order as last year. Type or print clearly. Sign on last page.</p>		

I. POSITIONS. (Reporting individual only; see pp. 15-17 of Instructions.)POSITIONNAME OF ORGANIZATION/ENTITY

<input type="checkbox"/> NONE (No reportable positions)	Judge <u>Montgomery County Court of Common Pleas</u>
Chairman, Board of Directors	<u>Pottstown Memorial Medical Center and</u>
	<u>Pottstown Healthcare, Inc. (non-profit community hospital)</u>

II. AGREEMENTS. (Reporting individual only; see p. 17 of Instructions.)DATEPARTIES AND

<input checked="" type="checkbox"/> NONE (No reportable agreements)	_____

III. NON-INVESTMENT INCOME. (Partial disclosure for spouse; see pp. 18-20 of Instructions.)DATE
(Honorary only)SOURCE AND TYPEGROSS INCOME
(yours, not spouse's)

<input type="checkbox"/> NONE (No reportable non-investment income)	1 <u>Commonwealth of PA, Administrative Office of PA Courts</u> \$ <u>113,000</u> \$ <u>(\$80,000/yr.)</u>
	2 <u>David A. Swinehart, Inc. - payment of legal fees earned prior to becoming a judge.</u> \$ <u>2,502</u> \$ <u></u>
	3 <u></u> \$ <u></u>

JOHN, JR., WILLIAM H.

June 13, 1991

IV. REIMBURSEMENTS and GIFTS—transportation, lodging, food, entertainment.
 (Includes those to spouse and dependent children; see pp. 20-21 of Instructions.)

<u>SOURCE</u>	<u>DESCRIPTION</u>
<input type="checkbox"/> NONE (No such reportable reimbursement or gift)	
1 Administrative Office of PA Courts	Reimbursement for payment of expenses for attending conferences of the Pennsylvania Conference of State Trial Judges.
2	
3	
4	
5	
6	
7	
8	
9	
10	

V. OTHER GIFTS. (Includes those to spouse and dependent children; see pp. 20-21 of Instructions.)

<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
<input checked="" type="checkbox"/> NONE (No such reportable gift)		
1		
2		
3		
4		

VI. LIABILITIES. (Includes those of spouse and dependent children; see pp. 22-24 of Instructions.)

<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE*</u>
<input checked="" type="checkbox"/> NONE (No reportable liabilities)		
1		
2		
3		
4		
5		
6		
7		
8		

* VALUE CODES:	J = \$0 to \$1,000 N = \$10,001 to \$100,000	K = \$1,001 to \$5,000 G = \$100,001 to \$250,000	L = \$5,001 to \$15,000 P = over \$250,000	M = \$15,001 to \$50,000
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YOHN, JR., WILLIAM H.

June 13, 1991

VII. INVESTMENTS AND TRUSTS-INCOME, VALUE, TRANSACTIONS. (Includes those of spouse; partner disclosure for dependent children, see pp. 24-35 of Instructions.)

A Description of Assets (including trust assets)	B Income during period		C Gross value at end of period		D. Transactions during period (Reporting individuals and spouse)					
	Amnt. Code: (A,N)	Type (e.g., div.)	Value Code: (I,J,N)	Value Method Code: (C,D)	Type (e.g., sold)	Case Month Div.	Name Code: (F,P)	Date Code: (A,B)	Identity of buyer/seller (if present transaction)	
Place "X" after each asset except from prior disclosure.										
<input type="checkbox"/> NONE (No reportable income, assets or transactions)										
1 Continental Bank Pottstown, PA-checking acct.	B	Int.	K	T						
2 Vanguard Money Market Prime Valley Forge, PA-mutual fund	B	Int.	K	T						
3 Vanguard Money Market Prime (DC) Valley Forge, PA-mutual fund	C	Int.	K	T						
4 Mutual Shares (DC) Worcester, MA-mutual fund	B	Div.	L	T						
5 Nicholas Fund (DC) Milwaukee, WI-mutual fund	B	Div.	L	T						
6 Nicholas II Fund (DC) Milwaukee, WI-mutual fund	B	Div.	L	T						
7 Partic. Income Prop. 1986,L.P. Phoenix, AZ - ltd. part.	C	Partner/ Dist.	L	U						
8 Houston Biotech Partners,L.P. The Woodlands,TX- ltd. part.	B	Int.	L	U						
9 Vanguard GNMA (IRA) Valley Forge, PA-mutual fund	B	Int.	L	T						
10 Vanguard Money Mkt.Prime(IRA) Valley Forge, PA-mutual fund	B	Int.	K	T						
11 Vanguard High Yield Bond Fund(IRA) Valley Forge, PA-mutual fund	C	Int.	L	T						
12 Vanguard Windsor Fund (IRA) Valley Forge, PA-mutual fund	C	Div.	M	T						
13 Virginia Beach S & L (DC) Virginia Beach, VA C.B.	D	Int.	M	T						
14 Virginia Beach S & L (DC) Virginia Beach, VA - C.D.	C	Int.			Closed	8/20/90				
15 Far Western Bank (DC) Tucson, CA - Cert. of Dep.	C	Int.			Closed	2/14/90				
16										
17										
18										
19										
20										
1 Income/Case Codes: A = exempt (\$0 to \$100) E = \$1,001 to \$15,000	B = \$101 to \$1,000 F = \$15,001 to \$50,000	G = \$50,001 to \$100,000	C = \$1,001 to \$2,500 H = over \$100,000	D = \$2,501 to \$5,000 I = over \$200,000						
2 Value Codes: I = exempt (\$0 to \$1,000) N = \$50,001 to \$100,000	K = \$1,001 to \$5,000 O = \$50,001 to \$250,000	L = \$5,001 to \$15,000 P = over \$250,000	M = \$15,001 to \$50,000 R = over \$50,000	J = \$50,001 to \$500,000 S = Appraised value	X = \$15,001 to \$50,000 T = Cash/market U = Book value V = Other W = Estimated					

YOHN, JR., WILLIAM H.

June 13, 1991

ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate section of Report.)

Check to affirm that differences in investments from those reported in prior year are exempt from disclosure.

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 "as of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, as to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation."

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.

Signature



Date June 13, 1991

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (28 U.S.C.A. APP. I, § 304, AND 28 U.S.C. § 1821).

FILING INSTRUCTIONS:

1. Mail signed original and 3 additional copies to:
Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544
2. Deliver one copy to the Clerk of the Court on which you sit or serve. (Judicial employees not associated with a specific court, such as employees of the Administrative Office and the Federal Judicial Center, need not file a copy with any court.)

JOHN, JR., WILLIAM H.

June 13, 1991

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	9,684.00	Notes payable to banks—secured	
U.S. Government securities—add schedule		Notes payable to banks—unsecured	
Listed securities—add schedule	21,481.00	Notes payable to relatives	
Unlisted securities—add schedule	21,128.00	Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid tax and interest	
Doubtful		Real estate mortgages payable—add schedule	10,290.00
Real estate owned—add schedule	200,000.00	Chattel mortgages and other bonds payable	
Real estate mortgages receivable		Other debts—itemize:	
Autos and other personal property			
Cash value—life insurance	60,000.00		
Other assets—itemize:			
IRA & Deferred Comp.	42,542.00		
Certificates of Deposit	29,052.00		
State Employees Retirement Fund — Accumulated contributions and interest	91,490.00	Total Liabilities	10,290.00
Total assets	475,377.00	Net worth	465,087.00
		Total Liabilities and net worth	475,377.00
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, maker or guarantor	None	Are any assets pledged? (Add schedule.)	No
On leases or contracts	None	Are you defendant in any suits or legal actions?	No
Legal claims	None	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	None		
Other special debt	None		

SCHEDULES
FOR
FINANCIAL STATEMENT
NET WORTH

ASSETS

1. Cash on hand and in banks

Continental Bank - checking account	\$ 3,583.00
Vanguard Money Market Prime	1,633.00
Vanguard Money Market Prime	4,468.00
	\$ 9,684.00

2. Listed securities

Mutual funds

Mutual Shares	\$ 6,368.00
Nicholas Fund	6,471.00
Nicholas II Fund	8,642.00
	\$ 21,481.00

3. Unlisted securities

Participating Income Properties 1986 L.P.	\$ 11,128.00
Houston Bio-Tech Partners L.P.	10,000.00
	\$ 21,128.00

4. Real Estate

Home - Crestwood Drive, Lower Pottsgrove Township, Pottstown, PA	\$200,000
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5. IRA and Deferred Compensation

Vanguard GNMA	\$ 6,757.00
Vanguard Money Market Prime	2,362.00
Vanguard High Yield Bond Fund	8,533.00
Vanguard Windsor Fund	15,546.00
Commonwealth of Pennsylvania - Deferred Compensation Program (stock index account)	9,344.00
	\$42,542.00

6. Certificates of Deposit

Virginia Beach Savings & Loan Assn.	\$29,052.00
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LIABILITIES

Real Estate Mortgage - Home at Crestwood Drive, Lower Pottsgrove Township, Montgomery County payable to Continental Bank, Morristown, PA. 11% rate of interest	\$ 10,290.00
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FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers.

None other than statutory pension benefits from the Pennsylvania State Employees Retirement Fund (SERF).

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

As chairman of the Board of Directors of the Pottstown Memorial Medical Center I would recuse myself from all litigation involving that institution, if there should be any. I intend to follow the guidelines of the Judicial Conference and if I am not permitted to remain as a member of the Board of Directors of a non-profit corporation, I would resign from the Board.

I know of no other areas likely to present potential conflict of interests questions.

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

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more.

See copy of Form AO-10--Financial Disclosure Report submitted to the Judicial Ethics Committee of the Administrative Office of the United States Courts.

5. Please complete the attached financial net worth statement in detail.

See attached Financial Net Worth Statement.

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

Yes.

1965 Montgomery County Republican Primary Campaign Committee, Chairman.

This primary campaign involved uncontested elections so that there was very little activity.

1966 Campaign Committee for Herbert R. Maack, Candidate for the Pennsylvania House of Representatives, Chairman.

1968, 1970, 1972, 1974, 1976 and 1978 Campaign Committee for William H. Yohn, Jr., for the Pennsylvania House of Representatives, Candidate.

1981 Campaign for the position of Judge of the Montgomery County Court of Common Pleas, Candidate.

III. GENERAL (PUBLIC)

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

From 1961 through 1981, while I was a practicing lawyer, I participated in the Montgomery County Legal Aid Program. Those of us who volunteered for this program manned the Pottstown Legal Aid Office on a rotating basis and handled all of those cases which came to us initially during our time in the office. The balance of whatever time was needed to handle the case was conducted through our private law office at no cost to the client. In addition, I was a member of the Montgomery County Lawyer Referral Service wherein persons who were ineligible for legal aid were referred to an attorney who agreed to participate in a half hour conference with the client for a fee of no more than \$10.00.

In addition, as a member of the Pennsylvania House of Representatives from 1968 through 1980 I had almost daily contact with individuals who had some problem with an agency of state government with which they needed assistance. Throughout my legislative career we had almost no staff assistance in matters of this nature so that all "casework" was handled directly by me.

Throughout my legal, legislative and judicial career, I have been very active in many community organizations which are of assistance to the disadvantaged including service as a member or chairman of the board of Pottstown Memorial Medical Center, a non-profit community hospital, since 1974; as a member or chairman of the board of INSIGHT, a drug abuse prevention program; and as a member of the board of the local unit of the American Cancer Society. I also served as chairman of various fund-raising events for local charities such as the Boys Scouts of America and the American Cancer Society and as a solicitor for other similar organizations such as the United Way. Since the time that I became a judge I have not been permitted to engage in fund-raising activities.

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

In the 1960's I was a member of the Pottstown Jaycees. I never held any position of authority with the organization. To the best of my knowledge there were never any women who applied for membership in the organization; however, I now understand that at that time the Jaycees nationally did not permit female members.

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

The Federal Judicial Nominating Commission of Pennsylvania was appointed by the Honorable John Heinz and the Honorable Arlen Specter. I applied to the Commission on three occasions and was placed on the "short list" of recommended candidates each time. I was interviewed by the Commission on each of the three occasions and was interviewed by both of the Senators after the second application. After the third application I was recommended for nomination by Senators Heinz and Specter. I was then interviewed by officials in the U.S. Justice Department on January 7, 1991, by a Special Agent of the Federal Bureau of Investigation on February 26, 1991, and by a representative of the American Bar Association on May 14, 1991. In addition, numerous members of the community and bar who have known me and worked with me in the past sent letters of support to both Senators.

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

No.

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

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

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

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

The primary function of a judge at the trial level is to conduct the trial so that the jury will receive a fair presentation of the evidence from the competing parties and their advocates in accordance with the rules of evidence and to instruct the jury on the law that applies to the case so the jury will be guided by the correct legal principles in arriving at its verdict.

As a former legislator, I have a strong belief in the separation of powers doctrine. Courts must show great deference to the responsibility of the legislative branch to decide political issues and must follow the clear meaning of the statutory language enacted by the legislative branch. If a statute requires revision, the amendments should come from the elected legislative branch of government and not the courts.

There are, of course, many occasions when the constitution, statutes and case law do not clearly resolve the issue at hand. This is most notably true in cases arising under the Bill of Rights and the Fourteenth Amendment. In these cases the multitude of unique factual distinctions, the general language of the constitutional principles and the often times evolving judicial precedent combine to make a clear resolution difficult. Moreover, the issues are of such fundamental importance to our society and to our concept of the proper balance between the role of government and the rights of an individual that a trial judge must exercise extreme care to resolve the cases in a fair manner to the litigants and consistent with the law. It then becomes the duty and function of the trial judge to determine, as best he or she can, the likely resolution of the issue by an appellate court and follow that direction, fashioning a remedy that is fact specific and tailored to the proof of the case in order to resolve the specific grievance between the particular parties to the litigation. The judge must attempt to refrain from imposing a personal political philosophy and seek to follow the guidance that exists in the language and legislative history of the constitution and the applicable statutes and prior decisional case law.

AFFIDAVIT

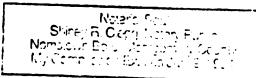
I, WILLIAM H. YOHN, JR. do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

June 18 1991
(DATE)

William Yohn Jr
(NAME)

Sworn and subscribed
before me this 18 day
of June, 1991

Shirley R. Clegg
(NOTARY)



CONFIRMATION HEARING ON STEWART R. DALZELL

WEDNESDAY, JULY 31, 1991

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

The committee met, pursuant to notice, at 10 a.m., in room SR-385, Russell Senate Office Building, Hon. Joseph R. Biden, chairman of the committee, presiding.

Present: Senators Biden, Thurmond, and Specter.

OPENING STATEMENT OF CHAIRMAN BIDEN

The CHAIRMAN. The hearing will come to order.

This morning, the Judiciary Committee convenes its 11th nomination hearing in the 102d Congress, and today's nominee is Stewart Dalzell, nominated to fill one of the new judgeships we created last year in the U.S. District Court for the Eastern District of Pennsylvania, at the mild insistence of the distinguished Senator from Pennsylvania, Senator Specter.

Some suggest this maybe should be called the Specter seat, but we have resisted calling it that in the eastern district, because we in Delaware still claim some—how shall I say it—proprietary rights on that, not district court, but the circuit court, and if we give them too much credit, Mr. Dalzell, with regard to the district court, then we lose our leverage on the circuit court.

Mr. Dalzell has quite a distinguished legal record, having been a partner at the Philadelphia law firm of Drinker, Biddle & Reath since 1976. He has had extensive litigation practice, having litigated complex cases in numerous Federal and State courts.

Given his experience and background, the American Bar Association rated Mr. Dalzell as unanimously well qualified, its highest rating.

Before proceeding to the nomination of Mr. Dalzell, I would like to briefly outline where we are, so to speak, and actually, in the interest of time, I will not do that. I will ask unanimous consent for the record, that the remainder of my statement setting out where we are, in terms of the number of nominees that have been sent to the committee, how far along we are, how many we will have gotten out, and what our plans are.

[The prepared statement of Senator Biden follows:]

/or Biden

STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

NOMINATION HEARING OF STEWART DALZELL

WEDNESDAY, JULY 31, 1991

THIS MORNING THE JUDICIARY COMMITTEE CONVENES ITS ELEVENTH NOMINATIONS HEARING OF THE 102ND CONGRESS. TODAY'S NOMINEE IS STEWART DALZELL, NOMINATED TO FILL ONE OF THE NEW JUDGESHIPS WE CREATED LAST YEAR ON THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MR. DALZELL HAS QUITE A DISTINGUISHED LEGAL RECORD, HAVING BEEN A PARTNER AT THE PHILADELPHIA LAW FIRM OF DRINKER, BIDDLE AND REATH SINCE 1976. HE HAS HAD AN EXTENSIVE LITIGATION PRACTICE, HAVING LITIGATED COMPLEX CASES IN NUMEROUS FEDERAL AND STATE COURTS. GIVEN HIS EXPERIENCE AND BACKGROUND, THE AMERICAN BAR ASSOCIATION RATED MR. DALZELL AS UNANIMOUSLY "WELL QUALIFIED" – ITS HIGHEST RATING.

- 2 -

IT IS ONLY DUE TO HIGHLY UNUSUAL, EXTRAORDINARY AND TRAGIC CIRCUMSTANCES THAT WE ARE PROCEEDING WITH THIS HEARING TODAY. ORDINARILY, THE COMMITTEE WAITS AT LEAST THREE WEEKS FROM THE RECEIPT OF THE NOMINEE'S QUESTIONNAIRE TO SCHEDULE A HEARING, AND THEN WAITS AT LEAST ONE WEEK FROM THE TIME OF THE HEARING TO PLACE THE NOMINEE ON THE AGENDA FOR THE COMMITTEE'S CONSIDERATION AT AN EXECUTIVE BUSINESS MEETING.

ONCE I DETERMINED THAT THE INVESTIGATION AND BACKGROUND WORK ON MR. DALZELL HAD BEEN COMPLETED FULLY AND THOROUGHLY -- INCLUDING AN INTERVIEW BY COMMITTEE INVESTIGATORS -- I AGREED TO MOVE FORWARD WITH THE HEARING IN MORE EXPEDITIOUS FASHION. EVEN THEN, IT IS DUE TO THE TRAGIC CIRCUMSTANCES SURROUNDING OUR GOOD FRIEND, THE LATE SENATOR JOHN HEINZ, THAT WE DECIDED TO PROCEED IN THE TIME FRAME THAT WE HAVE.

- 3 -

MR. DALZELL WAS A VERY CLOSE FRIEND AND
COLLEAGUE OF SENATOR HEINZ AND HIS FAMILY. IT WAS
SENATOR HEINZ'S WISH THAT MR. DALZELL BE NOMINATED
AND CONSIDERED IN A TIMELY FASHION BY THE SENATE. IT IS
IN ACCORDANCE WITH THAT WISH -- AND AFTER OUR USUAL
THOROUGH INVESTIGATION -- THAT WE ARE MOVING AHEAD
TODAY.

The CHAIRMAN. Just let it suffice to say that we are not about to sacrifice diligence and thoroughness for speed. Although there has been excessive speed with regard to you, Mr. Dalzell, we have not in any way sacrificed the diligence and thoroughness of our investigation of your background.

You are accompanied today by a woman who is probably as well or more respected than any woman in this town, and I suspect in the State of Pennsylvania, for sure, where everyone knows her, Mrs. Heinz.

Mrs. Heinz, as you know, has been an extremely strong backer, along with Senator Specter, of your nomination and seeing to it that it was properly and in a timely way considered.

And although it is as bit unusual, we are flattered and delighted to have Mrs. Heinz here to formally introduce you this morning. As I said to you before the hearing began, you have had no stronger advocate on your behalf than Mrs. Heinz, and it is, quite frankly, in part, at least, due to her strong support of you and her willingness to make your case for you among our colleagues, that we were able to expedite this hearing as we have, which, as I indicated, is a bit unusual.

It is not at all unusual, in terms of your quality or competence or our investigation of your background, but it is unusual, in terms of the timeframe within which we are able to do it.

So, I welcome you, Teresa. It is good to have you here. It is good to see you looking so well. I will yield the floor to you in a moment, but I now yield to the Senator from Pennsylvania, Senator Specter.

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

Senator SPECTER. Thank you very much, Mr. Chairman.

I thank you especially for holding this hearing today and for expediting the process. We may move ahead, hopefully, if many complex factors fall into place, to achieve confirmation for Stewart R. Dalzell to be a judge of the Federal court.

Mr. Dalzell comes to this position with extraordinary qualifications. He has excellent academic background, being a graduate of the University of Pennsylvania, Wharton School, and the University of Pennsylvania Law School, where he excelled academically.

He has been with one of Philadelphia's most prestigious firms for more than two decades, Drinker, Biddle & Reath, and has done outstanding legal work there.

He comes recommended from the nominating commission which my late colleague, Senator John Heinz, and I had established. He is well known both to Senator Heinz and to myself, rated well qualified unanimously by the American Bar Association, and has all the qualifications to be an extraordinary judge.

He comes to a court which is very heavily burdened at the present time, having just received some 20,000 asbestos cases on Monday, and a court which has undertaken very extensive responsibilities on the trial of drug cases. This is a project worked out by Senator Heinz and myself, in cooperation with you, Mr. Chairman, as you know, over the past several years, where Senator Heinz and I got a special appropriation from Philadelphia in 1986.

There is a strike force which was put into effect there, which is now a model for the Justice Department around the world, around the country—it should be around the world—and they are now trying many drug cases. This is really a Federal responsibility, because of the difficulties of the Philadelphia criminal justice system to provide public safety there, a matter that we have all been very concerned about.

I will not talk at any greater length, because we have Mrs. Teresa Heinz with us today, but I would conclude with only one comment, and that was the care exercised by my colleague, John Heinz, in the selection of Federal judges.

After we finished the process of having a citizens group review the credentials meticulously, they then made recommendations to Senator Heinz and myself. Senator Heinz took the initiative to invite everybody to come to meet with the two of us, and it was his initiative. When he took that leadership role, I joined him in those additional interviews.

In the past few months, we were sitting talking with one of the nominees, and John Heinz said to the nominee and me, "You know, your appointment is very important, because you will be here long after the rest of us are gone," a kind of lifetime appointment, and those words have special poignancy. Of course, we very much miss John Heinz, but part of his legacy is Judge Stewart Dalzell.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Mrs. Heinz.

STATEMENT OF MRS. JOHN HEINZ III

Mrs. HEINZ. Thank you, Mr. Chairman.

I have a prepared statement that I would like to submit for the record, but I will make just a few brief comments.

I know that if John, my husband, were here, he would have appeared in this chair next to Stewart, extolling his many fine qualities and shared with the committee why Stewart will make an excellent Federal judge.

He believed that Stewart was a dedicated lawyer and a gifted litigator, and someone who could make a valuable contribution to our judicial system. John believed Stewart to be a man of the highest integrity.

He was, and has been since 1976, a friend. Mr. Chairman, other than bringing my brother to introduce to the committee, I guess I could not bring anybody I would like more than Stewart Dalzell. I am very proud to introduce him.

Thank you.

[The prepared statement of Mrs. Heinz follows:]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
STATEMENT OF MRS. H. JOHN HEINZ, III

Mr. Chairman, Members of the Committee, I do want to thank you for the opportunity to speak on behalf of Stewart Dalzell, nominee to be a United States District Judge of the United States District Court for the Eastern District of Pennsylvania.

I have known Stewart well for over fifteen years. We met when my husband was a candidate in the primary for the United States Senate race in Pennsylvania in 1976. My husband chose Stewart for the sensitive tasks of Treasurer and lawyer for his campaign. From that date forward, Stewart served as John's lawyer and chief financial officer in all of his Senate campaigns.

We got to know Stewart personally over these years, and were pleased to welcome him as a guest in our home on many occasions. We have always known him to be a man of the highest integrity, and so we were delighted when Stewart let us know of his interest in becoming a member of the federal judiciary.

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We of course were not at all surprised when we learned that the American Bar Association's Committee on the Federal Judiciary unanimously gave Stewart its highest rating.

Besides Stewart's obvious abilities as a lawyer and his unquestioned integrity, there is a side of Stewart that I've known since that hard primary of 1976. Stewart is a compassionate man and one who cares passionately for the well-being of his city. He is also a man who puts his family first in everything he does, and I know how pleased he is that his daughter, Becky, and son, Andrew, can be here with his wife, Kathie, this morning.

Stewart's nomination and confirmation were matters of the highest priority to my late husband at the time of his death. I'm pleased to be here this morning to say that I, too, believe that Stewart would be a great credit, not only to the judiciary, but to the people he ultimately will serve.

I hope, therefore, that you will give Stewart prompt and favorable consideration. Thank you for your time this morning.

The CHAIRMAN. Thank you very much, Mrs. Heinz.

Mr. Dalzell, before we ask you to make a statement, if you have one, this is an incredibly unusual circumstance. I am sure it is not lost on you, the fact that you are here and your nomination was expedited, and I mean from the Justice Department on, is a consequence of the incredibly high regard with which we all held our former colleague, Senator John Heinz. It was obvious through Mrs. Heinz that you held a special place in his mind as to whether or not you would be qualified to be on the bench. So, you must be something special.

It is one of those things where associations make a difference, and because John Heinz was viewed by all of us, even when we disagreed with him, as a man of absolute total integrity, for him to suggest that that was one of your leading qualifications is of consequence, and you have a good deal to live up to. But I have no doubt, based on the fact that Mrs. Heinz paid you the compliment she did, that it will not be much difficulty for you to do it.

Do you have an opening statement? Actually, before you do, would you introduce to us your family?

Mr. DALZELL. It will be a great pleasure, Mr. Chairman.

My wife, Kathleen; Kathy is sitting here, and next to her is my daughter, Rebecca, who likes to be called Becky, who is 8 years old, and next to Becky is my son, Andrew, who is 6, and they are both students at the William Penn Charter School, which is exactly a block, I believe, from Senator Specter's house.

The CHAIRMAN. Your son, I am sure, is destined to either be a Chief Justice of the Supreme Court or President of the United States, because as I walked in the door, he looked at me, and I could see registering maybe that's the guy, and he walked up and put his hand out and said, "Hello," and shook my hand. He guessed right on this occasion. I told them all, I will say for the record, I tell all children who have to sit through such a boring undertaking, and watch their daddy or mommy be asked these questions, that they should extract from daddy and mommy at least the commitment of some kind of lunch or dessert or ice cream. I started to say that, and your young son said, "Daddy already promised me a candy bar." [Laughter.]

Mr. DALZELL. That is true, Mr. Chairman.

The CHAIRMAN. Would you stand to be sworn, Mr. Dalzell.

Do you swear that the testimony you are about to give will be the truth, and nothing but the truth, so help you, God?

Mr. DALZELL. I do.

The CHAIRMAN. Do you have any opening statement you would like to make?

TESTIMONY OF STEWART R. DALZELL, OF PENNSYLVANIA, TO BE A U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Mr. DALZELL. I really have no statement, Mr. Chairman, except to state that, besides the blessing of the three people that I just introduced, without question, the greatest blessing in my life, besides those three wonderful people, is the woman to my left and her late husband.

I just want to say to Senator Specter that I am extremely mindful of being part of John Heinz' legacy, and it will be always very much in my mind, and I just want to thank you all for that.

Teresa, I want to thank you for your very generous statement and for your love and affection over these years.

The CHAIRMAN. Let me ask you a few questions, Mr. Dalzell.

As a practicing attorney in Philadelphia, you probably are familiar with the civil justice reform legislation—

Mr. DALZELL. Yes, sir.

The CHAIRMAN [continuing]. That I introduced last year, along with several of my colleagues on this committee. The objective of the legislation, which the President signed into law last December, is to make the civil justice system more accessible and more affordable and more fair, because I believe middle-class people are being literally priced out of access to the civil justice system.

To meet that objective, the statute that is now on the books emphasizes case management and the need for judges to control their cases. Given the fact that the eastern district of Pennsylvania has among the highest caseloads per judge of any court in the country, your skills as a case manager will surely be put to a test, should you be confirmed.

What role do you think judges should play in controlling the pace, conduct, and cost of litigation?

Mr. DALZELL. Mr. Chairman, I think that the judge should take a very active role in that. I think I am extremely mindful of the cost of litigation, which is simply beyond belief, and I think, I hope that by early intervention and strong intervention in civil litigation, that the judge can make a material difference in making it quicker, more affordable, and, I might add, introduce the concept of settlement in the parties' minds as a way of resolving their dispute, so I think that management is for the good of the parties and it is for the good of the court.

The CHAIRMAN. With regard to management, you have been involved in two very large and significant cases, the Penn Central Securities litigation and the John Crane asbestos cases, two matters you mentioned in your questionnaire. I expect that there were inordinate costs incurred in the discovery process in both of those cases.

Now, some judges who have testified before this committee, not nominees, but judges, and those whom we have questioned by questionnaire, believe that it is not primarily the Federal judge's role to help control the discovery process, that it is up to the clients and the lawyers alone to control the discovery cost.

Now, I have a very different view and believe that judges, too, have a responsibility to play an important role with regard to discovery. Under the Federal rules, they are able to exercise that kind of involvement, but very few do. I do not want to be pejorative, but not as many do as should, in my view.

Given your experience, what is your view? Do you believe judges have an important role to play in controlling the discovery process, particularly discovery cost, as a part of the overall case management responsibility of a Federal judge?

Mr. DALZELL. Absolutely, I think that is exactly where, if you will forgive the informal locution, the system goes bananas, and

where the cost just goes out of sight to the parties, is in discovery. It is not in the trial. I mean, trial can be expensive, as we all know, but the real money to the parties is in the discovery, and it is certainly my intention, Mr. Chairman, to exercise a strong role in that.

I do not intend to delegate the resolution of discovery disputes in management to a magistrate, because, for one thing, I have a great deal of experience in it, and, No. 2, that is where the inefficiency lies in the system, frankly.

The CHAIRMAN. Now, let me ask you—and this may be a little premature, but it would be very helpful to me, at least, and hopefully the committee, if you could answer, and then I will yield to my colleague, Senator Specter.

As a district court judge, are there any specific techniques you would use to control discovery, particularly in the huge cases like the ones you have worked on and cited in your questionnaire?

Mr. DALZELL. Well, I think you can limit the number of depositions. You can set a threshold beyond which they cannot go, without permission of the court, for good cause shown. I do not think you need to have 500 depositions in a securities case, for example.

In a securities case, typically, the issue is nondisclosure, and you can establish that through 5 or 10 witnesses, but you do not have to go through every single witness. They are largely document cases, anyway, and I think that if I were given the opportunity by this committee and the Senate to exercise that control, I would limit the number of depositions, for certain, and they could come back, for good cause shown, to have more depositions.

But it is regrettable to tell this committee that, in a major civil litigation, running up 200 or 250 depositions is not at all unusual, and we are talking of depositions that can last, some of them, as long as 2 weeks, and it is, frankly, absurd. The costs are hundreds of thousands of dollars.

The CHAIRMAN. One of the things that appeals to me about your nomination, quite bluntly, is your extensive litigation experience and your knowledge of how the process works. I, quite frankly, think we have difficulty getting men and women of your caliber and experience who are willing to go on the bench. It is not a place that people flock.

It is one of those things where we find that people who view it as a salary increase are not people we want on the bench, in most occasions, not because they are bad people, but because usually they have demonstrated that they are not all that successful in the practice of law and the knowledge of the law.

There are notable exceptions with professorial types who have come before us, but I think we have enough professors and we need more practitioners on the bench. So, I sincerely hope it is not just a moment that has overtaken you. I have no doubt you believe you are telling the truth. I hope this is not a confirmation conversion. I hope it is real, because it is badly, badly, badly needed.

One of the studies that I did, I had an institute that we funded and working with the Brookings Institution, and we found that most of the average civil litigants could literally not afford the cost of what the square foot price of office space for most major law firms was to house the lawyers who were handling their cases.

It is just really out of control, and the way to control it, in my view, is not to control fees, as the Chief Justice keeps encouraging me to attempt to do. I do not believe that is the way to do it. But with a strong case management system and a man like yourself, who knows the system well and is not reluctant to deal with his colleagues, his former colleagues of the bar, you could make a significant contribution, in my view.

I have several other questions that I am going to submit to you—actually, I am not going to do that, because you will not have time to answer them. I will yield to the Senator from Pennsylvania now, and I will try to get through the rest of these questions before the next vote.

Senator.

Senator SPECTER. Thank you very much, Mr. Chairman.

I have no questions for Mr. Dalzell, because I have known him long enough to have answered any questions that might have arisen.

Senator Thurmond is the ranking Republican on this committee, Mr. Dalzell, and when he is here he frequently asks the question, if confirmed, do you promise to be courteous, and I will not ask you the question, because the answer is obvious.

I was surprised when I heard the question asked for the first occasion, but then his followup comment is a very profound one. It is: The more power an individual has, the more courteous he should be, and no one has more power in our society than a Federal judge. That is a sweeping statement, considering that there are others with great power, like the chairman of the Judiciary Committee and the President of the United States, but I believe it will be true.

The CHAIRMAN. Notice that he said it in the same breath.
[Laughter.]

Mr. DALZELL. It did not escape my attention, Mr. Chairman.

Senator SPECTER. Some choose to be chairmen of the Judiciary Committee over other alternatives, like—well, never mind. But I say it very seriously, because Senator Biden and I and the late Senator Heinz will have a special responsibility for you, and I perhaps more than others, because I will be hearing about you.

Senator Heinz and I have played a key role in some 15 Federal judges in Philadelphia today. Senator Heinz and I have talked about some comments we had heard about some of the people we had helped put on the bench, and there is a great temptation, when you are judge with life tenure, to be less courteous than one might be if you are soliciting votes for reelection, stated bluntly.

So, I just urge you to think of courtesy and consideration, when you discharge your duties, when you are thinking of Senator Thurmond and Senator Heinz and the rest of us.

Thank you, Mr. Chairman.

The CHAIRMAN. Robes, on occasion, have a transforming impact, as I am sure you observed as an attorney.

Mr. DALZELL. Yes.

The CHAIRMAN. Judge, let me ask you a couple more questions. We are supposed to vote at 10:30, and the reason why we are moving along quickly is because once the votes begin, there are supposed to be three in a row, and I do not want to have to sit here

deciding what type of candy bar you are going to purchase for the next 45 minutes, if I can avoid it being done.

The records show that our investigators have had a chance to ask a number of these questions, but I think it is important that several more be asked for the record.

As you can see, I am somewhat taken with the need for judicial reform, in terms of making the system more accessible to civil litigants, middle-class folks. The cornerstone of this Civil Justice Reform Act, which I am alternately given praise or blame for, depending on with whom you are speaking, is the creation of an advisory group in every district court.

The advisory group is made up of lawyers and nonlawyers alike, and this advisory group will recommend to each court a plan to reduce the cost and delays. In other words, the statute requires lawyers and judges to work with members of the community to improve the civil justice system.

Now, as a district court judge, would you be comfortable working closely with attorneys and concerned citizens on efforts to reduce the cost and delays of litigation?

Mr. DALZELL. I would welcome it and look forward to it.

The CHAIRMAN. What do you see as the principal benefits of what I would call the dialog-enforcing aspects of this law? In other words, we did not cross, nor wish to cross the separation of powers line in telling you all how to run your business, were you to be confirmed, but, in part, because of what Senator Specter just said about the concern he and Senator Heinz had about some judges who have been put on the court and things they had heard.

We are aware that there is a need to have a leavening experience for some of the judges, not something they have to follow, but they should be able to hear, they should hear from, they should be exposed to the concerns of the bench, as well as citizens about the delays and costs of litigation in the court system.

But that does not bother you at all, you do not see that as an infringement of your—

Mr. DALZELL. If I may say, Senator, I think one of the problems that we have is, in my over 20 years experience at this, is that the average person has no idea what to expect of the system, and I may say that I think the system can get so rarified for the judges involved, that the occupational hazard that Senator Specter very eloquently describes and that Senator Thurmond is concerned about is most assuredly there, so I think the reality-checking, if you will, process that you mandated in that statute is a good one.

I might add that Senator Specter and Senator Heinz, in the merit selection commission they have, went out of their way to assure that nonlawyers are on that, I think for the same reasons that you did what you did in the Justice Improvements Act, so I very much welcome that.

The CHAIRMAN. You are comfortable with it?

Mr. DALZELL. Absolutely.

The CHAIRMAN. Now, you have extensive legal experience and practice, though this has been devoted nearly exclusively to civil, many of them complex civil cases, rather than criminal cases. How do you plan to prepare for your transition to the Federal bench,

where a considerable portion of your caseload will involve criminal issues, both substantive and procedural?

Mr. DALZELL. What I primarily am doing is I have already, because obviously practicing in Philadelphia for so many years, I have a number of friends who are on the Federal bench and I have started consulting with the people who I think, I hope will be my future colleagues, for their counsel and experience on that, and to be educated.

Because you are quite right, I am extremely mindful of the fact that I have been a civil litigator, although my earliest trial experience, Senator, was in appointive habeas corpus and criminal cases, pro bono cases. That is where I got my actual feet wet, was in those cases, so I am not totally innocent of the criminal law, but I have a lot of catching up to do, there is no question about that.

I think I will read as much as I can and, above all, take the guidance of my future colleagues.

The CHAIRMAN. Senator, do you have any questions?

Senator THURMOND. I have had several committee meetings this morning, and I am sorry I could not be here for the entire hearing.

I want to welcome you here. You have a very lovely lady here to endorse you and that means a lot to us.

Mr. Dalzell, you have been a practicing attorney since 1970, I believe.

Mr. DALZELL. Yes, sir.

Senator THURMOND. You have been nominated to be a U.S. district court judge. Do you foresee any difficulty in the transition from advocate to impartial jurist?

Mr. DALZELL. I hope there will not be any difficulty, Senator Thurmond. It certainly will be an adjustment to make and one that I hope I am already making mentally, but I think I can do it, yes, sir.

Senator THURMOND. Mr. Dalzell, I consider judicial temperament to be a prerequisite for a Federal judge. Would you give me your thoughts on this subject? The reason I say that, I have witnessed Federal judges embarrass lawyers, witnesses, and jurors, and there is no excuse for that.

Mr. DALZELL. I could not agree with you more, Senator, on that. I think before you came into the room, Senator Specter was alluding to what I would characterize as the occupational hazard of article III life tenure, which is that you actually start to think that you are some kind of demigod. Of course, you are not, you are flesh and blood, like everyone else.

I am glad you asked me that question, because I think besides the management issue that Senator Biden asked me, I think one of the other very important issues in our courts, Federal and State, is the issue of civility. We hear a lot about civility between lawyers breaking down, but I think it also breaks down at times, as you correctly note, between the bench and the bar and witnesses.

I have no patience for it, and I can tell you that I have a number of people who will remind me that I am flesh and blood like everyone else. They are seated behind me. They have no illusions, as my daughter says, that "you're still going to be my daddy," and so I hope I will be mindful of that.

Senator THURMOND. Another thing, too, some judges have become activists and, under the Constitution, their duty is to interpret the law, but they have gone to making law and taking over school districts, hospitals, prisons, and other State institutions. How do you feel about an activist jurist?

Mr. DALZELL. I believe passionately in the concept of judicial restraint. I believe in the limitations of article III, that we should decide cases and controversies, that you are legislators, we are not. You make the policy decisions, and we implement them.

You are considering me to be a U.S. district judge, not to be the president of the school district of Philadelphia or the head of the Philadelphia Bureau of Prisons. I am not competent in either of those areas. So, I am very mindful of the limits on the judicial power under article III and I believe in them passionately, Senator.

Senator THURMOND. I want to congratulate you upon being appointed by the President and having the strong endorsement of our distinguished colleague here, Senator Specter of Pennsylvania, a very influential member of this committee.

I wish you well on the bench and would be glad to support you.

Mr. DALZELL. Thank you very much, Senator Thurmond.

The CHAIRMAN. I have a couple more questions, Mr. Dalzell.

One of the issues this committee has increasingly taken an interest in is the question of what private clubs a nominee belongs to, and whether or not they are integrated and whether or not those clubs allow women as members. There has been some significant controversy on this committee about that, but, at least at the moment, a clear majority believe very strongly that Federal judges and nominees for the court should not belong to such institutions.

Now, in response to your committee questionnaire, you currently wrote that you are a member of the Union League of Philadelphia—

Mr. DALZELL. Yes, sir.

The CHAIRMAN [continuing]. Which, until 1986, excluded women from its membership. Now, I know you have already discussed this issue at length with the committee staff, but for the record, would you please tell the committee what efforts you took to bring about a change in the club's bylaws to allow women full voting privileges?

Mr. DALZELL. I would be happy to. I cannot say I took a leading role in it, but I was a great supporter of it. Our law firm, chiefly through my senior partners, Louis Van Deusen and Raymond K. Denworth, Jr., who were both well known to Senator Specter, and I helping them, were I think leaders in the effort to do it. My partner, Mr. Denworth, wrote the legal opinion that was debated a lot, that said that if the city of Philadelphia chose to proscribe that, that it would be constitutional. I certainly agreed with my partner's conclusion and so stated.

I engaged in advocacy among members that I knew to get out and vote, because it required a two-thirds vote to amend the bylaws, so we did not take that for granted, and I did what I could in that respect to change it.

We had a powerful interest in our firm (a) because it was right, and (b) because we had a number of female partners, and it was

untenable, it is as simple as that, untenable not to give them full privileges, and I am delighted to say that the rule was changed.

The record should also note that one of the leaders in encouraging that change was the distinguished councilwoman of Philadelphia, who happens to be related by marriage to the senior Senator from Pennsylvania.

The CHAIRMAN. I have no further questions, Mr. Dalzell. I, too, plan on supporting your nomination. I hope that your considerable academic record and background, your legal practice and your obvious sensitivity to how a Federal judge should act relative to both counsel in any case before him is also tempered by a genuine sense of compassion and understanding, that people who come before you, in many instances, as you know from experience, may not be the kind of people you would want to bring home to mom, take home to dinner, but are equally as entitled to every right and privilege that any other American is. You will be tested sorely on that point in the Federal court, but I pray that you are able to keep that sense of balance.

I have found—and I will close with this—I have found, as my distinguished colleague, Senator Thurmond, who was running for President before I entered grade school—and I consider him a close friend, as well—I found that what he, I suspect, has found much earlier than I have, that the temperament of a Federal judge is almost always guaranteed, if he or she is extremely talented and assumes they have a possibility of becoming a circuit court judge or a Supreme Court judge. That is one of the things that tends to hold those tempers in balance and check.

I do not think you need that to keep you, as we say, in check, but I suspect, from your background, we would not be surprised to see you back here after serving on the district court for some time.

I again am delighted to be able to have held this hearing. I thank my colleagues for their support and doing what is a bit unusual. Again, I close by saying that if I—I will not say “if I get in trouble,” I am always getting in trouble—the next time I get in trouble, I hope I have Teresa Heinz standing behind me. It will increase my prospects significantly, being able to move and traverse the difficulty beyond my ability to do it myself.

Teresa, thanks.

Mrs. HEINZ. Thank you very much, Joe.

The CHAIRMAN. You are quite a lady.

The hearing is adjourned.

[Whereupon, at 10:45 a.m., the committee was adjourned.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
Stewart Richard Dalzell
2. Address: List current place of residence and office address(es).
Home: 2112 Locust Street, Philadelphia, PA 19103
Office: Drinker Biddle & Reath, 1100 PNB Building,
Philadelphia, PA 19107
3. Date and place of birth.
September 18, 1943; Hackensack, N.J.
4. Marital Status (include maiden name of wife, or husband's name).
List spouse's occupation, employer's name and business address(es).
Married to Kathleen Regan Dalzell. Wife is a full-time mother.
5. Education: List each college and law school you have attended,
including dates of attendance, degrees received, and dates degrees
were granted.
University of Pennsylvania, 9/61-5/65, B.S. in Econ.
University of Pennsylvania Law School, 9/66-5/69, J.D.
6. Employment Record: List (by year) all business or other
professional corporations, companies, firms, or other enterprises,
partnerships, institutions and organizations, nonprofit or
otherwise, including firms, with which you were connected as an
officer, director, partner, proprietor, or employee since graduation
from college.

1965-1966	Financial Analyst, National Broadcasting Company, 30 Rockefeller Center, New York, NY.
1969-1970	Visiting Lecturer in Law, University of Pennsylvania, Wharton School, Philadelphia, PA.
1970-1976	Associate, Drinker Biddle & Reath.
1976-Present	Partner, Drinker Biddle & Reath
7. Military Service: Have you had any military service? If so, give
particulars, including the dates, branch of service, rank or rate,
serial number and type of discharge received.
No.

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

College: Beta Gamma Sigma, junior year; Dean's List all four years; John Marshall honorary Pre-Law Society; Dean's Special Student Advisory Committee (top 5 students in junior year).

Law School: Speiser Award for best student original research, published at 117 U. Pa. L. Rev. 448 (1969).

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

American, Pennsylvania, and Philadelphia Bar Associations.
International Association of Defense Counsel.

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

The only organizations I belong to that could be said to be "active in lobbying before public bodies" would be Bar Associations, which lobby on issues well known to the Committee, and the Republican Party, whose "lobbying before public bodies" is also well known. From time to time, of course, many private organizations engage in such lobbying, including the Episcopal Church, to which I have been a lifelong member. With the exception of occasional legal advice supplied at the request of Senator Heinz (and therefore subject to the attorney-client privilege), I personally have not, through my membership in the aforementioned organizations, engaged in any lobbying.

A list of the other organizations to which I belong, or have belonged, follows:

1966-present: Communicant, sometime Member of the Vestry, Accounting Warden (1968-72), chorister (1973-present), St. Mary's Church, Hamilton Village, 3916 Locust Walk, Philadelphia, PA 19104.

1980-1990: Member, The Standing Committee of the Episcopal Diocese of Pennsylvania; 1985-1990, Chairman, Mission Endowment Committee.

1973-present: Secretary, Thomas Skelton Harrison Foundation.

1979-present: Assistant Treasurer, Secretary, and General Counsel of People for John Heinz Committee, Sen. John Heinz's principal campaign organization.

1976-1982: Treasurer and General Counsel for John Heinz for Senate Committee, Sen. Heinz's principal campaign committee in his 1976 campaigns.

1978: Co-Chairman and Chief Spokesman, Committee to Protect the Charter (campaign to preserve Philadelphia City Charter).

1982-1985: Director and Member of the Executive Committee, The Clay Studio, Philadelphia, PA.

1988-present: Secretary, Reading Terminal Market Preservation Fund.

1976-present: Member, The Union League of Philadelphia.

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

<u>Jurisdiction</u>	<u>Date</u>
Pennsylvania Supreme Court	November 16, 1970
Eastern District of Pennsylvania	November 19, 1970
Third Circuit	June 10, 1971
United States Supreme Court	February 19, 1975
Ninth Circuit	April 14, 1977
Eleventh Circuit	January 17, 1979
Federal Circuit	January 19, 1983
Fifth Circuit	January 4, 1984
Second Circuit	September 3, 1986

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

- A. "Client Service in a Defender Organization: The Philadelphia Experience," 117 U. Pa. L. Rev. 448 (1969) (co-author).
- B. "The State Preemption Doctrine: Lessons from the Pennsylvania Experience," 33 U. Pitt. L. Rev. 205 (1971).
- C. "Torts in the Court -- Is There Any Hope?" Risk Management, March 1988 (reprint attached.)
- D. "Torts in the Courts -- Yes, There's Hope". Risk Management September, 1988 (reprint attached.)

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

Excellent. February 27, 1991.

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

None.

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

N/A

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

Republican Committeeman, Fifth Ward, First Division,
Philadelphia, PA, 1970 - 1978.

17. Legal Career:

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

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

No.

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

No.

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

1970-1976: Associate, Drinker Biddle & Reath
 [Address cited in answer to question 2.]

1976-now: Partner, Drinker Biddle & Reath

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

My practice has been exclusively or predominately litigation throughout my time at Drinker Biddle & Reath. After some pro bono criminal defense work in the first four years of my practice, the balance has been commercial litigation, chiefly in the federal courts around the country.

As an associate in the Litigation Department in a major law firm, one is initially assigned to be the junior member of a team on a given litigation. In my case, I started as the junior lawyer on the massive Penn Central Securities Litigation (see answer to question 13), and ended in the most responsible role in that matter by the time of the "global" settlement on December 2, 1974.

By the time I was admitted to the partnership in 1976 (in the fastest time allowed in the firm), I was largely in charge of all my matters, although on major cases - e.g. the Polish Golf Car Case, Outboard Marine v. Pezetel and, say, the Gotaas-Larsen Shipping Corporation spin-off litigation, Rubenstein v. IU International Corp. (both cited infra at Nos. 21 and 19, respectively, in the schedule part of the answer to question c. 4 in this section) - I shared equal responsibility with one other partner.

By the advent of the Kemper Environmental Coverage Litigation, described in answer to question 18, I became partner-in-charge of all matters I handled.

Since its creation in 1988, I have served on the firm's Litigation Department Steering Committee, and in 1987 and 1988 was in charge of Litigation Department training for all our associates.

Lastly, it is important to note that seniority in a large firm usually brings with it greater management demands on the partners, and that has certainly been my experience. In this regard, and most recently, in 1988 the Managing Partners of the firm asked me to serve as Co-Chairman of the firm's Business Development Committee (with Morgan R. Jones,

Esq.), and, since February, 1990, as sole Chairman, which occupies a significant part of my time.

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

My "typical" clients have been corporations or individuals of substantial means. I have also represented a number of non-profit entities, most recently Reading Terminal Market Merchants' Association and Reading Terminal Market Preservation Fund, two corporations we formed in 1988 in the effort to preserve Reading Terminal Market from extinction in the face of the construction of the Convention Center in downtown Philadelphia. Over the years I have also had an active canon law practice for the Episcopal Diocese of Pennsylvania and a number of parishes therein.

In 1981, I was asked to represent one of the insurance company members of The Kemper Group in an action brought in the Eastern District of Pennsylvania, Commercial Union v. Pittsburgh Corning Corp., et al. (cited at No. 18 on the question c. 4 schedule). Since that time, I have been in charge of that relationship, which has grown to be the largest client by far of Drinker Biddle & Reath. Given the magnitude of my practice in recent years, my role has shifted to formulating litigation strategy for Kemper and other clients, and junior partners, under my supervision, carry out these plans.

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

See answer to 17 b. 1.

2. What percentage of these appearances was in:

(a) federal courts.	90%
(b) state courts of record.	10%
(c) other courts.	0%

3. What percentage of your litigation was:

(a) civil	100%
(b) criminal	0% (but see early <u>pro bono</u> work)

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

Dozens.

Introductory note: At Drinker Biddle & Reath in general, and in my litigation practice in particular, one is almost never "sole counsel" given the complexity or stakes involved in our cases. As will be seen in the following schedule, in all but one case where I was literally "sole counsel" I was doing pro bono criminal defense work in cases where I was appointed by a court to represent an indigent prisoner.

As used in the following selected list of my cases, "chief counsel" means actual, in court handling of the case and oral argument. In cases where I use "co-counsel," I have chosen cases where, though I shared responsibility, I took an active role through the proceedings and, for example, shared trial or argument responsibility, as in Outboard Marine Corp. v. Pezetel, cited at No. 21, where I bore an equal burden with my then senior partner, Henry W. Sawyer, III, and our co-counsel, Prof. Louis B. Schwartz, then of the University of Pennsylvania Law School.

The following schedule sets forth selected reported decisions, and type of case, in the following courts where I served the stated roles, as above defined:

Federal

1. Warden v. Marrero, 417 U.S. 653 (1974); federal criminal; co-counsel.
2. Voest-Alpine Trading USA Corp. v. Vantage Steel Corp., 919 F.2d 206 (3d Cir. 1990); fraudulent conveyances; chief counsel.
3. Robertson v. Allied Signal, Inc., 914 F.2d 360 (3d Cir. 1990); toxic torts; partner-in-charge and co-counsel.
4. Grace v. Continental Cas. Co., 896 F.2d 865 (5th Cir. 1990); asbestos-in-buildings coverage, amicus; partner-in-charge and co-counsel.
5. Rotnberg v. Rosenbloom, 808 F.2d 252 (3d Cir. 1986), cert. denied 481 U.S. 1017 (1987); Securities Exchange Act of 1934; chief counsel.

6. Lumbermens Mutual Casualty Co. v. Connecticut Bank & Trust Co., N.A., 806 F.2d 411 (2d Cir. 1986); federal/state abstention issues, Moses H. Cone; partner-in-charge and co-counsel.
7. Rothberg v. Rosenbloom, 771 F.2d 818 (3d Cir. 1985); earlier, but different, decision in case finally resolved in #5, wherein case remanded; chief counsel.
8. Patlex Corp. v. Mossinghoff, 771 F.2d 480 (Fed. Cir. 1985); reexamination under Patent Laws; partner-in-charge and co-counsel.
9. Riehl v. Travelers Ins. Co., 772 F.2d 19 (3d Cir. 1985); environmental coverage dispute, amicus; chief counsel.
10. Polish-American Machinery Corp. v. R.D.&D. Corp., 760 F.2d 507 (3d Cir. 1985), East-West international commercial dispute; partner-in-charge and co-counsel.
11. Ducre v. Executive Officers of Halter Marine, Inc., 752 F.2d 976 (5th Cir. 1985); silicosis and asbestosis coverage litigation; chief counsel.
12. Sansom Committee v. Lynn, 735 F.2d 1535 (3d Cir.), cert. denied 469 U.S. 1017 (1984); federal subject matter jurisdiction over consent decrees involving non-diverse nonparties; chief counsel.
13. Gould v. Control Laser Corp., 650 F.2d 617 (5th Cir., Unit B [now 11th Circuit], 1981); antitrust and patent; chief counsel.
14. Kipperman v. Academy Life Insurance Co., 554 F.2d 377 (9th Cir., 1977); alleged private right of action under Postal Reorganization Act; sole counsel.
15. United States ex rel. Barnwell v. Rundle, 461 F.2d 768 (3d Cir., 1972); federal habeas corpus; sole counsel.
16. Moskowitz v. Lopp, 128 F.R.D. 624 (E.D.Pa. 1989); Class action, Securities Exchange Act of 1934; chief counsel.
17. Lustgarten v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 528 F.Supp. 1125 (E.D.Pa. 1981); multistate statute of limitations problem; chief counsel.

18. Commercial Union Ins. Co. v. Pittsburgh Corning Corp., 553 F.Supp. 311 (E.D.Pa. 1980); asbestos bodily injury insurance coverage declaratory judgment; chief counsel.
 19. Rubenstein v. IU International Corp., 506 F.Supp. 311 (E.D.Pa. 1980); Securities Exchange Act of 1934; co-counsel with partner.
 20. Abramson v. INA Capital Management Corp., 459 F.Supp. 917 (E.D.N.Y. 1978); Investment Company and Investment Advisors Acts; chief counsel.
 21. Outboard Marine Corp. v. Pezetel, 461 F.Supp. 384 (D.Del. 1978); antitrust, Antidumping Act of 1916, Foreign Sovereign Immunities Act; co-counsel with partner.
 22. Broyer v. The B.F. Goodrich Company, 415 F. Supp 193 (E.D.Pa. 1976); antitrust; chief counsel.
 23. Boyertown Burial Casket Co. v. Amedco, Inc., 407 F.Supp. 811 (E.D.Pa. 1976); Clayton and Williams Acts; co-counsel with partner.
 24. C. Albert Sauter Co., Inc. v. Richard S. Sauter Co., Inc., 368 F.Supp. 501 (E.D.Pa. 1973); antitrust; co-counsel with partner.
 25. United States ex rel. Barnwell v. Rundle, 337 F.Supp. 688, 691 (E.D.Pa. 1972); federal habeas corpus; sole counsel.
 26. United States ex rel. Watson v. Mazurkiewicz, 326 F.Supp. 622 (E.D.Pa. 1971); federal habeas corpus; sole counsel.
 27. In Re Penn Central Securities Litigation, M.D.L.56, see separate LEXIS printout of eighteen reported decisions, attached to answer to question 18.
- State
28. Den-Tal-Ez, Inc. v. Siemens Capital Corp., 389 Pa. Super. 219, 566 A.2d 1214 (1989 *en banc*); 9 U.S. P.Q. 1932 (Panel, Pa. Super. 1988); enforceability of letters of intent in mergers and acquisitions area; chief counsel.

29. Posel v. Redevelopment Authority of City of Philadelphia, 72 Pa. Cmwlth. 115, 456 A.2d 243 (1983); federal and state urban renewal laws; chief counsel.
30. Marques v. Bunch, 18 D. & C. 3d 371 (Bucks Cty, C.P. 1980); common law environmental, Pa. Clean Streams Act; chief counsel.

5. What percentage of these trials was:

(a) jury	2%
(b) non-jury	98%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
- (a) the date of representation;
 - (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
 - (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. Kemper Environmental Coverage Litigation. Beginning with Commercial Union v. Pittsburgh Corning Corp., 553 F.Supp. 311 (1981) [opposing counsel, James Restivo, Esq., Reed Smith Shaw & McClay, Pittsburgh, PA 15219, (412) 288-3122], I came to be national environmental coverage counsel for insurance companies of The Kemper Group. By 1990, we had represented Kemper companies in over 70 cases from Guam to all three coasts. By 1984, with our client we formulated a national coverage strategy for pollution and waste site coverage cases that, by 1988, was described by the Appellate Division in New York as representing an "emerging national consensus", Technicon Electronics Corp. v. Am. Home Assurance Co., 141 A.D. 2d 124, 533 N.Y.S.2d 91 (Second Dept., 1988), aff'd 74 N.Y. 2d 66, 542 N.E.2d 1048 (1989). From the now-leading case of American Motorists Ins. Co. v. General Bost, 667 F.Supp. 1423 (D.Kansas 1987) to the three declaratory judgment actions comprising the New Bedford Harbor Coverage Cases (see, e.g., 725 F.Supp. 1264 (D.Mass. 1989)) involving upwards of \$300 million, it is fair to say that we have changed the course of law in this important area. See also Lumbermens Mutual Cas. Co. v. Belleville Industries, Inc., 407 Mass. 675 (1990). Indeed, no less than a third of the cases the Court

cites in Technicon were cases in which we were lead plaintiff or defense counsel. Throughout these ten years, I have been partner-in-charge of this strategy and its implementation, which I share with my talented partner, Wilson M. Brown, and others over time.

2. In Re Penn Central Securities Litigation, M.D.L 56. Within weeks of the filing of the reorganization petition by Penn Central Transportation Company on June 21, 1970, the first of what ultimately became about 50 suits were filed around the country, most of them consolidated in Philadelphia before then-Chief Judge Joseph S. Lord, III. Our firm represented 22 former outside directors of Penn Central who were sued in these actions under the Securities Laws and state law (for corporate mismanagement). At the time, it was the largest securities litigation in American history (a rank it may still hold). Our firm was also Liaison Counsel for all defendants. David Berger, Esq., 1622 Locust Street, Philadelphia, PA 19103 (215) 875-3030), was Liaison Counsel for Plaintiffs. Since I had joined the firm full-time on June 22, 1970, I was the juniormost member of the Penn Central team when the first action was filed. I rapidly rose in responsibility, however, and participated in virtually every one of the decisions shown on the LEXIS printout following case #10 herein. In some cases, e.g. case nos. 9 and 16 (Bryon Williams, 349 F.Supp. 1029, 333 F.Supp. 382), I actually handled all aspects of the proceedings and arguments before the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407. By December 2, 1974, I presided and handled the final closing of the settlement of these cases, dealing with counsel from all over the country, an enterprise that took twelve hours on that memorable day.
3. Voest-Alpine Trading USA Corp. v. Vantage Steel Corp., 919 F.2d 106 (3d Cir. 1990). This is an important litigation about the scope of relief that may be granted under the Uniform Fraudulent Conveyance Act, and represents, in the view of many specialists in the area, the most significant decision in this area since the Third Circuit's celebrated decision in U.S. v. Tabor Court Realty, 803 F.2d 1288 (3d Cir. 1986), cert. denied sub nom. McClellan Realty Co. v. U.S., 107 S.Ct. 3229 (1987). We represented a judgment creditor who succeeded in persuading Chief Judge Fullam and the Third Circuit to collapse a series of inter-related transactions and, among other things, to impose a constructive trust on the equity interest of the mastermind of the scheme; this appears to be the first such case in the nation to grant such relief in such a case. Opposing counsel in this matter are

Patrick W. Kittredge, Esq., Kittredge & Donley, 421 Chestnut Street, 5th Floor, Philadelphia, PA 19106, (215) 829-9900 and C. Clark Hodgson and others at the firm of Stradley, Ronon, Stevens & Young, 2600 One Commerce Square, Philadelphia, PA 19103, (215) 564-8026.

4. John Crane Asbestos Litigation. Since 1982, I have been the partner in charge of representing John Crane, Inc., a defendant in asbestos-related bodily injury cases. At its peak in 1990, we represented John Crane in over 3,200 cases in Philadelphia area state and federal courts. I have been the architect of John Crane's defense strategy in these cases, ably assisted by my partner, Kenneth C. Frazier. We have created an automated management system to defend these cases which, we are told, represent the state of the art. On August 28, 1990, as a result of the Third Circuit's decision in Robertson v. Allied Signal, Inc., 914 F.2d 360 (3d Cir. 1990) we succeeded in dispatching the so-called "fiber drift" theory of causation in asbestos-related cases, and the direct result of this decision was the dismissal, with prejudice, of 962 John Crane cases that had been pending in the United States District Court for the Eastern District of Pennsylvania. Given the thousands of such cases in so many jurisdictions, it would not be meaningful to identify any one particular opposing counsel.
5. Den-Tal-Ez, Inc. et al. v. Siemens Capital Corp., et al., 389 Pa. Super. 219, 566 A.2d 1214 (1989 en banc). This is an important litigation in the mergers and acquisitions area which, not unlike Pennzoil v. Texaco, has to do with the enforceability of letters of intent and related contracts (or non-contracts) in the corporate takeover area. I was trial counsel, and have argued consistently against Arlin M. Adams, Esq., former Judge of the U.S. Court of Appeals for the Third Circuit (Judge Adams is now at Schnader, Harrison, Segal & Lewis, Suite 3600, 1600 Market Street, Philadelphia, PA 19103, (215) 751-2072). My clients are companies in the Siemens Group of Germany. The trial judge was the late Harry A. Takiff, who has been succeeded by the Hon. Victor J. DiNubile.
6. Rothberg v. Rosenbloom, 808 F.2d 252 (3d Cir. 1986), cert denied, 481 U.S. 1017 (1987), and 771 F.2d 818 (3d Cir. 1985). This was a significant decision on the in pari delicto defense in cases brought under the Securities Exchange Act, most notably §§ 10(b) and 29 thereof. On a second trip to the Third Circuit, I succeeded in obtaining the reversal of Judge Marvin Katz's decision as being contrary to the Supreme

Court's holding in Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985). The defendants were originally represented by Thomas N. O'Neill, Jr., now United States District Judge in the Eastern District of Pennsylvania, Room 14613, United States Court House, Philadelphia, PA 19106, (215) 597-2750. Judge O'Neill was succeeded by Tom P. Monteverde, Esq., 123 South Broad Street, Philadelphia, PA 19109 (215) 735-1900. Finally, the defendants were represented by James D. Crawford, Esq., Schnader, Harrison, Segal & Lewis, Suite 3600, 1600 Market Street, Philadelphia, PA 19103, (215) 751-2162.

7. Sansom Committee v. Lynn, 735 F.2d 1535 (3d. Cir.), cert denied 469 U.S. 1017 (1984), was a litigation that for me began in 1974 and did not really end for over twelve years. Our client throughout was the University of Pennsylvania (principal contact, Mr. Arthur F. Hirsch, then-Vice-President for Operational Services). In the Eastern District, the case was throughout this decade-plus assigned to the Hon. Clarence C. Newcomer. We were opposed at various times by Robert Sugarman, Esq. (now at 101 N. Broad Street, Philadelphia, PA 19101, (215) 751-9733) and Mari Gursky Shaw, Esq. (Dechert, Price & Rhoads, 1717 Arch Street, 4000 Bell Atlantic Tower, Philadelphia, PA 19103, (215) 981-2564). The case in its later stages became a significant Court of Appeals decision having to do with federal subject matter jurisdiction and consent decrees. The Panel, consisting of Judges Seitz, Becker and Garth, sharply divided three ways, and the case has occasioned scholarly comment in the area of Federal Courts.
8. Gould v. Control Laser Corp., 650 F.2d 617 (5th Cir., Unit B [now 11th Circuit], 1981). This was an interesting and notable antitrust and patent action that dealt with the important question about who, after all, really invented the laser. In the case I was throughout the partner in charge and chief counsel for Control Laser's defense, and in the case cited what is now the Eleventh Circuit affirmed former Middle District of Florida Chief Judge George Young's holding that the common defense fund Control Laser organized did not run afoul of the antitrust laws. My opposing counsel in the action was William Mentlik, Esq., 600 South Avenue West, Westfield, NJ 07090, (201) 654-5000. It its later stages, see e.g., Patlex Corp. v. Massinghoff, 771 F.2d 480 (Fed. Cir. 1985), Mr. Mentlik's co-counsel was Alan J. Davis, Esq., now of Ballard, Spahr, Andrews & Ingersoll, 1735 Market Street, Philadelphia, PA 19103, (215) 668-8500 (as of February 25, 1991).

9. Rubenstein v. IU International Corp., 506 F. Supp. 311 (E.D.Pa. 1980). This was a case that had two phases, the first an equity action to enjoin the spin-off of IU International's wholly-owned subsidiary, Gotaas-Larsen Shipping Corporation to shareholders of IU International, a quarter billion dollar transaction. Plaintiffs, represented by Samuel E. Klein, Esq., of Kohn, Savett, Klein & Graf, P.C., 1101 Market Street, Philadelphia, Pa. 19107, (215) 238-1700, alleged that the proxy statement and offering circular were violative of §§ 10(b) and 14(a) of the Securities Exchange Act. After Judge Louis H. Pollak denied the application for preliminary injunction on December 13, 1979, the action became one for damages, but was dismissed, after a lengthy argument, by Judge Pollak's opinion on December 30, 1980. I was co-counsel for IU with my then-partner, Morris R. Brooke.
10. Marques v. Bunch, 18 D.&C. 3d 371 (Bucks Cty. C.P. 1980), was an unusual case I tried before President Judge Isaac S. Garb in Doylestown. Our client, Mr. Anthony Marques, objected to sludge dumping and spreading by his neighbor, Devey Bunch, represented by Christopher Chandor, Esq., 350 S. Main Street, Doylestown 18901, (215) 348-1600. What was unusual about this injunction action was that our real opponent, not ally, was the Pennsylvania Department of Environmental Resources, which ardently supported Bunch. Notwithstanding this official sanction, we succeeded in permanently enjoining Bunch's obnoxious activity, in an important opinion in state environmental jurisprudence by Judge Garb.

LITIGATION IDENTIFIED AT CASE #2.

PAGE 1

LEVEL 1 - GROUP 1 - 18 CASES

1. IN RE: PENN CENTRAL SECURITIES LITIGATION Shearson Hayden Stone Inc., Bache & Co., Inc., Drexel Burnham & Co., Inc., Loeb, Rhoades & Co., Paine, Webber, Jackson & Curtis Inc., Wheat, First Securities Inc., Dean Witter & Co., Inc., E. F. Hutton & Co., Inc., Hornblower & Weeks-Hemphill, Noyes Incorporated, Merrill Lynch, Pierce, Fenner & Smith Inc., Reynolds Securities Inc., L. F. Rothschild & Co., and Thompson & McKinnon, Auchincloss Kohlmeyer Inc., Appellants (D.C. MDL No. 56), No. 76-2139, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 560 F.2d 1138; 23 Fed. R. Serv. 2d (Callaghan) 1242, August 5, 1977, Filed
2. In re PENN CENTRAL SECURITIES LITIGATION, M.D.L. DOCKET NO. 56, Civil Action Nos.: 70-2005; 70-2010; 70-2137; 70-2320; 70-2505; 70-2596; 70-2818; 70-2933; 71-265; 71-266; 71-267; 71-268; 71-277; 71-278; 71-280; 71-476; 71-971. Plaintiff-shareholders in the above-captioned actions, Appellants., No. 73-1609, United States Court of Appeals, Third Circuit., 494 F.2d 528, March 14, 1974, Decided.
3. IN RE: PENN CENTRAL SECURITIES LITIGATION, M.D.L. DOCKET NO. 56, IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, 416 F. Supp. 907, JUNE 21, 1976
4. IN RE: PENN CENTRAL SECURITIES LITIGATION GEORGE P. BAKER, et al. v. DAVID C. BEVAN, et al., M.D.L. DOCKET NO. 56 CIVIL ACTION NO. 71-853, IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, 395 F. Supp. 192; 20 Fed. R. Serv. 2d (Callaghan) 573, May 30, 1975
5. In re PENN CENTRAL SECURITIES LITIGATION. Luanne Templeton, et al. v. Great Southwest Corporation, et al., N.D. Texas, Civil Action No. CA-2-1324, No. 56., Judicial Panel on Multidistrict Litigation., 374 F. Supp. 1400, April 17, 1974.
6. In Re Penn Central Securities Litigation; Abernathy, et al. v. Great Southwest Corp., MDL Docket No. 56, No. 72-2112, United States District Court, Eastern District of Pennsylvania., 62 F.R.D. 181; 18 Fed. R. Serv. 2d (Callaghan) 467;, January 30, 1974.
7. Penn Central Securities Litigation; Williams, et al. v. Pennsylvania Co., et al., No. 71-2838., United States District Court for the Eastern District of Pennsylvania., 367 F. Supp. 1158; 18 Fed. R. Serv. 2d (Callaghan) 112; 1974 Trade Cas. (CCH) P74,900; 1974-1 Trade Cas. (CCH) P74,900; Fed. Sec. L. Rep. (CCH) P94,318, November 19, 1973.
8. In re PENN CENTRAL SECURITIES LITIGATION., M.D.L. Docket No. 56 Civ. A. Nos. 70-2005, 70-2010, 70-2137, 70-2320, 70-2505, 70-2596, 70-2696, 70-2818, 70-2933, 71-265, 71-266, 71-267, 71-268, 71-277, 71-278, 71-280, 71-476, and 71-971., United States District Court, E.D. Pennsylvania., 357 F. Supp. 869, April 17, 1973.
9. In re PENN CENTRAL SECURITIES LITIGATION. Byron Williams et al. v. Pennsylvania Co. et al. (N. D. Texas, No. CA 3-4859 D.) E.D.Pennsylvania, Civil Action 72-2838., No. 56., Judicial Panel on Multidistrict Litigation., 349 F. Supp. 1029; 1972 Trade Cas. (CCH) P74,181, Oct. 2, 1972.
10. In re PENN CENTRAL SECURITIES LITIGATION. Richard S. ROBINSON et al. v. PENN CENTRAL COMPANY et al. M.D.L. Docket No. 56., Civ. A. No. 70-2010., United States District Court, E.D. Pennsylvania., 347 F. Supp. 1347; 16 Fed. R. Serv. 2d (Callaghan) 595, Aug. 24, 1972.

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LEVEL 1 - GROUP 1 - 18 CASES

11. In re PENN CENTRAL SECURITIES LITIGATION. M.D.L. Docket No. 56., Civ. A. Nos. 70-2005, 70-2010, 70-2137, 70-2320, 70-2505, 70-2596, 70-2696, 70-2818, 70-2933, 71-265 to 71-268, 71-277, 71-278, 71-280, 71-476, 71-971., United States District Court, E.D. Pennsylvania., 347 F. Supp. 1327; 16 Fed. R. Serv. 2d (Callaghan) 545; Fed. Sec. L. Rep. (CCH) P93,610, Aug. 7, 1972.
12. In re PENN CENTRAL SECURITIES LITIGATION. Richard S. ROBINSON et al. v. PENN CENTRAL COMPANY et al. Byron WILLIAMS et al. v. PENN CENTRAL COMPANY et al. M.D.L. Docket No. 56., Civ. A. Nos. 70-2010, 71-2838., United States District Court, E.D. Pennsylvania., 347 F. Supp. 1324, June 23, 1972.
13. In re PENN CENTRAL SECURITIES LITIGATION. Mayer S. REICH v. Howard BUTCHER, III, et al. Richard S. ROBINSON et al. v. PENN CENTRAL COMPANY et al. Herbert COOK and Rose Cook Small v. PENN CENTRAL COMPANY et al. Philip BARON and Ann Nemser v. Stuart SAUNDERS et al. Rebecca LOWEY et al. v. David C. BEVAN et al. Edward PERRY v. David C. BEVAN et al., M.D.L. No. 56. Civ. A. Nos. 70-2005, 70-2010, 70-2505, 70-2596, 70-2818 and 70-2933., United States District Court, E.D. Pennsylvania., 338 F. Supp. 436; 15 Fed. R. Serv. 2d (Callaghan) 1044, Jan. 13, 1972.
14. In re PENN CENTRAL SECURITIES LITIGATION. Mayer S. REICH v. Howard BUTCHER, III, et al. Philip BARON and Ann Nemser v. Stuart SAUNDERS et al. Rebecca LOWEY et al. v. David C. BEVAN et al., M.D.L. No. 56. Civ. A. Nos. 70-2005, 70-2596 and 70-2818., United States District Court, E.D. Pennsylvania., 338 F. Supp. 438 Jan. 13, 1972.
15. In re PENN CENTRAL SECURITIES LITIGATION., M.D.L. Docket No. 56., United States District Court, E.D. Pennsylvania., 335 F. Supp. 1026; 16 Fed. R. Serv. 2d (Callaghan) 557, Dec. 6, 1971.
16. In re PENN CENTRAL SECURITIES LITIGATION. Byron Williams, et al. v. The Pennsylvania Co., et al., Northern District of Texas, Civil Action No. CA-3-4859-D., No. 56., Judicial Panel on Multidistrict Litigation., 333 F. Supp. 382; 1971 Trade Cas. (CCH) P73,743, Nov. 4, 1971.
17. In re PENN CENTRAL SECURITIES LITIGATION., No. 56., Judicial Panel on Multidistrict Litigation., 325 F. Supp. 309, April 9, 1971.
18. In re PENN CENTRAL SECURITIES LITIGATION., No. 56., Judicial Panel on Multidistrict Litigation., 322 F. Supp. 1021, Jan. 25, 1971.

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

Obviously, in twenty-one years of legal practice a lawyer becomes involved in a variety of legal or quasi-legal matters that either do not involve litigation or involve it only peripherally. That, in any event, has been my experience, and, putting aside political campaigns which, for me, have often had a legal dimension, the following will give a fair sample.

Reading Terminal Market. Over the past three years, I have represented Reading Terminal Market Merchants' Association and Reading Terminal Market Preservation Fund in the effort to save Philadelphia's historic and much-beloved Reading Terminal Market at 12th and Filbert Streets in downtown Philadelphia. This effort has, to say the least, been a very high visibility one, and has occasioned dozens of press accounts and much editorial comment. See, e.g., lead editorials in the Philadelphia Inquirer of July 1, 1988, p. 12-A, and, more recently, March 10, 1990, p. 6-A. The effort regrettably involved a period of litigation with the Pennsylvania Convention Center Authority, in which I was quite prominent. See, e.g., the lead story on page 1 of the December 22, 1989 Legal Intelligencer. Happily, the litigation is now behind us, a multi-million dollar Continuous Market Operations Agreement has been entered into that protects the Merchants' Association members, and the Preservation Fund staged a hugely successful "Valentine to the Market" on February 16, 1991, that demonstrated once again the ongoing public commitment to preserve the Market. See, e.g. Philadelphia Inquirer, February 19, 1991, p. D-4. In all these efforts of both the Preservation Fund and the Merchants' Association, I have, with the principal officer of each organization, created the strategy that, to date, has resulted in deed restrictions on the Convention Center Authority that should, together with the Continuous Market Operations Agreement, preserve and strengthen the Market that Philadelphians for generations have known and loved.

Kemper Environmental Coverage Litigation. As noted in answer to question 18 at p. 10, this collection of cases genuinely shaped (and is shaping) a major body of law. This part of the law, in turn, is resolving an important national question, i.e., who is to pay for America's commercial disregard for its environment? Our position for Kemper is, at bottom, that the policies mean that those who caused industrial pollution should bear the consequences of their actions, and should not be allowed to socialize the cost of their deeds through the insurance mechanism.

The Episcopal Church. Since graduating from Law School, I have been very active in the Episcopal Diocese in Pennsylvania in a variety of legal and quasi-legal roles. For example, I was the Chairman of the Committee on Democratic Processes that reorganized much of the Diocese and rewrote the canons to accomplish this. This effort was completed in 1973, and that legislative accomplishment remains unchanged. Since that time, I have been involved, both for fees and without recompense, in a variety of internal parochial disputes, pursuant to the national canons of the Church, as to whether the rectors of such parishes should be removed from office, an obviously sensitive and complex enterprise at best. During my ten-year stint on the Standing Committee of the Diocese, which just ended in October of 1990, I was called upon to participate or resolve countless legal problems involving, for example, ordinations, disputes over church property, and responsibility for the disbursement of over \$500,000 per year in Diocesan endowment income.

Posel v. Redevelopment Authority of City of Philadelphia, 72 Pa. Cmwlth. 115, 456 A.2d 243 (1983), is a case of which I'm particularly proud. Because a courageous client was not afraid of taking on, quite literally, City Hall, we were able to stop a virtual giveaway of City property to an ally of the then-Mayor in 1979 that would have cost the City millions of dollars of lost revenue. Notwithstanding a detour occasioned by an appellate ruling said to be on an odd procedural point, we ultimately saw a multimillion dollar hotel project built on the property that is annually reaping hundreds of thousands of dollars in wage and tax revenues than would not have been paid - to say nothing of hundreds of jobs created by the project - had the proposed transfer not been enjoined in our case. It should be recorded that our client at no time had any business interest in the subject property.

II. FINANCIAL DATA AND CONFLICT OF INTERESTS (PUBLIC)

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

It is my understanding that my profit sharing account shortly after I leave the firm must, under the Internal Revenue Code, be rolled into my Individual Retirement Account. With respect to any other "continuing financial interests" in Drinker Biddle & Reath, by Agreement dated April 30, 1991, all of my capital in the firm will be paid to me the day after my withdrawal from the firm. In addition, the same day I will be paid a lump-sum if the date of such withdrawal is prior to November 30, 1991. In addition, the Agreement provides for declining monthly installment payments commencing in January, 1992 and ending in December of 1993.

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

During the period of any post-partnership payments from my former law firm, I would recuse myself from any cases in which Drinker Biddle & Reath is representing any party. I would also recuse myself during such period from any case involving one of my former clients, and would probably be required to recuse myself from ones involving such clients for a very long time. In all such cases, I would, of course, be guided and bound by applicable strictures.

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

No.

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

1991 (through June 30)

Drinker Biddle & Reath	\$288,494.87
Vanguard Pennsylvania Tax-	
Free Fund	2,068.42
	<u>\$290,563.29</u>

1990

Drinker Biddle & Reath	\$527,636.00
Vanguard Pennsylvania Tax-	
Free Fund	5,682.37
Sun Energy Partners	610.00
Cape Cod Five Cent Savings Bank	538.59
	<u>\$534,466.96</u>

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

See Schedule

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

Yes. Since I attended college, I have been involved in dozens of political campaigns. These have typically involved Republican efforts. Putting aside my work with the Young Republicans and Young Americans for Freedom in college, which often involved support of various Republican candidates, I will only list campaigns where I had significant substantive responsibility for the candidate and/or campaign entity.

1972 -- I was the Political Director for Philadelphia for the Committee to Re-Elect the President. The Chairman of the Pennsylvania branch of the Committee was then-District Attorney Arlen Specter. I was responsible for the soup-to-nuts of the campaign in Philadelphia, ranging from organizing poll watchers to

bi-partisan group of lawyers and other citizens that tried to elect thirty-nine Philadelphia Common Pleas Judges on the basis of merit, in an election which, because of an expansion of the court, presented the Primary voters with literally hundreds of candidates. This was an extraordinarily complicated problem, and our goal was to get the "Good Judges" nominated in both parties' Primaries, thereby assuring election in November. Regrettably, we were only successful in about eight or nine cases, but this was the first major grass roots effort toward merit selection of judges in Pennsylvania, which, only now, is beginning to bear fruit in a court which, unfortunately, has suffered from well-publicized corruption convictions that have resulted in an understandable erosion of public confidence.

1975-Present -- In December of 1975, then-Congressman John Heinz asked me to be Treasurer and, shortly later, General Counsel, to John Heinz for Senate Committee, his principal campaign committee for his United States Senate races. As Senator Specter will recall, we had a bruising six-candidate Primary which Congressman Heinz narrowly won, and then, after another energetic campaign, Congressman Heinz won against Congressman Bill Green in November of that year. My services for Senator Heinz in 1976 were greater than holding a second full-time job, and I was involved in seemingly every detail of the two campaigns. For Senator Heinz's 1982 and 1988 campaigns, we formed, at my direction, a Pennsylvania non-profit corporation, People for John Heinz Committee, which served (and serves) as Senator Heinz's principal campaign committee. Since its creation in 1979, I have served as Assistant Treasurer, Secretary and General Counsel for People for John Heinz Committee.

1977 -- I was Finance Chairman of James Fitzgerald's unsuccessful campaign to become Philadelphia City Controller. I undertook to raise as much money as possible for nov-Judge Fitzgerald's effort, performing the usual functions associated with being Finance Chairman. Judge Fitzgerald now sits on the Philadelphia Court of Common Pleas, having been elected in 1987.

1978 -- During the Primary that year, I was very active in a legal and fund raising capacity for Dick Thornburgh's campaign for the Republican nomination for Governor. I assisted the Campaign Manager and other senior personnel in a variety of legal, political and financial matters, and found myself, for example, in the Philadelphia Court of Common Pleas representing the campaign well into the evening of Election Day in the Primary, seeking to impound voting machines because of election irregularities.

1978 -- Shortly after the Primary, a group was formed known as the Committee to Protect the Charter, whose goal was to preserve the Philadelphia Home Rule Charter from changes that would remove, among other things, the two-term limitation on Philadelphia Mayors. This bi-partisan grass roots group asked me to become Co-Chairman and Chief Spokesman, and I accepted the invitation (and thereby had to resign from the Thornburgh campaign). From June of 1978 through November of that year I was, in effect, acting as a candidate does,

with frequent public appearances in the media and in other public fora. In addition, it became necessary for me to act as de facto Campaign Manager and Finance Chairman, which was all quite demanding, but happily, ended with a two-to-one victory at the polls that November.

1980 -- In this year, Senator Heinz was the Chairman of the National Republic Senatorial Campaign Committee, so I was often called upon to assist with questions of various campaigns arising under the Federal Election Campaign Act of 1971, as amended. Most particularly, I assisted the Campaign Manager and others in Senator Specter's successful campaign for the United States Senate that year, and, shortly thereafter, helped Senator Specter's campaign staff to create the fund raising system we successfully invented for Senator Heinz.

1982 -- As noted, this was a re-election year for Senator Heinz, and I was involved in the day-to-day political, finance and legal effort in his successful campaign against Cyril Wecht.

1985 -- I was an early supporter, and active Finance Committee member, for the Castille for District Attorney Committee, which successfully ran the upset campaign of District Attorney Ron Castille. I was also an active member that year of the Committee assisting in the late Philadelphia Common Pleas Judge Wilhelm Knauer's campaign (Judge Knauer was the brother of a long-time friend and client, Valerie Knauer Burden). I do not recall whether I had any official title in either Judge Knauer's or Mr. Castille's campaign, although I may well have.

1986-1990 -- Over the years, I have provided legal services to Pennsylvania Auditor General Barbara Hafer, beginning when Ms. Hafer was County Commissioner in Allegheny County, Pennsylvania. I was an active Finance Committee member in her Auditor General campaign in 1988 and in her ill-fated 1990 campaign for Governor against incumbent Bob Casey.

1988 -- In my usual roles, I was involved in the day-to-day management of the legal, fundraising, and political aspects of Senator Heinz's re-election effort against former Philadelphia City Controller Joseph Vignola. I was also in that year Chairman of Karen Chizeck's unsuccessful campaign for State Representative; Ms. Chizeck, who worked for me in Senator Heinz's 1982 campaign, was the endorsed Republican candidate for that office.

Various -- Since 1976, I have been on the Finance Committees for many candidates, as well as, for example, the Republican State Committee in 1977 and, more recently, in 1990, in connection with President Bush's effort to help the Republican slate in Pennsylvania. I have also informally assisted, and contributed money to, the Primary campaigns of my college classmate and friend of 25 years, former Philadelphia District Attorney Edward G. Rendell. After all of these years and campaigns, it would not be meaningful (or probably reliable) for me to list any more than I have described in the preceding entries. These entries have sought to identify, in accordance with the question's directions, those campaigns where I had a title and official responsibility.

III. GENERAL (PUBLIC)

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

From the beginning of my career at Drinker Biddle & Reath, through the present, I have always been directly involved in pro bono or community service activities. As will be seen in some of the early cases listed in answer to my litigation experience (e.g., Barnwell and Watson, Case Nos. 25 and 26) my earliest trial experience was on an appointive basis representing relators petitioning for the writ of federal habeas corpus. I have always been especially proud of the accolade then-Chief Judge Lord kindly gave me in Barnwell, 337 F.Supp. at 691. See also, Barnwell in the Third Circuit, 461 F.2d 768 (1972), as well as Warden v. Marrero, 417 U.S. 653 (1974) (co-counsel).

Beginning in 1973, I became Secretary of the Thomas Skelton Harrison Foundation, a foundation created to support good government, municipal reform, and related community efforts in the City of Philadelphia. I attach at the end of this §III a copy of the Philadelphia Inquirer story of April 23, 1990, which discusses the Foundation's work in general, and some of my contributions in particular. As will be seen, we have, among other things, helped spearhead a leadership role in creative approaches to homeless families, and the Harrison Foundation has also given me the opportunity, year after year, to assist organizations working with the poor, such as the Mediation Program of Good Shepherd Neighborhood House, 5356 Chev Avenue, Philadelphia, PA 19113 (Sister M. Brigid Lawlor, head) or the West Philadelphia Fund for Human Development, which the Rev. Arthur F. Brunner, of the United Methodist Church, led for many years.

For five years, I was Chairman of the Mission Endowment Committee of the Episcopal Diocese of Pennsylvania, and in that capacity saw to it that significant funding was obtained for homeless shelters (e.g., "Wintershelter" at Trinity Memorial Church, 22nd and Spruce Streets, Philadelphia, PA), and ministries to the elderly through Episcopal Community Services and the Dolphins of the Merion Deanery of the Diocese.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical

implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies.

I do not belong to any organization "that invidiously discriminates on the basis of race, sex, or religion." At one time, The Union League of Philadelphia, of which I have been a member since 1976, did not admit women as members. Together with my senior partners, Lewis H. Van Dusen, Jr. and Raymond K. Denworth, Jr., we supported the efforts to change the By-Laws of the organization and, I am pleased to report, the two-thirds requisite vote was obtained in 1985.

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

Senators Heinz and Specter sometime ago created the Federal Judicial Nominating Commission of Pennsylvania, a bi-partisan group of fourteen citizens, before whom I appeared on December 14, 1989. Prior to my appearance, I submitted a lengthy personal data questionnaire, not unlike this form. I was one of four individuals the Commission recommended to Senators Heinz and Specter. Thereafter, the four of us met individually with the two Senators, and this resulted in their letter of recommendation to President Bush on or about March 13, 1990, recommending me for the vacancy created on February 13, 1990, by Judge Joseph L. McGlynn's taking senior status on that day.

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

No.

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

Being a federal judge is a very tough job. The connotations of the term, "a federal case," properly point to the complexities and stakes often associated with federal litigation. Resolving the factual and legal issues federal cases present is, therefore, a sufficiently demanding enterprise by itself. There simply does not seem, in my view, to be room for adding yet another layer of complexity by imposing some sort of agenda extraneous to the facts and law applicable to the case before the Court.

Twenty-one years experience in the federal courts on all three coasts of our country have convinced me that a good judge is by definition one who, in good conscience, seeks to resolve disputes before him or her on the basis of the record and applicable law and nothing more. I certainly have had the experience of meeting result-oriented judges, and it is difficult to explain to clients how such an approach, which becomes evident when obvious facts are distorted to a pre-ordained end, legitimately can happen with members of our judiciary.

My Bible from Law School to the present in this area is embodied in Hart and Wechsler's The Federal Courts and Federal System which, I believe, properly describes the appropriate limits of federal "judicial power" in our federal system. I was immeasurably helped in obtaining a clear picture of this role from Professor Paul Mishkin, who studied with Professor Wechsler at Columbia, and who taught me and my colleagues at the University of Pennsylvania Law School. Professor Mishkin is now at the University of California at Berkeley (Boalt Hall). Appropriately enough, he is one of the editors of the new edition of Hart and Wechsler.

MONDAY
April 23, 1990

SECTION B

METRO

A small, but solid, foundation

What the Harrison board lacks in renown, it more than makes up for in influence with its funding of public-policy research.

By Marc Devosier

Seven years ago, a businessman, diplomat and civic reformer whose name means little in present-day Philadelphia gave half his estate — more than \$500,000 — to help future generations battle corruption and inefficiency in city government.

The foundation that manages this sprawling trust does not have an office or a full-time staff. Its board members serve without pay and the eight to 10 grants they hand out each year add up to barely \$70,000 — a puny sum by the standards of modern foundations.

Yet what the Thomas Skelton Harrison Foundation lacks in renown, it more than makes up for in influence, according to city officials, civic leaders and people who rely on foundations for funding.

The organization has financed detailed studies on topics ranging from homelessness to police brutality to whether Philadelphia would be better off if it abolished the Parking Authority.

It has sponsored forums on the little-known city zoning laws crucial to the fate of the Reading Terminal Market. It has helped train family-planning counselors, rehabilitate female offenders and educate people about the dangers of AIDS.

"This foundation does a hell of a lot less than any other similar organization that I know about," said City Councilman Edward W. Thescher Longstreet, a former member of the Harrison board.

Edward Schwartz, Philadelphia's director of housing and community development, said the foundation was far more important than its size would suggest, because it is one of the few that consistently funds research on public policy.

"They give support for projects that you almost cannot get funded anywhere else," said Schwartz, who was born, reared and educated in Philadelphia's inner city government.

Harrison, who lived from 1837 to

1920, was a partner in his family's paint and chemical business in Gray's Ferry, and served in the Navy during the Civil War and was later appointed U.S. consul general in Egypt, where he spent two years.

Back home, he devoted much of his time to fighting the entrenched corruption and political policies for which Philadelphia was notorious. He was a leader of various reform movements and played a key role in enactment of the Bullitt Charter of 1870, which reformed state and streamlined city government.

In his will, he established a trust to help future generations carry on the struggle. He listed various "uses and persons" to which the foundation should be put. These include monitoring city contracts, bringing crooked officials to justice and encouraging "the immediate adoption by the city . . . of a wise, clear and accountable system of bookkeeping and accounting."

Stewart Dalzell, the foundation's secretary and legal adviser, said the "use" provision of the will was one calling on the trustees to obtain and disseminate information "about the municipal government and . . . in the inauguration or conduct of movements for . . . reform."

In keeping with those aims, the foundation has given numerous

foundation in public policy



Says Stewart Dalzell, secretary and legal adviser: "We care very much about making an impact."

grants to the Pennsylvania Economy League, the Committee of Seventy and other nonprofit groups for studies on topics ranging from spending, hiring and other practices and comparing municipal services here with those in other cities.

This research has helped shape public debate and, in some instances, has led to measurable improvements. A 1987 study by the economy league found that the city's controversial Class 500 program of grants for students and community groups was poorly managed and ripe for corruption.

Later that year, Council President Joseph E. Coleman acknowledged that he had received \$2,000 from Class 500 funds to two constituent youth groups, thereby creating a hidden fund from which he disbursed money to favored organizations.

The Class 500 budget was cut in half last year to \$1 million and Mayor George V. Kotsopoulos eliminated the grants in the fiscal year starting July 1.

Auditing powers

An economy league study urged that the Goode administration demand the right to audit the health and welfare funds of municipal unions. The city incorporated this idea into its bargaining strategy and, during the negotiations, won the power to demand auditing powers, said Diane E. Reed, director of the economy league's Philadelphia office.

"Without a lot of money, I think we encouraged a lot of good things in this city," said Dalzell, a respected trial attorney. "We care very much about making an impact."

The foundation has been particularly active in calling attention to the city's budget crisis and the possibility of massive deficits in the near future.

Last month, the Harrison board and the Greater Philadelphia Chamber of Commerce sponsored a forum at the Hotel Atop the Believe, with city officials and several hundred business and political leaders.

Over lunch in a ballroom in the Hotel Atop the Believe, the guests heard Reed present the results of a Harrison-funded study challenging the popular notion that the city's fiscal problems are largely self-inflicted, the result of slovenly management.

State aid

Philadelphia's Reed said spends slightly less per capita on basic services than do other major cities. The problem, she said, is that the city gets proportionally much less state and federal welfare and other social services.

Stephen J. Harnlein, a Center City lawyer who has served on the Harrison board for nine years, said the

trustees hoped to create a political climate in which state legislators would be able to approve additional aid to the city.

The foundation's principal aim is simply to keep Philadelphians informed about — and involved in — their government.

The Committee of Seventy used a Harrison grant to publish a booklet titled "The Right for Municipal Office." In 1986 and 1987, the foundation gave WHYY-FM, the local public radio station, a total of \$20,000 to pay part of the salary for a full-time City Hall reporter.

The foundation has also helped community groups get innovative programs off the ground. One grant paid for a lawyer to help a single mother obtain judicial orders for child support. Another supported a mediation program designed to keep neighborhood disputes out of the courts.

Informal style

In December, the trustees gave a nonprofit group \$12,500 toward the purchase of a home for a woman and three children who had been living in a shelter.

The foundation operates in an informal, almost genteel style. Paperwork is kept to a minimum so that small organizations will not be discouraged from applying. One recent grant came in a letter from Dalzell stating that the trustees would be "privileged" to support their activities.

To keep politics as far as possible from the board's deliberations, Harrison wanted the power of appointment in educational and civic institutions that he considered immune to partisan pressure.

The trustees of Pennsylvania, the Franklin Institute, the Chamber of Commerce and the Philadelphia College of Physicians each appoint one trustee. Three others are named by the administrative judge of the Orphans' Court Division of Common Pleas Court.

The board meets three or four times a year in the exclusive Racquet Club in Center City to review applications and discuss the state of the city. Longstreet said these sessions were not too fun — freewheeling and provocative.

A list of board members reads like a page from Who's Who. The chairman, Marvin E. Wolfgang, is a nationally known criminal lawyer who taught at the George L. Spears ophthalmological at Wills Eye Hospital; is an authority on glaucoma. The Rev. Paul M. Washington is a long-time civil rights activist who served on the commission that investigated the 1985 MOVE disaster.

The other trustees are Harnlein a senior partner in the law firm of Dilworth Paxson Kalish & Kauffman, G. Fred Dubois Jr., former president of the Chamber of Commerce; Richard C. Johnson Jr., chairman of the Board of Pennsylvania Hospital, and Angel A. Keeble, a housing consultant.

Once it has narrowed the field of applicants, the board meets for luncheon at the Racquet Club each fall and interviews the finalists.

"It's clear that they have read through our proposals," said Reed of the economy league. "They ask off-the-top questions."

Spears said the experience had taught him "the effect that can come from a small amount of money or a small group of people with a very good idea. It can make a difference, it can affect a lot of us. If we had \$1 million to distribute, would we be more effective? I'm not sure we would."

For more information

Write to the Thomas Skelton Harrison Foundation, 1100 Philadelphia National Bank Building, Philadelphia 19107. On larger grants, the foundation prefers to grant them directly. Applications must be filed in Sept. 15 to be considered for funding in 1991.

Confidential Financial Statement
of Stewart Dalzell

As of July 21, 1991, unless otherwise noted.

Assets

Cash on hand and in banks	\$ 39,000
Vanguard Pa. Tax-Free Money Fund	30,671
Vanguard Pa. Insured Long-Term Fund	40,000
Securities (see schedule)	132,363
Real Estate Owned (see schedule)	506,500
Auto and Fine Art (est.)	30,000
Cash value of life insurance	10,400
Vested Profit Sharing (est.)	475,000
IRA (see schedule)	32,517
Capital in Law Firm	53,444
Total Assets:	<u>\$1,349,895</u>

Liabilities & Net Worth

Real Estate Mortgages Payable (see schedule)	\$ 172,224
Net Worth	<u>\$1,177,671</u>
Total Liabilities & Net Worth:	<u>\$1,349,895</u>

Notes:

I am a Guarantor, with my wife, of \$25,000 of bank debt of The Clay Studio, a § 501(c)(3) arts organization in Philadelphia.

I am Grantor of trusts for the benefit of my children, whose principal value, plus that of custodial income accounts under the U.G.M.A., is approximately \$238,000 as of June 30, 1991.

I am also Grantor of a life insurance trust for the benefit of my children, whose cash value as of June 30, 1991 was \$16,204.34.

All life insurance policies are issued by Equitable Variable Life Ins. Co.

With respect to my interest in the firm's profit sharing plan, the total given is my best estimate of the current value of my share of the portfolio. Templeton International manages the portfolio, and has complete investment discretion over it.

Securities (prices as of 7/20/91 close):

1,000	Glaxo Holdings ADR	\$ 44,000
500	USX-Marathon	12,813
100	USX-USSteel	2,550
500	Westinghouse Electric	12,750
1,000	Sun Energy Partners	8,750
\$20,000	Tesoro Petroleum 12.75%	
	sub. debs. 3/15/01	17,600
\$ 5,000	Council Rock School District 9.25% 3/1/97 (est.)	5,000
300	Bell South Corp. (wife)	13,875
400	Telefonica de Espana (wife)	10,650
500	Sun Energy Partners (wife)	4,375
		<u>\$132,363</u>

IRA

1,000	Apco Argentina, Inc.	21,750
\$ 8,000	Phila. Savings Fund Society Money Multiplier 11.50%	5,175
	CEF Money Market Portfolio	5,592
		<u>32,517</u>

Real Estate:

Principal residence, Philadelphia, PA ¹	\$302,000
Vacation home, Wellfleet, MA	204,500
	<u>\$506,500</u>

Real Estate Mortgages Payable:

(Principal balances as of 7/4/91)

Mellon Bank, N.A., Phila., PA	\$ 66,877
Neworld Bank, Boston, MA	105,347
	<u>\$172,224</u>

1. Approximate tax basis under I.R.C.

2. Most recent real estate tax appraisals by Town of Wellfleet

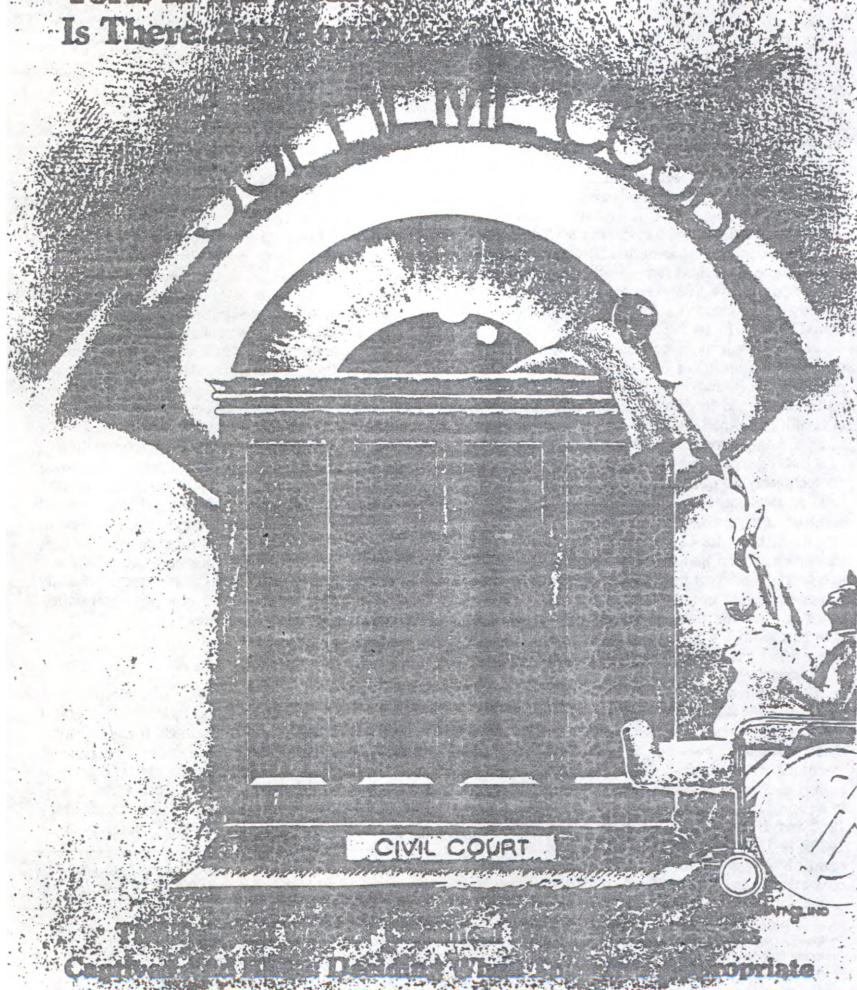
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Risk Management

Torts in the Workplace

Is There Any Safe Job?

March 1988 \$1.00



The Civil Court of Appeals
Courtroom 1000
1000 Main Street
Appropriate

Torts in the Courts— Is There Any Hope?

by Stewart Dalzell

Purchasers and providers of comprehensive general liability insurance coverage can be forgiven for despairing at the state of civil business and tort law in the United States. In recent years there has been a litigation explosion. For example, in a report last year, the U.S. Department of Justice noted a 758 percent increase in products liability case filings in the federal courts in the 11 year period from 1974 to 1985.¹ Ever since the Supreme Court of New Jersey's famous 1960 decision, *Henningsen v. Bloomfield Motors*,² opened the door to expanding tort and contract liability, courts have routinely seemed to establish more extreme theories of liability or eliminated defenses which had been fixtures of Anglo-American common law.

Putting aside the obvious inflationary growth of compensatory awards in the past 25 years, there has been an even more disturbing exponential growth in punitive damage verdicts. In a study the Rand Corporation's Institute for Civil Justice published this year, the authors found that both the number and percentage of trials in which punitive damages were awarded increased 25-fold in the Cook County, Illinois Circuit Court in just the past 20 years.³ The same study showed that in the San Francisco Superior Court between 1980 and 1984, 13.6 percent of all trials with compensatory verdicts also awarded punitive damages, compared with only 2.0 percent of such cases between 1960 and 1964—an almost seven-fold increase.

Perhaps even more disturbing, the same Rand study finds hard evidence of what Rand calls the "fortification of contract law."⁴ Rand documents a radical change in the imposition of punitive damages in business tort and breach of contract cases between 1960 and 1984. Indeed, the study shows that in the 1980s in California, almost one-half of all dollars awarded as punitive damages were imposed in business and contract cases. In "bad faith" actions, the

medium punitive damage awarded was \$336,000 and the average in California was \$1.6 million.⁵

A consequence of this 25-year experience has been the insurance crisis. In the majority of jurisdictions, of course, there has never been coverage for punitive damage awards, and so the expansion of that kind of liability means that insureds in all but one-quarter of the states are self-insured against such verdicts as a matter of public policy. Bad as these common law developments are in this country, it is not the purpose of this article to indulge in hand-wringing. While it would be premature to begin painting any rosy pictures, the canvas is perhaps not as dark as some might think. There have, for example, been a number of high-visibility legislative responses to this crisis, as well as such notable direct popular responses as Proposition 51 in California. This article focuses, however, on recent judicial decisions that suggest all may not be lost or hopeless in our courts. It will do so first by examining early signs of promise in the U.S. Supreme Court. In addition, this note will briefly survey a few less visible decisions in the product liability area that hint at the beginning of a pendulum swing away from a liability apocalypse.

'Excessive Fines'

The root of hope for relief from wild punitive damage verdicts may well be found in the United States Constitution. The Eighth Amendment to the Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Excessive Fines Clause traces its origin to the English Magna Carta, which prohibited "amercements," or fines. Chapter 20 of the

1. U.S. Dept. of Justice, *Report of the Tort Policy Working Group on the causes, extent and policy implications of the current crisis in insurance availability and affordability* at p. 45 (1986).

2. 32 N.J. 358, 161 A.2d 69 (1960).

3. M. Peterson, S. Samra & M. Shanley, *Punitive Damages: Empirical Findings* at p. 9, Table 2.1 (Rand Corp. R-3311-ICJ 1987).

4. *Id.* at p. iv.

5. *Id.* at pp. vi-vii.

Stewart Dalzell is a member of the Philadelphia law firm of Drinker, Biddle & Reath. Mr. Dalzell is also a member of the Products Liability Committee of the International Association of Defense Counsel.

Magna Carta provided, in relevant part, that:

A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence, and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise.⁶

This ancient concept in our fundamental Anglo-American law was cited in 1986 against a \$3.5 million punitive damage verdict awarded by an Alabama jury against Aetna Life Insurance Co. The jury found that Aetna was in "bad faith" for tendering \$1,650.22 on a disputed \$3,028.25 medical claim. While this 2.500 multiple of actual damages suffered did not trouble the Alabama Supreme Court, the U.S. Supreme Court thought otherwise, and unanimously reversed the lower court's decision.⁷

The Supreme Court based its reversal on its holding that it violated the Fourteenth Amendment's Due Process Clause for one of the Alabama Supreme Court Justices not to have disqualified himself when he had his own "bad faith" lawsuit pending against another carrier. Regarding the Excessive Fines Clause and related Constitutional arguments directed against this seven-figure punitive damage verdict, Chief Justice Burger tantalizingly wrote for the court that "These arguments raise important issues which, in an appropriate setting, must be resolved."⁸

"There has been a disturbing exponential growth in punitive damage verdicts"

It took less than a year for evidence to appear that the former Chief Justice's remark represented a genuine invitation to continue the Constitutional battle against punitive damage lotteries. On March 9, 1987, the Supreme Court agreed to hear Bankers Life & Casualty Company's appeal from a Mississippi Supreme Court decision that approved a \$1.6 million punitive damage award in a case involving a disputed \$20,000 insurance claim.⁹ Bankers Life & Casualty squarely asked the Supreme Court to address whether this punitive award violated the Excessive Fines Clause, or is "otherwise invalid under the Contract and Due Process Clause because the award is grossly disproportionate to actual

6. J. H. Holt, *Magna Carta* at p. 323 (1965).

7. *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580 (1986). There were two concurring opinions, and Mr. Justice Stevens did not participate.

8. *Id.* at p. 1589.

9. *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1986), probable jurisdiction noted 55 U.S.L.W. 3607 (No. 85-1765, March 10, 1987).

damages. . . ."

This "constitutional principle of proportionality,"¹⁰ has been firmly established in Eighth Amendment cases involving criminal defendants, but it has yet to be formally embraced in civil cases. *Bankers Life v. Crenshaw* must establish this precedent before a breakthrough can be pronounced. In the meantime, however, the sheer fact of the Court addressing two jackpot punitive damage cases in only one year is itself extraordinary.

Moreover, the former Chief Justice's conclusion for the court that these are "important issues" which "must be resolved" by the Supreme Court represents a long-overdue acknowledgement that the punitive damage problem is national, and not merely local, in importance. Even pending the outcome of the Bankers Life decision, the Supreme Court has now sent a signal to the state courts that they are no longer free to continue the punitive damage game without federal oversight and, it may fervently be hoped, federal rules of fairness and "proportionality."

Although unquestionably a creature of state common law, products liability cases, too, are finding that they sometimes implicate federal legal concerns, with more reasonable and balanced decisions as a result.

Article VI of the United States Constitution provides that federal law "shall be the supreme law of the land" that shall bind "the judges of every state. . ." Article VI is the underpinning of the so-called preemption doctrine, which holds that federal authority supplants state law, including common law, when Congress either expressly states or implies this supremacy.

Thus, in the now-famous *Cipollone* case,¹¹ the United States Court of Appeals for the Third Circuit held that New Jersey's strict liability tort common law was impliedly preempted by the Federal Cigarette Labeling and Advertising Act,¹² and therefore tort claims of defective labeling and inadequate warning on cigarette packages must be dismissed. In August of this year, federal Appeals Courts in Atlanta and Boston came to the same conclusion. Needless to say, if *Cipollone* has been decided the opposite way, it would have been safe to expect a new chapter of tort litigation to be written, rivaling what was already in progress in the asbestos arena. Similarly, pervasive federal regulation has been found to preempt common law claims

10. This phrase is from *Solem v. Heim*, 46 U.S. 277, 286 (1983), which traces its lineage as a constitutional concept to *Wearns v. United States*, 217 U.S. 349, 367 (1910), an early Eighth Amendment decision in a criminal case.

11. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), cert. denied 107 S. Ct. 907 (1987).

12. 15 U.S.C. §§1334-1340 (1982).

relating to DPT vaccine,¹³ the alleged failure to equip cars with air bags,¹⁴ and the sale of allegedly adulterated feed.¹⁵

Another recent area of progress involves companies that do business with the federal government. Assume two U.S. Navy pilots die as a result of alleged defects in the ejection system of a jet fighter. The widows sue for claimed design defects under §402A of the Restatement (Second) of Torts. The aircraft's manufacturer defends by arguing that the Navy approved "reasonably detailed specifications for the ejection system." If the aircraft maker can prove this defense, it will win, according to the United States Court of Appeals for the Ninth Circuit.¹⁶ This promising and valuable defense will get an important construction this term when the U.S. Supreme Court decides *Boyle v. United Technologies*,¹⁷ another favorable decision for this defense. Since these cases arise out of commerce with the largest consumer in America, the government contractor defense has the potential to serve manufacturers in a wide variety of business.

Lastly, outside the realm of federal-state interplay, state appellate courts, even from pro-plaintiff jurisdictions, may actually be having second thoughts about what they have wrought. One of the seminal cases in the creation of the liability expansion of the past 25 years was the *Henningsen* decision of the New Jersey Supreme Court. Since 1960, this tribunal has justly earned its reputation as one of the friendliest in the country to tort plaintiffs.

For example, in 1982, in the infamous *Beshada* case,¹⁸ the New Jersey Supreme Court actually held that a defendant had a duty to warn of dangers that were unknowable to it (or anyone else) at the time it sold its product. In lawyer's parlance, the court rejected the "state of the art" defense. *Beshada's* holding not only shocked the defense bar, but even resulted in some confessed "wavering" from one of the country's most ardent advocates of plaintiff's causes. Thus, Dean John W. Wade, who in 1973 argued that products liability decisions should begin with the assumption that the defendant manufacturer knows of its products' dangerous properties,¹⁹ 10 years later, and a

year after *Beshada*, retreated from his 20/20 hindsight approach.²⁰

This was apparently an influential retreat. The next year, the New Jersey Supreme Court was faced with a state of the art defense involving the alleged failure to warn physicians that a drug had an unwanted (but not life-threatening) side effect. The drug manufacturer did not know of the defect at the time of sale. To the bar's great surprise, the court accepted the state of the art defense, and, after citing Dean Wade's more recent article and other criticism, limited *Beshada* to asbestos.²¹

Where Do We Go From Here?

There is little question that courts have predicated the expansion of corporate civil liability on the presumed existence of comprehensive liability insurance coverage. As Yale Professor of Law and Economics, George L. Priest said in a very recent *Yale Law Journal* article, this expansion assumes it "will lead to the provision of insurance along with the sale of the product or service itself" and thus, through the product's higher price, effectively provide "insurance to individuals, especially the poor, who have not purchased or cannot purchase insurance themselves."²²

To no surprise of any reader of this magazine is Professor Priest's conclusion, after meticulous scholarly analysis, "that the expansion of tort liability has had exactly the opposite effect." Indeed, he shows that the real victims of "the current insurance crisis are the low-income and poor, exactly the parties that courts had hoped most to aid."²³

It doesn't seem extravagant to suggest that the possible change in the pendulum's direction has as its root a recognition among an ever-growing number of judges that the well-meant enterprise of liability expansion has proved counterproductive and perhaps at times unconstitutional. It is surely incumbent upon purchasers and providers of commercial insurance, those most knowledgeable about these consequences of legal risk expansion, to continue to press their arguments in both state and federal courts. If they do, the likelihood will increase that the possible trend observed here is not just wishful thinking, but the beginning of a real movement toward reclaiming fairness in our civil liability law. RM

- 13. *Hurley v. Lederle Laboratories*, 651 F. Supp. 953 (E.D. Tex. 1986).
- 14. *Vancouver v. Ford Motor Company*, 632 F. Supp. 1095 (E.D. Mo. 1986); *contra: Murphy v. Nissan Motor Corp.*, 650 F. Supp. 922 (E.D. N.Y. 1987).
- 15. *Animal Legal Defense Fund Boston, Inc. v. Prostini Veal Corp.*, 626 Supp. 278 (D. Mass.), affirmed 802 F.2d 440 (1st Cir. 1986).
- 16. *McKays v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983). See also *Kastenbaum v. Boeing Verical*, 755 F.2d 352 (3d Cir. 1985).
- 17. 792 F.2d 413 (4th Cir. 1986), cert. granted 55 U.S.L.W. 3472 (January 12, 1987).
- 18. *Beshada v. Johns-Manville Corp.*, 90 N.J. 191, 447 A.2d 539 (1982).

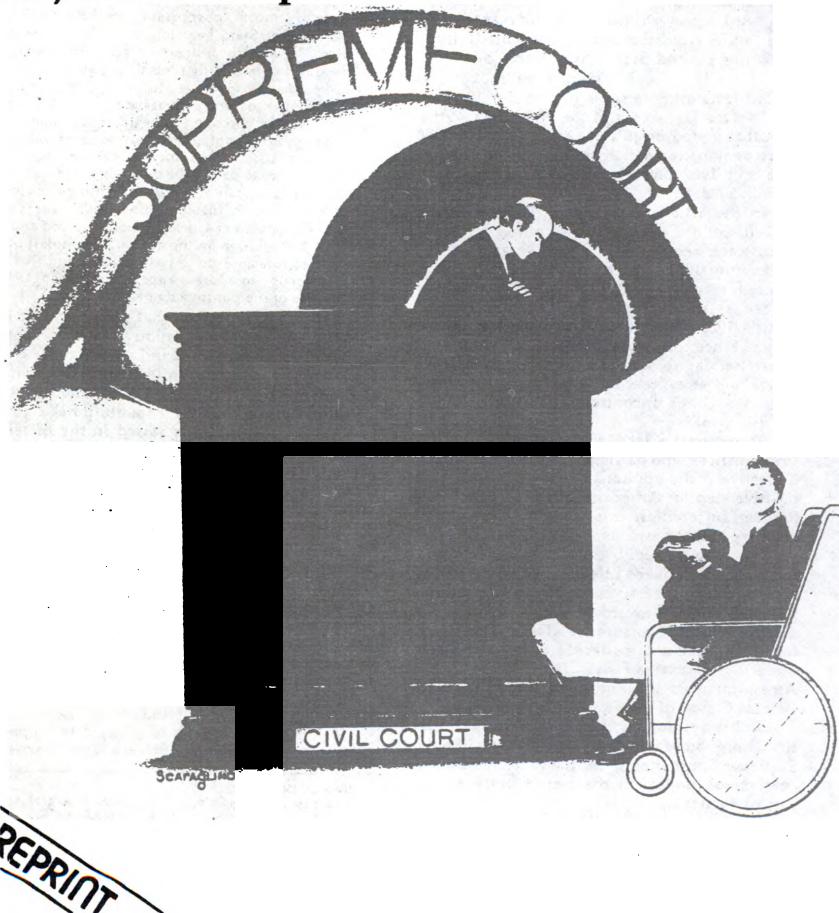
- 19. Wade, "On the Nature of Strict Tort Liability for Products," 44 Miss. L.J. 825 (1973).
- 20. Wade, "On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing," 58 N.Y.U.L. Rev. 734 (1983).
- 21. *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984).
- 22. Priest, "The Current Insurance Crisis and Modern Tort Law," 96 Yale L.J. 1521, 1525 (June 1987).
- 23. *Id.*

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Torts in the Courts—
Yes, There's Hope

September 1988



REPRINT

Torts in the Courts— Yes, There's Hope

by Stewart Dalzell

In my article in the March 1988 issue of *Risk Management*, I argued that tantalizing signs from the courts, particularly from the United States Supreme Court, offered hope of a "beginning of a real movement toward reclaiming fairness in our civil liability law." In the last weeks of the Supreme Court's term that ended on July 1, the nation's highest court demonstrated that the glimmers seen in 1986 and 1987 have brightened into genuine hope in 1988.

In the article, the case of *Banker's Life & Casualty Co. v. Crenshaw* (for a complete review of this case, see David R. Strawbridge's article, "Does Punishment Fit the Civil Claim," in the August issue of *Risk Management*) was described as the logical step after the Supreme Court's 1986 decision in *Aetna Life Ins. Co. v. Lavoie*.¹ Since the article appeared, the Supreme Court, on May 16, rendered its decision in *Crenshaw*,² and it represents good news for those who care about uncontrolled jackpot punitive damage awards.

There were a total of four opinions of the seven justices who participated in the decision.³ Collectively, the opinions of the justices mark a positive step for American business which has to date suffered in this standardless bog of punitive damage awards.

Not unexpectedly, the Court seized upon the failure of Banker's Life to preserve the issues relating to the excessiveness of the \$1.6 million punitive damage award in a case involving a disputed \$20,000 insurance claim. The Court therefore declined to decide either the claim under the Excessive Fines Clause of the Eighth Amendment or the argument under the Due Process Clause of the Fourteenth Amendment.

In his opinion for the Court, however, Justice Thurgood Marshall explained that while the Supreme Court should decline to decide the excessiveness issues on the record presented in this particular case,

Our review of appellant's claim now would

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short-circuit a number of less intrusive, and possibly more appropriate, resolutions: The Mississippi State Legislature might choose to enact legislation addressing punitive damage awards for bad-faith refusal to pay insurance claims; failing that, the Mississippi state courts may choose to resolve the issue by relying on the state constitution or on some other adequate and independent nonfederal ground; and failing that, the Mississippi Supreme Court will have its opportunity to decide the question of federal law in the first instance, while any ultimate review of the question that we might undertake will gain the benefit of a well-developed record and a reasoned opinion on the merits. We think it unwise to foreclose these possibilities, and therefore decline to address appellant's challenges to the size of the punitive damage award.⁴

It seems that the Court has craftily chosen to back up the carrot just quoted with the constitutional stick displayed in Justice Sandra Day O'Connor's opinion. While Justice O'Connor (and Justice Anthony Scalia, who joined in her opinion) agreed that the constitutional claims had not been sufficiently raised in the Mississippi Supreme Court, she nonetheless expressed her view that "there is reason to think that [the punitive character of such awards] may violate the Due Process Clause."

Justice O'Connor noted that the Mississippi decisions permitted juries to award punitive damages "for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong." She added that, under Mississippi authority, "the amount of the penalty that may ensue is left completely indeterminate." Justice O'Connor then left little doubt of her view as to the unconstitutionality of this Mississippi law:

This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process. The Court has

1. 106 S.Ct. 1580 (1986).

2. *Banker's Life & Casualty Co. v. Crenshaw*, 56 U.S.L.W. 4418 (May 17, 1988).

3. Justice Stevens did not participate for unstated reasons, and Justice Kennedy did not participate because he was not a member of the Court at the time the case was argued on November 30, 1987.

4. *Id.* at 4422.

recognized that 'vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given statute.' Nothing in Mississippi law warned appellant that by committing a tort that caused \$20,000 of actual damages, it could expect to incur a \$1.6 million punitive damage award.⁵

As noted, Justice Anthony Kennedy was not a member of the Court when *Crenshaw* was argued. Two weeks after the *Crenshaw* decision, however, he dissented with Justice O'Connor in the denial of review in *Ohio Casualty Ins. Co. v. Dorney Savings & Loan Assn.*,⁶ another punitive damages case. This act represents tangible evidence that Justice Kennedy shares Justice O'Connor's view of this problem.⁷

It seems reasonable to expect that most state courts will not be blind to *Crenshaw's* carrot and stick. The lesson of the case would thus seem to be that the Supreme Court will give the states a few years to see if, indeed, they get the message that the punitive damage lottery cannot continue. If the state courts do not heed this message, there appears to be a solid majority of the present Court that is prepared to follow Justice O'Connor's analysis.

Justice Kennedy proved to be the swing vote in another case that was cited and discussed in March, *Boyle v. United Technologies*. This case involved an action by the personal representative of a U.S. Marine helicopter co-pilot who drowned when his helicopter crashed off the Virginia coast. His personal representative argued that the Sikorsky Division of United Technologies had defectively designed the helicopter's co-pilot emergency-escape hatch system. The jury returned a general verdict in favor of Boyle and awarded him \$725,000. The trial court sustained this verdict, but the United States Court of Appeals for the Fourth Circuit reversed it.⁸

Boyle was first argued in the Supreme Court on October 13, 1987, while the vacancy caused by Justice Lewis Powell's retirement remained. An almost certain indicator that the Court was deadlocked four-to-four was that the Court ordered reargument after the Senate confirmed Justice Kennedy's nomination. The case was reargued before all nine justices on April 27.

Exactly two months later, the Court ruled, five-to-four, that the verdict against United Technologies could not stand.⁹ Justice Kennedy was in the majority.

In the view of Justice William Brennan, who led the dissenters, "The Court's newly discovered government contractor defense is breathtakingly sweeping."¹⁰ In the view of the dissenters, the decision applies not only to defense contractors, but

... even if the government has not intentionally sacrificed safety for other interests like speed or efficiency, and, indeed, even if the equipment is not of a type that is typically considered dangerous; thus, the contractor who designs a government building can invoke the defense when the elevator cable snaps or the walls collapse.¹¹

While it remains to be seen whether the decision is as broad as Justice Brennan and the dissenters assert, Justice Scalia's opinion for the majority does make it clear that the government contractor defense will apply:

... when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.¹²

Given that the United States is, obviously, the nation's largest buyer, the decision in *Boyle* could conceivably affect hundreds of billions of dollars of transactions each year. Even if *Boyle* does not have the reach that the dissenters decry, it seems fair to suggest that the mere fact of the decision by the nation's highest court in this area is itself strong grounds for hope that a movement has begun toward reclaiming fairness in our civil liability law. Put another way, few defense or plaintiff's lawyers would have predicted, even 10 years ago, that the Supreme Court would have even heard a case like *Boyle*, much less would have ruled as it did.

As noted in the earlier article, tort law in the United States remains largely a creature of state law. The Supreme Court's decisions in *Crenshaw* and *Boyle* confirm the conclusion, however, that the highest federal court in the land is not blind to the explosion of tort liability, and has signaled the states that they must reconsider the direction they have taken since the *Henningson*¹³ case was decided in 1960. RM

5. *Id.* at 4423.

6. No. 87-159, 56 U.S.L.W. 3818 (May 31, 1988).

7. The Supreme Court on May 31 denied review in five other cases that had raised, in varying degrees of explicitness, punitive damage-related issues.

8. 792 F.2d 413 (4th Cir. 1986).

9. 56 U.S.L.W. 4792 (June 28, 1988).

10. *Id.* at 4796.

11. *Id.*

12. *Id.* at 4795.

13. *Henningson v. Blawiehfeld Motors*, 32 N.J. 358, 161 A.2d 69 (1960).

CONFIRMATION HEARING ON: ALICE M. BATCHELDER, HAROLD R. DeMOSS, JR., REBECCA F. DOHERTY, AND DENIS R. HURLEY

THURSDAY, SEPTEMBER 26, 1991

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

The committee met, pursuant to notice, at 2:25 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin presiding. Present: Senators Heflin, Grassley, and Brown.

OPENING STATEMENT OF SENATOR HEFLIN

Senator HEFLIN. The hearing will come to order. I apologize for being late, but I think we all in the Senate realize there is no way we can control our time and things do come up.

The Senators are here, and usually the procedure is that Senators—since they have things to do and are busy, we will allow them to introduce the nominee from their State and then let them go if they have other business, or they can stay if they would like.

Now, we have got a number of Senators here and I believe Senator Glenn is senior. I don't know whether I can go by seniority. I don't know all the seniority, but anyway on the list I have, I believe you are the senior one. And isn't there a Congressman here from Ohio? Yes, Bob McEwen, if you will come forward and both of you introduce your nominee, and then we will go to the next group, either Senators D'Amato, Gramm, or Breaux from Louisiana. If you will tell me how your seniority is, I will go in that regard.

Senator GLENN.

STATEMENT OF HON. JOHN GLENN, A U.S. SENATOR FROM THE STATE OF OHIO

Senator GLENN. Thank you, Mr. Chairman and members of the committee, and I am especially pleased today to introduce you to Judge Alice M. Batchelder, who is with us here at the table. Judge Batchelder has been nominated to serve on the Sixth Circuit Court of Appeals, which has Michigan, Kentucky, Tennessee, and our home State of Ohio.

I want to thank the members of the committee for allowing me this opportunity to introduce a friend and fellow Ohioan who is coming before this committee today for confirmation.

Judge Batchelder has a varied and impressive legal background, having worked in the private sector as an advocate of the law and in the court system for a number of years. For the past 6½ years,

Judge Batchelder, who lives in Cleveland, has served as a U.S. district court judge for the northern district of Ohio. So she comes with 6½ years of experience to this nomination today. Prior to this service, Judge Batchelder served on the U.S. Bankruptcy Court for the Northern District of Ohio, a position which she held from 1983 to 1985.

As a practicing attorney prior to her service on the bench, Judge Batchelder engaged in a general civil practice, doing both trial and appellate work in the areas of corporate, commercial, probate, personal injury, zoning, real estate, and administrative law—quite a broad background.

She describes her practice as a devotion to doing work for working people, which is not unlike what we like to think we do right here in the Congress. It exemplifies her dedication to and understanding of the needs of the average American, a quality trait in a jurist.

In addition to her legal work, Judge Batchelder has managed to engage in a significant number of civic activities. She has been active in the Medina County Mental Health Board, the fundraising agency for all mental health agencies in the community, as well as the board of the community library, which during her tenure built a new county library facility.

Judge Batchelder graduated from Ohio Wesleyan University with a bachelor of arts in 1964. She was awarded a law degree from the University of Akron School of Law in 1971, and a master of laws in judicial process from the University of Virginia School of Law in 1988.

Judge Batchelder is married to William G. Batchelder III, who is with us. Bill, would you stand up?

[Mr. Batchelder stood.]

Senator GLENN. He is also an attorney in Ohio and a member of our Ohio House of Representatives. Two children are with her here today, Bill and Elizabeth. Would you stand up, please?

[Bill and Elizabeth Batchelder stood.]

Senator GLENN. Thank you. I am glad to introduce the whole family to you today, Mr. Chairman.

Mr. Chairman, Judge Batchelder's experience in the legal profession, especially her judicial experience, have allowed her to gain the knowledge and legal tools necessary to perform in an exemplary manner as a judge on the Sixth Circuit Court of Appeals.

I hope the committee will give her nomination an early and favorable treatment for that Sixth Circuit Court of Appeals, and I am glad to recommend her to you.

Thank you, Mr. Chairman.

Senator HEFLIN. Congressman, would you like to go ahead?

STATEMENT OF HON. BOB McEWEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. McEWEN. Thank you, Mr. Chairman. I have some prepared remarks that I will submit, and express that it is a real pleasure for me to join our senior Senator from Ohio, Mr. Glenn, in recommending Judge Alice Batchelder for this exalted position.

She has distinguished herself not only on the bankruptcy court, but on the court for the northern district of Ohio. But especially in that camaraderie that is necessary in a large court such as the one that is centered in Cleveland, her leadership has brought true change to that court and has sent ripples throughout the judicial system of our Nation.

We are very, very proud of her. We appreciate the service that she has given to our State not only as the wife of the active minority whip of the house of representatives and distinguished leader on the rules committee and elsewhere in the State legislature, but as a mother and now in her career as a judicial leader.

So it is a real pleasure to join Senator Glenn, as I said, and recommend a good friend to all of us and to me personally, an outstanding jurist, and I commend the committee favorable consideration of this excellent recommendation of the President.

[The prepared statement of Mr. McEwen follows:]

INTRODUCTION OF JUDGE ALICE M. BATCHELDER

UNITED STATES DISTRICT JUDGE

NORTHERN DISTRICT OF OHIO

THE SENATE JUDICIARY COMMITTEE

SEPTEMBER 26, 1991

**MR. CHAIRMAN, IT IS MY PLEASURE TO HAVE THIS
OPPORTUNITY TO JOIN SENATOR GLENN BEFORE THE SENATE
JUDICIARY COMMITTEE TO INTRODUCE JUDGE ALICE M.
BATCHELDER AT HER CONFIRMATION HEARING FOR THE POSITION
OF UNITED STATES CIRCUIT JUDGE FOR THE SIXTH CIRCUIT.**

**AS SENATOR GLENN HAS NOTED, JUDGE BATCHELDER COMES
BEFORE THIS COMMITTEE WITH EXCELLENT CREDENTIALS, A
WEALTH OF VALUABLE JUDICIAL AND LEGAL EXPERIENCE, AND THE
HIGHEST REPUTATION FOR INTEGRITY AND THOUGHTFULNESS. I
AM HONORED TO SAY THAT I HAVE BEEN ABLE TO CONSIDER ALICE
BATCHELDER A FRIEND OF MINE FOR A NUMBER OF YEARS.**

**JUDGE BATCHELDER'S CAREER ON THE FEDERAL BENCH BEGAN
IN 1983 WITH THREE YEARS AS A UNITED STATES BANKRUPTCY
JUDGE FOR THE NORTHERN DISTRICT OF OHIO. SINCE 1985 SHE**

HAS SERVED WITH DISTINCTION AS A U.S. DISTRICT JUDGE FOR
THE NORTHERN DISTRICT OF OHIO.

HER SERVICE AS A FEDERAL JUDGE FOLLOWED OVER TWELVE
YEARS OF PRACTICE AT THE BAR WITH WILLIAMS AND
BATCHELDER, AND DEGREES FROM OHIO WESLEYAN UNIVERSITY,
THE UNIVERSITY OF AKRON, AND THE UNIVERSITY OF VIRGINIA.

ONCE AGAIN, MR. CHAIRMAN AND MEMBERS OF THE
JUDICIARY COMMITTEE, I CONSIDER THIS A GREAT HONOR AND
PLEASURE TO INTRODUCE THE NEXT UNITED STATES CIRCUIT
JUDGE FOR THE SIXTH CIRCUIT, JUDGE ALICE BATCHELDER. IN
MY HUMBLE OPINION MR. CHAIRMAN, NEITHER A FINER PERSON,
NOR MORE DESERVING NOMINEE, WILL COME BEFORE THIS
COMMITTEE FOR CONFIRMATION TO THE FEDERAL CIRCUIT COURT.

Senator HEFLIN. All right, thank you. Now, we will go to the next nominee. Senator D'Amato and Senator Gramm, which one of you is senior? I don't know whether Senator Gramm concurred or not, but anyway you stepped forward. All right, Senator D'Amato.

STATEMENT OF THE HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. Well, Mr. Chairman, we are going to be brief. It gives me great pleasure to introduce to this committee, Mr. Chairman, a friend of mine, Judge Denis R. Hurley, who has been nominated by the President to serve as U.S. eastern district judge.

Now, I have known Denis Hurley for 40 years this very month. We met in high school as freshmen back at Chaminade in September 1951. Following high school, Denis distinguished himself at the Wharton School of Pennsylvania, in the business school there. Thereafter, he received a master's degree from Columbia, a law degree from Fordham University.

At Fordham, incidentally, he attended evenings while married with two children, a full-time job, and he was a member of the law review and graduated in the top 5 percent of his class. I think that attests to his scholarship.

He comes before you with a broad range of experience over the past 25 years in the private practice of law and in public service, which will serve him well on the Federal bench. In the public service area, he has served as a principal assistant district attorney in the felony trial bureau of the Suffolk County district attorney's office. He is known as a prosecutor's prosecutor. Indeed, he was the special prosecutor in Suffolk County as the senior assistant county attorney in charge of the torts unit of the Suffolk County Department of Law, and as a Suffolk County legislator as well.

Since 1983, he has served with distinction as a New York State judge, first in the family court, then as an acting New York State Supreme Court justice, and currently as a county court judge handling felony trials.

I know Denis to be a man of scholarship, compassion, integrity, and dedication to public service, and I most enthusiastically recommend him for your favorable consideration.

Denis is accompanied today by his lovely wife, Patty, and is joined in spirit by his children, Denis R. Hurley, Jr., Susan, Pamela, and Jennifer, who could not be here on this proud occasion.

Mr. Chairman, I ask for your speedy consideration. I think the President has chosen well, and I know that Denis Hurley will continue to credit himself with the great distinction that he has already brought to his family and to his career.

I thank the Chair.

Senator HEFLIN. Thank you.

All right, Senator Gramm.

Senator BROWN. Mr. Chairman, Senator Gramm looks older, even though he may not be senior. I don't know. [Laughter.]

**STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE
STATE OF TEXAS**

Senator GRAMM. It is from bearing the heavy burden of responsibility and doing the work of many. [Laughter.]

Senator BROWN. We trust you will get over those bad habits.

Senator GRAMM. Mr. Chairman, I am joined here by my dear friend and colleague who represents part of Houston in Congress, Bill Archer.

Mr. Chairman, I can be very brief. Hal DeMoss is and has been for 30 years one of the premier lawyers in our State. He is a partner of Bracewell Patterson. For 30 years, he has served as a partner, and he has been involved in everything good going on in the legal profession in Texas.

When I came to the Senate, not being a lawyer myself, I sought to assemble an advisory committee of attorneys to evaluate legal credentials. One of the first people asked to serve on that committee was Hal DeMoss, and over all these years, with no compensation and no one paying his expenses, he has traveled all over Texas to evaluate people and to help me in making some 29 recommendations to the Federal district bench.

He is exactly the kind of person who ought to be on the fifth circuit court and I strongly recommend him for this position, Mr. Chairman.

I would like to ask unanimous consent that a statement of support by my colleague, Lloyd Bentsen, appear in the record.

Senator HEFLIN. It will be so entered.

[The prepared statement of Senator Bentsen follows:]

STATEMENT OF THE HONORABLE LLOYD BENTSEN
AT THE CONFIRMATION HEARING FOR THE
NOMINATION OF MR. HAROLD DEMOSS
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Good afternoon Mr. Chairman and members of the Judiciary Committee. Mr. Chairman, I want to thank the Committee for the opportunity to speak on behalf Mr. Harold DeMoss, a native of Houston, Texas. I commend his nomination to the United States Court of Appeals for the Fifth Circuit.

Hal DeMoss received his B.A. from Rice University in 1952 and his LL.B. degree from the University of Texas Law School in 1955. In 1955 he married his wife Judith. She is here today along with their daughter, Holly, their son Chip and his wife Jan. I understand, too, that Hal and his wife have recently been blessed with their first grandchild who is also here with us today.

Hal DeMoss' legal career qualifies him for the federal bench. He has been a partner with the law firm of Bracewell and Patterson in Houston, Texas since 1961 and was an associate with the firm from 1957 to 1961. Hal DeMoss has distinguished himself as a first rate admiralty, real estate, and oil and gas lawyer over his thirty-six years of practice. He has been a litigator and transactional lawyer in these areas. He has represented a diverse array of clients, including banks, partnerships, corporations and the Houston Independent School District. He also has found the time to defend indigent criminal defendants.

Moreover, Hal DeMoss has found the time to serve our nation in various official capacities. No newcomer to Washington, D.C., Mr. DeMoss was a Director with the Panama Canal Company here from 1978 to 1979 and a Director at the Legal Services Corporation here from 1982 to 1983. Since 1989, he has been a council member of the Administration Conference of the United States.

Mr. DeMoss has been very active in the bar and the Houston community. He was a Director of Amigos de las Americas, an organization which recruits high school and college students to go to Central and South America to deliver immunization shots. A Board Chairman for the Texas Bill of Rights Foundation, he was also a past Director and First Vice President of the Houston Bar Association.

I believe this committee will find Harold DeMoss qualified for the court of appeals. I trust that he will labor long and hard at deciding the complicated and serious issues he will face on the appellate court. I believe, too, that he will show the judicial temperament and integrity necessary to be one of the brethren.

Mr. Chairman, I respectfully ask this committee to report his nomination favorably. I ask the Senate to join with me in confirming Harold DeMoss to the Fifth Circuit Court of Appeals. I thank the chair and committee.

Senator GRAMM. I would also like to introduce Hal's wife, Judy; his son, Chip; his daughter, Holley; his daughter-in-law, Jan; and his grandson, Austin. So, Mr. Chairman, thank you for giving me the opportunity. I strongly recommend Hal DeMoss.

Senator HEFLIN. All right.

Congressman Archer.

STATEMENT OF HON. BILL ARCHER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. ARCHER. Thank you, Mr. Chairman. I am delighted to be here to concur in the recommendation of your colleague and my friend, Senator Gramm. I have known Hal DeMoss for too many years in Houston, TX, and I must tell you that he is one of the outstanding legal scholars of our community.

He not only is that, but he is a man of extremely high integrity, which I think is extremely important on the bench. He calls them down the middle; he calls them fairly, even when it is against his own self-interest, and he will make an outstanding Federal judge.

So I simply want to say at this very high moment in his life for him and his family that I am sure you will confirm him because there is no blemish on his record either from the standpoint of intelligence, judicial capability, legal capability, or integrity.

Senator HEFLIN. Thank you.

Senator Breaux, when he comes in—oh, there he is. I didn't see you.

Senator BREAUXT. I am hiding behind all these old men.

Senator GRASSLEY. Mr. Chairman, could I make the comment that Congressman Livingston from Louisiana was here as well to participate in this introduction, but he had to leave. But he wanted us to know of his support and endorsement of this nominee as well.

[The prepared statement of Senator Grassley follows:]

PREPARED STATEMENT OF SENATOR GRASSLEY

I would like to express my appreciation to Senator Heflin and Senator Biden for holding this judicial nomination hearing. As we know, the Judiciary Committee has been holding hearings on the Thomas nomination to the Supreme Court. Many other judicial positions remain empty. I am grateful that the committee is working to fill judicial vacancies even as we consider the nomination of Judge Thomas.

Senator HEFLIN. Senator Breaux.

STATEMENT OF HON. JOHN B. BREAUXT, A U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator BREAUXT. Thank you very much, Judge Heflin.

Senator HEFLIN. You might have been senior to them. I didn't see you. You see, now, when you get behind a good-looking woman, it is hard to see you. [Laughter.]

Senator BREAUXT. It is not a bad place to be. Thank you, Judge Heflin and Senator Grassley and Senator Brown. I am very delighted to also be present with my colleague, Congressman Livingston, whom Senator Grassley mentioned, in support of Rebecca Doherty.

I think it is a very bright day for the American judicial system, and we can come to the Judiciary Committee and support young, intelligent, experienced members of the bar for recommendation to become judges on our district and our court of appeals.

I am particularly also pleased that in this case, this young, intelligent, experienced person happens to be a woman. I think that it is important that our judicial system in this country fairly reflect the membership of both genders in this country, and I am delighted to see that the nominations are moving in that direction, quite frankly.

In this case, Rebecca Doherty brings that type of experience which I think is so incredibly important, and that is an active practice in southwest Louisiana where she is going to be called upon to serve as a Federal district judge, and a practice that consists of maritime, personal injury, defense, and environmental law. These are the types of cases that the judges in this particular district are facing day in and day out.

While I have a great regard for scholars, I have an even greater regard for judges who actually had the opportunity to participate and experience the type of cases as a litigant that they will then be called upon to decide later on as a judge.

Her educational credentials are impeccable—a B.A. degree in English; a master's degree in speech from Northwestern University, graduating at the top of her class; a juris doctorate from Louisiana State University, where she was in the top 10 percent of her class, Order of the Coif, as well as the LSU Law Review.

In 1987, Rebecca Doherty was inducted into the LSU Law Center's hall of fame, a special honor honoring the very best and the very brightest of the university's graduates. So from the Hall of Fame to the Halls of Congress, I am very delighted to enthusiastically support her confirmation.

Her mother and her sister from Arkansas have journeyed—I almost said down to Louisiana, but rather up to Washington to be with her, and I would just like them to stand and be recognized as well.

[The aforementioned persons stood.]

Senator BREAX. So we wholeheartedly recommend her confirmation to the committee.

Senator HEFLIN. Thank you.

If you will just stay there, Ms. Doherty, I will ask each of the nominees—Judge Batchelder, Mr. DeMoss, Ms. Doherty, and Mr. Hurley—if you all will raise your right hands and take the oath.

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

Judge BATCHELDER. I do.

Mr. DEMOSS. I do.

Ms. DOHERTY. I do.

Judge HURLEY. I do.

Senator HEFLIN. All right. Judge Batchelder, if you will take the witness chair, are there any other people that you would like to introduce, friends or distant relatives? Usually, we give an opportunity to introduce family and friends, and since they limited it to just some of the family, there may be others here that you would like to—if there are others that you would like to introduce, we would be delighted that you do so at this time.

**TESTIMONY OF HON. ALICE M. BATCHELDER, CLEVELAND, OH,
TO BE U.S. CIRCUIT JUDGE FOR THE SIXTH CIRCUIT**

Judge BATCHELDER. Mr. Chairman, I appreciate having that opportunity because I was fortunate enough to have a whole group of former and current law clerks and some of my staff who very much wanted to see this come out here with me today, and it has been a lot of fun. I would like to have the opportunity to introduce them, and if they would stand up as a group I would appreciate it.

Senator HEFLIN. All right, fine.

Judge BATCHELDER. I have Andrew Paisley, who has been a law clerk; Joe Miller, who is now a law clerk; a young lady, Heather Berry, who is a very dear friend of ours from home; Michael Tinker, who will be one of my law clerks.

Behind, we have Melissa Schultz, who is from my hometown and works for Congressman McEwen now; Ms. Emily Sanderson, who is Heather's mother and a dear friend of mine; my courtroom deputy, Barbara Dwyer; Diane Richards, who has been a law clerk of mine and is now with Bricker & Eckler in Columbus; and Sharon Fuller, who is my indispensable secretary.

[The aforementioned persons stood.]

Senator HEFLIN. You don't have any fellow Girl Scouts that you want to introduce? [Laughter.]

Well, we are delighted to have you.

Do you have any opening statement that you would like to make?

Judge BATCHELDER. Mr. Chairman, I do not. I will be happy to respond to any of your questions.

Senator HEFLIN. Judge Batchelder, as a circuit court judge, would you consider yourself bound by the Supreme Court decisions even though you might personally believe some of these decisions were incorrect?

Judge BATCHELDER. I do indeed, Mr. Chairman.

Senator HEFLIN. You have been criticized by the court of appeals on at least two occasions, first in *United States v. Woods* and then in bank one of *Cleveland v. Abbey*, for disposing of motions by marginal orders. What that means was that in both cases you noted your order in the margin of the motion, but did not state any reasons underlying your decisions, nor the specific facts upon which you relied.

As the court of appeals noted in the *Woods* case, such actions make appellate review quite difficult and seem to controvert the purpose of rule 58 of the Federal Rules of Civil Procedures requiring every judgment to be set down in a separate document by the trial judge.

Would you tell the committee your reasons for relying on marginal orders in those particular cases, and do you agree with the criticism raised by the court of appeals?

Judge BATCHELDER. Mr. Senator, I certainly agree with the criticism relative to rule 58, and I simply think that I was wrong. I don't think, however, that the substance of what was done was as much of a problem, but marginal orders were not appropriate.

Senator HEFLIN. Judge Batchelder, I read with interest in your response to the committee's questionnaire that you have served as

the northern district of Ohio's trainer on the issue of Federal sentencing guidelines. You attended sessions at the Federal Judicial Center and trained judges in your district about the guidelines.

You describe the judges' attitudes as varying widely, but that the judges showed, and I quote from the questionnaire now, "a mixture of hostility, apprehension, confusion, irritation, disgust, enthusiasm, and anticipation about the use of the guidelines." Which, if any, of those adjectives describes your attitude toward the sentencing guidelines, and do you feel the guidelines unduly limit your discretion as a judge?

Judge BATCHELDER. Mr. Chairman, am I limited to those adjectives? [Laughter.]

Senator HEFLIN. In my judgment, I agree with you. [Laughter.]

Judge BATCHELDER. I think I would choose "ambivalent." I think that there are strengths and weaknesses to the guidelines. It is not my position that Congress doesn't have the authority to restrict the discretion of the judges in sentencing. I think Congress clearly does, but I am troubled by what the effects of the guidelines have been in some areas.

Senator HEFLIN. Would you want to elaborate on that? You and I agree, so I am using this as a forum to try to educate some of the staff of the other Senators in regard to this. Could you elaborate a little bit on that?

Judge BATCHELDER. Well, I can do that, Mr. Chairman. My biggest concern, I think, is that I have seen as a result of using the sentencing guidelines now for several years that we are creating some problems down the road, it seems to me, because of the inability of judges to make virtually any discretionary calls based on the particular circumstances.

While I certainly understand that we want to avoid having wide discrepancies in sentencing, we are now in a position where virtually every judge has his or her hands tied even in situations in which there are compelling reasons not to sentence according to the guidelines, but those reasons are not reasons which are acceptable to support a departure.

One of the things which I particularly am concerned about is when we look at some of the very hefty sentences, which by and large I agree with, on drug crimes. There are certain instances in which I think we are throwing away the possibility of finding some better way to deal with young people with real potential, and down the line I wonder what we are planning to do with some of the people we are putting away for such a long period of time when they are very young and, I suspect, destroying all hope that they may have as far as their futures are concerned. We will have to do something with them when they come out of 15-, 20-year sentences.

Senator HEFLIN. Several of the attorneys that the committee staff interviewed criticized you for taking more time than average to dispose of matters pending on your docket. Several attorneys who had matters pending before you said that many months and, in some instances, over a year had passed without an action on your part. How would you respond to this criticism?

Judge BATCHELDER. I would respond, Mr. Chairman, by saying that, first of all, in substance, there have been some times when I have taken longer than I would have liked to in ruling on some

matters. When I came on to the district court, I inherited a docket of roughly 600 cases. Some of those cases were already 10 years old when I inherited them and they were not the pick of the crop. They were a mess and they have taken a considerable amount of unsnarling. I have spent 6½ years working very diligently to unsnarl them, but in the meanwhile, of course, I was picking up new cases at the same rate as everyone else.

Senator HEFLIN. Senator Brown, do you have some questions?

Senator BROWN. Mr. Chairman, I had a series of questions on natural law, but I don't seem to have them with me, so I will pass that opportunity. [Laughter.]

Senator HEFLIN. You are going to pass?

Senator BROWN. Thank you, Mr. Chairman.

Senator HEFLIN. All right. Well, thank you. You don't seem to have much opposition, so as far as I know right now, you are flying pretty good. [Laughter.]

Judge BATCHELDER. Thank you, Mr. Chairman.

Senator HEFLIN. All right, thank you.

We will go now to our next nominee, which is Mr. DeMoss. Would you like to introduce any other members of your family that have not been introduced, and any friends that you have with you? We would be delighted for you to do so.

TESTIMONY OF HAROLD R. DeMOSS, JR., HOUSTON, TX, TO BE U.S. CIRCUIT JUDGE FOR THE FIFTH CIRCUIT

Mr. DeMoss. Yes, Mr. Chairman, if I may. I think we have covered the family well. First of all, I would like to introduce Mr. Gene Godley, who is a partner of my law firm here in the Washington office, and he has a group of younger associates from the Washington office who have come to sort of observe the goings-on. Gene, would you all stand?

[The aforementioned persons stood.]

Mr. DeMoss. Also, I would like to introduce one of my partners from the Houston office, Mr. Alfredo Perez, who happens to be in Washington today and came by to join us.

[Mr. Perez stood.]

Mr. DeMoss. And then I would like to introduce an individual who represents the senior partners of my law firm, Bracewell & Patterson, Mr. Joe Bracewell, who is the son of Circe Bracewell.

[Mr. Bracewell stood.]

Senator HEFLIN. Fine.

Mr. DeMoss, as a circuit court judge, would you consider yourself bound by Supreme Court decisions even though you might personally believe some of these decisions to be incorrect?

Mr. DeMoss. Absolutely.

Senator HEFLIN. Suppose you heard a case where there was no clear Supreme Court precedent on point, but which had been clearly governed by fifth circuit precedent with which you did not agree. What do you believe your obligation is in that situation? And, second, under what circumstances would you vote to reverse a fifth circuit precedent? What are the factors that you would consider?

Mr. DeMoss. The fifth circuit, like many of the circuits, follows a sort of in-house rule of following the rule of the circuit that has

been established by a panel of judges from that circuit until that rule, as established by a three-judge panel, is reversed or changed by an en banc hearing of the court.

So I would follow the pattern which the fifth circuit has used, and if there was a serious case where I felt a panel had not made a correct decision, I would seek to have that matter as it came up before me to be presented en banc and let the court as a whole decide the matter.

Senator HEFLIN. I have read your responses to the committee's questionnaire and I notice that the majority of the cases you list as significant litigated matters are over 15 years old. I also see that a majority of your background is in either admiralty law or oil and gas law.

I am sure you know that if you are confirmed for the court of appeals, many of the cases you will address will concern complex issues of criminal law, constitutional law, and other areas of practice in which you appear to have not a great deal of familiarity. What in your background prepares you for the serious and weighty responsibilities of a circuit court judge?

Mr. DEMOSS. Well, Mr. Chairman, in regard to the criminal law aspect, I'm going to have to go to school and I will go to school, and I pledge and commit to the committee that I'll be up to snuff in the area of criminal law in 6 to 9 months. I have not done a lot of it in my practice. I have been exposed to it incidentally as appointed counsel back in the early days of my career.

But I'm going to go to school and I'll be a fine judge on the criminal law aspects, even though I haven't had that as part of my practice. I do recognize that there are many other areas with which I have not dealt in my private practice, and those areas, too, I'll have to get up to snuff on.

Senator HEFLIN. All right, sir. Senator Brown, do you have some questions?

Senator BROWN. Just a brief series. Senator Gramm had mentioned that you had made recommendations to him from time to time as to other judges. What sort of qualities did you place the highest priority on in considering others for service on the bench?

Mr. DEMOSS. The committee that I worked on for Senator Gramm was charged with looking at candidates for the Federal trial bench, the district court, and it was my feeling and the feeling of most of the members of the committee that substantial active trial experience was probably the most highest priority item.

Following that, we obviously looked for elements of judicial temperament and for their respect and standing in the community, for their participation in other community activities and affairs.

Senator BROWN. Did you find that your committee was a good forecaster of the kind of judge—of how someone would behave on the bench?

Mr. DEMOSS. The problem of judge-it-is or Federal-it-is, or however it is referred to, is one that our committee talked about a lot and discussed in detail with all of the candidates before the committee. And we tried to elicit a pledge out of each one of them that they would do everything they could to not get infected with that problem.

Some of those whom we passed on and have been selected by Senator Gramm, nominated by the President, and gone on the bench, I think have made a very diligent effort to comply with their pledge, and most of them, I think, have done very good. There's always one or two that you seem unable to inoculate them in advance.

Senator BROWN. Thank you, Mr. Chairman. No other questions.

Senator HEFLIN. It sounds like they ruled against you. [Laughter.]

Well, you seem to be in mighty good shape, too. There is no real objection to your nomination, and I would anticipate that the committee will move rapidly in regard to—

Mr. DEMOSS. Thank you, Mr. Chairman.

Senator HEFLIN [continuing]. The advice-and-consent function that we have the responsibility to undertake. Thank you very much.

Now, we will have Ms. Doherty. Are there members of your family or other friends that are here that you would like to introduce that haven't been introduced?

**TESTIMONY OF REBECCA F. DOHERTY, LAFAYETTE, LA, TO BE
U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF LOUISIANA**

Ms. DOHERTY. Mr. Chairman, my mother and sister did stand earlier. My mother is Annabelle Smith. I don't believe Senator Breaux mentioned her name. She is from Arkansas. My sister is Deborah Shannon. Also with us is Betsy O'Brien, who is practicing here in Washington. Betsy and I were on the same study group when I was in law school; and Midge Keller, who is from our office in Lafayette.

Senator HEFLIN. Well, thank you. You have been in private practice for your entire legal career, and in your questionnaire you indicate that you had not had any criminal litigation experience. If confirmed, however, you will be moving from the role of advocate to jurist and will be faced with a docket that includes a lot of criminal matters along with civil matters.

What are the greatest challenges you face in making this transition and how do you plan to meet those challenges, and what steps, if any, have you taken to get up to speed on those areas of the law, particularly criminal law, which have not been a regular part of your practice?

Ms. DOHERTY. I think the greatest challenges that I will face, Mr. Chairman, are those of education and organization. I think I will need to get educated as to the criminal law. It is an area where I have a great interest. When I was in law school, in fact, I made the highest grade in my—in each of my classes in criminal law, and got the American Jurisprudence Award for Excellence in Criminal Law. So it's an area that I enjoy, and I have at least kept up as a layman because it is something I find of interest.

So I intend to avail myself of the educational programs that are available to nominee judges with the Center, and to find the necessary information that I will need. I also have a friend who has practiced white collar criminal law in Little Rock who has gra-

ciously offered to give me a tutorial from the defendant's point of view on criminal law, and I'm going to avail myself of that. My sitting judges have also offered to help.

Senator HEFLIN. I notice that you have had a great deal of experience in litigation. In fact, the attorneys contacted by the committee responded exceptionally favorably when informed of your nomination. One attorney described you as being in the top 10 percent of the area's litigators. Litigation is a part of criminal law and there are a lot of similarities in the type of civil litigation that you have had experience in and criminal law. On the other hand, there are considerable differences, but I think your experience in litigation will serve you well when you come to the issue of trying as a jurist criminal law cases.

Ms. DOHERTY. Thank you.

Senator HEFLIN. In your questions, you stated that you are presently litigating a number of silicosis, asbestos, cement dust cases in the Fourth Judicial District Court for Louisiana. You also indicated that the Louisiana Supreme Court had appointed a special judge to handle these cases, along with 300-plus asbestos cases.

In your questionnaire, you state, "Counsel are working with the court to establish uniform discovery procedures, standing court orders, trial methods, and experimenting with new, innovative options." Would you please describe some of the docket management options that have been developed in connection with this litigation and how such options might be applied in order to relieve some of the docket backlog that faces our Federal bench?

As you probably know, the Judicial Conference of the United States has decried the problems that have arisen in regard particularly to asbestos litigation, and says that something has to be done to relieve the tremendous backlog and other problems that are there, but didn't tell us how to do it; the Conference threw it into the laps of Congress to come up with a solution to the problems.

So while you are here, we want to sort of pick your brain on that. If you have some ideas from your experience with this, we would appreciate hearing from you.

Ms. DOHERTY. My experience, Mr. Chairman, has been more with the silicosis rather than the asbestos cases. However, I think the key to handling cases such as this is a matter of organization, consolidation, and scheduling. I think when you are dealing with cases that are as large and as cumbersome as these cases are, and cases which create such tremendous paper trails, that it becomes incumbent upon the judiciary to organize them properly, to consolidate them when possible, and to move them forward with a very strong scheduling order, and that is what we have been attempting to do. In fact, we have done that.

Judge Fellman, in the eastern district of Louisiana in New Orleans, had the asbestos and silicosis cases for the Federal district court in that area and did, I think, a very good job in streamlining the process.

The manner in which it was done was litigants who were of similar situation were consolidated together so that those cases could go forward with the same discoveries and scheduling orders. That was very helpful both from the trial advocate's point of view and I would think from the court's point of view as well.

Additionally, once they had been consolidated into groupings which were of similar interest, within those groups the defendants were organized into committees and those committees were litigants with similar interests. Of that, one person was named a chairman to be on a liaison committee. The liaison committee was constructed and the liaison committee had one member who dealt with the court.

All discovery and scheduling orders were worked through the liaison committee. This allowed for streamlining of the discovery process, which, particularly in these large types of cases, can at times get out of hand. And it allowed for, for instance, one set of interrogatories to be sent to the plaintiff from all of the defendants, and yet each of the defendants was specifically recognized and his questions were within the interrogatories that were sent forward because they were put together within the liaison committee and in the committee for each of the individual defendants, and then they met and put together one master set.

It helped streamline it greatly. The master set for, for instance, as many as 15 to 20, 25, sometimes 30 cases could be handled with one set of discovery, which I felt helped streamline it tremendously. The committees worked forward as well in the manner in which the cases were tried, and this is what we have been trying to accomplish in Lake Charles in the State court system so that particularly in that instance where you have a small court, it tends to be overwhelmed.

Senator HEFLIN. In the past few years, there has been a growth in the use of secrecy orders in product liability and environmental tort cases. Critics of this trend claim that those orders prevent the public from learning about grave threats to public health and safety.

When a judge hears a request to make documents in such cases confidential, how should he or she balance the public's right to know against a litigant's right to privacy?

Ms. DOHERTY. I think that's exactly what the judge should do, Mr. Chairman, is attempt to balance those two conflicting interests because you do have a tension that is available between the two interests. I think the public is beginning to have its interest in right to know being represented particularly under the right-to-know amendments to the Superfund and CERCLA.

I think that information is becoming more and more available to the public, which I think is very important. However, I also believe that the function of the judiciary and the manner to allow each of the litigants to have a fair day in court also should be considered, and I think there must be a very delicate balance between the two.

Senator HEFLIN. Senator Brown, do you have some questions?

Senator BROWN. Yes. I notice the nominee has a very distinguished academic background, exceptional achievement as you have gone through school. I also notice that you had been involved with some lobbying organizations; specifically, World Wildlife Fund, Amnesty International, and Greenpeace.

Can you give us an idea of when you were active in those? Are those ones you continue to be currently active in?

Ms. DOHERTY. I am still a member of the World Wildlife Fund. I am not a member of Greenpeace or of Amnesty International. I

was a member of both those organizations for 1 year about 3 to 5 years ago. I strongly believe that there needs to be a balance within our society, and I think that that balance sometimes has to be effected by people who can raise different views.

Senator BROWN. Well, I think that is certainly in line with our concept of democracy in this country. In looking at your background, I notice you have got about 5 percent of your practice that was before environmental agencies and administrative law judges.

Ms. DOHERTY. Yes.

Senator BROWN. Would that be in the environmental area, environmental issues, primarily?

Ms. DOHERTY. Yes, yes.

Senator BROWN. Is some of that work pro bono work?

Ms. DOHERTY. Very little of it was pro bono. However, some of it has been pro bono. I have worked very hard in an attempt to educate the public as to the existing environmental laws, and to help companies and individuals, particularly sole proprietorships, understand what the laws are and how they relate to them because it has been my experience that business and industry—in particular, small proprietorships—want to do what is right, but they don't know what it is.

They have not been educated or have had available to them education as to what the environmental laws are. So I have worked very hard. I have given seminars to small business and industry, to the hospital organizations in conjunction with our local university, in order to help educate the public. And I have also taken some of the small proprietorships and sort of walked them through so they might know to whom to speak and where they need to go for their permits, and that sort of thing.

Senator BROWN. One of the things that is suggested to us from time to time as an effort to eliminate unnecessary lawsuits or unnecessary litigation has been the suggestion that presiding judges have the ability to award attorney fees if an action or a motion is frivolous.

Would you share with us your view on that subject, on the awarding of attorney's fees for frivolous action to the other party?

Ms. DOHERTY. I think we have, again, a situation where there has to be a balancing of needs and issues. I think—on the one hand, I think that those particular people who happen to be named in lawsuits which are deemed frivolous—I think it is very onerous upon them to have to pay the attorney's fees in order to defend those lawsuits, particularly in the environmental arena. That can be very, very expensive, and some of the small proprietorships cannot afford that.

So, that is a problem when they are named in frivolous lawsuits, and I understand the argument for and the pull to award attorney's fees in that situation. By the same token, we have to balance against that the potential chilling effect that it will have of all of the citizens to have the right and proper access to our courts, because if someone feels that they do have a grievance, it has historically been our policy within this country to allow them access to the courts. And there are some people who would not be able to bring their claim if, in fact, they felt that they were going to have to pay the attorney's fees if they lost.

So you have two very divergent and, I think, very worthy issues that have to be weighed and have to be balanced.

Senator BROWN. If you came to the conclusion that an action indeed was frivolous, would you have any reluctance to award attorney's fees?

Ms. DOHERTY. I would have to look at all the facts surrounding the situation, whether it was seemingly done with an intent, with malice, a complete, total disregard, arbitrarily and capriciously. I think the facts of any situation would govern that.

Senator BROWN. But you don't start off with a preconceived objection to awarding attorney's fees, do you?

Ms. DOHERTY. I start off with a preconceived concern of awarding attorney's fees because I do not want to create the chilling effect when someone truly does have a grievance. But by the same token, I believe that those people who are brought suit against in a completely frivolous manner and have to put forward the cost of attorney's fees—that is not fair or just either.

I personally do not know the answer. I think we have two very competing—very worthy, competing issues to balance, and I personally don't know the answer. I think the facts would have to govern.

Senator BROWN. Thank you, Mr. Chairman.

Senator HEFLIN. Thank you. Well, thank you.

Ms. DOHERTY. Thank you very much.

Senator HEFLIN. We appreciate your testimony, and there is no real opposition to you one way or the other, so I would expect you will get confirmed rapidly, and I know you hope so. Thank you.

All right. Our next—Mr. Hurley, if you will come forward, are there members of your family that were not introduced, and friends here that you would like to introduce? We would be delighted for you to do so.

TESTIMONY OF HON. DENIS R. HURLEY, RIVERHEAD, NY, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF NEW YORK

Judge HURLEY. Well, Mr. Chairman, my wife, Patty, is here and she was introduced to the committee. And as Senator D'Amato has indicated, my other family members and friends are here in spirit.

Senator HEFLIN. Fine. All right, sir. You have been a State court judge for the past 10 years. Do you see any difficulty in making the transition from the State to the Federal bench?

Judge HURLEY. Mr. Chairman, I think many of the skills and experiences I've had as a State judge will serve me well as a Federal judge if I'm fortunate enough to be confirmed. I obviously will have to address some areas that are outside the area of my experience now—areas of copyright, and so forth. But I think that with hard work and availing myself of the facilities that are available by way of training through the Judicial Center and other avenues, I think I can remedy whatever problems there may be in that regard.

But my key point is, I think with hard work I can transfer the abilities I have, and my experiences, to the Federal bench and do a good job.

Senator HEFLIN. Judge Hurley, in your questionnaire you stated that during your tenure as senior assistant county attorney in Suffolk County, you oversaw the investigations and settlement evalua-

tions of all Federal civil rights claims pending against the county during that time. Would you describe to us the criteria you used for evaluating claims and recommending settlements?

Judge HURLEY. Mr. Chairman, what I endeavored to do in that regard is that I would sit down with a number of people that were in the department. We had, for instance, an individual who was an expert in the area of insurance and exposure, the value of a case, so to speak, because the county was self-insured. So I would discuss the matter with him.

I discussed the matter with the assistant who actually would be charged with the trial of the case, and then we would try to fashion a fair and equitable settlement and I think we were fairly successful in that regard.

Senator HEFLIN. In April, the U.S. Sentencing Commission sent to Congress new guidelines for punishing corporate criminals. The guidelines set up a system of fines and probation for corporations. Some business representatives have criticized the guidelines as being too harsh and unfair to corporations that are good corporate citizens with meaningful compliance programs already in place. Others have criticized the guidelines as not being tough enough to deter corporate criminal misconduct.

What do you believe are the most effective and fair tools for punishing corporations who have been found guilty of criminal laws?

Judge HURLEY. Mr. Chairman, I have not obviously had an opportunity to work with the Federal sentencing guidelines. I do believe—I have reviewed the various articles and comments that have addressed the organizational guidelines. I do believe that there is a provision within the guidelines where there could be an adjustment in the sentence for those corporations which have a mechanism built into their system to try to prevent wrongdoing.

But what I will have to do in that regard—the sentencing guidelines are obviously—they are very complicated. They have been in existence now since 1987, I think. I think the act was in 1983 or 1984, but they have actually been in effect since 1987 without the corporate guidelines, which were just recently submitted to the Congress for their consideration.

But I'm going to have to study that very carefully. I do think, though, that it is very important that since crimes are committed through the corporate entity, that those crimes have to be addressed in a satisfactory manner. I think in many situations, I think white collar crimes are more troubling than those committed by others that are less fortunate in our society, and I think that the Sentencing Commission in their review has underscored that idea to some extent.

Senator HEFLIN. We both know that certain commentators, as well as certain Senators, criticize those judicial opinions that they label the work of judicial activists. These same critics recognize the importance of stare decisis, or judicial precedent. Sometimes these two goals—on the one hand, a desire to avoid what some may call legislating from the bench and, on the other hand, the need to follow settled law—may conflict.

If confirmed, what will you do when faced with a circuit or Supreme Court decision that, although applicable to the case before

you, would require you to rule in a way that you feel would be judicial activism?

Judge HURLEY. Well, I'm not so sure, Senator, at least in my humble judgment, that they are inconsistent. I think that a district court judge's responsibility is to evaluate the facts and then apply the law as it exists to those facts. And, typically, the law would be found in the appellate court decisions and the Supreme Court decisions, and I think that would be my job and I would apply it.

Now, if I do that, if I follow that responsibility, I'm acting consistent with my oath. I am not trespassing on anyone else's area of responsibility, such as the Congress in their legislative function. So I think that they can be dovetailed, and I think they should, so I don't think they are inconsistent.

Senator HEFLIN. Senator Brown, do you have some questions?

Senator BROWN. Yes, Mr. Chairman. I would be interested also in the candidate's views with regard to awarding of attorney's fees, if he has anything he would like to share. Obviously, that is an issue that has come before him in his current assignments as well.

Judge HURLEY. Well, it has to some extent, but not that much. I served as an acting supreme court justice in the State and handled a number of divorce actions and, by statute, there is a mechanism there to award counsel fees to the prevailing party. So I did have some experience with it.

With respect to my responsibilities as a Federal judge if I am confirmed, I am familiar with rule 11 of the "Federal Rules of Civil Procedure," and the underlying philosophy of that, as I understand it, when the amendment was made in 1983 was to, in effect, impose a sanction if there is a clearly frivolous either pleading or motion paper served.

Now, I haven't had a chance, obviously, to work with that statute at all. I agree with one of the prior speakers that we must be careful in administering any rule not to chill the access of individuals to our judicial system. But on the other hand, I must consider what the legislation says, and there is some language in there that indicates if something is clearly frivolous, then some type of sanction should be employed.

In the process, it would seem to me, among other things, again, if you have that precondition, clearly frivolous, you must look at all the attendant circumstances so that you make sure that the sanction—and much of that is addressed to your discretion—that it be appropriate to the violation.

Senator BROWN. My own impression is that it was intended to chill access to the legal system.

Judge HURLEY. Well, yes, Senator, I agree with that and I—as I say, I have not worked with it. I've read the business guides, "Chromatic Communications," the *Enterprises* case, and so forth, and I want to do what's required and I will do what's required.

If it's clearly frivolous, as I understand it, the language is mandatory. It says that if it's found to be frivolous either on the motion of either party or the court *suisponte*, which has an obligation to come forward in the appropriate case, sanctions must be employed. My only point would be that you'd have to evaluate the range of sanctions to fashion one that is appropriate.

Senator BROWN. I see by the background material that you are not fully vested yet in your other pension.

Judge HURLEY. No.

Senator BROWN. I wonder if we shouldn't approve you a year-and-a-half hence.

Judge HURLEY. Senator, I'll be delighted if my vesting does not come about due to what transpires today and shortly thereafter. [Laughter.]

Senator BROWN. Thank you. Thank you, Mr. Chairman.

Senator HEFLIN. Thank you. We appreciate your testimony. Again, I would say that no objections have been made or lodged against you, and I think you will have smooth sailing.

That will conclude our hearings. They always give me the non-controversial type. They don't trust me with the controversial ones, so I have all the noncontroversial hearings. So, you can tell your future nominees that if they come before me, expect clear sailing and a nice, smooth confirmation hearing.

We will now adjourn. Thank you.

[Whereupon, at 3:20 p.m., the committee was adjourned.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Alice Moore Batchelder (Alice M. Moore)

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

Home Address: 435 E. Smith Road
Medina, Ohio 44256

Office Address: United States Courthouse
Room 256
201 Superior Avenue
Cleveland, Ohio 44114

3. Date and place of birth.

August 15, 1944
Wilmington, Delaware

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

William G. Batchelder III
Attorney at Law
Williams and Batchelder, Johnson, Bux and Bramley
105 W. Liberty Street, Medina, Ohio 44256
and
Member of Ohio House of Representatives
State Capitol Building
Columbus, Ohio 43215

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

Ohio Wesleyan University, Delaware, Ohio
(September 1961-May 1964)
B.A. 1964
(September 1964-May 1965 -- teaching certification)

University of Akron School of Law, Akron, Ohio
(September 1968-June 1971)
J.D. 1971

University of Virginia School of Law
Charlottesville, Virginia
1986 and 1987 (summers)
Master of Laws in Judicial Process 1988

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

1985-present: United States District Court, N.D. Ohio
1983-1985: United States Bankruptcy Court, N.D. Ohio
1971-1983: Williams and Batchelder, Attorneys at law
1967-1968: Buckeye Board of Education, Medina County, Ohio
1966-1967: Upper Arlington Board of Education, Upper Arlington, Ohio
1965-1966: Plain Local Board of Education, Franklin County, Ohio
1964 (summer) Johns Hopkins School of Advanced International Studies

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

No

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

None

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

Ohio Board of Bar Examiners -- 1975-1980
Constitutional Law Drafting Committee of the Multi-State Bar Exam -- 1980-present
Bankruptcy Education Committee of Federal Judicial Center
American Bar Association
Ohio State Bar Association
Medina County Bar Association
Federal Bar Association

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

Organizations active in lobbying:
Federal Judges Association

Other organizations:

National Colloquium Advisory Committee for
Ohio Wesleyan University

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

All Ohio courts -- 1971
United States District Court (N.D. Ohio) 1973

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

Book Review: Akron Law Review, Vol. 3, page 89, Fall 1969
Psychiatric Justice, by Thomas Sasz

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

Excellent
April 2, 1991

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

Judge, United States District Court, N.D. Ohio
Appointed by President Ronald Reagan on April 4, 1985.
The federal district courts were created pursuant to Article III of the Constitution, which establishes the fundamental judicial power of the federal government, creates the United States Supreme Court and empowers Congress to create "such inferior courts as the congress may from time to time ordain and establish." Congress has defined the judicial power of the district courts in numerous statutes which closely mirror

the classes of cases set forth in Article III, including inter alia, cases and controversies arising under the Constitution and laws of the United States or arising between citizens of different states, cases and controversies to which the United States is a party, cases in admiralty, and cases arising under Treaties made under the authority of the Constitution and laws of the United States.

Judge, United States Bankruptcy Court, N.D. Ohio
March 31, 1983, through April 4, 1985.

The jurisdiction of the bankruptcy courts was in question for most of the period of time that I served on that court. As a result of the Marathon Pipeline case, the bankruptcy courts essentially heard all of the bankruptcy cases and matters arising in or related to cases in bankruptcy, pursuant to a general reference from the District Court, by virtue of the Emergency Model Rule promulgated by the Judicial Conference of the United States and adopted by the Circuits. The Bankruptcy Amendments and Federal Judgeships Act of 1984 established the jurisdiction over bankruptcy matters in the District Courts with a reference to the bankruptcy courts. Pursuant to that Act, the bankruptcy courts heard, with certain exceptions specified in the Act, all core bankruptcy matters and matters arising in or related to cases in bankruptcy, subject to a withdrawal of the reference.

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

See Exhibit A attached

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

None

17. **Legal Career:**

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

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
2. whether you practiced alone, and if so, the addresses and dates;
3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each

I was employed as a law clerk for Williams and Batchelder, 105 W. Liberty Street, Medina, Ohio, immediately after taking the Ohio Bar Exam in July, 1971. I became an associate of that firm when I was admitted to practice in Ohio in October, 1971, and practiced there until I was appointed to the Bankruptcy Court on March 31, 1983. The firm of Williams and Batchelder (now Williams & Batchelder, Johnson, Bux & Bramley) is the oldest in the community of Medina, and consisted at that time of the two name partners and several associates, of which I was one.

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

I was engaged in a general civil practice, doing both trial and appellate work, in the areas of corporate, commercial, probate, personal injury, zoning, real estate and administrative law. I did very little domestic relations work and no criminal work. A good deal of my practice was devoted to doing work for working people, including probate, home acquisitions, consumer problems, adoptions and the like.

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

My typical clients included a manufacturer of cold-formed steel products, a printing company, a department store, a railroad, a furniture store, small businesses, individual investors and working people with a wide variety of legal needs. I did frequent work for the firm's insurance company clients. I did most of the work in our firm involving the Uniform Commercial Code and related commercial law.

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

I appeared in court regularly throughout my practice.

2. What percentage of these appearances was in:

- (a) federal courts;
(b) state courts of record;
(c) other courts.

Federal courts 1%
State courts of record 98%
Other courts 1%

3. What percentage of your litigation was:

- (a) civil;
(b) criminal.

Civil 100%

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

Sole counsel: 9
Chief counsel: 4
Associate counsel: 15

5. What percentage of these trials was:

- (a) jury;
(b) non-jury.

Jury: 40%
Non-jury: 60%

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

- (a) the date of 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 names, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
- 1) Reed, et al. v. Molnar, et al.
Medina County Common Pleas Court

This was an attempt by a plaintiff truck driver to impose strict liability on owners or keepers of cattle in Ohio for personal injury caused by the animals' escape onto the highway, and to extend that liability to absentee landlords.

The significance of this case lies in the fact that since 1908 plaintiffs in Ohio have been attempting to impose judicially a greater liability than the Ohio legislature has chosen to impose in these instances. The Ohio Supreme Court chose to address the issue definitively in this case and refused to expand the legislated liability.

I was co-counsel for the absentee landlord John Molnar, Sr., with William G. Batchelder, Jr. I did all of the trial preparation and discovery work, and was second-chair at trial. We obtained a directed verdict at the close of the plaintiff's case. Although Mr. Batchelder, Jr.'s name appears in the reported case, I was sole counsel representing this defendant in a successful defense of the directed verdict through the Ohio Supreme Court. (67 Oh.St. 2d 76, 1981)

Trial Judge:	Phillip Baird
Co-Counsel:	William G. Batchelder, Jr. Williams & Batchelder 105 W. Liberty Street Medina, Ohio 44256 (216) 725-6666

Counsel for Co-Defendant:	James L. McCrystal, Jr. Weston, Hurd, Fallon, Paisley & Howley 2500 Terminal Tower Cleveland, Ohio 44113 (216) 241-6602
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Counsel for Plaintiff Reed:	Walter C. Grosjean and J. Douglas Drushal
-----------------------------	--

Critchfield, Critchfield,
Critchfield & Johnson
225 N. Market Street
Wooster, Ohio 44691
(216) 264-4444

Counsel for Buckeye
Union Insurance Co.:

Angelo Fannelly & John Lambert
Hargreaves & Fannelly
930 Centran Building
Akron, Ohio 44308
(216) 434-5118

Trial Dates: October 2 & 3, 1979

2) Akron Savings and Loan v. Merle Weber
Medina County Common Pleas Court

This case involved the multi-million dollar insolvency of a real estate developer, in which numerous banks and savings and loans foreclosed upon the developer's properties. The particular significance of this case stemmed from the way in which it was handled procedurally, as the foreclosure actions were severed from the multitudinous counterclaims and crossclaims brought by the developer. After judgments in foreclosure were rendered and the properties sold, the developer attempted to raise as counterclaims matters which constituted defenses to the foreclosure actions and which had not been raised in that part of the proceedings. Various aspects of this case went on through a period of six (6) years, handled primarily by visiting judges, due to alleged conflicts of interest on the part of the Medina County Common Pleas Judges and affidavits of prejudice filed by the developer.

I was co-counsel in this matter with Harold L. Williams and William G. Batchelder, Jr. of Williams and Batchelder, representing North Akron Savings and Loan. Various aspects of this case were tried and appealed over a six (6) year period from 1971 through 1977. I participated in trial, handled much of the court appearance for the voluminous motion practice, and handled virtually all of the appellate work of this case.

Judges: Paul Perkins of Carroll County
Paul Riley of Clinton County

Co-Counsel: William G. Batchelder, Jr.
Williams & Batchelder
105 W. Liberty Street
Medina, Ohio 44256
(216) 725-6666

Other counsel:**Akron Savings & Loan:**

John Glenn
 Buckingham, Doolittle &
 Burroughs
 P.O. Box 1500
 1 Cascade Plaza
 Akron, Ohio
 (216) 376-5300

Joseph J. Burgoon
 Cardinal Federal Savings Bank
 333 Euclid Avenue
 Cleveland, Ohio 44114
 (216) 241-8000

Cleveland Trust:

John Oberholtzer
 Oberholtzer, Filous, Chase and
 Young Co.
 230 S. Court Street
 Medina, Ohio 44256
 (216) 725-4929

Citizens Bank & Trust:

Thomas Kilbane
 1800 Huntington Building
 Cleveland, Ohio
 (216) 687-8564

Merle C. Weber:

Mr. Weber was at various times
 represented by:
 Archie Skidmore
 1101 Centran Building
 Akron, Ohio 44308
 (216) 253-1550

Harry Schwab
 40 E. Mill Street
 Akron, Ohio 44308
 (216) 253-1101

George A. Clark
 20th Floor
 1 Cascade Plaza
 Akron, Ohio
 (216) 376-2700

**First Nat'l. Bank
 of Wadsworth:**

Carl Tschantz
 118 Gordon Avenue
 Wadsworth, Ohio 44281

Great Northern
Building & Loan Co.: John May
203 Great Northern Building
Barberton, Ohio
(216) 745-9027

3) Januska v. Norfolk and Western Railway Co.
Medina Municipal Court

I was sole counsel for the N. & W. in this railroad crossing case, which, in itself, would have had little significance. It was the railroad's belief, however, that this case was intended to be the first in a series of crossing cases in Medina County designed to establish the particular crossing as ultra-hazardous, thus greatly expanding the railroad's liability. This case was tried to a jury, but I obtained a directed verdict for the railroad at the close of the plaintiff's case.

Judge Walter Hay

Counsel for Plaintiff: Dean Steigerwald
129 N. Broadway Street
Medina, Ohio 44256
(216) 723-1889

Trial Dates: March 1, 1983

4) Yonkoff v. Creamer
Medina County Common Pleas Court

I was co-counsel with William G. Batchelder, Jr. for the defendant in this action for recovery of damages for personal injury allegedly suffered as a result of a rear-end collision.

My participation included all of the discovery and trial preparation, and I was second chair at trial. This case took on particular significance during the course of the trial because the demeanor of the plaintiff and some small discrepancies among his responses to interrogatories propounded prior to trial, his testimony under direct examination, and his early testimony under cross-examination caused us to change the direction of our cross-examination and resulted in a jury verdict for exactly the amount which we had offered in settlement prior to trial, and a subsequent indictment and trial of the plaintiff on perjury charges.

Judge: Phillip Baird

Counsel for Plaintiff: James Kehn

33 Public Square
Cleveland, Ohio 44113
(216) 861-5665

Jeffrey W. Largent
11925 Pearl Road
Strongsville, Ohio
(216) 238-1313

Trial dates: September 14, 15, 16, 1977

5) Thomas v. Komjati
Medina County Common Pleas Court

I was co-counsel with William G. Batchelder, Jr. at trial, did the discovery and trial preparation work, and prepared the trial brief in this action for a TRO, preliminary and permanent injunctive relief, and damages, filed against our client for allegedly breaching the terms of a condominium agreement by constructing an addition to her unit. This case was tried at a time when condominium development was just beginning in Medina County, and resulted in the revision by the condominium association's attorney of the documents governing that particular condominium association.

The Court denied the injunctive relief sought and our client was permitted to complete her addition. No damages were awarded the plaintiff.

Judge: Phillip Baird

Counsel for Plaintiff: Charles Courtney,
now deceased

Trial Date: August 8, 1975.

6) Miller v. Martinsons
Medina County Common Pleas Court

We represented the defendant in this action brought by a young man who was seriously injured and whose girl friend was killed in the accident. Our client was also seriously injured and counter-claimed for damages, denying all liability.

The aspect of this case which made it more than usually challenging was the contrast between the plaintiff, who was a college student who had picked his date up from church immediately prior to the accident, and who claimed not to be able to recall anything from that point until he awoke in the hospital after the collision, and the

defendant, who was a professional gambler and operated a pool hall. I was co-counsel with William G. Batchelder, Jr. at trial, and did most of the pre-trial preparation. We were successful in persuading the jury to leave both parties where it found them.

Judge: Neil Whitfield

Counsel for Plaintiff: Paul Perantinides
824 Centran Building
Akron, Ohio
(216) 253-5454

William Oldham
One Cascade Plaza
Akron, Ohio
(216) 376-5300

Trial Dates: February 17 - 19, 1976

7) Investors Fidelity Life Assurance Company v. Bender, et al.
Guernsey County Common Pleas Court

I was chief trial counsel in this action, representing the plaintiff in an action against one of its agencies and the agency president personally for defalcation and breach of contract.

The difficulty in this case lay in proving to the jury that the agency president was personally liable for his actions. The jury's responses to the interrogatories which we propounded to them clearly demonstrated that we had proven just that. However, although they rendered a verdict against the agency, they refused to find against its president. My client declined to appeal, although I strongly urged it to do so.

Judge: John Henderson

Co-Counsel: William G. Batchelder III
Williams & Batchelder
105 W. Liberty Street
Medina, Ohio 44256
(216) 725-6666

Blaise Urbanowicz
123 W. 8th Street
Cambridge, Ohio
(614) 439-1228

Counsel for Defendant: David Ellwood

Bank Ohio Building
Cambridge, Ohio
(614) 439-7711

Trial Dates: July 8 & 9, 1982

8) A C & Y Railroad v. Fry Roofing
Medina County Common Pleas Court

I was sole counsel representing the railroad in this action to recover thousands of dollars in demurrage charges which the defendant steadfastly refused to pay because it viewed them as "unfair" as a matter of principle. The significance of the case lay in the fact that the charges in Medina County were the first for which this company was being sued, but payment of many thousands of dollars more of demurrage charges was being refused by the company in several other states. Judgment for the railroad was appealed and affirmed, and was of precedential value to the railroad in its collection of the remaining amounts.

Judge: Neil Whitfield

Counsel for Defendant: Thomas Filous
Oberholtzer, Filous, Chase &
Young Co.
230 S. Court Street
Medina, Ohio 44256
(216) 725-4929

Trial Date: July 7, 1976

9) Rinner, et al. v. Joyce Sexton
Medina County Common Pleas Court

After a long struggle to arrive at an amicable dissolution of a partnership, I finally filed this action on behalf of three of the four partners. I was sole counsel at the trial, which finally resulted in a judgment granting dissolution and ordering the defendant to abide by the terms of the partnership agreement relative to valuation of the assets and sale of her interest to the remaining partners. As a result of the protracted negotiation and the need finally to try the case, the market had dropped, and the defendant's interest was actually valued at substantially less than she had been originally offered.

Judge: Phillip Baird

Counsel for Defendant: Bruce Parish
 211 S. Court Street
 Medina, Ohio 44256
 (216) 725-6082

Trial Dates: April 8 - 9, 1982

10) State of Ohio, Ex rel. Armstrong Utilities Inc. v.
Board of Elections
Supreme Court of Ohio

This was an original action in prohibition in the Ohio Supreme Court, filed by a cable television franchisee seeking to prevent a referendum on a cable television ordinance from being placed on the ballot. I was counsel for the Committee of Petitioners which had timely gathered the requisite number of signatures on a referendum petition. We intervened in the Supreme Court action and were successful in defending against the cable company's allegation that cable television is a public utility and thus subject to a more stringent referendum statute than the one under which the Committee had proceeded.

Attorney for Relator: Bruce Parish
 211 S. Court Street
 Medina, Ohio 44256
 (216) 725-6082

Attorney for Respondent: Roger Ingraham
 218 E. Washington Street
 Medina, Ohio 44256
 (216) 722-6554

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

In responding to this question, it may be worth noting that "significance," like beauty, is at least to some extent in the eye of the beholder. In the years since I graduated from law school, I have been involved in a number of different kinds of legal activities which have in my view been significant. For over fifteen years I have been a bar examiner, first as a member of the Ohio Board of Bar Examiners, and, since 1980, as a member of the committee of the National Conference of Bar Examiners which prepares the constitutional law questions for the Multi-State Bar Exam.

In each of these capacities, I have felt that I was contributing to the effort to maintain the standards and quality of my profession, which I believe every member of the profession has some obligation to do. In addition, the work of a bar examiner, and particularly the work as a member of the Constitutional Law Drafting Committee has been invaluable in my efforts to stay current on constitutional issues which simply do not frequently arise in the district courts. The work of an Ohio Bar Examiner entailed untold hours of reading the applicants' answers to the questions which I had prepared for the Ohio Bar Exam semi-annually, and provided some valuable, and often somewhat discouraging, insights into the quality of the education which many of our nation's young people are getting.

In the context of the law practice, the significance of my activities is probably best viewed from the perspective of the clients I represented. For example, to the small savings and loan which I represented in the Weber v. Akron Savings Association case which I noted above, that case was probably as significant a matter as the institution had ever been involved in, because the money which it had loaned to the plaintiff to build an apartment complex was by far the largest single loan the institution had ever made. The character of the institution and its investors was such that recouping its money was crucial, not because the loss would have seriously impacted on the institution's solvency, but because failure to recoup would have been devastating to the institution's credibility with its largely blue-collar and ethnic depositors. The plaintiff's repeated attacks upon the officers of that savings and loan were assaults upon their characters and competence, and our success in pursuing the institutions' interests in the foreclosure and in defending against the counterclaims was of genuine significance.

In a somewhat similar vein, I also represented a hospital in a will construction action in which, incredibly, the lawyer who had drafted the will of a wealthy widow, brought an action to construe the very language he had composed in the devise of a large parcel of real estate to one devisee who was dissatisfied with the boundaries of the parcel. This action impacted on the residual charitable bequest to the hospital, which, as a result of the will construction action, also found itself faced with defending against a claim made under Ohio's mortmain statute. The hospital's relatively small size, and the relatively large size of the bequest contained in the will, made the successful resolution of the case preserving the bequest a matter of considerable significance.

One rather minor aspect of my law practice has had enormous significance to individuals in Medina County seeking to adopt children privately. During the time I was in the practice,

I was the only attorney in our county who was willing to take the time to work with youngsters faced with unwanted pregnancies and opposed to the option of abortion, in assisting in the private placement and adoption of their infants. I worked with the probate judge of the county to set up the procedures which are still being used today to assure that such placements complied in each and every particular with Ohio's excellent but difficult placement and adoption statutes, including a procedure pursuant to which the probate court reviews each and every expenditure made by anyone in connection with the placement and adoption. Because each of these placements was unique to the individuals and circumstances involved, they took a lot of time, and it was neither feasible nor appropriate to bill for much of it. I regarded most of this work as non-billable, and did much of it during non-office time. From the perspective of both the birth mothers and the adoptive parents of the infants placed, the importance of having the proper procedures followed, as well as having someone who was willing to spend the time required to accomplish these placements and adoptions, is probably incalculable.

Finally, I assume that "legal activities [I] have pursued" also is intended to encompass activities while I have been on the district court. The most obvious of these are cases tried and opinions written, and, although I have never attempted to keep score on the basis of "significance," one case which does immediately commend itself to this question was United States v. Crane, the ten-week trial of a local municipal judge on criminal tax evasion charges over which I presided. That case attracted considerable media attention, both because the defendant was a judge and because she was a well-known political figure. After nine weeks of trial and one week of deliberation, the jury tearfully found the defendant guilty on both counts of the indictment.

Less obviously significant may be the major cases which I have been able to assist in settling short of trial. The most satisfying of these was the Lubrizol v. Exxon patent case which I inherited when I came on this court. After months of difficult discovery problems and considerable rancor among the counsel involved, I issued a preliminary injunction. The week prior to the scheduled commencement of the trial on the merits (which was expected to take 12 to 14 weeks,) while the lawyers worked at resolving as many of the disputes relative to proposed exhibits as possible prior to trial, at the request of the parties and with the consent of their counsel, I worked directly with the parties in an attempt to resolve at least some of the issues in the case. At midnight on the Sunday night before jury selection was scheduled to begin, and after we had spent fourteen hours each day of that weekend in

intensive negotiation, the parties signed a consent order settling the case for \$86 million.

When I refused to issue a temporary restraining order in the matter of George Steinbrenner's agreement with the Commissioner of Baseball to resign as General Partner of the limited partnership which owns the New York Yankees, my name appeared on Monday Night Football, which I gather is an indication that, at least to the world of sports, that matter was significant.

Two other activities come to mind as significant legal activities in which I have been involved during my time on this court. One of these was my participation as the "trainer" for the judges of the Northern District of Ohio in the implementation of the Sentencing Guidelines when they became effective. The attitudes of the judges here (as well as across the country as a whole) were widely varied, and there was a mix of hostility, apprehension, confusion, irritation, disgust, enthusiasm and anticipation about the use of the Guidelines. "Trainers" were responsible for attending the Federal Judicial Center's training seminars and then setting up and conducting training sessions for the judges in their respective districts, designed both to educate the judges about the substance and procedures contained in the Guidelines and to dispel, or at least diminish, the adverse attitudes with which the Guidelines were met.

The second of these activities has been an ongoing interaction and relationship with law clerks, and a continuing participation in externship programs of law schools, not only to maximize the contributions of law clerks and externs to the work of this chambers, but to assist in the continuation of their legal educations and to encourage them carefully to scrutinize and evaluate all aspects of the legal practice which they see in the court. In particular, I feel a great responsibility to work with these young lawyers and prospective lawyers to increase their awareness of the importance of attorneys' keeping constantly in mind the ethical implications of their actions, as those actions relate to the integrity of the profession, the responsibility of the attorneys to the courts, and the obligation of the attorneys to their clients.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

None

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

My business and financial arrangements are not of the kind which would occasion many conflict situations. However, in the event that I determined that I was in a position of conflict of interest for any reason, I would recuse myself from considering the case. This could arise where any member of the firm with which I was associated appeared before me representing a party, or where a party to an action before me was a former client of mine or was a client of that firm.

I believe that the more difficult situation arises from instances of perceived conflict, where no actual conflict exists, such as a case in which an attorney or a litigant is a personal friend. I do not believe that such a relationship would affect my judgment; however, I would present it to the parties and their counsel. Any objection to my sitting on the case would be honored forthwith.

In any event, in any situation which presented a conflict or might be perceived to present a conflict, I would follow the dictates of the Code of Conduct for United States Judges, as well as any applicable Advisory Opinion issued in connection with the Code of Conduct.

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

I would expect to continue my work with the Multi-State Bar Exam, which I consider to be professional service.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and

other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See Financial Disclosure Report attached hereto as Exhibit B

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

See Exhibit C attached

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

I served as campaign treasurer for my husband's campaigns for the Ohio Legislature from 1968 through 1980. I have not been involved in any of his campaigns in any capacity since 1983, when I went on the bankruptcy court. Additionally, during the primaries in 1976, I served as co-ordinator of an effort to organize a slate of delegates and alternates pledged to then-Governor Reagan in the 13th Ohio Congressional district. This was an independent and ad hoc effort.

III. GENERAL (PUBLIC)

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

As a practitioner, I, as well as the other members of my firm, regularly represented individuals who were unable to pay for those services. At the time that I was in the law practice, Medina County did not have any effective legal aid agency, and many of us in the practice simply represented privately those who could not afford to hire counsel. Typically, if such a person had an ability to make a nominal payment, we would charge a nominal fee. If there was no ability to pay, there was not any charge. These matters ranged from representing individuals who were sued in personal injury actions to representing juveniles in juvenile court to assisting in the resolution of landlord-tenant disputes. In addition, our firm regularly represented a number of churches in various kinds of legal proceedings, for which we did not charge any fee. I recall particularly one instance in which I represented an indigent and virtually illiterate defendant in a personal injury action filed by a youngster who had borrowed an ancient

lawnmower from my client and proceeded to incur severe burns when he poured gasoline into the mower while it was overheated and the gasoline which dripped onto the manifold caught fire. My client was the upstairs boarder for the lady whose lawn was being mowed and who was also named as a defendant, he had gratuitously loaned the plaintiff the mower, and he had bought the mower used at a yard sale. Both defendants were members of a racial minority, and while the landlady had some insurance and therefore had representation, my client had neither insurance nor the money to hire counsel, and he had a severe speech impediment which made it extremely difficult to understand him. In spite of my best efforts to reassure him, he was terrified that a judgment would be rendered against him which he would be unable to pay, and he would be put in jail. After numerous trips to Cleveland for an interminable series of status conferences, I was finally able to secure my client's dismissal from the case, and to convince him that prison was not in his future.

Also, during my years in practice, I was assigned by the State Department of Education to serve as an impartial hearing officer in numerous disputes between school administrators and parents regarding the placement of handicapped children pursuant to P.L. 94-142. These hearings were in areas geographically well-removed from the area of my residence and practice, and involved a considerable expenditure of time in training and certification, which was not compensated. On a number of occasions the hearings involved were lengthy, they usually required considerable time in preparation and review of the evidence presented, and the compensation for the time expended was never commensurate with the actual expenditure of time. The work, however, was both challenging and rewarding.

Finally, I spent a great deal of time and energy for many years as an active member of the Board of Trustees of the Franklin Sylvester Library and as a member of the Medina County Mental Health Board. Both of these boards are voluntary and uncompensated, require dedication to the goals of the respective enterprises and willingness to take tough stands on many issues, particularly fiscal ones. During my tenure on the Library Board, we built a new library in one Medina County municipality, built a large addition to an existing facility in another and converted the old school district library system to a county-wide library which greatly increased the strength of the other branches throughout the County. Building on the work which the board did during that time, the Medina County Library has today achieved the thirteenth largest circulation in the State of Ohio. During my tenure on the Mental Health Board, we restored to fiscal responsibility the major agency under our direction, which was the agency providing counselling services for those in the

community with mental and emotional problems. Those services were provided on a sliding payment scale according to ability to pay, and since the agency's inception, it had been operating with a substantial deficit, resulting primarily from poor management by its director, even including a failure to collect insurance payments to which it was clearly entitled. Because of these problems, the continued existence of the agency was threatened.

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

I do not belong to any such organization. Many years ago I belonged to the American Association of University Women, which at that time may not have had any male members. I discontinued my membership in the organization in the early 1970's, and have no idea what its current policy regarding membership may be.

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

To my knowledge there is no selection commission in my jurisdiction.

On December 24, 1990, I received a call at my office from the Justice Department, requesting that I come to Washington to be interviewed for a position on the Sixth Circuit. On January 7, 1991, I was interviewed by numerous people in the Justice Department with whom I discussed my work as a district judge and what contributions I might be able to make on the Circuit. On March 27, 1991, I received a call from the Justice Department, indicating that if I was interested in the appointment, the Department intended to proceed with the process. The next day, I received the paperwork, including this questionnaire. Subsequently, I have been interviewed and investigated by the FBI and the ABA.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be

interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No

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

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

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

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

The ever-increasing growth in the body of state and federal legislation, the growth in the nation's population, the changes in social attitudes and the advances in our technology are all factors which have contributed and continue to contribute to the growing caseload in the courts and the perception that the first line of attack on perceived problems is or ought to be through prosecution of litigation. As these perceived problems come before the courts, there is an increasing opportunity for judges to respond with rulings and decisions which are expedient and which appear to address the specific problem at hand in a way which is satisfactory to the judge, according to his or her perception of what constitutes a desirable outcome.

Certainly a judicial system which is rigid and wholly inflexible may be tyrannical. There is, however, an

inevitable truth to the statement that he who interprets the laws makes the laws. The life tenure of the members of the federal judiciary insulates them from the citizenry and renders their commitment to the basic concepts of separation of powers and stare decisis essential to the preservation of our system of government. To the extent that the federal courts engage in the invalidation or the re-writing, either by expansion or restriction, of the laws in the guise of interpretation of them, or render sweeping interpretations of the law where the specific case could be decided by a narrower holding confined to the specific factual situation, or depart from precedent in order to achieve a particular outcome or because of the individual judge's personal reading of the law or the Constitution, or intervene into and impose judicially mandated solutions upon the legislative or executive functions, the system is seriously threatened. So, while the independence of the judiciary is vital in order to facilitate the judges' rendering of decisions which may not reflect the "mainstream" of current public opinion, nevertheless, if the judiciary can re-write the statutes and amend the Constitution by interpretation, then the will of the electorate becomes irrelevant, and the legislative branch is rendered virtually impotent.

As a matter of philosophy and principle, this kind of judicial activity is entirely irreconcilable with the belief that freedom can only be preserved under a government of laws, not of men. As a matter of governmental policy, this judicial activism is unsatisfactory, since it takes the legislative, executive and administrative functions out of the hands of those elected and trained to perform them and reposes those functions instead in the judges, who may have no qualifications to perform them, and certainly have no popular mandate or support. As a matter of practicality, it is uneconomical at best, and frequently disastrous, to permit the circumvention of a proven system of government, by a select group of individuals who are not responsible to the citizens for either the costs or the consequences of their actions.

EXHIBIT A

I. Ten most significant opinions

In the six years I have been on the bench, I have disposed of over 1,800 civil cases. I have never kept track of my opinions on the basis of their significance, partly because I have not had time to set up such a system, and partly because I am not certain what the criteria for such a classification would be. Ten of my opinions come to mind which have significance to me, either because of the particular issue involved (e.g. Veere Inc. v. Firestone Tire & Rubber Co.) or because of the type of case it was (e.g. McCarthy v. Vincent). Those opinions as well as the citations to the appellate disposition of them are the following:

1. Boddie v. American Broadcasting Companies, Inc.,
694 F. Supp. 1304 (N.D. Ohio 1988), aff'd 881 F.2d 267 (6th Cir. 1989).
2. Lubrizol Corp. v. Exxon Corp.,
696 F. Supp. 302 (N.D. Ohio 1988).
3. Veere Inc. v. Firestone Tire & Rubber Co.,
685 F. Supp. 1027 (N.D. Ohio 1988).
4. United States v. McNeal,
735 F. Supp. 738 (N.D. Ohio 1990).
5. A & D Supermarkets Inc. No. 2 v. United Food and Commercial Workers Local Union 880,
732 F. Supp. 770 (N.D. Ohio 1989).
6. Benedict v. United States,
634 F. Supp. 123 (N.D. Ohio 1986), reversed 822 F.2d 1426 (6th Cir. 1987).
7. Craighead v. E.F. Hutton & Co., Inc.,
No. C87-348 (N.D. Ohio March 8, 1989), aff'd 899 F.2d 485 (6th Cir. 1990).
8. Sullivan v. City of Cleveland Heights,
No. C86-4980 (N.D. Ohio April 10, 1987), aff'd 869 F.2d 961 (6th Cir. 1989).
9. McCarthy v. Vincent,
No. C90-1471 (N.D. Ohio Aug. 21, 1990) appeal dismissed
No. 90-3718 (6th Cir. Oct. 12, 1990).
10. United States v. Williams,
No. CR85-123 (N.D. Ohio Aug. 2, 1985) aff'd No. 85-3835 (6th Cir. Sept. 25, 1986).

II. Short summary of published appellate opinions reversing or affirming with significant criticism.

1. Armour v. Ohio, 925 F.2d 987 (6th Cir. 1991) (en banc) Plaintiffs brought this action challenging the boundaries of two state legislative districts which resulted in a fragmentation of the black vote in Mahoning County under the fifteenth amendment and section 2 of the Voting Rights Act 42 U.S.C. §1973. I held that plaintiffs could not maintain their constitutional or statutory claims because the black voters were too few in number to constitute a majority of voters no matter which way the district lines were drawn. In its first opinion, 895 F.2d 1095 (vacated and opinion withdrawn), the Sixth Circuit reversed holding that since it was possible for a state representative to be elected by a plurality vote, plaintiffs could state a claim under the fifteenth amendment and the Voting Rights Act. The Sixth Circuit (en banc) reversed with instructions to convene a three judge panel pursuant to 28 U.S.C. §2284.
2. In re The George Washington Co., 913 F.2d 316 (affirming district court and bankruptcy court) reversed on rehr'q 921 F.2d 626. In the first opinion, the Sixth Circuit held that since the Bankruptcy Code did not contain any provision for the payment from the estate of reimbursement of administrative expenses incurred by the unsecured creditors' committee, the Court would not legislate that provision from the bench. On rehearing, the Sixth Circuit found authority in the legislative history for the payment despite Congress' having three times considered such payments and each time having declined to amend the statute.
3. Farber v. Massillon Board of Education, 917 F.2d 1391 (6th Cir. 1990). In age and sex discrimination action, I ordered remittitur of jury's damage award in age discrimination action and rendered judgment for defendants on sex discrimination charges. The Sixth Circuit reversed holding that there was sufficient evidence to support jury verdict thereby precluding remittitur; that plaintiff is entitled to reinstatement or front pay; that there was evidence to support sex discrimination claim; that §1983 claim was not barred by statute of limitations; and that trial of Title VII action did not preclude trial of §1983 claim on the ground of collateral estoppel in light of right to jury.
4. Bank One of Cleveland v. Abbe, 916 F.2d 1067 (6th Cir. 1990). Plaintiffs brought civil RICO action against defendants alleging that defendants obtained loans from banks through a pattern of racketeering activity. I

entered default judgment against two defendants as a sanction for noncompliance with discovery orders. The Sixth Circuit reversed in part, holding that the Fifth Amendment's privilege against self-incrimination in criminal trials survived the nolo-contendere pleas of those defendants, and that so long as there was any possibility of further criminal charges against them, the defendants were protected from responding to discovery in the civil action as well as from any adverse judgment in that action.

5. Gibson v. R.G. Smith Co., 915 F.2d 260 (6th Cir. 1990). The Sixth Circuit reversed and remanded in this case in which I had utilized a long-standing northern district practice of sending applications to proceed in forma pauperis and for appointment of counsel to attorneys for their review and resultant filing either of a formal complaint or a report to the Court that the filing of a complaint would be frivolous. The Circuit indicated that the in forma pauperis application could not be dismissed until after plaintiff was afforded the opportunity to file a formal complaint.
6. White Fabricating Co. v. United States, 903 F.2d 404 (6th Cir. 1990). I held the government had probable cause for the search and therefore denied the return of the seized property under Rule 41(e) of the Fed. R. Crim. P. The Sixth Circuit reversed holding that plaintiffs could move for return and remanded for an evidentiary hearing on the question of whether the alleged agent of the government had authority to consent to search or whether officers reasonably believed the agent had authority to consent.
7. Interroyal Corp. v. Sponseller, 889 F.2d 108 (6th Cir. 1989). This action was brought by an employer against its former employee and his new employer for breach of contract, tortious interference of contract, and misappropriation of trade secrets. I granted defendants' motion for summary judgment. The Sixth Circuit reversed finding that a party opposing a motion for summary judgment need not specifically designate which portions of the record it relies on to substantiate its claim that there exists a genuine issue of material fact and that it was an abuse of discretion not to allow plaintiffs to file an amended complaint.
8. United States v. Woods, 885 F.2d 352 (6th Cir. 1989). I granted summary judgment for plaintiff in action brought by government to recover educational assistance funds. The Sixth Circuit reversed for failure to set forth the judgment on a separate document and noting its disapproval of my failure to make specific findings of

fact in ruling on a motion for summary judgment.

9. Bucary v. Rothrock, 883 F.2d 447 (6th Cir. 1989). Action was brought against police officers in state court alleging various state law claims. Plaintiffs moved for remand; remand was ordered and defendants were ordered to pay costs. The Sixth Circuit reversed finding that it was an abuse of discretion to order forfeiture of the entire amount of the \$250.00 removal bond without specific findings of fact in regard to the amounts expended by plaintiffs for costs and disbursements.
10. Boddie v. American Broadcasting Companies, 881 F.2d 267 (6th Cir. 1989) (Boddie II) affirming 694 F. Supp 1304. This action was originally drawn by Judge Aldrich of this Court. Plaintiff sued defendants for invasion of privacy, placing her in false light, and for a violation of the wiretap provisions of Title III 18 U.S.C. §2511 et seq. A jury found for the defendants on the first two counts and Judge Aldrich dismissed the wiretap count. On the first appeal, the Circuit Court, 731 F.2d 333 (6th Cir. 1984) (Boddie I), held that the wiretap statute did provide a private cause of action and that the District Court had improperly dismissed the wiretap count. After discussion of the legislative history of § 2511(2)(d), the Circuit held that the question of whether the purpose of the defendant in recording the conversation complained of was "a purpose of committing any other injurious act" was a factual question for the jury, and remanded the case. The Circuit Court in Boddie I did not address the issue of the constitutionality of the wiretap statute. While the case was on remand, Congress amended the wiretap statute, specifically stating that the statute had never been intended to create a cause of action for the activities alleged by the plaintiff in Boddie I. At that point the case was transferred to me. On motion for summary judgment, I interpreted the amendment to the statute as a clarification, noting that if the pertinent portion of the statute as it read at the time of its alleged violation did in fact create a cause of action based on the purpose of the defendants in making the otherwise lawful recording of the plaintiff's conversation, there would be serious question as to its constitutionality. Accordingly, I dismissed the action for failure to state a claim upon which relief could be granted. On appeal, the Sixth Circuit in Boddie II concluded that I had erred in treating the amendment as a clarification of prior law, but that in any event the wiretap statute in place at the time of the actions complained of was unconstitutional and therefore the dismissal was affirmed. The concurring opinion was strongly critical of my presuming to question the

Circuit's analysis in *Boddie I* of the wiretap statute, and concurred that the statute as it had existed at that time was unconstitutional.

11. Gould v. Pechiney Ugine Kuhlmann, 853 F.2d 445 (6th Cir. 1988). American Corporation brought action alleging violation of RICO, and misappropriation of trade secrets pursuant to the Foreign Sovereign Immunities Act. I denied defendants' motion to dismiss and appeal was taken. While noting that this Court's analysis regarding the question of subject matter jurisdiction was correct, the Sixth Circuit remanded for additional discovery.
12. Benedict v. United States, 822 F.2d 1426 (6th Cir. 1987). Plaintiffs brought this tort action against the United States after contracting Guillain-Barre syndrome after having received a swine flu vaccination. After trial, this Court entered judgment for defendant. The Sixth Circuit reversed and remanded for a new trial on the ground that I erred in refusing to allow plaintiffs to present a rebuttal witness.
13. Demery v. City of Youngstown, 818 F.2d 1257 (6th Cir. 1987). This action brought under 42 U.S.C. §§1981 and 1983 was dismissed as time-barred. The Sixth Circuit affirmed the analysis of the limitations period applicable to §1981 actions, but on rehearing, and on consideration of recent Supreme Court decision, it reversed and remanded the dismissal of the §1981 claim for a determination of whether the shorter period should be retroactively applied.
14. Dunleavy v. Local 1617, United Steelworkers of America, 814 F.2d 1087 (6th Cir. 1987). Union officer brought this action challenging his removal. This Court granted union's motion for summary judgment. The Sixth Circuit held that while the court correctly utilized a six month statute of limitations, the action did not begin to accrue until after the union officer had appealed his removal to the union international convention.

III. Citations for substantive opinions on federal or state constitutional issues with subsequent procedural history.

1. Armour v. Ohio, No 88-1104Y Slip op. (N.D. Ohio November 4, 1988) reversed Armour v. Ohio, 925 F.2d 987 (6th Cir. 1991) (en banc).
2. Sullivan v. City of Cleveland Heights, No. C86-4980 Slip op. (N.D. Ohio April 10, 1987) aff'd

869 F.2d 961 (6th Cir. 1989).

3. United States v. McNeal,
735 F. Supp. 738 (N.D. Ohio 1990).
4. United States v. Williams,
No. CR85-123 Slip. op. (N.D. Ohio Aug. 2, 1985) aff'd.
No. 85-3835 Slip op. (6th Cir. September 25, 1986)

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C.A. App. 6, 101-112)

1. Person Reporting (Last, first, middle initial) BATCHELDER ALICE M	2. Court or Organization U.S. COURT OF APPEALS, 6TH CIR	3. Date of Report 06/12/91
4. Title (Magistrates indicate full or part time) (Circuit and District Judges indicate active or Senior Status) U.S. DISTRICT JUDGE	5. Report Type Nomination 06/12/91	6. Reporting Period 1/90-5/91
7. Chambers or Office Address U.S. COURTHOUSE RM. 256 201 SUPERIOR AVENUE CLEVELAND, OHIO 44114		

EXHIBIT B

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

Name of Person Reporting ALICE BANCHOLDER	Date of Report 06/11/91
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I. POSITIONS. (Reporting individual only; see pages 7-8 of Instructions.)

POSITION NAME OF ORGANIZATION/ENTITY

 NONE (No reportable positions)

Const. Law Drafting National Conf. of Bar Examiners,
Committee Multi-State Bar Exam

Advisory Board National Colloquium, Ohio Wesleyan

Member University

Name of Person Reporting ALICE BARCHOLIER	Date of Report 06/11/91
--	----------------------------

II. AGREEMENTS. (Reporting individual only; see pages 8-9 of Instructions.)

DATE PARTIES AND TERMS

X

NONE (No reportable agreements)

-- NOTHING TO REPORT --

Name of Person Reporting ALICE BATCHELDER	Date of Report 06/11/91
--	----------------------------

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pages 9-12 of Instructions.)

<u>DATE</u>	<u>SOURCE AND TYPE</u>	<u>GROSS INCOME</u>
-------------	------------------------	---------------------

(Yours, not Spouse's)

NONE (No reportable non-investment income)		
1/90	Nat'l Conf. of Bar Examiners, Const'l Law Drafting Committee	2200.00
3/90	Nat'l Conf. of Bar Examiners, Const'l Law Drafting Committee	2200.00
10/90	Nat'l Conf. of Bar Examiners, Const'l Law Drafting Committee	2200.00
3/91	Nat'l Conf. of Bar Examiners, Const'l Law Drafting Committee	2200.00
Williams & Batchelder, Johnson & Bux Attorneys at Law Partshp (S)		0.00
State of Ohio -- Salary (S)		0.00
Investor's Fidelity Marketing Programs, Inc., Director's Fees (S)		0.00
Investor's Fidelity Life Assurance Corp., Director's Fees (S)		0.00
Investor's Fidelity Service Corp., Director's Fees(S)		0.00
		0.00

Name of Person Reporting ALICE BACHELOR	Date of Report 06/11/91
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IV. REIMBURSEMENTS and GIFTS -- transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children) use the parentheticals "(S)" and "(DC)" to indicate reportable
reimbursements and gifts received by spouse and dependent children, respectively. See pages 13-15 of Instructions.)

SOURCE	DESCRIPTION
<input type="checkbox"/>	NONE (No such reportable reimbursements or gifts)
National Conf. of Bar Examiners	Reimbursement of expenses for January, March and October 1990 and March 1991 meetings
Federal Judicial Center	Reimbursement of expenses for April 1990 meeting of Bankruptcy Education Committee
Federal Judicial Center	Reimbursement of expenses for October 1990 7th Circuit Workshop participation
Federal Judicial Center	Reimbursement of expenses for July 1990 Breckinridge Seminar
CACI Institute	Reimbursement of expenses for November 15, 1990 meeting (Seminar Participant)

Name of Person Reporting ALICE BATCHELDER	Date of Report 06/11/91
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V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pages 15-16 of Instructions.)

<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
<input checked="" type="checkbox"/> NONE (No such reportable gifts)		
** NOTHING TO REPORT **		0.00

Name of Person Reporting ALICE BATCHELDER	Date of Report 06/11/91
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VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separable liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pages 16-18 of Instructions.)

CREDITOR	DESCRIPTION	VALUE CODE
<input type="checkbox"/> NONE	(No reportable liabilities)	
Old Phoenix National Bank	Unsecured Note -- joint with spouse	K
Old Phoenix National Bank	Secured Note (secured by CD) -- joint with spouse	L
Old Phoenix National Bank	Mtge and Note on 16-22 Parkview, Medina; Duplex; jt. with spouse	J
Old Phoenix National Bank	Mtge and Note on 248 S. East St., Medina; single family; jt. with spouse	K
Wm. G. Batchelder, Jr.	Unsecured Note; joint with spouse	J
Old Phoenix National Bank	Mtge and Note on Farm/duplex, Lodi, Ohio; jt. with spouse	K
Inv. Heritage Life Ins., Frankfurt,		
Kentucky	Mtge on Commercial Building, Public Square, Medina, Ohio; spouse	K
Inv. Heritage Life Ins., Frankfurt,		
Kentucky	Mtge on William and Mary Apartments, Medina, Ohio; jt. with spouse	L
Inv. Heritage Life Ins., Frankfurt,		
Kentucky	Mtge and note on 960-962 Ryan Rd., Medina, Ohio; duplex; jt. with spouse	K
Inv. Heritage Life Ins., Frankfurt,		
Kentucky	Mtge and note on 964-988 Ryan Rd., Medina, Ohio; duplex; jt. with spouse	K
Old Phoenix National Bank	Note and Land Contract owned by Bank on Duplex at 24-26 Parkview, Medina	K
Old Phoenix National Bank	Mortgage on 410 Bronson St. and 223-225 N. Vine St., Medina, Ohio; 1 single family and one duplex unit	K
Inv. Heritage Life Ins., Frankfurt,	Mortgage and Note on 227-229 Jackson Street, Medina, Ohio; duplex	K
Kentucky	Mtge and Note on 227-229 Jackson St., Medina, Ohio; duplex	K
Earl and Jean Neptune, Medina, Ohio	Mtge and Note on 518 S. Broadway St., Medina, Ohio; duplex; spouse	J
Old Phoenix National Bank	Mtge and Note on 334 E. Liberty St., Medina, Ohio; three-family; spouse	K

VALUE CODES:	J=\$15,000 or less	K=\$15,001 to \$50,000	L=\$50,001 to \$100,000	M=\$100,001 to \$250,000
	N=\$250,001 to \$500,000	O=\$500,001 to \$1,000,000	P=More than \$1,000,000	

Name of Person Reporting ALICE BATCHELDER	Date of Report 06/11/91
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VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separable liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pages 16-18 of Instructions.)

CREDITOR	DESCRIPTION	VALUE CODE
<input type="checkbox"/> NONE (No reportable liabilities)	Dix Publishing Co., Wooster, Ohio Note and Sec. Agr. on misc. newspaper computer, camera and darkroom equipment; spouse	J

VALUE CODES: J=\$15,000 or less K=\$15,001 to \$50,000 L=\$50,001 to \$100,000 M=\$100,001 to \$250,000 H=\$250,001 to \$500,000 O=\$500,001 to \$1,000,000 P=More than \$1,000,000

Name of Person Reporting ALICE BATCHELDER	Date of Report 06/11/91
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VIII. INVESTMENTS and TRUSTS -- income, value, transactions. (Includes those of spouse and dependent children; see pages 18-27 of Instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period	C. Gross Value at end of reporting period	D. Transactions during reporting period					
Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.	(1) Amt. Code1 (A-B)	(2) Type (e.g. div, rent, int.)	(1) Value Code2 (J-P)	(2) Value Meth. Code3 (Q-W)	(1) Type (ex: buy, sell,mar- gar,red- emption)	If not exempt from disclosure		
Place "X" after each asset exempt from prior disclosure.					(2) Date: Month/ Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/ seller (if private transaction)

<input type="checkbox"/> NONE (No reportable income, assets, or transactions)	A	INT	J	T				
Old Phoenix National Bank								
passbook savings account								
Old Phoenix National Bank								
certificate of deposit	B	INT	X	T				
First Federal Savings Passbook								
savings account	A	INT	J	T				
A.G. Edwards & Sons IRA Acct.	A	DIV	J	T				
A.G. Edwards & Sons IRA Acct.								
(S)	A	DIV	J	T				
Duplex at 227-229 Jackson St.	D	RENT	L	V				

Income/Gain Codes: A=\$1,000 or less (See col B1 & D4)	B=\$1,001 to \$2,500 E=\$15,001 to \$50,000 F=\$50,001 to \$100,000	C=\$2,501 to \$5,000 G=\$100,001 to \$1,000,000 H=More than \$1,000,000	D=\$5,001 to \$15,000
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Value Codes: J=\$15,000 or less (See col C1 & D3)	K=\$15,001 to \$50,000 M=\$250,001 to \$500,000 O=\$500,001 to \$1,000,000	L=\$50,001 to \$100,000 P=More than \$1,000,000	M=\$100,001 to \$250,000
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Value Method Codes: Q=Appraisal (See column C2)	R=Cost (real estate only) U=Book Value V=Other	S=Assessment W=Estimated	T=Cash/Market
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Name of Person Reporting ALICE MERRILL

Date of Report 06/11/91

VII. INVESTMENTS and TRUSTS -- income, value, transactions.(Includes those of spouse and dependent children; see pages 18-27 of Instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period	C. Gross Value at end of reporting period	D. Transactions during reporting period					
(1) Amt. (A-H)	(2) Type (e.g. div. rent. int.)	(1) Value Code2 (J-P)	(2) Value Method Code3 (Q-W)	(1) Type (ex: buy, sell,mar- gar,red- emption)	(2) Date: Month/ Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/ seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)								
Indicate, where applicable, owner of the asset by ending the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(H)" for separate ownership by spouse, "(D)" for coownership by dependent child.								
Place "(X)" after each asset exempt from prior disclosure.								

<input type="checkbox"/>	NONE (No reportable income, assets, or transactions)							
1/3 interest in two-family								
house at 223-225 W. Vine St.	B	RENT	J	V				
1/3 interest in single-family								
house at 410 Bronson St.	B	RENT	J	V				
1/2 interest in 4 duplex units								
at 16-22 Parkview, Medina;(J)	D	RENT	L	V				
1/2 interest in 2 duplex units								
at 24-26 Parkview, Medina;(J)	D	RENT	K	V				
1/2 interest in residential units on Smith and Jefferson								

Income/Gain Codes:	A=\$1,000 or less (See col B1 & D4)	B=\$1,001 to \$2,500 F=\$50,001 to \$100,000	C=\$2,501 to \$5,000 G=\$100,001 to \$1,000,000	D=\$5,001 to \$15,000 H=More than \$1,000,000
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Value Codes:	J=\$15,000 or less (See col C1 & D3)	K=\$15,001 to \$50,000 M=\$250,001 to \$500,000	L=\$50,001 to \$100,000 O=\$500,001 to \$1,000,000	N=\$100,001 to \$250,000 P=More than \$1,000,000
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Value Method Codes:	Q=Appraisal (See column C2)	R=Cost (real estate only) U=Book Value	S=Assessment V=Other	T=Cash/Market W=Estimated
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Name of Person Reporting ALICE BANCHELDER	Date of Report 06/11/91
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VII. INVESTMENTS and TRUSTS -- income, value, transactions.(Includes those of spouse and dependent children; see pages 18-27 of Instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period	C. Gross Value at end of reporting period	D. Transactions during reporting period
Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child.			
Place "(X)" after each asset exempt from prior disclosure.			

(1) Amt. Code1 (A-H)	(2) Type (e.g. div., rent, int.)	(1) Value Code2 (J-P)	(2) Value Method (Q-W)	(1) Type (ex: buy, sell, exch- ge, redi- ctio-	If not exempt from disclosure			
				emption)	(2) Date: Month/ Day	(3) Value Code2 (J-P)	(4) Value Code1 (A-H)	(5) Identity of buyer/ seller (if private transaction)

<input type="checkbox"/> NONE (No reportable income, assets, or transactions)	D	RENT	X	W					
Streets, Medina; (J)									
1/3 interest in Wm. and Mary									
Apts., Wadsworth Rd., Medina									
(J)	E	RENT	M	W					
1/2 interest in 4 duplex units									
at 960-988 Ryan Rd, Medina,									
Ohio, (J)	E	RENT	L	W					
1/3 interest in farm located									
at 9472 Lodi Road, Lodi, Ohio									
(J)	D	RENT	L	W					

Income/Gain Codes: A=\$1,000 or less (See col B1 & D4)	B=\$1,001 to \$2,500 B=\$15,001 to \$50,000	C=\$2,501 to \$5,000 F=\$50,001 to \$100,000	D=\$5,001 to \$15,000 G=\$100,001 to \$1,000,000	H=More than \$1,000,000
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Value Codes: J=\$15,000 or less (See col C1 & D3)	K=\$15,001 to \$50,000 N=\$250,001 to \$500,000	L=\$50,001 to \$100,000 O=\$500,001 to \$1,000,000	P=More than \$1,000,000	M=\$100,001 to \$250,000
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Value Method Codes: Q=Appraisal (See column C2)	R=Cost (real estate only) U=Book Value	S=Assessment V=Other	T=Cash/Market W=Estimated
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Name of Person Reporting ALICE BACHELDER	Date of Report 06/11/91
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VII. INVESTMENTS and TRUSTS -- income, value, transactions.(Includes those of spouse and dependent children; see pages 18-27 of Instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period		C. Gross Value at end of reporting period		D. Transactions during reporting period							
	(1) Aut. Code1 (A-H)	(2) Type (e.g. div, rent, int.)	(1) Value (J-P)	(2) Value (Code2 (Q-W))	(1) Type (ex: buy, sell,mer- ger,red- emption)	If not exempt from disclosure			(2) Date/ Month/ Day	(3) Value (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/ seller (if private transaction)
NONE (No reportable income, assets, or transactions)												
1/5 interest in hog feeder												
operation at 9472 Lodi Road,												
Lodi, Ohio; (J)	A	NO INC	J	W								
1/2 interest in single-family												
residence at 248 S. East St.,												
Medina, Ohio; (S)	C	RENT	X	W								
1/3 interest in commercial												
bldg at 105 W. Liberty Street												
Medina, Ohio; (S)	E	RENT	X	W								
1/2 interest in three-family												

Income/Gain Codes: A=\$1,000 or less B=\$1,001 to \$2,500 C=\$2,501 to \$5,000 D=\$5,001 to \$15,000
 (See col B1 & D4) E=\$15,001 to \$50,000 F=\$50,001 to \$100,000 G=\$100,001 to \$1,000,000 H=More than \$1,000,000

Value Codes: J=\$15,000 or less K=\$15,001 to \$50,000 L=\$50,001 to \$100,000 M=\$100,001 to \$250,000
 (See col C1 & D3) N=\$250,001 to \$500,000 O=\$500,001 to \$1,000,000 P=More than \$1,000,000

Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market
 (See column C2) U=Book Value V=Other W=Estimated

Name of Person Reporting ALICE BARTENDER	Date of Report 06/11/91
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VII. INVESTMENTS and TRUSTS -- income, value, transactions.(Includes those of spouse and dependent children; see pages 18-27 of Instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period	C. Gross Value at end of reporting period	D. Transactions during reporting period					
			(1) (2) Type (e.g. div., rent., int.)	(1) (2) Value Code1 (A-H)	(1) (2) Value Code2 (J-P)	(1) (2) Value Code3 (Q-M)	If not exempt from disclosure (ex: buy, sell,mer- ger,red- emption)	(2) Date: Month/ Day
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)								
residence at 334 E. Liberty								
Street, Medina, Ohio; (S)	D RENT	L	V					
(Property is listed; no sale								
has been finalized)								
1/2 interest in duplex at 538								
S. Broadway Street, Medina;								
(S)	D RENT	X	V					
1/2 interest in bare land on								
Spring Grove Street, Medina								
(S)	A NO INC	X	R					

Income/Gain Codes: A=\$1,000 or less (See col B1 & D4)	B=\$1,001 to \$2,500 F=\$50,001 to \$100,000	C=\$2,501 to \$5,000 G=\$100,001 to \$1,000,000	D=\$5,001 to \$15,000 H=More than \$1,000,000
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Value Codes: (See col C1 & D3)	J=\$15,000 or less N=\$250,001 to \$500,000	K=\$15,001 to \$50,000 O=\$500,001 to \$1,000,000	L=\$50,001 to \$100,000 P=More than \$1,000,000	M=\$100,001 to \$250,000
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Value Method Codes: Q=Appraisal (See column C2)	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market
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Name of Person Reporting ALICE BACHELIER	Date of Report 06/11/91
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VII. INVESTMENTS and TRUSTS -- income, value, transactions.(Includes those of spouse and dependent children; see pages 18-27 of Instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period	C. Gross Value at end of reporting period	D. Transactions during reporting period					
(1) Amt. Code1 (A-H)	(2) Type (e.g. div., rent., int.)	(1) Value Code2 (J-P)	(2) Value Code2 (Q-W)	(1) Type (ex: buy, sell,mer- ger,red- emption)	(2) Date: Month/ Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/ seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)								
2.2 acre of bare land on st.								
Rt. 18, Medina, Ohio; (S)	A	[NO INC]	L	X				
Investors' Fidelity Marketing								
Programs, Inc./Investors'								
Fidelity Service Corp.; (S)								
see note 2 at Section VIII	D	DIV	L	V	ASSET	1/17	O	C Consumers Financial Corp.
Miscellaneous newspaper, com-								
puters, cameras and darkroom								
equipment	A	[NO INC]	K	T				
1/3 interest in Williams &								

Income/Gain Codes: A=\$1,000 or less (See col B1 & D4)	B=\$1,001 to \$2,500 F=\$50,001 to \$100,000	C=\$2,501 to \$5,000 G=\$100,001 to \$1,000,000	D=\$5,001 to \$15,000 H=More than \$1,000,000
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Value Codes: J=\$15,000 or less (See col C1 & D3)	K=\$15,001 to \$50,000 N=\$250,001 to \$500,000	L=\$50,001 to \$100,000 O=\$500,001 to \$1,000,000	M=\$100,001 to \$250,000 P=More than \$1,000,000
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Value Method Codes: Q=Appraisal (See column C2)	R=Cost (real estate only) U=Book Value	S=Assessment V=Other	T=Cash/Market W=Estimated
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Name of Person Reporting ALICE BARTCHELDER	Date of Report 06/11/91
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VII. INVESTMENTS and TRUSTS -- income, value, transactions.(Includes those of spouse and dependent children; see pages 18-27 of Instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period	C. Gross Value at end of reporting period	D. Transactions during reporting period						
Indicate, where applicable, owner of the asset by using the parenthetical "(S)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(OC)" for ownership by dependent child.	(1) Ast. Code1 (A-H)	(2) Type (e.g. div, rent, int.)	(1) Value Code2 (J-P)	(2) Value Method Code1 (Q-W)	(1) Type (ex: buy, sell,mer- gar,red- emption)	If not exempt from disclosure			
Place "(X)" after each asset exempt from prior disclosure.	(2) Date: Month/ Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-B)	(5) Identity of buyer/ seller (if private transaction)					
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
Bartchelder, Johnson, Bux &									
Bramley partnership assets(S)	A	NO INC	K	U					
ASSETS OF DEPENDENT CHILDREN									
Firer Bank Group Stock	A	drv	J	T					
General Motors Stock	A	drv	J	T					
Old Phoenix Bank Passbook									
Savings Accounts	A	int	J	T					

INCOME/GAIN Codes: A=\$1,000 or less B=\$1,001 to \$2,500 C=\$2,501 to \$5,000 D=\$5,001 to \$15,000
 (See col B1 & D4) E=\$15,001 to \$50,000 F=\$50,001 to \$100,000 G=\$100,001 to \$1,000,000 H=More than \$1,000,000

Value Codes: J=\$15,000 or less K=\$15,001 to \$50,000 L=\$50,001 to \$100,000 M=\$100,001 to \$250,000
 (See col C1 & D3) N=\$250,001 to \$500,000 O=\$500,001 to \$1,000,000 P=More than \$1,000,000

Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market
 (See column C2) U=Book Value V=Other W=Estimated

Name of Person Reporting ALICE BACHELIER

Date of Report 06/11/91

VII. INVESTMENTS and TRUSTS -- income, value, transactions. (Includes those of spouse and dependent children; see pages 18-27 of Instructions.)

A. Description of Assets (including trust assets)	B. Income during reporting period	C. Gross Value at end of reporting period	D. Transactions during reporting period					
					If not exempt from disclosure			
(1) Amt. Code1 (A-H)	(2) Type (e.g. div. rent, int.)	(1) Value Code2 (J-P)	(2) Value Meth. Code3 (Q-W)	(1) Type (ex: buy, sell,max- gar,red- emption)	(2) Date: Month/ Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/ seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)								

Income/Gain Codes:	A=\$1,000 or less (See col B1 & D4)	B=\$1,001 to \$2,500 E=\$15,001 to \$50,000 F=\$50,001 to \$100,000	C=\$2,501 to \$5,000 G=\$100,001 to \$1,000,000	D=\$5,001 to \$15,000 H=More than \$1,000,000	
<hr/>					
Value Codes:	J=\$15,000 or less (See col C1 & D3)	K=\$15,001 to \$50,000 L=\$50,001 to \$100,000 M=\$100,001 to \$250,000 N=\$250,001 to \$500,000 O=\$500,001 to \$1,000,000 P=More than \$1,000,000			
<hr/>					
Value Method Codes:	Q=Appraisal (See column C2)	R=Cost (real estate only) U=Book Value V=Other	S=Assessment W=Estimated	T=Cash/Market	

Name of Person Reporting ALICE BATCHELDER	Date of Report 06/11/91
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VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

1. Included in the value of several of the real estate assets is the value of the individual bank checking account for the respective property. The amount in the accounts is nominal as these accounts are used solely for the purpose of collecting the rents and paying the bills on the properties.
2. My husband was for a number of years involved in a family of companies engaged in the insurance business. On 17 January 1990, the operating companies, IFILAC and ICR, were sold. The companies which remain, which include Investors' Fidelity Marketing Programs, Inc. and Investors' Fidelity Service Corp., are not actively engaged in business, but are only involved in winding up.

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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.A. app. 7, 501 et. seq., 5 U.S.C. 7353 and Judicial Conference regulations.

Signature Alice M. Batchelder

Date 6-12-91

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, AND 18 U.S.C. 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to: Judicial Ethics Committee Administrative Office of the United States Courts Washington, DC 20544
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EXHIBIT C

Personal Financial StatementIndividual Information

Alice M. Batchelder
 435 E. Smith Road
 Medina, Ohio 44256
 U.S. District Judge
 United States Courts
 United States Court House
 201 Superior Avenue
 Cleveland, Ohio 44114

District Judge since April, 1985

Residence: (216) 725-6191
 Office: (216) 522-2630

Other Party Information

William G. Batchelder III
 435 E. Smith Road
 Medina, Ohio 44256
 Attorney, State Representative and Businessman
 Williams & Batchelder,
 Johnson, Bux & Bramley
 105 W. Liberty Street,
 Medina, Ohio 44256

Attorney since 1967, State Representative since 1968

Residence: (216) 725-6191
 Office: (216) 725-6666
 (614) 466-8140

Statement of Financial Condition as of March 15, 1991

Cash on Hand	\$15,000	Notes payable to banks	\$73,000
Pledged C.D.	50,000	Real Estate Mortgages payable (Schedule B)	265,666
Escrow Proceeds	50,000	Wm. G. Batchelder, Jr.	12,000
Real Estate Holdings (Schedule B)	1,107,500	Dix Publishing Co.	
Personal Property held for leasing	25,000	Note & U.C.C. agr.	5,000
Other Personal Property	60,000		
A.G. Edwards, Custod. IRA's (\$11,000 ea.)	22,000	TOTAL LIABILITIES:	\$355,666
Williams & Batchelder, Johnson, Bux & Bramley	30,000	NET WORTH:	\$978,834
Medina County Tribune Inc.	5,000		
TOTAL ASSETS:	\$1,334,500	TOTAL LIABILITIES AND NET WORTH:	\$1,334,500

		SCHEDULE B					
ACQUIRED	ADDRESS	TYPE	% ACT. OWNSHIP	COST	MKT VAL	MORTGAGE AMOUNTS	EQUITY
1.	1974 16-22 Parkview	2 duplexes	50	35000	75000	8000	67000
2.	1975 248 S. East St.	Single Family	50	15000	32000	20000	12000
3.	1986 538 S. Broadway	Duplex	50	32500	35000	-0-	35000
4.	1977 9472 Lodi Road	172 ac. farm	33 1/3	41666	60000	16666	43300
5.	1977 519 W. Smith	Triplex	50	30500	41000	15000	26000
6.	1977 220 N. Jefferson	Duplex	50				
7.	1976 105 W. Liberty	Comm. Bldg. 2-story/lev.	33 1/3	75000	140000	30000*	110000
8.	1976 Wm & Mary Apts. Wadsworth Road	25 unit garden apartments	33 1/3	117806	230000	64000*	166000
9.	1979 960-962 & 986-988 Ryan Road	2 Duplexes	50	62500	80000	20000*	60000
10.	1981 24-26 Parkview	Duplex	50	35000	37500	18000	19500
11.	1981 410 Bronson St.	Single Family	33 1/3	22000	30000	12000	18000
12.	1981 223-225 N. Vine	Duplex	33 1/3				
13.	1984 227-229 Jackson	Duplex	100	65000	75000	36000*	39000
14.	1985 332-334 E. Liberty	Single/Duplex	50	45000	50000	26000*	24000
15.	1986 240 S. East St.	Vacant multi- family lot	100	20000	30000	-0-	30000
16.	1972 435 E. Smith	Single Family	100	58000	110000	-0-	110000
17.	1986 Spring Grove and Harding Sts.	Vacant Lot-- zoned for 16 apt units	50	16000	27000	-0-	27000
18.	1986 Abbeville Rd & Rt. 18	Vacant Land Zoned for Apts	100	50000	55000 1107500	-0- 265666 265666	55000 841800

Note: Market values and mortgage amounts are estimated.
Mortgages marked with asterisk (*) are to Investors Heritage Life Insurance Co.,
Frankfort, Kentucky. All other mortgages are to Old Phoenix National Bank, Medina,
Ohio.

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
Harold Raymond DeMoss, Jr.
2. Address: List current place of residence and office address(es).

Residence: 6231 Valley Forge
Houston, Texas 77057

Office: 2900 South Tower
Pennzoil Place
Houston, Texas 77002
3. Date and place of birth.
December 30, 1930 - Houston, Harris County, Texas
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
Married March 12, 1955 to Judith Carter Phelps
DeMoss, homemaker.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
Rice University - Houston, Texas
September 1948 to May 1952
Bachelor of Arts

University of Texas Law School - Austin, Texas
September 1952 to February 1955
LLB
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.
 - a. September 1961 to Present - Bracewell & Patterson,
2900 South Tower, Pennzoil Place, Houston, Texas
77002 - Partner in law firm

- b. September 1957 to September 1961 - Bracewell, Reynolds & Patterson, First City Bank Building, Houston, Texas 77002 - Associate in law firm
 - c. April 1956 to September 1957 - U. S. Army CIC Detachment, Pentagon, Washington, D.C. - Investigator Agent
 - d. April 1956 to September 1957 - Jesse Phillips Kling and Kendrick, Attorneys, Court House Square, Arlington, Virginia - Title Examiner, part-time
 - e. September 1955 to April 1956 - U. S. Army Intelligence School, Fort Holabird, Baltimore, Maryland - Student
 - f. June 1955 to September 1955 - Texas General Land Office, 11th Street, Austin, Texas - Clerk
 - g. January 1955 to June 1955 - Texas Senate, Capitol Building, Austin, Texas - Clerk, part-time
 - h. October 1954 to January 1955 - Texas Legislative Service, Capitol Building, Austin, Texas - Clerk, part-time
7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.
- Yes. September 1955 to September 1957. United States Army Counter Intelligence Corps, Sergeant, ER18462936, Honorable Discharge.
8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.
- During law school, I was elected to Phi Delta Phi honorary legal fraternity.
9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.
- a. September 1957 to Present - State Bar of Texas
 - b. September 1957 to Present - Houston Bar Association (Director 1969-71; First Vice President 1972-73)
 - c. 1961 to Present - American Bar Association

- d. 1961 to Present - Maritime Law Association of the U.S.
 - e. 1961 to Present - Texas Association of Defense Counsel (Director 1972-74)
 - f. 1975 to Present - American Judicature Society
 - g. 1980 to Present - International Bar Association, Energy Section
 - h. 1990 to Present - Administrative Conference of the U. S. (Council Member)
10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.
- a. Lobbying Organizations
 - 1. 1978 to 1979 - Panama Canal Company, Washington, D.C. (Director)
 - 2. 1982 to 1983 - Legal Services Corporation, Washington, D.C. (Director)
 - 3. 1989 to Present - Administrative Conference of the United States (Council Member)
 - b. Other Organizations
 - 1. 1962 to 1972 - Texas Bill of Rights Foundation (Director 1968-70 and Chairman of the Board 1970-72)
 - 2. 1969 to 1983 - Houston Racquet Club
 - 3. 1969 to Present - Tanglewood Homes Association (Director 1982-84, President 1985)
 - 4. 1972 to 1974 - Amigos de las Americas (Director)
 - 5. 1975 to 1983 - Houston Athletic Club
 - 6. 1983 to Present - The Houstonian Fitness Center, Houston, Texas
 - 7. 1983 to Present - The Houston Club, Houston, Texas

8. 1983 to Present - Capitol Hill Club, Washington, D.C.
 9. 1983 to Present - Plaza Club, Houston, Texas
11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.
- a. Supreme Court of Texas - 1955
 - b. U.S. District Court for the Southern District of Texas - 1959
 - c. U.S. District Court for the Eastern District of Texas - 1964
 - d. United States Court of Appeals for the 5th Circuit - 1961, renewed 1989
 - e. United States Supreme Court - 1970
12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None

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

Very good, February 1991

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

None

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

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

Not applicable.

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

I have not been a candidate for or held any elective public office. I have been appointed to the Board of Directors of the Legal Services Corporation (1982), the Board of Directors of the Panama Canal Company (1978), and the Council of the Administrative Conference of the U.S. (1990), as indicated in answer to question 10.

17. Legal Career:

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

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

No

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

No

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

In 1956 and 1957, I worked as a part-time Title Examiner for the law firm of Jesse Phillips Kling & Kendrick in Arlington, Virginia.

In September of 1957, I went to work as an associate with the firm of Bracewell, Reynolds & Patterson in Houston, Texas and became a partner thereof in 1961. In 1966, several lawyers with that firm

withdrew, and the rest of us continued practice under the name of Bracewell & Patterson, which has continued down to the present.

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

Answer: See next question.

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

While I have not been certified as a specialist in any area of practice defined by the State Bar of Texas, my practice over the years has generally involved four main areas, as follows:

- (1) Admiralty and Maritime Law - In the period between 1960 and 1975, this field took up about 60% of my time. The clients were a group of related corporations home-based here in Houston which operated dredges, tugboats and barges in the Intracoastal Waterway of the State of Texas and also operated river towboats and fleets of barges on the intracoastal waterway and rivers flowing into the Gulf Coast of Texas and along the Mississippi River and its tributaries.
- (2) Real Estate Law - Since 1975, this area of practice has represented approximately two-thirds of my time. Our clients have been individuals, corporations, partnerships, and joint ventures engaging in the business of developing various real estate projects including single family residential subdivisions, shopping centers, hotels and motels, and office buildings.
- (3) Condemnation and Eminent Domain - Over most of the time that I have been with this firm, we have represented the Houston Independent

School District (HISD). One of the aspects of this representation that I personally have handled has been the acquisition of sites for new schools through exercise of the power of eminent domain.

Typically, this occurs when HISD is in an expansion phase which has occurred at about ten year intervals. Most of these acquisitions are finalized as a result of the commissioners' hearing, an administrative hearing by three commissioners appointed by the Judge of the County Courts at Law. The remainder proceed on for a trial held before a jury in one of the County Courts at Law.

- (4) Oil, Gas and Other Mineral Development - Our practice in this area has risen and fallen with the cycle of the oil and gas industry. At times, I have had a large volume of work in this area, but at other times, nothing at all. On average, I would say this area has constituted about 15% of my practice. Clients in this area have generally been the small to medium size independent oil and gas operators who are in the business of exploring for and producing oil and gas, together with types of limited partnerships who provided capital for these operations.
- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.
2. What percentage of these appearances was in:
 - (a) federal courts;
 - (b) state courts of record;
 - (c) other courts.
3. What percentage of your litigation was:
 - (a) civil;
 - (b) criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.
5. What percentage of these trials was:
 - (a) jury;
 - (b) non-jury.

Answer: As indicated in the answer to part a. above, the period during which I was most involved in litigation was the period during which I was handling admiralty and maritime cases. During this time, I would estimate that I tried three or four collision cases and seven to ten personal injury or death cases to a verdict or judgment by the court.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
 - (a) the date of representation;
 - (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
 - (c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Answer: To the best of my recollection, none of the cases which I tried were appealed, and there are therefore no reported decisions on those cases. Other than the condemnation case for the Mayes Family commented on in answer to question to 17.a above and in Schedule A hereafter, none of the other trials extended existing rules of law nor opened new theories of recovery. The issues litigated were routine issues of fault or liability and assessment of damages resulting therefrom. While these issues obviously had sufficient significance at the time to justify carrying them through trial, I have difficulty now in attributing "particular significance" to any of these cases. I have no independent recollection at this time of the dates of the trials nor of the names of the various judges and all opposing counsel. Attached hereto as Schedule A is a listing of a representative

sampling of trial matters which I handled in the 1960s and early 1970s.

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

See Schedule A as to litigation activities.

My admiralty practice involved cases relating to ship collisions, personal injury and death claims, cargo contamination and losses, mostly in the federal district courts, but some in the state district courts of Texas. Most of these matters were disposed of by settlement prior to or at the time of trial; but I did try several ship collision cases to conclusion before the federal judge in whose court they were pending, and I tried seven to ten personal injury and death claims before state court juries. In all of these cases, I represented both our corporate clients and their marine underwriters.

My real estate practice is essentially an office practice revolving around the preparation of a multitude of written agreements which are involved in this development activity. I have also represented various banks, savings and loan associations, and mortgage companies who have provided financing for these real estate activities primarily in the construction loan phase.

In addition to the eminent domain work I have done for HISD, I have also represented property owners whose land was being taken by other condemning authorities for highways, pipelines, and water development projects. In this latter category, during 1969-1971 I represented the Mayes Family which owned the largest single block of acreage acquired by the United States for construction of the Wallisville Reservoir on the Trinity River east of Houston. This case involved not only the standard problems of federal condemnation law, but also unique issues as to (i) damages to mineral estates and rights not being taken; (ii) title to surveyed acreage in excess of acreage originally patented by the State; and (iii) measure of value of waterfront acreage in relation to the navigational servitude of the United States. Though settled on the verge

of trial, this case involved several evidentiary hearings through the discovery phase.

As part of my oil and gas practice, I have also represented major banks and lending institutions who were providing financing for the purchase of or development activities based on producing properties. My practice in this area has additionally involved representation of owners of large tracts of land in the initial phases of oil and gas leasing and title examination work. This practice also carried me into representation of a partnership which was formed between two major corporate entities to produce uranium by the insitu leach mining process, which involves similar contractual arrangements and financing agreements to those in the standard oil and gas areas.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

Under the terms of the Partnership Agreement for my law partnership, upon resignation or withdrawal, I would be entitled to certain dollar amounts based upon a percentage of prior year earnings; and this amount is typically payable over a sixty month period following resignation or withdrawal.

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

I will follow the guidelines of the Judicial Conference regarding conflict of interest situations. So long as I were receiving withdrawal payments from my prior law firm, I would recuse myself from considering any case in which my law firm was counsel of record for one of the parties.

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

I have no present plans, commitments, or agreements.

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

See financial disclosure form attached.

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

See attached Financial Statement.

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

- a. In the 1960s, I was a Republican Precinct Chairman and member of the Harris County Republican Executive Committee and a delegate to various Senatorial District and State Republican Conventions.
- b. In 1968 and 1970, I was active in the Congressional and Senatorial Campaigns of George Bush.
- c. In 1972 and 1978, I was active in the Senatorial Campaigns of John Tower.
- d. In 1972, I was active in the Richard Nixon for President Campaign in Harris County, Texas.
- e. In 1976, I was a Republican National Convention delegate candidate for Gerald Ford in the Presidential Primary and one of the Co-Chairmen in Harris County, Texas in the Gerald Ford for President Campaign in the General Election.
- f. In 1979 and 1980, I was the Texas Chairman of the George Bush for President Primary Campaign.
- g. In 1980, I was elected a delegate to the Republican National Convention pledged to George Bush; and I served as one of the Co-Chairmen for Harris County, Texas in the Reagan-Bush Campaign in November.
- h. In 1984, I served as Harris County Co-Chairman of the Reagan-Bush Campaign and was elected alternate delegate-at-large to the Republican National Convention.
- i. In 1986, I served as Harris County Chairman of the Tom Loeffler for Governor Primary Campaign.
- j. In 1988, I served as Texas Vice Chairman for the Bush for President Primary and was elected an alternate delegate-at-large to the Republican National Convention.

- k. During the fall of 1988, I worked in the National Headquarters of the Bush for President Campaign as a research analyst.
- l. In 1990, I served as a Co-Chairman for Harris County of the Kent Hance for Governor Primary Campaign.

III. GENERAL (PUBLIC)

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

In 1974-76, I served on the Board of Amigos de las Americas, an organization which recruited high school and college students to go to Central and South America to deliver immunization shots in the countryside of those nations. This activity involved attendance at board meetings and committee meetings consuming approximately five hours a month over the two year period.

In 1982, I served as an interim appointee to the Board of Directors of the Legal Services Corporation in Washington, D.C. This activity involved attendance at board meetings and committee meetings in Washington, D.C. and other cities and reading and studying various reports on matters before the Board. I estimate that I spent an average of twenty hours a month, not including travel time, on this activity during the time I was on the Board.

I have just recently been elected to the Board of the Family Service Center here in Houston, Texas. This organization provides family counseling for underprivileged families. I estimate I will spend an average of three or four hours a month at board meetings, committee meetings, and other activities.

Back in the 1960s and 1970s I served on three or four occasions as appointed counsel for indigent criminal defendants. In the last few years, I have been a participant in the Houston Volunteer Lawyers Program which provides pro bono legal assistance to individuals who cannot otherwise afford a lawyer. I have had one referral from this organization.

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

list, with dates of membership. What you have done to try to change these policies?

I do not now belong to any organization which discriminates on the basis of race, sex or religion. During my law school years, 1952 through 1955, I belonged to Delta Tau Delta social fraternity which discriminated on the basis of race and sex. I know the fraternity has since changed its bylaws to eliminate any racial provision, but so far as I know, they may still limit membership to males. The Houston Club, to which I now belong, did prior to 1982 expressly limit membership to males and even earlier had practical implementation of membership policies which discriminated on the basis of race. In 1982, these bylaw provisions were expressly amended, and membership is now open to all ladies and gentlemen of good character over 21 years of age; and the club does in fact have many female and minority members.

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

United States Senator Phil Gramm from Texas has an Advisory Committee which makes recommendations to him regarding nominations for United States District Judges. To the best of my knowledge, there is no such commission or committee relating to United States Circuit Judges, and I did not appear before any such committee or commission. The circumstances involved in my nomination and interviews heretofore have been: During the last week of June 1990, I received a call from The White House, inquiring as to whether I would be interested in putting my name under consideration for appointment to the United States Court of Appeals to the Fifth Circuit. After taking a few days to talk the matter over with my wife, I replied that I would be very pleased to have my name under consideration for such appointment. I interviewed with various individuals in the Department of Justice on July 2, 1990. In December of 1990, I was in Washington on other matters and talked with individuals at The White House, simply to let them know of my continued interest in being considered. In February of 1991, I received a call from The White House indicating that my name was on a list of names to be considered by the President for appointment to

the Fifth Circuit and that I would be contacted by representatives from the Department of Justice about completing the necessary application forms and paperwork. I was interviewed on several occasions by an FBI agent regarding the investigation conducted by that agency, and I have been interviewed once in person and several times by phone calls by the individual who is the Fifth Circuit representative on the American Bar Association Standing Committee on Federal Judiciary.

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

No

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

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

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

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

Answer: Federal constitutional issues have not been a significant part of my professional legal practice; and I do not consider myself an authority in any sense on constitutional law. My exposure to the topics and cases most frequently involved in the area of "judicial activism" has come primarily from reading newspapers and magazines and following commentary and academic discussion in legal periodicals. I have not attempted at any time to formulate in my own mind a definitive position on the subject of judicial activism, and approach this statement with some hesitancy simply because I know that the scope of my knowledge on the subject is limited. With these general statements as a background, however, I can make the following statements:

- a. I think our adversarial system is an excellent one for resolving controversies between individuals or between the State and individuals when its function is to apply the law as it is to the facts as exist; but that same system is inefficient and inherently unrepresentative, when it purports to define broad issues of public policy or to administer broad areas of governmental responsibility.
- b. I think the fundamental concept of separation of powers under our governmental system is one of the cornerstones of our system, and we should work hard to maintain those separation of functions.

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SCHEDULE A

SCHEDULE OF CASES

1. Cause No. 44925; Filed in 1965 in the District Court of Brazoria County, Texas; 23rd District. Styled Mrs. Angela Find, Plaintiff v. Matagorda Shell Company, Inc. Death action as to Forest E. Find. Mistrial declared after two days of trial. Later settled. I represented the Defendant.

Counsel for Plaintiff: Don Fullenweider
4300 Scotland
Houston, Texas
(713) 880-4600

2. Cause No. 663248; Filed in 1965 in the 164th Judicial District Court, Harris County, Texas. Styled Glenn A. Daniels v. Sioux City and New Orleans Barge Lines, Inc. Claims under the Jones Act for personal injuries. Settled after discovery. I represented the Defendant.

Counsel for Plaintiff: John L. Hill
Liddell, Sapp, Zivley,
Hill & LaBoon
Texas Commerce Tower
Houston, Texas 77002
(713) 226-1200

W. Douglas Matthews
Schmidt & Mathews
1000 Louisiana, Suite 2140
Houston, Texas
(713) 651-1133

3. Cause No. 691014; Filed in 1966 in the District Court of Harris County, Texas; 125th District. Styled F. Stricklen v. Parker Brothers & Co., Inc. Personal injuries under the Jones Act. Tried to jury verdict in favor of Plaintiff. I represented the Defendant.

Counsel for Plaintiff: W. W. Watkins (deceased)
Brown, Kronzer, Abraham,
Watkins & Steeley

4. Cause No. 737822; Filed in June 1967 in the District Court of Harris County, Texas; 127th Judicial District. Styled Gallie Smith Halcumb, Jr., Temporary Administrator of the Estate of Darrell M. Halcumb, Deceased v. John Young Company. Filed June 1967. Death claim under the Jones Act. Settled prior to trial. I represented the Defendant.

Counsel for Plaintiff: Robert H. Roch (deceased)
Fisher, Roch, Sales & Blackstock

5. Cause No. 727929; Filed 1967 in the 155th Judicial District Court, Harris County, Texas. Styled James C. Herring v. Sioux City and New Orleans Barge Lines, Inc. Suit for personal injuries under the Jones Act. Settled after discovery. I represented the Defendant.

Counsel for Plaintiff: Harold R. Ratcliff
Suite 514
Durmond Building
Memphis, Tennessee 38103

Chris Dixie
3303 Main Street, Suite 300
Houston, Texas
(713) 526-1998

6. Civil Action 71-H-1439; filed in 1971 in the U.S. District Court, Southern District of Texas. Ronald Kellner, Administrator of the Estate of William J. Miller, Deceased, v. Houston Barge Line, Inc. Maritime death claim settled prior to trial. I represented the Defendant.

Counsel for Plaintiff: Sidney Raffkin
Mandell & Wright
712 Main Street
Houston, Texas
(713) 228-1521

7. Civil Action 79-195; Filed 1971 in the U. S. District Court for the Eastern District of Louisiana, Baton Rouge Division. Styled James Richard v. Houston Barge Line,

Inc. Suit for personal injuries under the Jones Act. Settled prior to trial. I represented the Defendant.

Counsel for Plaintiff: John F. McKay
2525 North Acadian Thruway East
Baton Rouge, Louisiana 70805

8. Cause No. 880281; Filed August 1971 in the 55th Judicial District Court, Harris County, Texas. Styled Larry Wayne Stasney, Plaintiff, v. Texas Molten Sulphur Transport, Inc. Settled at time of trial. I represented the Defendant.

Counsel for Plaintiff: David H. Burrow
Burrow & Williams
1301 McKinney, Suite 3500
Houston, Texas
(713) 222-6333

9. Cause No. 904,943 filed in 1971 in the 125th District Court of Harris County styled Melba Doris Bland, et al. v. Parker Brothers & Co., Inc., enjoined by Limitation of Liability Action in Civil Action 72-H-1395 in the District Court of the United States for the Southern District of Texas; In the Matter of the complaint of Parker Brothers & Company, Inc., as owner and operator of the Barge PB93 and the work platform, known as the Patch Barge, for exoneration from or limitation of liability - death of Carl Bland, Sr. Settled prior to trial of Limitation Action. I represented Parker Brothers & Co., Inc.

Counsel for Claimants as heirs of Carl Bland, Sr.:

W. W. Watkins (deceased)
Brown, Kronzer, Abraham,
Watkins & Steeley

10. Civil Action No. 66-G-35; United States of America v. 132.7 Acres of Land in Chambers County, Texas, et al. (Tracts 154, 157 and 158), and Civil Action No. 66-G-29; United States of America v. 8.968.06 Acres of Land in Chambers and Liberty Counties, Texas (Tracts 232-1, 2, 3; 372-1 and 2); filed in 1966 and 1968, respectively, and consolidated in 1969, in the United States District

Court for the Southern District of Texas, Galveston Division, which were eminent domain actions by the United States Government for the taking of the surface of the tracts of land described therein for the Wallisville Reservoir Project, but leaving all oil, gas and other mineral estates in the present owners subject to the right of the United States to flood the surface thereof for reservoir purposes. This was a very complicated condemnation case which I handled as lead counsel with assistance from Patrick C. Oxford (who is now again a partner in my law firm) over a period of about four years. We represented the heirs of J. J. and Sara Mayes (approximately twenty in number), who designated as their special agents Mr. Bradford Pickett, attorney at law, who is still practicing in Liberty, Texas, and Mr. John Middleton, an attorney at law and investor who now resides in Wallisville, Texas. This case involved numerous preliminary and evidentiary hearings on issues peculiar to the status of title and physical characteristic of the tracts of land being taken. In order to secure "fair market value" as the measure of compensation for the taking of our client's property, it was necessary to secure amendatory legislation from the United States Congress. In support of such legislation, I testified before the Subcommittee on Flood Control -- Rivers and Harbors of the Committee on Public Works of the U. S. Senate on Thursday, June 18, 1970. My testimony included not only oral remarks, but also a prepared, written memorandum and a later supplemental written statement discussing in detail the need for such amendatory legislation and the Supreme Court cases which had precipitated the confusion on the subject. I am appending herewith as Exhibit "1" copies of pages 677 to 699 of the volume on Omnibus Water Resources Authorizations - 1970, published for the use of the Committee on Public Works which reported my testimony. The substance of this statutory change was ultimately passed as Public Law 91-611 Title I, Section 111 and codified as 33 USCA § 595a.

The principal attorney for the United States of America in this litigation was Rex R. Green, who is deceased. Mr. Andrew Gary, who at that time was a former Assistant United States Attorney for the Western District of Texas, was designated as Special Counsel to assist in the litigation. Mr. Gary now practices law in San Marcos, Texas and may be reached at phone number (512) 396-2541.

Other individuals who were then Assistant United States Attorneys and worked on this matter are:

1. Winston P. Crowder, who practices in Houston and may be reached at (713) 789-1973; and
2. William L. Bowers, Jr., who practices in Houston and may be reached at (713) 781-5200.

The consolidated case was pending before United States District Judge James Noel, who is now retired, but living here in Houston and may be reached at phone number (713) 522-0678. The case was settled on the verge of trial as a result of a settlement conference mandated by Judge Noel.

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EXHIBIT 1

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and county or whatever the local agency was, to a flat 70-30 percent split in the hope of improving the program at that level.

Senator DOLE. Thank you very much, gentlemen.

We will now move to consideration of S. 3815 concerning modification of land acquisition policy.

Senator Tower is on his way. In the meantime, perhaps Mr. De Moss and Mr. Sylvia might come forward.

STATEMENT OF HAROLD R. DE MOSS, JR., ESQ., HOUSTON, TEX.

Mr. De Moss. Mr. Chairman, I am Harold De Moss, from Houston, Tex. I am appearing here today to urge the favorable consideration by this subcommittee of S. 3815.

It is noted on your docket sheet here as a modification of the land acquisition policies. Actually, it really should better be called a clarification of the policies. This bill seeks to define better what Congress has previously attempted to define in regard to the value that is to be paid to riparian landowners when their land is taken for public works projects.

The fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the Government of the United States.

The guiding principle which insures that the power of eminent domain can never degenerate into a power of confiscation is that the just compensation called for by the fifth amendment must be a full and perfect equivalent for the property taken.

From this constitutional concept of full and perfect equivalent has evolved the well-established principle of condemnation law that when an owner's land is condemned, he is entitled to be compensated on the basis of market value fairly determined.

In 1960, the Congress recognized this well-established principle when it passed the Land Acquisition Policy Act of 1960, Public Law 86-645, 74 Stat. 502, wherein it was stated:

It is declared to be the policy of Congress that owners and tenants whose property is acquired for public works projects of the United States of America shall be paid a just and reasonable consideration therefor (33 U.S.C. 506 (1960)).

In the section of the act immediately following, Congress instructed the Secretary of the Army and the Corps of Engineers to advise owners in a project area concerning various matters including "payments for moving expenses or other losses not covered by appraised market value." 33 U.S.C. 597. Thus, Congress impliedly, if not expressly, indicated that appraised market value should be the base standard for determining just and reasonable compensation.

B. THE PROBLEM

Despite these well-established constitutional, congressional, and equitable principles, a recent decision of the U.S. Supreme Court, *U.S. v. Rands*, (1967) held that the U.S. Government need not pay a property owner any value accruing to his high fast land because of riparian location when this property is taken by the Government for a project involving navigable waters.

According to the *Rands* decision, in such a taking the riparian location of the property may be disregarded in determining its highest and best use or market value, even though it is fundamental that where property is located and the uses to which property can with reasonable probability be put are the most important elements in determining its fair market value. If broadly applied, the *Rands* decision will allow the Government in future condemnation cases to ignore these two elements, and consequently, the Government will get by with paying a lesser value for property than would otherwise have been paid and the individual landowner will sustain a serious and unfair loss which he would not otherwise have sustained.

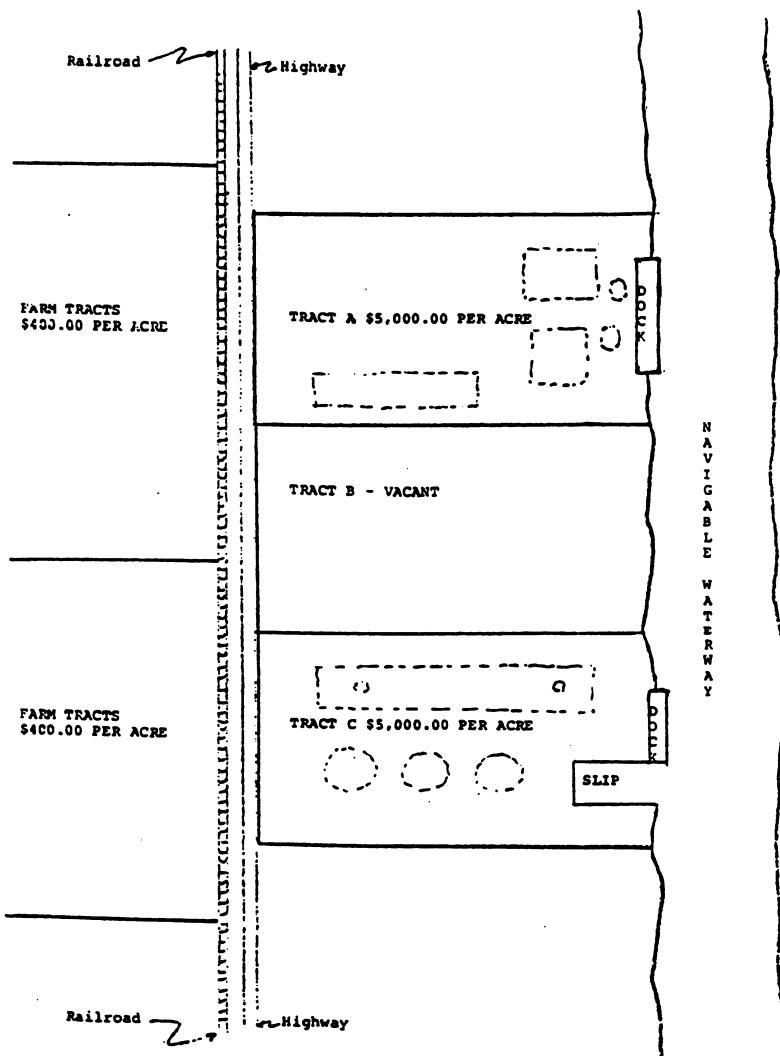
If the Senator would look at the plat which is attached to the brief summary of my remarks, we can illustrate the problem that we are faced with here. If you assume that tract B were condemned for some public work project, and the adjacent tracts had sold for \$5,000 an acre and were presently being used for some purpose in connection with the navigable waters, such as an industrial plant having a dock facility or something else, and if you assume that the farm tracts to the left on the other side of the railroad and the highway had been regularly selling for \$400 an acre, and you applied the *Rands* decision literally, then the owner of tract B, would not be entitled to receive anything near \$5,000 an acre which his neighbors had received for private sales of their property, but he would, in fact, be limited to recovering only the agricultural value of his vacant land represented by the sales of the farm tracts, or \$400 an acre.

We submit that is a gross injustice and an inequity to the land-owners involved whose land is being taken for public works projects.

(The chart referred to follows:)

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Mr. De Moss. In 1970, the Supreme Court in *Reynolds v. United States* returned the case to the lower court, to determine whether the land taken was within the original scope of the project. The determination was necessary because the Supreme Court indicated if it was not within the original scope, the compensable value of the land would be measured by its economic potential as lakeside residential or recreational property, uses which clearly involve access to and utilization of navigable waters.

There is a conflict therefore between the Supreme Court decisions in *Rands* and *Reynolds* which should be clarified by a legislative express.

C. THE SOLUTION

Senate bill 3815 amends the Land Acquisition Policy Act of 1960 to make it perfectly clear that the just and reasonable compensation required by the Constitution and intended by Congress to be paid riparian landowners is fair market value including riparian uses. It in no way affects or reduces the rights of the United States within the area between or below the high water marks where the dominant navigational servitude is paramount.

The bill expressly confines itself to land above the normal high water mark along navigable waters. The case law development is quite clear that the navigational servitude of the United States historically has applied only to the geographical area bounded on one side by the normal high water mark and on the other side by the normal high water mark on that side.

In conclusion, we would submit to this committee that Congress is well aware that, in the present-day market, private buyers and sellers are selling and purchasing riparian property at values determined to a large extent by their riparian location and the demand therefor. Unless Congress clarifies its stated policy to pay just and reasonable consideration based on appraised market value for all condemned property, including high fast riparian property, serious injustice and loss will be visited upon many riparian owners should their property be condemned by the United States at a price determined by disregarding riparian value.

Mr. Chairman, I have submitted a quite extensive written statement which includes a much longer amplification of these basic principles as to the background, the problem and the solution, together with a very extensive brief of the particular cases which have been mentioned.

I would ask, Mr. Chairman, that that written statement be included as part of my remarks.

Senator DOLE. Without objection, it will be made part of the record.
(The statement and material submitted follows.)

PREPARED STATEMENT OF HAROLD R. DE MOSS, JR.

Mr. Chairman and Members of the Committee, my name is Harold R. De Moss, Jr., and I am an attorney with the firm of Bracewell & Patterson in Houston, Texas. I am appearing here today to urge your passage of Senate Bill S-3815 which seeks the independent judgment of this Committee and the Senate on the question of whether or not the law as it now stands regarding compensation to be paid for the taking of private property for public purposes along navigable waters of the United States is fair, just and equitable and in accordance with

the intention of the Congress. I know that at least one member of this Committee, Senator Muskie, has spent an enormous amount of time studying and proposing changes in the general area of federal condemnation procedures and policies; and Senate Bill No. 1, which was passed by this Senate last year, reflects the judgment of the Senate that in the areas dealt with in that Bill the law was not fair, just and equitable. While the specific problem of valuing riparian lands which are condemned for public purposes does not appear to have been dealt with in the Senate Bill 1, the philosophy represented by Senate Bill 1 and Senate Bill 3815 are identical; and it is, of course, the fundamental responsibility of the Congress to clarify, change and revise the law whenever it is inconsistent with common fairness and justice, regardless of whether the inconsistency or confusion results from administrative practices and procedures as dealt with in Senate Bill 1 or case law development as is dealt with in Senate Bill 3815.

So that you might appreciate the basic policy questions raised by Senate Bill 3815, let me ask that each of you assume that you own a vacant tract of land containing 100 acres which has 1,000 feet of frontage on some navigable waterway of the United States, such as the Houston Ship Channel, the Gulf Intracoastal Waterway, the Mississippi River or the Ohio River. Identical tracts of lands as far as size, shape and topography about you on each side. A paved roadway and a main railroad line form the rear boundary of all three tracts. The two tracts on each side of you were sold as vacant land within the last year for \$5,000 an acre to industrial concerns who are presently in the process of constructing industrial plants thereon including dock facilities so as to utilize the convergence of rail, highway and water transportation. The land on the other side of the railroad and highway from your property is used as farmland and has recently sold at a price of \$400 an acre. Assume further that the city, the county, the state or some other governmental agency having the power of eminent domain decides that your property would make an ideal location for some public project, such as public docks and wharves, a sewage treatment station, or a public water supply station. You feel that your land is increasing in value and you are not really interested in selling the property to the condemning authority. Negotiations with the condemning authority for an agreed price are unsuccessful. The condemning authority then exercises its power of eminent domain and files a condemnation proceeding against your property. The constitution of the state provides that you are entitled to receive "just compensation" for your property taken for public purposes; and the essential problem then is to determine what those words mean in dollars and cents. The procedure and standards for making this determination which have evolved in literally thousands of condemnation cases decided by Courts at all levels in the state and federal systems, contain the following fundamental principles:

(1) A judge, jury or set of commissioners makes the determination in a full open hearing wherein each side is entitled to introduce evidence of the property's value;

(2) The measure by which just compensation is to be determined is "fair market value". The condemning authority certainly ought not to have to pay a premium or more than the landowner could have gotten from a private sale in the market; and the landowner ought not to receive less or suffer a loss below what he might have received in the market;

(3) Market value is indicated by sales between a seller who was desirous of selling but under no compulsion to sell, and a purchaser who was desirous of purchasing but under no compulsion to purchase;

(4) The sales to be used must be sales having some likeness or similarity to the property taken. The landowner would not want the condemning authority putting in sales of land 100 miles away in a desert or a wilderness area; and the condemning authority would not want you putting in sales of vacant land in the middle of a nearby city;

(5) The time frame for determining market value should be "on or about the date of taking". Obviously, you as landowner would not want the condemning authority producing sales of similar property twenty years ago as evidence of the current market value; and the condemning authority would not want you speculating about what the market was going to do in the future;

(6) Since land may naturally be undergoing a change of economic use, the

market value should be determined by taking into consideration the highest and best use for which the property is reasonably adaptable. Certainly a willing seller who was under no compulsion to sell would not sell for anything other than the best price determined by the highest use. On the other hand, if for some physical or technical reason your property would not be susceptible of being used for this highest and best use, the condemning authority ought not to have to pay a value determined by considering a use for which the property was not reasonably adaptable.

With these guidelines established, the trier of fact, whether it be judge, jury or commissioner, would proceed to hear the testimony and evidence of both sides and arrive at a determination of just compensation. That determination would of course depend upon the trier of facts weighing of the evidence offered by each side and arriving at an independent determination; and if this evidence were limited to the facts stated in the hypothetical situation above, you could reasonably expect that the determination of compensation payable to you would be something in the neighborhood of \$5,000 per acre.

As another example, assume you own a tract of land which has 2,000 feet of frontage along a navigable river in Arkansas or North Carolina. At the point where your land fronts on the river, the river widens to form a natural lake approximately one mile long and one-half mile wide. The river is clear and clean and abounds with fish, and the lake area is free of obstructions and perfect for water skiing and sailing. Your land extends back from the river to a depth of 250 feet where it is bounded by a paved highway leading into a main metropolitan area. An identical tract of land so far as size, shape and access to water and paved roadway was sold on the opposite side of the lake within the last year for \$2,000 an acre; and was subsequently subdivided by the new owner into individual water front lots which have now been improved by individual owners with private piers and boat houses for their boats. The land on the other side of the highway from your property is farmland which has been selling regularly for \$300 an acre. The state or county determines that your land would make an excellent public park; and after unsuccessful attempts to negotiate an agreed price with you, the state or county files a condemnation suit to take your land. The same format and principles discussed under the previous hypothetical situation would of course apply here and would provide a fair and equitable basis for resolving the determination of "just compensation" due you under the Constitution. Again, if the evidence were limited to the facts presented in the hypothetical situation, you could reasonably expect that the trier of fact would arrive at a value somewhere in the vicinity of \$2,000 an acre as the "fair market value of your property on or about the date of taking as determined by the price which a willing buyer, desiring to buy but under no compulsion to buy, would pay to a willing seller, desiring to sell but under no compulsion to sell, considering the highest and best use for which the land was reasonably adaptable." This formula represents a classic example of the strength and vitality of the common law system and its ability to come up with a fair and workable formula for resolving one of the most fundamental conflicts that can be presented to the legislative and judicial processes, the conflict between the private property rights of the individual and the needs of the government to take private property for public purposes.

If you change the fact situation slightly, we get to the heart of the problem raised by Senate Bill 3815. Suppose that the Corps of Engineers or some other Federal agency determines that your property is needed in the first hypothetical situation to construct a connecting canal running over to another waterway or to provide a diversionary channel for flood waters coming down the waterway on which your property fronts; or suppose in the second situation that the Corps of Engineers determines that a dam must be constructed on the river where your property fronts and your entire land will be inundated by the waters behind this dam. Your attempts to negotiate an agreed sales price with the Federal Government are unsuccessful and the Federal Government files a condemnation proceeding to take your land under the power of eminent domain. No changes should be made in the formula or format we have previously discussed. The Constitution of the United States, like the constitution of all states, contains a "just compensation" provision to protect you as landowner; and the compensation which you receive for the taking of your land for one public purpose ought to be the same compensation you would receive for the taking of your land for any other public purpose, regardless of whether it is the state, the city or the Federal Government that is the condemning authority.

The Department of Justice argues, however, that you should not be entitled to fair market value for the following reasons:

(a) Under the Commerce Clause of the United States Constitution, Congress has the paramount power and authority to regulate navigable waters of the United States. Under this power, Congress has passed a statutory provision, 33 U.S.C. 403, which requires a landowner to get a permit from the Corps of Engineers before he can construct any dock, wharf or pier along navigable waters or before he can make any changes in the course or condition of that navigable water. Therefore, in the hypothetical situations referred to above, you cannot show any economic use of your property which would require getting a permit from the Corps of Engineers, because the Corps of Engineers *might not* grant such a permit; and

(b) It has been held by the Supreme Court that where the United States performs certain works within the navigable waters of the United States which have the incidental effect of depriving adjacent riparian land of access to navigable waters, the United States is not liable for any such consequential damage. Therefore, in the hypothetical situations referred to, you cannot show any value of your property resulting from access to or utilization of navigable waters because the United States *could in the future take away those rights without obligation to compensate you therefor.*

If the Justice Department prevails in these arguments, you will, of course, suffer a substantial loss in the determination of the value of your property. In either of our hypothetical situations you would be limited to showing only the agricultural value of your land, because in both hypothetical situations the other sales mentioned obviously involved an economic use which required getting a permit from the Corps of Engineers and represented a sale based upon access to and utilization of navigable waters.

You would, no doubt, suggest the following counter-arguments:

(a) In regard to the necessity of getting a Corps of Engineers permit under 33 U.S.C. 403, this statute was designed and intended basically to prevent the obstruction of navigable waters; and to this extent it serves a very salutary purpose. However, it does not allow the Corps of Engineers to refuse permits for arbitrary or capricious reasons. In the first hypothetical situation, the abutting property owners have gotten permits for construction of the wharf facilities at the front of their property; and in the second hypothetical situation, the landowners across the lake have secured permits from the Corps of Engineers for the construction of their boat houses and piers. If the Corps of Engineers has already issued permits to these neighboring properties, there is no reason to assume they would not issue similar permits for similar economic uses on your property. Furthermore, the permits required from the Corps of Engineers are essentially the same as the building permits which would have to be secured from a local city or other governmental agency. Certainly no one could contend that if the city were condemning your land that they could deprive you of the right to show its "reasonable susceptibility" for erection of improvements simply because they might refuse to grant a building permit. Finally, under the generally recognized concepts of condemnation law, the "willing buyer" is not the condemning authority; and to inject into the determination of value an exclusionary provision which is dependent upon what the condemning authority might or might not do in the future destroys the fundamental impartiality of the market value determination.

(b) In regard to the non-liability for incidental effects of works performed within the navigable waters, no such work project which deprived access to your property had in fact occurred; and it is pure speculation of the rankest sort that it might occur in the future. Injection of this exclusionary provision ignores the time frame of on or about the date of taking which is essential to the determination of any fair market value. Furthermore, as argued in regard to the Corps of Engineers permit, consideration of what the Federal Government might do in the way of work projects in the future destroys the impartiality of the willing buyer-willing seller principle. Furthermore, the risk that the Federal Government might perform some work in the navigable waters which deprives your property of access, is a risk not peculiar to your property but shared by all other property along all other navigable waters in the United States. Finally, there is no logical connection between the determination of market value in a condemnation situation and the absence of liability under some other situation. Certainly a city, which has the right under its police power to close

public streets for safety purposes without liability to the abutting property owners, could not contend that when it condemns a piece of property fronting on a street, the property should be considered as not having street frontage because the city might in the future close the street under its police power.

The counter-arguments set forth above are far more logical and consistent with the historically developed concepts of fair market value, and from the standpoint of public policy represent by far the better solution to the particular questions. However, I am here today urging your adoption of Senate Bill 3815 because in the case of *United States v. Rands*, 380 U.S 121, 88 S. Ct. 203 (1967), the Supreme Court held that when property along navigable waters is condemned, the United States need not compensate the owner for any elements of value derived from access to or utilization of navigable waters; and the Government is permitted to disregard value arising from riparian location in compensating the owner when fast lands are appropriated. I have italicized the words "not need" and "is permitted" to indicate clearly and immediately that we are dealing here with a question of public policy. Under our system of government, it is the Congress, and the Congress alone, which can most accurately and correctly reflect the sense of common fairness and justice which ultimately controls the public policy question of the conflict between the individual and the state in this condemnation situation.

In this connection I would point out that nowhere in the decision in *United States v. Rands* did the Supreme Court refer to, discuss, analyze, or acknowledge the existence of, the last expression of public policy in this area which was the Land Acquisition Policy Act of 1960, passed by Congress and incorporated as 33 U.S.C. 598 and 597 in our statutes. Furthermore, I would point out that in a later decision, *United States v. Reynolds*, 90 S. Ct. 803 (1970), the Supreme Court sent the case back to the Trial Court for a proper determination of the question of whether or not the land was within the original scope of the project; and this was essential because if the land involved was not within the original scope of the project, the Supreme Court said: "*Its compensable value is properly measurable in terms of its economic potential as lakeside residential or recreational property*". Strangely enough, the Supreme Court opinion in the *Reynolds* case did not discuss the *Rands* decision. Certainly, "lakeside residential or recreational property" involves a value derived from "access to or utilization of" navigable waters, which under the *Rands* decision the United States need not pay for; and if the *Rands* decision really meant what it said, it was useless for the Supreme Court to send the case back to the Trial Court in the *Reynolds* case to determine a compensable value measured by lakeside residential or recreational uses.

I respectfully submit therefore that the status of the law on the question of compensating landowners for the taking of lands along navigable waters is confused and uncertain; and it is incumbent upon this Committee, the Senate and the Congress to expressly state the intention of Congress on the question of compensating landowners of riparian property and thereby clarify the law in this regard. I am submitting with this statement a brief which discusses the non-liability navigational servitude cases and the case law development relied upon by the Court in arriving at its decision in the *Rands* case and the inconsistencies between the *Rands* case and the *Reynolds* decision. For those of you who are interested in digging into the subject, I am confident that this brief will show you numerous areas of condemnation law where the *Rands* decision is inconsistent with other Supreme Court decisions besides the *Reynolds* case.

Setting aside the legal technicalities for the time being, the question of public policy presented to this Committee by Senate Bill 3815 is what is the fair, right and just measure of compensation to be used when lands along navigable waters are condemned for public purposes. Will it be the measure of "market value" including the historically developed concepts of "willing buyer-willing seller" and "highest and best use" including riparian uses; or will it be a truncated and butchered version of market value that limits the property to certain specific uses and excludes certain other uses even though the property is completely adaptable for such other uses? Senate Bill 3815 adopts the former of these two alternatives. With all of the earnestness which I can command, I urge this Committee to act favorably upon Senate Bill 3815 and include it as part of the omnibus rivers and harbors legislation for the year 1970. In addition to the reasons already outlined in this statement, I would submit the following policy reasons for favorable action on Senate Bill 3815:

(1) If the Federal Government can condemn land at less than its fair market value, as a broad and comprehensive application of the *Rands* decision might indicate, then the Corps of Engineers, the Department of Interior and other agencies of the Federal Government will become condemnation brokers for numerous states and state agencies who would otherwise have to pay full riparian value if they condemned lands along navigable waters outright themselves. This sort of inter-governmental hanky-panky is exactly what occurred in the *Rands* case itself, where the State of Oregon first took an option from the land-owner at a price using port site value, the Federal Government then condemned the property disregarding port site value, and the Federal Government then conveyed the property to the State of Oregon who leased it to a private corporation for use as a port site.

(2) The modern trend as exhibited both by the case law and legislative enactments, is towards a substantial decrease if not elimination of the doctrine of governmental immunity. The non-liability navigational servitude cases, even as limited to activities within navigable waters for strictly improvement of navigation and without invasion of fast lands, is in its ultimate form simply another facet of governmental immunity. If because of this non-liability navigational servitude doctrine the Federal Government is permitted to condemn riparian lands at less than their fair market value, governmental immunity is being expanded and extended rather than reduced and limited.

(3) In 33 U.S.C. 593 Congress has long ago expressly stated that in the cases where partial takings are made of property for improvement of rivers and harbors, the jury or tribunal awarding compensation for the part taken or assessing damages to the remainder will take into consideration by way of reducing such compensation or damages any special and direct benefits to the remainder arising from the improvement. Obviously, where rivers, harbors, canals and waterways of the United States are being improved, one of the special and direct benefits to the remaining land could be that it was afforded access to or utilization of these navigable waters which did not exist previously. This concept of reducing compensation for the land taken or damages to the remainder by enhancement of value of the remainder is a well recognized and universally applied concept in condemnation law. In fairness and justice the Federal Government should not require consideration of enhancement in value to the remainder resulting from access to or utilization of navigable waters; and at the same time and in the same case contend that the compensation for the land taken should not include any value which it had prior to the taking because of access to or utilization of navigable waters. Passage of Senate Bill 3815 will make clear and express the policy of Congress that value deprived from access to or utilization of navigable waters should be considered not only in determining enhancement of the remainder but also in determining compensation or market value for the portion taken.

(4) Finally, I would urge this Committee's favorable action upon Senate Bill 3815 for the purest and most fundamental of equitable reasons. Suppose we add to our hypothetical factual situations the fact that you had purchased your property for the same price paid by your neighbors and at the same time they bought theirs. You paid cash for the land and at the time you bought it there had been no notice or any indication of any kind that the land was to be needed for any public purpose. In each case you obviously bought the land contemplating its use in connection with the waterways adjacent thereto and the price which you paid in that free open market transaction obviously included values relating to access to and utilization of the navigable waters. But under a broad interpretation of the *Rands* case, you would not be permitted to show the cost which you had in the land; and considering only sales for agricultural purposes, the compensation to which you would be entitled would be limited to Four Hundred and No/100 (\$400.00) Dollars an acre. Your land has been taken against your wishes and you have received a fraction of what you had invested in the land. You have not received a full and just equivalent for the property taken from you; and if the concept of equity means anything at all, you have been dealt with inequitably.

Turning now to an analysis of S-3815 itself, let me point out some of the things the Bill does and does not do and amplify on some of the terminology used in the Bill. I am appending to this statement a copy of S-3815 on which I have underlined the new language which this Bill proposed to insert in Section 301 of the Land Acquisition Policy Act of 1960. As the Committee can see, the

first and last sentences of this Bill are identical with the existing statutory provisions of Section 301 (33 U.S.C. 596). In brief, the new portions of this Section 301 would constitute an express statutory definition of the words "just and reasonable consideration" as they now exist in the statutory provision. The Committee should note the following specific language provisions of the new definition:

1.) The property to which the new definition would apply is defined as being the "property taken by the United States above the normal high-water mark of navigable waters in the United States." The term "normal high-water mark" is well defined by case law as being the highest level at which the river or other body of water stands during normal conditions, excluding the extremes of flood stages during the winter and spring and low-water stages during summer droughts.

2. As indicated in the brief submitted with this statement, the area between or below the normal high-water marks is the area to which the dominant navigational servitude of the United States applies. Since the new statutory definition proposed by S-3815 would apply only to property above the normal high-water mark, it is obvious that the passage of this Bill will in no way affect or reduce the rights of the United States in the area where its dominant navigational servitude is paramount.

3. As indicated previously in this statement, the words "fair market value" are the normal and ordinary tests used in condemnation cases for determining compensation due the landowner, and would include the concepts of "willing buyer-willing seller" and "highest and best use".

4. The words "including the value of any riparian use which may exist at the time of taking of such property or for which such property would be suited with reasonable probability in the foreseeable future" have been inserted for two purposes: first, to make clear that elements of value relating to riparian uses of the property would be considered; and second, to make clear that the well recognized concept of highest and best use limited by "reasonable probability" would be applied in the determination of value of riparian lands.

5. The words "disregarding the exercise of any navigational servitude of the United States involved in the taking itself or any potential future exercise of such servitude" have been inserted to expressly indicate that the non-liability navigational servitude concepts will not be applied in the determination of value of the land taken: and therefore, the land will be valued just as it stood prior to the taking. It is important to note that nothing in this definition excludes consideration of an exercise of the navigational servitude which occurred previous to and unrelated with the project for which the land is taken. Obviously in this latter situation, the market value of the land as between private buyers and sellers would have to take into consideration the incidental effects of the prior exercise of the navigational servitude by the United States.

6.) Section 2 of S-3815 has been inserted to make clear that the new statutory definition would not disturb acquisitions which have already been completed either by agreed price and voluntary deed or by final judgment in a condemnation proceeding. This is accomplished by specifying in the first phrase of Section 2 that the amendment made by the first section would apply to acquisitions of property taking place after the enactment of this Bill. The second phrase of Section 2 of this Bill would make the benefits of this new statutory definition applicable to the determination of value in condemnation suits pending on the date of enactment of the Bill. This is only fair and just since no final determination of the "just compensation" due the landowner has been made: and the landowners who are currently contesting the question of "just compensation" with the government should not be left to cope with the confused state of the law and exposed to inequitable treatment which would occur if the new statutory definition were limited completely to future acquisitions. Since Senate Bill S-3815 would be remedial in nature, serving to amplify and clarify a previously existing statutory provision, there can be no doubt that Congress can, if it chooses, make this Bill applicable to the determination of value in pending condemnation suits.

As the Committee may have already deduced, I am representing a group of some sixteen individuals who owned in varying undivided interests some nine thousand (9,000) acres of land along the Trinity River in Chambers and Liberty County, Texas. This land has been condemned by the United States Government for the Wallisville Reservoir Project. What I have posed, therefore, as

hypothetical situations for the Committee's consideration, are painful realities to my clients. While by the very nature of things I cannot give this Committee specific figures, there is no doubt whatsoever that hundreds of other landowners are faced with this same painful reality; and unless this Committee takes favorable action on Senate Bill S-3815, there will be thousands of landowners in the future who will go through the shocking experience of having their land taken from them and receiving in return a fraction of its true value in the market.

Before concluding, let me anticipate what, from my experience with the Corps of Engineers, they will say by way of objections to this Bill. First, they will say, "if this Bill passes, the public will pay a lot more for its public works projects". The answer to that contention is simply that if the public has been paying less than market value for the land taken from private owners then the public should pay more. If the Corps of Engineers recognizes that Senate Bill 3815 will require them to pay more for land needed for public works projects, then they are impliedly, if not expressly, admitting that they have been paying less than "fair market value" in the past; for that is all Senate Bill 3815 requires, that "fair market value" nothing more, nothing less, be paid when riparian property is taken for public works. Secondly, the Corps of Engineers will object on the grounds that passage of this Bill will disturb their cost estimates of various projects underway or anticipated in the future. Again, the answer is, if these cost estimates have not kept abreast of what is happening to the market value of land in this country, then those cost estimates should be disturbed. When the economy is expanding, when the population is increasingly rapidly, when there is more and more leisure time for people to do more and more different things and when there is, as there inevitably is around large metropolitan areas, a changing economic use for lands, then then market value of land goes up, and this affects not only the land which the Federal Government wants for public purposes, but it affects the land that business wants for industrial and commercial uses, that residential developers want for homes and apartments and that schools and churches and hospitals and public utilities need for their various purposes.

I know that this Committee, the Senate and this Congress have many important matters pending before them, but among all these many important matters, there is none whose subject is of greater importance than the subject of Senate Bill 3815. For, as Justice McReynolds said in the early case of *Monongahela Navigation Company vs. United States*, "in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government."

Passage of S-3815 will clarify an area of law which has become clouded with legal conceptualism. Passage of S-3815 will reaffirm the sanctity of private property under our system of government. Passage of S-3815 will insure that justice and equity in the fullest sense of the term are the guiding principles for the taking by the United States of private property. Passage of S-3815 will guarantee that when the public needs private property for public purposes, the public will not load upon the owner of that property more than his just share of the burden of government; and when the public requires that some individual property owner must surrender to the public something more and different from that which is exacted from other members of the public, then a full and just equivalent shall be returned to him.

I urge this Committee to take favorable action upon Senate Bill S-3815 and include this Bill as part of the omnibus River and Harbors legislation to be reported to the Senate.

Thank you for giving me the opportunity to present this statement to the Committee.

AN ANALYSIS OF THE RANDS CASE

A. The Basic Reasoning of the Rands Opinion.

The reasoning used by the Supreme Court in the *Rands* case progresses through the following steps:

1. The superior navigational servitude of the United States Government permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss. *State of South Carolina v. State of Georgia*, 93 U.S. 4, 23 L.Ed. 782 (1876); *Gibson v. United States*, 166 U.S. 17 S.Ct. 578 (1897); *Scranton v. Wheeler*, 179 U.S. 141, 21 S.Ct.

48, 45 L.Ed. 126 (1900); and *United States v. Commodore Park, Inc.*, 324 U.S. 386, 65 S.Ct. 803, 89 L.Ed. 1017 (1945)).

2. Relying upon the navigational servitude doctrine, the Government may disregard the value arising from power site location in compensating an owner when fast lands are appropriated. *United States v. Chandler-Dunbar Water Power Co.*, 220 U.S. 53, 33 S.Ct. 687, 57 L.Ed. 1063 (1913); *United States v. Ticin City Power Co.*, 350 U.S. 222, 76 S.Ct. 259, 100 L.Ed. 240 (1956); and *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 81 S.Ct. 784, 5 L.Ed. 888 (1961).

3. There is no distinction between the value of land as a power site and its value as a port site; and since Congress could "completely regulate navigable waters to the exclusion of private port owners," to allow port site value as part of a landowner's compensation would be to allow value for a right the Government in the exercise of its dominant servitude can grant or withhold as it chooses.

4. Therefore, port site value need not be paid for when appropriated by the United States.

B. Rands—The Dominant Navigational Servitude Cases.

Turning first to the "dominant navigational servitude cases", a careful reading of *South Carolina v. Georgia*, *Gibson v. United States*, *Scranton v. Wheeler*, and *United States v. Commodore Par. Inc.*, *supra*, will show that the holding of non-liability on the part of the United States is premised and based upon the following essential elements:

1. The project work or activity undertaken by the United States had as its sole and exclusive purpose the improvement of navigation;

2. All of the work, activities and structures erected were within the carefully defined area covered by the navigational servitude, which is the area between normal high water line on one side of the water and normal high water line on the other side; and,

3. There was no physical invasion in any form of the high fast lands for which damages were sought to be recovered.

When all three of these elements exist the Courts have denied liability on the part of the United States even though some consequential damage to riparian rights may occur from the activities involved. But where one or more of these elements do not exist, the United States has been held liable to a damaged landowner. In *United States v. Kansas City Life Insurance Co.*, 330 U.S. 799, 70 S.Ct. 885 (1950), the Court made the distinction:

"It is not the broad constitutional power to regulate commerce, but rather the servitude derived from the power and narrower in scope that frees the government from liability in these cases." p. 890.

The concept of non-liability established by these cases is akin to the well recognized concept of non-liability on the part of states or political subdivisions thereof for the exercise of various police powers, such as zoning ordinances, regulating direction of traffic flow, or parking on public streets, and establishment of limited access freeways and throughways, all of which may have some incidental effects upon the uses to which property can be put or the access thereto. Whether the navigational servitude cases be rationalized upon the theory of "no taking" or upon the theory that the government activity merely subjects certain limited private rights to the public necessities to which they have always been subordinate, little objection can be raised to the policy of nonliability reflected by these holdings. The landowner involved still owns all of his fast lands together with all the other riparian rights not restricted by the government activity in the particular case. It is apparent that in the Rands case, the Supreme court did not recognize the specific limitations upon the non-liability navigational servitude doctrine; and as a result, erroneously concluded that the non-liability doctrine was coextensive with the constitutional power to regulate commerce, contrary to but without overruling the *Kansas City Life* case.

Under its powers to regulate commerce and provide for the general welfare, Congress has the power to undertake all sorts of multi-purpose projects; but simply because it has the constitutional power to perform the project does not and should not mean that it is exempt from liability to individuals whose private property is taken for such project. Conversely, the mere fact that, under certain limited circumstances, the Courts have concluded that the government should not be liable for indirect or consequential effects upon certain aspects of an individual's property, does not and should not mean that an individual's whole property

can be taken and discounted in value on the theory that under some other circumstances the government might not be liable for part of its actions resulting from the taking. But what the courts had created as a shield to protect the government from liability in a narrow field, the *Rands* opinion has converted into a "sword of Damocles" hanging over all riparian property, and by which the government may take private property and cut away elements of value which would be clearly recognized in any other condemnation situation.

C. *Rands*—The Power Site Cases.

The second element of the Court's opinion in the *Rands* case dealt with the "power site" cases and their effect upon the task of compensating riparian owners in eminent domain cases.

The earliest case dealing with the question of valuation of power site use in the context of Federal condemnation was *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 33 S. Ct. 667 (1913). After determining that the Chandler-Dunbar Company did not have any private property rights in the water power capacity of the rapids and falls of the St. Mary's River which would support the award of \$550,000 for the present money value of the rapids and falls to the Chandler-Dunbar Company as made by the Trial Court, the Supreme Court turned to a consideration of the awards made for the uplands taken in the same condemnation proceeding. The Trial Court awarded to the Chandler-Dunbar Company the following amounts for the respective areas of upland:

a. For an 8 acre strip, \$65,000 consisting of the following separate items:

(i) "For its value including railroad side tracts, buildings and cable terminal, including its use wholly disconnected with power development or public improvement, that is to say for all general purposes like residences or hotels, factory sites, disconnected with water power, \$20,000;"

(ii) "For use as a factory site in connection with the development of 6,500 horsepower either as a single site or for several factories to use the surplus of 6,500 horsepower not used in the city, an additional amount of \$20,000; and"

(iii) "For use for canal and lock purposes an additional value of \$25,000."

b. For the other small parcels a total sum of \$25,000 consisting of the following:

(i) "For general wharfage, dock and warehouse purposes disconnected with development of power in the rapids, \$10,000;"

(ii) "For its special value for canal and lock purposes an additional sum of \$10,000; and"

(iii) "In connection with the canal along the rapids if used as part of the development of 6,500 horsepower, an additional value of \$5,000." (p. 676)

In sustaining the exceptions of the United States to the values allowed in items a(ii) and b(iii) above, the Supreme Court stated that these "additional values were based upon the erroneous hypothesis that the company had a private property interest in the water power of the river, not possibly needed now or in the future for purposes of navigation, and that that excess or surplus water was capable by some extension of their works already in the river of producing 6,500 horsepower." Page 677. (emphasis added) The Supreme Court overruled, however, the exceptions of the United States to the values awarded in items a(iii) and b(ii) above, stating, "that this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use, had passed beyond the region of the purely conjectural or speculative." The Supreme Court in *Chandler-Dunbar* then went on to quote from the case of *Mississippi and Rum River Boom Co. v. Patterson*, 98 U.S. 403, 25 L. Ed. 208, as follows:

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable having regard to the existing business of wants of the community or such as may be reasonably expected in the immediate future." (p. 677)

It is interesting to note also that the awards for use of the upland taken for residences, hotels, factory sites, wharfage, dock and warehouse purposes as allowed in items a(i) and b(i) above were not objected to by the government and were sustained by the Supreme Court. In commenting upon the general question of rights of riparian owners, the Supreme Court in the *Chandler-Dunbar* case further stated:

"That riparian owners upon public navigable rivers have in addition to the rights common to the public, certain rights to the use and enjoyment of the stream, which are incident to such ownership of the bank, must be conceded. These additional rights are not dependent upon title to the soil over which the river flows, but are incident to ownership upon the bank. Among these rights of use and enjoyment is the right, as against other riparian owners, to have the stream come to them substantially in its natural state both in quantity and quality. They also have the right of access to deep water and when not forbidden by public law may construct for this purpose wharfs, docks and piers in the shallow water of the shore." (p. 674-675.)

The next Supreme Court case to consider directly the problem of power site valuation in condemnation cases was the case of *United States v. Twin City Power Co.*, 350 U.S. 222, 76 S.Ct. 259 (1956). The Commissioner appointed by the District Court involved in this condemnation proceeding made an award of compensation to Twin City based upon certain computations comparing the cost of producing electricity by the steam plant method and the cost of producing electricity by the water power of a hydroelectric dam. Under this theory the Commissioners determined that a buyer would pay for the land a sum equal to one-half of the capitalized cost differential between producing an assumed number of kilowatt hours of electricity annually by water power as opposed to steam power. 95 Yale L.J. 96, 98 n.17 (1955). In reversing both the District Court and the Court of Appeals who had affirmed the Commissioner's Award, the Supreme Court stated that this case was controlled by the *Chandler-Dunbar* case; and to attach a value of water power of the Savannah River due to location and to enforce that value against the United States would go contra to the teaching of *Chandler-Dunbar*—"that the running water in a great navigable stream is capable of private ownership is inconceivable." In discussing the question of valuing riparian rights, the Court said "that location of the land might under some circumstances gives them special value as our cases have illustrated." p. 262. But in this case as in the *Chandler-Dunbar* case, the Court stated that "it is the water power that creates the special value whether the lands are above or below ordinary high water." It is important to note in the *Twin City* case that the Court stated that a single question of valuation was presented:

"It is whether the just compensation which the United States must pay by force of the Fifth Amendment includes the value of the land as a site for hydroelectric power operations" (p. 260)

It is important to note further that in its opinion in the *Twin City* case, the Supreme Court carefully delineated the aspect of value being discussed as the "stream itself", "value in the flow of the stream", "value due to the flow of the stream", and "value added to fast lands if the flow of the stream were taken into account". It is obvious, therefore, that in the *Twin City* case the Supreme Court was dealing with some specific element of value and not with any generalized category of values; and this is further confirmed by the fact that in the *Twin City* case the Court noted at page 262 that that portion of the holding in the *Chandler-Dunbar* case which allowed compensation for the values of land for lock and canal purposes was distinguishable from the issue before the Court in the *Twin City* case. (76 S.Ct. at 262 n.1). Had the Court been intending to establish a broad general rule of valuation application to all elements of value relating to riparian location, it would have done so by clearly overruling the other parts of the *Chandler-Dunbar* holding which allowed compensation for lock and canal purposes and for wharf and dock purposes.

The next Supreme Court case dealing with the problem of power site valuation was *United States v. Virginia Electric & Power Co.*, 385 U.S. 624, 81 S.Ct. 784 (1960). In this case the United States sought to take by power of eminent domain a flowage easement upon certain fast lands which were already subject to a flow-easement held by the Virginia Electric Co. ("Vepco"). After the owner of the base fee in the lands settled with the Government for One (\$1.00) Dollar, the Commissioners awarded Virginia Electric Co., the only remaining party, a sum which excluded any element of value arising from the availability of the land for water power purposes. The United States Government contended, however, that the Virginia Electric Co.'s flowage easement had no compensable value at all and brought the case up on appeal to the United States Supreme Court. The Supreme Court spent considerable time in its opinion reviewing the various cases dealing

with the Government's dominant navigational servitude, and concluded its commentary with the following quotation:

"Thus just as the navigational privilege permits the government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, *United States v. Commodore Park*, 324 U.S. 386, 65 S.Ct. 803; *Scranton v. Wheeler*, 179 U.S. 141, 21 S.Ct. 48; and *Gibson v. United States*, 166 U.S. 269, 17 S.Ct. 578, it also permits the government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated" 81 S.Ct. at 788.

This quoted portion of the Court's opinion was pure dictum for the reason that the flowage easement of the Virginia Electric Co. had one and only one riparian use, and that was in connection with water power development; and both the government and the Virginia Electric Co. recognized that no value could be ascribed to this flowage easement because of that riparian use under the *Twin City* case. Consequently, the quoted portion of the Court's opinion above was wholly irrelevant to the issues before the Court since there was no riparian owner who had any other right of access to navigable waters before the Court. This quoted portion was, however, cited by the Supreme Court in the *Rands* case as a cornerstone of its holding; and consequently a careful analysis of this quoted portion is required.

First of all, the *Commodore Park*, *Scranton*, and *Gibson* cases did not deal with any problem of measure of damages but simply held that the Government was not liable at all to a riparian landowner when the Government exercises its navigational servitude within navigable waters and without physical invasion of the riparian land. Consequently, the first portion of this quoted dicta from the *Vepco* case creates the mistaken impression that a value question similar to that involved in condemnation proceedings was at issue in those cases. Secondly, this quoted dictum, coming at the end of a discussion of the holding in the *Twin City* case creates a mistaken impression that the *Twin City* case was based upon the reasoning reflected by the quoted dictum. However, as pointed out above, the *Twin City* case was determined on the same theory as the *Chandler-Dunbar* case, i.e. that a riparian owner does not own any interest in the "water power" or "flow of the stream" of a navigable river. Finally, the last portion of this quoted dictum states a conclusion never before drawn by the Supreme Court in dealing with the question of values to be compensated in a condemnation proceeding, and absolutely no cases, statutes or authority are cited in support of this conclusion, although the Court was purportedly reviewing the development of the law.

After this background discussion, the Court in the *Vepco* case turned to the specific questions before it, to-wit: determining whether the flowage easement taken by the Government had any value, and apportioning the value between the owner of the fee and the owner of the private flowage easement. After disposing of the Government's contention that the flowage easement of *Vepco* had absolutely no value and after approving the method used by the Trial Court to determine the value of the whole flowage easement taken by the Government, the Supreme Court turned to an analysis of the division of the whole value between the fee owner and the private flowage easement owner and stated:

"The guiding principle of just compensation is reimbursement to the owner for the property interest taken. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is entitled to no more. *Olson v. United States*, 232 U.S. 246, 54 S.Ct. 704, 78 L.Ed. 1235. In many cases this principle can readily be served by the ascertainment of fair market value—"what a willing buyer would pay in cash to a willing seller." *United States v. Miller*, 317 U.S. 360, 374, 63 S.Ct. 276, 280, 87 L.Ed. 336." (p. 790-791) (emphasis added.)

After holding that the Trial Court had allocated a maximum value to *Vepco*'s flowage easement which was not supported by the record, the Supreme Court adopted and quoted with approval the method of allocating values used by the Fifth Circuit in *Augusta Power Co. v. United States*, 278 F. 2d 1 (1960). This quote from the Fifth Circuit case indicates that if the power company had completed its project and permanently flooded the lands and the United States then condemned the project by taking a flowage easement, then all of the compensation would be payable to the power company; but that on the other hand, if various factors made it certain that the power company would never exercise its flowage easement, then the compensation would be payable to the fee owner. The quoted portion of the Fifth Circuit opinion then goes on to state:

"Between the two extremes just illustrated, the respective values of the fee and of the easement would fluctuate from time to time depending on the probability or improbability of actual exercise of the easement by the power company or its assigns. If all interested parties were before the court, the maximum which the United States would be required to pay would be the value of the lands, not including their value for hydroelectric power purposes. . . . It seems to us that the maximum compensation payable for the flowage easement under any conceivable circumstances is so much of the value of the lands for agricultural and forestry purposes and for any other purposes, not including hydroelectric power, as the easement owner had a right to destroy or depreciate." (p. 791, 792, emphasis added).

The Supreme Court in the Vepco case then added the following instructions to the Fifth Circuit's standards:

"It is to be emphasized that in assessing this improbability, no weight should be given to the prospect of governmental appropriation. The value of the easement must neither be enhanced nor diminished by the special need which the government had for it. *United States v. Cors*, 337 U.S. 325, 332-334, 69 S. Ct. 1086, 1090-1091, 93 L. Ed. 1392; *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 278, 87 L. Ed. 338; *Olson v. United States*, 292 U.S. 246, 261, 54 S. Ct. 704, 711, 78 L. Ed. 1236; *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76, 33 S. Ct. 667, 667, 57 L. Ed. 1063. The court must exclude any depreciation in value caused by the prospective taking once the government 'was committed' to the project. *United States v. Miller, supra*, 317 U.S. at pp. 376-377. 63 S. Ct. at p. 281; 63 S. Ct. at p. 281; see *United States v. Cors, supra*, 337 U.S. at p. 332, 69 S. Ct. at p. 1090. Accordingly, the impact of that event upon the likelihood of actual exercise of the easement cannot be considered. As one writer has pointed out, 'it would be manifestly unjust to permit a public authority to depreciate property values by a threat . . . [of the construction of a government project] and then to take advantage of this depression in the price which it must pay for the property' when eventually condemned. 1 Orgel *Valuation Under Eminent Domain*, § 105 at 447 (2nd Ed.); see *Congressional School of Aeronautics, Inc. v. State Roads Commission*, 218 Md. 236, 239-50, 146 A. 2d 558-565. (p. 792)

The latter quoted holding of the majority in the Vepco case was of extreme and crucial significance in the determination of the case; for otherwise, if, as the dissent in the Vepco case contended, the very act of the government in determining to undertake the project and condemning the flowage easement rendered it impossible for the power company to exercise its private flowage rights, then the theory of apportioning the compensation between the fee owner and the private flowage easement owner on the basis of the probability-improbability of the private flowage easement holder exercising its rights would have been rendered meaningless.

D. Conclusions with Respect to a Broad Reading of RANDS.

As pointed out previously in this memorandum, the *Rands* opinion erroneously construed the navigational servitude non-liability doctrine as being co-extensive with the power of Congress to regulate interstate commerce and navigable waters. In addition, I would point out for this Committee's consideration the following errors in the *Rands* opinion:

1. It misconstrues the holding in both the *Chandler-Dunbar* case and the *Tacoma City* case. As indicated above, both of these cases turned upon the holding of the Courts that the riparian landowner had no private property interest in the flow of the stream or its power producing capacity; and that therefore the riparian owner was not entitled to compensation for "the present dollar value of what is called 'raw water'" (*Chandler-Dunbar*) or the value "in the flow of the stream" as used in a capitalization of cost differentials of producing electricity by stream as opposed to by water power (*Tacoma City*). These cases hold there was no private property interest in the water; not that a private property interest in land was taken, but the United States was exempted from liability under the navigational servitude doctrine as the *Rands* opinion indicates.

2. The *Rands* opinion grossly overstates the constitutional powers of Congress in regard to navigable waters. In the *Rands* decision the Court states that Congress may constitutionally "regulate navigable streams to the total exclusion of private port owners"; and that the government may "in the exercise of its dominant servitude grant or withhold as it chooses" the right to develop a site as

a port. Surely the Supreme Court did not mean to say that Congress can grant or deny an application for a permit to erect a dock or wharf purely as it chooses, arbitrarily, capriciously or as a matter of whim. Certainly Congress could not grant a permit for dock purposes to one riparian owner and deny a permit to an adjacent owner whose waterfront is in identically the same situation as the party to whom the permit was granted. Does Congress really have the power to totally exclude private port owners from navigable waters? How could there be commerce on navigable waters without having "ports"? Could Congress under the *Rands* theory likewise totally exclude all private vessels? With reference to aspects of interstate commerce other than transportation by water, Congress clearly has exercised regulatory authority over interstate pipelines, interstate airways, interstate telephone, television and radio. Certainly this does not mean that Congress could regulate these interstate commerce activities as to totally exclude all private pipelines, all private airlines, all private telephone, television and radio operations. Thus, if the United States Government condemned the property of an interstate pipeline, it could not disregard any value arising from activities of the pipeline which the United States Government could totally exclude. In short, the *Rands* opinion did not include the concepts of "reasonableness" and "appropriateness" in considering the regulatory authority of Congress over navigable water. In the case of *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 46 S.Ct. 144 (1924), the Court stated:

"The right of the United States in the navigable waters within the several states is however 'limited to the control thereof for purposes of navigation.' *Port of Seattle v. Oregon Railroad*, 255 U.S. 56, 41 S.Ct. 237, 65 L.Ed. 500. And while Congress in the exercise of this power may adopt in its judgment any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, *United States v. Chandler-Dunbar Co., supra*, (33 S.Ct. 667), it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end. In *Yates v. Milwaukee, supra*, 504, it was said in reference to the right of a riparian owner on a navigable stream: 'This riparian right is property and is valuable and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired.' 269 U.S. at 419.

3. The *Rands* opinion obliterates the well recognized concept that property taken by the power of eminent domain is to be valued as it stood immediately prior to the taking; and overrules the well recognized concept that the act of the condemning authority in taking the property for a public purpose cannot in itself be a basis for depreciating the value of the property. At the time the Congress authorized the project which ultimately necessitated the taking of the property in the *Rands* case, that property was located on navigable waters and was factually susceptible for use as a port site and had in fact been so used in the past. There was no evidence or showing made that the government had ever refused to issue a permit for docks or wharves under 33 U.S.C. 403, nor was there any testimony or evidence that showed any physical, factual or navigational reason why such a permit would not be issued. But the Supreme Court held that the U.S. was not obligated to compensate for any port site value because Congress could completely exclude a private port owner from navigable water. There was no general statutory provision of Congress excluding all private port owners from navigable waters; and even assuming that Congress might constitutionally pass such legislation, Congress had not in fact done so. Thus, there are only two explanations for what the Court was saying in *Rands*: either (1) that value need not be paid for what Congress might in the future take away; or (2) value need not be paid for what Congress impliedly took away at the very time the project was authorized and the taking made necessary. Certainly the first of these explanations is the rankest sort of speculation which had been in condemnation cases. See *United States v. Powelson*, 319 U.S. 286, 63 S.Ct. 1047 (1943) where the Court states:

"The United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of the taking merely because it could destroy that value by appropriate legislation or regulation." p. 105.

Further, any speculative contention on the part of the landowner that Congress might at some time in the future pass legislation which would enhance the value of his property, would certainly not be tolerated. Neither should similar governmental speculation be given any weight.

The second of these explanations runs afoul of the well recognized concept that the act of the government in taking the property cannot be used as a basis for depreciating the value of the property (see quotes from *United States v. Virginia Electric Power Co.*, *supra*.) If, as the Supreme Court said in *Vepco*, "the landowner is entitled to be put in as good a position pecuniarily as if his property had not been taken", must not the quantum of property taken be determined as if the property had not in fact been taken; and if so, then the taking itself cannot be deemed to reduce the nature and extent of the property and its appurtenant rights as the Supreme Court permits in the *Rands* decision. A brief analogy to a similar situation might serve to demonstrate more clearly the injustice of the *Rands* decision. Suppose a city condemned a piece of property fronting on an improved public road. The city could not contend that the property should not be evaluated as having road frontage because the freeway which the city contemplates constructing on the taken property will result in the elimination of the old roadway.

4. The *Rands* decision is in direct conflict with the most recent Congressional expression of intent on the subject of compensation in taking of property for public uses. In 1960 the Congress passed the Land Acquisition Policy Act of 1960. Pub.L. 86-645, 74 Stat. 502. This Act was the Third Title of Public Law 86-645, with the First Title covering congressional authorization for various Rivers and Harbors improvements, Title II, covering congressional authorization for various flood control projects, and Title III stating the policy regarding "acquisition of Required Land". The provisions of Title III have been codified as 33 U.S.C. 596 and 33 U.S.C. 597. In 33 U.S.C. 596, the Congress states:

"It is declared to be the policy of Congress that owners and tenants whose property is acquired for public works projects of the United States of America shall be paid a just and reasonable consideration therefor."

In 33 U.S.C. 597 the Congress instructs the Secretary of the Army and the Corps of Engineers to advise owners in a project area regarding various matters, among which is:

"4.) payments for moving expenses or other losses not covered by appraised market value."

In the face of this statutory declaration of policy, the Court should not hold that the United States may acquire land "and disregard value arising from riparian location". If Congress had intended such a result, it would have mentioned in some way that landowners would not be compensated for riparian location in this very act, which was a part of a general act authorizing Rivers and Harbors and Flood Control projects, and which required the Corps of Engineers to make full disclosure of all matters dealing with compensation. To the contrary, Congress used the words "or other losses not covered by appraised market value" impliedly, if not expressly, indicating that "appraised market value" is the base standard for determining "fair and reasonable compensation". This Act reflects in general a policy on the part of the Congress that landowners are to be dealt with "fairly", "openly" and "reasonably" and not shortchanged in any way. The Supreme Court's language, however, could be interpreted to mean that in all cases an element of value, i.e. riparian location, which the Court acknowledged affected "market value", should be completely disregarded, even though the Court did not mention the existence of this statutory declaration of Congressional policy.

5. Finally, the *Rands* opinion is wrong and should be narrowly construed because it created a mythical fact situation for the purposes of determining value. The right of eminent domain is a harsh remedy regardless of the governmental entity which may be exercising the right. The exercise of this right creates one of the most fundamental conflicts between the state and the individual; and the principle of just compensation of all states is all that stands between the individual and confiscation of his property. Over many years of case law development, the concepts of "fair market value", "highest and best use", and "willing buyer—willing seller" have been evolved by the courts to insure that the principle of just compensation is accorded more than mere lip service. Where land is located is one of the most important, if not the most important, elements in determining its fair market value and the uses to which property can with reasonable probability be put are probably the second most important factor in determining value. But a broad application of the *Rands* opinion would mean that insofar as lands adjacent to navigable waters are concerned, these fundamental elements of location and potential use must be eliminated; and the land-

owner, his expert witnesses, and the trier of fact whether it be judge, jury or commissioners, are left to try to determine the value of a mythical piece of property having no relation to actual fact and existing only in some "never never land" where a willing seller would sell his property without considering the value of its location and without considering the most valuable purpose for which the land could be used. Further, it is pure sophistry to say, as the Supreme Court says in the *Rands* case, that on the one hand the navigational servitude of the United States does not extend beyond the high water mark and when fast lands are taken just compensation must be paid; but that on the other hand that just compensation must be reduced by any value arising from riparian location.

E. Reynolds, Rands, and the Resultant Confusion.

In light of a more recent Supreme Court pronouncement with respect to a "commerce clause" taking by the Federal Government, *United States v. Reynolds*, 90 S. Ct. 803 (1970), it is very unclear whether in takings pursuant to the commerce clause, which clause gives rise to the navigational servitude, value accruing to the condemned property because of riparian location is compensable or not.

Reynolds was a commerce clause ("flood control") case wherein the question primarily before the Court was whether the subject property was properly within the project's original scope. The relevance of this question was the resultant value differential that the landowner could take advantage of if his land was on the navigable waters created by the project as originally planned rather than just a parcel of land included in the original project with no waterfront projection to add to its value.

Thus, according to the Court:

"If on the other hand the acreage was outside the original scope of the project, its compensable value is properly measurable in terms of economic potential as a lakeside residential or recreational property. 90 S.Ct. at 808.

If, indeed, according to *Rands*, the navigational servitude of the commerce clause bars the landowner from asserting any claim for value accruing to land because of its riparian location, the question before the Court in *Reynolds* would have been a moot one. No extra value could accrue to the property because of its riparian location which the landowner could assert against the Federal Government whether it was part of the original project or not.

The *Reynolds* and *Rands* cases, then, create a situation of uncertainty with respect to the landowner's rights which must be clarified by legislative action.

Mr. De Moss. I have one final remark concerning the plat that is attached to my oral remarks. The inconsistency that would occur in the event you assume that rather than the Federal Government it was a State or local government which was condemning tract B. In that instance, that State or local government would not, even under the *Rands* decision of the Supreme Court, have any claim for disregarding any of the riparian value of this property.

Consequently, if a State or local government were condemning tract B, the just compensation which would have to be paid to the landowner would be something approximating the \$5,000 an acre which was paid for the adjacent properties.

We would add that when an individual's property is taken by the power of eminent domain, whether it be by the Federal Government or by the State or local government, and regardless of what the project is, he ought to receive the same basic consideration for it, the same basic compensation; and that basic compensation ought to be fair market value, including all of its highest and best uses for which the property is reasonably adaptable.

That would be what would be accomplished by Senate bill 3815, to make clear that it is the intention of Congress that when these lands are acquired, this measure would be used in compensating the private property owner.

Thank you very much for allowing me this opportunity.

Senator DOLE. With reference to the attachment, you are indicating that Tract A and Tract C were acquired for \$5,000 per acre in their original state or is that the value after improvements?

Mr. DE MOSS. No, I am indicating that they were sold as vacant land just like tract B was for \$5,000 an acre prior to any improvements or developments. Obviously, I have drawn the hypothetical situation in maybe extreme form, but to present the disparity in value that can result if you disregard riparian location and access to and utilization of navigable waters.

I think anyone who has been active in any way in the real estate market would certainly confirm that waterfront property, whether it be for recreation or residential type purposes or whether it be for industrial purposes, commands a higher value than nonwaterfront property.

Senator DOLE. It would be helpful if you defined the terms used in S. 3815—"reasonable probability, foreseeable future, navigational servitude"—

Mr. DE MOSS. Our written memorandum, we point out therein and discuss some of the specifics about the use of this terminology. These words have all been commonly used in case law opinions, particularly in connection with the question of highest and best use.

This is a historically well-recognized concept, that you need not be limited when you are valuing land to the present use.

Obviously, where the land is located in an area where economic uses of the land are changing, such as an expanding metropolitan area or a new industrial development—

Senator DOLE. But those words are defined in the more extensive brief made a part of the record?

Mr. DE MOSS. Yes, sir.

Likewise, the terminology "normal high water mark" is well established by case law as being the normal mark at which the river stands during its normal times excluding the flood stages of the spring and the extreme droughts of summer and fall.

Senator DOLE. Are you familiar with S. 1 which was introduced by 44 Senators and passed the Senate on October 27, 1969 and is now pending in the House. Title 3 of that bill deals specifically with uniform land acquisition policy.

Mr. DE MOSS. I am familiar with it. I hoped S. 1 would satisfy this problem. In my judgment, while it speaks with the same general philosophy of wanting to insure that the landowner is fairly and equitably dealt with, and while the bill does recognize some of the same concepts we talked about, highest and best use, for one, it does not deal with the question of the impact of the navigational servitude of the United States upon riparian lands. This was one of the bases on which the Supreme Court said that you could disregard these things.

Senator DOLE. Did you comment on title 3 of S. 1 in your memorandum?

Mr. DE MOSS. No; I did not. I made mention of the fact that I was aware of the existence of that bill and the tremendous amount of work that Senator Muskie had put in in background study of general condemnation practices and procedures.

I did not elaborate in any way as to whether that bill attempted to solve this problem. As I say, the reason S. 3815 has been introduced is that S. 1 does not expressly deal with the problem of either the navigational servitude, riparian location, or access to or utilization of navigable waters, which are the concepts that were involved in the Rand case.

Again I would point out that in the Reynolds case, a later case, a 1970 case, the Supreme Court said that the value of the property could be determined by its economic uses for lakefront, residential, and recreational property.

That phraseology and the Rand's case are just completely inconsistent. That is the reason we submit that this committee ought to state the public policy position of the Congress on the question of compensation.

Senator DOLE. It might be helpful if you would submit a brief memorandum to this committee, explaining the shortcomings of title 3 of S. 1. At the same time, you may want to consider submitting amendments to the House which would accomplish your objectives.

(The following statement was later supplied:)

SUPPLEMENTAL STATEMENT OF HAROLD D. DEMOSS, JR. IN SUPPORT OF SENATE BILL S-3815

Mr. Chairman and members of the committee, during my oral presentation at the hearing on S-3815 on June 18, Senator Dole inquired as to whether or not the substantive changes contemplated by S-3815 were already taken care of by the provisions of S-1, which the Senate passed last year and which is now pending before the House Public Works Committee. Also, Senator Dole inquired as to any shortcomings which I felt Title 3 of S-1 may have in regard to the problem of valuing riparian lands taken in condemnation; and suggested that I submit a Brief Memorandum to the Committee discussing the possible relationship between S-3815 and S-1.

I am submitting, therefore, this Supplemental Statement to give the Committee my thoughts in regard to these matters. First of all, as I pointed out during my oral presentation, the basic philosophy behind S-3815 and S-1 are identical. Both Bills seek to insure that full justice and equity are accorded to landowners whose property is taken by the power of eminent domain. In particular, I would call the Committee's attention to the following:

1.) Section 201 of Title 2 of S-1, dealing with uniform relocation assistance, states that it is the purpose of that Title to establish a uniform policy for the fair and equitable treatment of owners and other persons displaced by the acquisition of real property in federal programs "to the end that such persons shall not suffer disproportionate injuries as a result of the public as whole". This concept that the owner whose property is taken by eminent domain shall not suffer a loss or injury which other members of the public are not called upon to suffer has been frequently cited in numerous cases as one of the cornerstones of "just compensation".

2.) Section 301(a)(1) of Title 3 of S-1 states that transactions for the acquisition of real property shall be conducted so as to assure to the extent possible that persons whose property is acquired "shall not be worse off economically than they were before the property was acquired". Again, the courts have frequently used language almost identical to this in recognizing that "just compensation" means that the owner whose land is taken by eminent domain shall be left in the same economic position he was in immediately prior to the taking; and to the extent that fair market value indicates the economic benefits which the owner might have realized had the property not been taken, that value insures that the owner will receive the full equivalent of the economic benefits which were inherent in his property prior to the taking.

Both of these concepts, i.e., that the owner should not suffer any unique or disproportionate injury or loss and that he should not be worse off economically

than before his property was taken, are elements of "fair market value" which is specified as the standard in S-3815. To that extent, S-3815 simply states expressly the measure of damages which S-1 defines indirectly.

3.) Finally, Section 301(a)(4) of Title 3 of S-1 provides that no increase in the value of real property prior to the date of valuation "caused by the public improvement for which the property is acquired or by the likelihood that the property would be acquired for the proposed public improvement" will be considered in determining the compensation for the property. This again is a concept which has been regularly recognized by the courts as being necessary to insure that the landowner gets "fair market value". In this connection, S-3815 which specifies that the exercise of any navigational servitude of the United States involved in the taking itself or any potential future exercise of such servitude will be disregarded in determining the value of the land taken, simply states a specified instance of a decrease in value caused by the public improvement which S-1 prohibits in general terms.

For the foregoing reasons, I believe it is apparent that S-1 and S-3815 are completely compatible as far as their basic philosophy; and those who supported and voted for S-1 should certainly have no objection to S-3815 on the grounds of the fundamental concepts underlying both Bills.

Turning now to the question of whether there are any inadequacies in S-1, I would point out that I have reviewed S-1 exclusively from the standpoint of the problem of valuing lands taken along navigable waters for Public Works Projects of the United States. In this area, the basic problem is that the Corps of Engineers and the Department of Justice take the position that in the case of *U.S. v. Rands*, the Supreme Court said the United States need not pay any value for riparian property which results from its riparian location or access to or utilization of navigable waters even though the later case of *U.S. v. Reynolds* casts serious doubt as to the broad application of the *Rands* decision. S-3815 was drafted to meet this problem head-on and makes expressly clear the intention of Congress that riparian value shall be included in the determination of market value of land taken along navigable waters. Does S-1 solve this same problem? There are three provisions of S-1 which, in my judgment, raise considerable doubt that it does solve this problem of valuing riparian lands.

First and most important, Section 301(b) of Title 3 of S-1 states "the provisions of this Section shall not affect the validity of any property acquisitions by purchase or condemnation". Perhaps this provision was intended to prevent the passage of S-1 from reopening and casting question upon previously completed acquisitions of property by purchase or condemnation. If so, then it would seem that the phrase "completed prior to the passage of this Act" should have been inserted at the end of Section 301(b). As it now stands, however, Section 301(b) would seem to seriously dampen the effect of the substantive policy expressions contained in the preceding part (a) of Section 301. Pursuant to Section 301(b) a federal agency might completely disregard the substantive policy changes contemplated by Section 301(a) in a property acquisition by purchase or condemnation, citing Section 301(b) as authority for the proposition that the proceedings which disregarded 301(a) are completely valid. In short, it appears that the provisions of Section 301(b) might render the provisions of Section 301(a) totally ineffective by leaving open the possibility that the court could interpret that Section as an expression of congressional policy that the federal agencies *ought* to follow but which they were under no legal obligation to follow.

Secondly, Title 3 of S-1 is inadequate in that it does not expressly define the standard by which just compensation will be determined. As indicated earlier in this statement, Section 301(a) does use language which the courts have recognized as being attributes of fair market values; but nowhere in Section 301(a) does the terminology "fair market value" expressly appear. While Section 301(a)(3) requires that the property be appraised and Section 301(a)(4) requires that the initial offer be an amount not less than the appraised value, there is no mention as to the standard by which the property will be appraised. Consequently, if in the instance of land taken for a Rivers and Harbors project, the Corps of Engineers instructs its appraisers to appraise the property "disregarding any value attributable to riparian location or access to navigable waters", there is nothing in Title 3 of S-1 which would indicate that this was not consistent with legislative intent.

Finally, if S-1 were passed by the Congress and S-3815 were not passed, the courts might not conclude that Congress intended to make a change in the specific area of valuing riparian lands. In this connection, I call the Committee's attention to Section 322 of S-1 which specifies that Sections 401, 402 and 403 of Housing and Urban Development Act of 1965 and Section 35 of the Federal Aid Highway Act of 1968 are repealed. To the extent that the repealer provisions of any statute reflect the areas of the law in which Congress intends to effect a change, these repealer provisions of S-1 might be construed by the courts as limiting the effect thereof to property taken for Housing and Urban Development projects and for Federal Highway Projects. S-3815, on the other hand, proposes an amendment to Section 301 of the Land Acquisition Policy Act of 1960 which was passed by Congress as part of the Omnibus Rivers and Harbors legislation for that year and which has been codified in 33 U.S.C. 506, which is the title of the U.S. code dealing with navigable waters. The passage of S-3815, therefore, would directly and expressly indicate the intent of Congress in regard to the valuation of riparian lands taken for Public Works projects; and there would be no room for judicial confusion, such as that created by the conflict between the *Rands* and *Reynolds* decisions, as to the intention of Congress in authorizing Rivers and Harbors and flood control projects.

For all of the foregoing reasons, I would submit for the Committee's consideration the following conclusions:

- a.) There is no fundamental conflict or inconsistency between the provisions of S-1 and S-3815 and passage of both Bills would be completely consistent with a congressional intent to insure fair and just treatment for landowners whose property is taken by eminent domain; and
- b.) The specific problem dealt with by S-3815 is not already adequately dealt with by the broader provisions of S-1; and in order to insure fair and just treatment for riparian landowners, S-3815 should be passed by the Senate.

I appreciate the opportunity accorded me by the Committee of submitting this Supplemental Statement.

Senator DOLE. Mr. Sylvia?

STATEMENT OF ROBERT SYLVIA, ESQ., BOSTON, MASS.

Mr. SYLVIA. I am Robert F. Sylvia, an attorney from Boston, Mass. I, too, have submitted to the subcommittee a written statement which is going to be, I hope, made part of the record.

That being the case, I do not intend to belabor the committee by reading that to you now. I will endeavor, if I can, to highlight a couple of the things which I think are significant and try not to repeat what Mr. De Moss has said.

My involvement in this case I think illustrates the very human problem created by the Rand decision. Our firm was retained to represent a landowner in New Bedford whose property has been taken for a part of the New Bedford-Fair Haven hurricane barrier project, designed to restrict the hurricane flood tides from causing flood damage in downtown New Bedford which has been rather extensive over the years.

Mr. Travers owned a piece of property with a pier on it. The Government took it. It was a recognized beneficial project for the area so nobody could have any complaint about that. What happened afterwards however does in my opinion give rise to some cause for complaint.

We entered an appearance in the litigation resulting from the condemnation. There was a good deal of controversy which is outlined in my prepared remarks about the effect of this case and the various Federal decisions on the manner in which the Government would

AO-10
Rev. 1/91

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-154, section 311, 10 U.S.C.
(§ 55101-112)

1. Person Reporting (Last name, first, middle initial) DeMOSS, HAROLD R. JR.	2. Court or Organization U. S. Court of Appeals for the 5th Circuit	3. Date of Report June 28, 1991
4. Title (Article III Judges indicate active or senior status; Magistrate judges indicate full- or part-time) Judge, Active	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date 6/27/91 <input checked="" type="checkbox"/> Initial Annual Final	6. Reporting Period January 1, 1990 to May 31, 1991
7. Chambers or Office Address 2900 South Tower, Pennzoil Place Houston, Texas 77002		

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

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

<u>POSITION</u>	<u>NAME OF ORGANIZATION/ENTITY</u>
<input type="checkbox"/> NONE (No reportable positions)	
1. Partner	Bracewell & Patterson, law firm, Houston, TX
2. Partner	B & P Co., investment partnership, Houston, TX

(continued on page 4)

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

<u>DATE</u>	<u>PARTIES AND TERMS</u>
<input type="checkbox"/> NONE (No reportable agreements)	Partnership Agreement of Bracewell & Patterson provides for future payments after my withdrawal or retirement from the firm based upon a percentage of average income of four highest years of income. Precise amount of monthly payments not yet determined.

(continued on page 4)

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

<u>DATE</u> (Honors only)	<u>SOURCE AND TYPE</u>	<u>GROSS INCOME</u> (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income)		
1	Bracewell & Patterson - partners distribution 1990	\$ 279,435.00
2	Bracewell & Patterson - partners distribution 1991	\$ 106,000.00 (est)
3	Sun Refining Co. - oil and gas royalties 1990	\$ 1,120.00
4	Sun Refining Co. - oil and gas royalties 1991	\$ 250.00 (est)
5		\$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting HAROLD R. DeMOSS, JR.	Date of Report June 28, 1991
---	---------------------------------

IV. REIMBURSEMENTS and GIFTS – transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals '(S)' and '(DC)' to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of instructions.)

SOURCE	DESCRIPTION
<input type="checkbox"/> NONE (No such reportable reimbursements or gifts)	
1 Exempt	
2	
3	
4	
5	
6	
7	
8	

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals '(S)' and '(DC)' to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of instructions.)

SOURCE	DESCRIPTION	VALUE
<input type="checkbox"/> NONE (No such reportable gifts)		
1 Exempt		\$ _____
2		\$ _____
3		\$ _____
4		\$ _____

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical '(S)' for separate liability of spouse, '(J)' for joint liability of reporting individual and spouse, and '(DC)' for liability of a dependent child. See pp.16-18 of instructions.)

CREDITOR	DESCRIPTION	VALUE CODE
<input type="checkbox"/> NONE (No reportable liabilities)		
1 O.N.Baker, Attorney at Law Inc.		
2 Employees Profit Sharing Trust (J)	Mortgage on rental condo units	N
3 First Interstate Bank (J)	Unsecured notes	K
4		
5		
6		
7		

* VALUE CODES: J = \$15,000 or less; I = \$15,001 to \$50,000; L = \$50,001 to \$100,000; M = \$100,001 to \$250,000;
 K = \$250,001 to \$500,000; C = \$500,001 to \$1,000,000; P = None: Other: \$1,000,000+

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

HAROLD R. DeMOSS, JR.

Date of Report

June 28, 1991

VII. INVESTMENTS and TRUSTS - income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)

A. Description of Assets (including trust assets) Indicate, where applicable, owner of the asset by marking the appropriate "(C)" for joint ownership or reporting individual and spouse, "(S)" for separate ownership, spouse, "(D)" for ownership by dependent child.	B. Income during reporting period		C. Gross value at end of reporting period		Transactions during reporting period							
	(1) Accts. Code# (A-D)	(2) Type (div., renter, int.)	(1) Value Code# (3-5)	(2) Value Method Code# (Q-R)	(1) Accts. Code# (A-D)	(2) Dividend/ Interest Rate	(3) Accts. Code# (A-D)	(4) Value Code# (3-4)	(5) Accts. Code# (A-D)	(6) Value Code# (3-4)	(7) Accts. Code# (A-D)	
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)												
¹ Eight Condo Units - Rent Property, Houston, TX	E	rent	N	R								
² Kemper Clearing Corp. * (J) Acct.No.UW74-2358-1094	B	div.	K	T								
³ Kemper Clearing Corp. * (S) Acct.No.UW74-2358-1110	D	div./ int.	M	T								
⁴ Kemper Clearing Corp. (S) Acct.No.UW74-2358-1096	A	div.	L	T								
⁵ Merrill Lynch * No. 582-15E85	B	div./ int.	K	T								
⁶	B	int.	K	T								
⁷	A	int.	J	T								
⁸	B	int.	K	U								
⁹												
¹⁰												
¹¹												
¹²												
¹³												
¹⁴												
¹⁵												
¹⁶												
¹⁷												
¹⁸												
¹⁹												
²⁰												

1 Income/Gain Codes: A=\$1,000 < less
(See Col. E1 & D4) E=\$15,001 to \$50,000
F=\$50,001 to \$100,000 G=\$100,001 to \$1,000,000 H=\$1,001 to \$10,000,000
I=\$10,001 to \$100,000 J=\$100,001 to \$1,000,000 K=\$1,001 to \$10,000,000
L=\$10,001 to \$100,000 M=\$100,001 to \$1,000,000 N=\$1,001 to \$10,000,000
2 Value Method Codes:
1=Appraisal
(See Col. C1 & D3) U=Cost (real estate only)
2=Book Value V=Licenses
(See Col. C2) W=Other Y=Estimated Z=Cash/Market

* See attached monthly reports for specifics of current holdings

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
HAROLD R. DeMOSS, JR.	June 28, 1991

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report)**I. POSITIONS (continued)**

3. Partner	Piping Rock Investors, investment partnership, Houston, TX (closed 12/31/89)
4. Trustee	McGregor Children's Trust, Houston, TX
5. Independent Administrator with Will Annexed	Estate of Harold R. DeMoss, Deceased, Houston, TX
6. Vice President	PGB Funding, Inc., Houston, TX
7. Director	Family Service Center, Houston, TX
8. Council Member	Administrative Conference of the U.S., Washington, D.C.

II. AGREEMENTS (continued)

2.	401(K) Plan of Bracewell & Patterson permits continuation of my participation in plan after withdrawal or retirement, but with no future contributions to the Plan. Withdrawal payments must begin when I reach age 70-1/2 and permissive withdrawal of all or some portion of funds now vested in my account may occur upon my departure from the law firm or at any later time before mandatory withdrawal payments begin.
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IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(C), in the outcome of such litigation.

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.A. app. 7, § 501 et seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature

Date

June 29, 1991

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.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

Kemper SECURITIES

Lovett Underwood Neuhaus & Webb Division

STATEMENT

ACCOUNT	TAX ID	STATEMENT PERIOD	PAGE
UW74-2358-1094	452-40-1253	5/01/91 - 5/31/91	1 OF 2

HAROLD R DEMOSS JR
2900 SOUTH TWR PENNZOIL PLACE
HOUSTON TX 77002

ACCOUNT EXECUTIVE

HARRY WEBB
LOVETT UNDERWOOD NEUHAUS &
WEBB
P O BOX 4348
HOUSTON TX 77210
713-653-2162

NET VALUE SUMMARY

Priced Portfolio Value	25,005.97
Money Market Balance	.00
Net Money Balance	.00
NET VALUE	25,005.97

MONEY BALANCE SUMMARY

ACCOUNT	OPENING BALANCE	CLOSING BALANCE
Cash	.00	.00
Margin	.00	.00
BALANCE	.00	.00

INCOME AND EXPENSE SUMMARY

DESCRIPTION	THIS PERIOD	YEAR-TO-DATE
Dividends	58.50	361.79
TOTAL INCOME	58.50	361.79

SECURITIES PORTFOLIO VALUATION

TYPE	LONG	SHORT	DESCRIPTION	SYMBOL	PRICE	VALUE
1	812.062		KEMPER MUNI INC TR SHARE BENEFICIAL INT	KTF	11.8750	9,643.47
1	300		PEPSICO INCORPORATED	PEP	31.3750	9,412.50
1	200		WESTINGHOUSE ELECT CORP	WX	29.7500	5,950.00
				TOTAL		25,005.97

ACTIVITY DETAIL

DATE	TYPE	ACTIVITY	QUANTITY	DESCRIPTION	PRICE	DEBIT	CREDIT
5 06	1	Dividend		KEMPER MUNI INC TR SHARE BENEFICIAL INT			58.50

in account with Kemper Clearing Corp.
Members New York Stock Exchange
and other principal exchanges



KEMPER SECURITIES

Lovett Underwood Neuhaus & Webb Division

STATEMENT

ACCOUNT

UW74-2358-1094

HAROLD R DEMOSS JR

STATEMENT PERIOD

5/01/91 - 5/31/91

PAGE

2 OF 2

ACTIVITY DETAIL - CONTINUED

DATE	TYPE	ACTIVITY	QUANTITY	DESCRIPTION	PRICE	DEBIT	CREDIT
5 06 1	Reinvestment		5.096	KEMPER MUNI INC TR SHARE BENEFICIAL INT			
5 06 1	Dividend			DIV REINVEST @ \$11.48/SH		58.50	

FOR YOUR INFORMATION

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in account with Kemper Clearing Corp.
Members New York Stock Exchange
and other principal exchanges





Lovett Underwood Neuhaus & Webb Division

STATEMENT

ACCOUNT	TAX ID	STATEMENT PERIOD	PAGE
UW74-2358-1110	452-40-1253	5/01/91 - 5/31/91	1 OF 2

HAROLD R DEMOSS JR
SEPARATE PROPERTY
2900 S TOWER PENNZOIL PLACE
HOUSTON TX 77002

ACCOUNT EXECUTIVE

HARRY WEBB
LOVETT UNDERWOOD NEUHAUS &
WEBB
P O BOX 4348
HOUSTON TX 77210
713-653-2162

NET VALUE SUMMARY

Priced Portfolio Value	82,022.00
Money Market Balance	56,145.33
Net Money Balance	.00
NET VALUE	138,167.33

MONEY BALANCE SUMMARY

ACCOUNT	OPENING BALANCE	CLOSING BALANCE
Cash	.00	.00
Margin	.00	.00
BALANCE	.00	.00

MONEY MARKET FUND SUMMARY

FUND	OPENING BALANCE	CLOSING BALANCE	AVERAGE YIELD	DIVIDEND PERIOD
CEF - Tax Exempt Fund	55,961.28	56,145.33	3.96%	4/15 - 5/15

INCOME AND EXPENSE SUMMARY

DESCRIPTION	THIS PERIOD	YEAR-TO-DATE
CEF - Tax Exempt Portfolio	184.05	831.08
Dividends	120.00	567.00
Interest - Municipal	.00	875.00
TOTAL INCOME	304.05	2,273.08

SECURITIES PORTFOLIO VALUATION

TYPE	LONG	SHORT	DESCRIPTION	SYMBOL	PRICE	VALUE
1	200		BRISTOL-MYERS SQUIBB CO	BMY	80.7500	16,150.00
1	100		COMPAQ COMPUTER CORP	CPQ	38.2500	3,825.00
1	300		EDEXX CORP	XON	58.2500	17,475.00
1	200		HERSHEY FOODS CORP	HST	43.8750	8,775.00

in account with Kemper Clearing Corp.
Members New York Stock Exchange
and other principal exchanges



Kemper
SECURITIES

STATEMENT

Lovett Underwood Neuhaus & Webb Division

ACCOUNT

STATEMENT PERIOD

PAGE

UW74-2358-1110

HAROLD R DEMOSS JR

5/01/91 - 5/31/91

2 OF 2

SECURITIES PORTFOLIO VALUATION - CONTINUED

TYPE	LONG	SHORT	DESCRIPTION	SYMBOL	PRICE	VALUE
1	100		MINNESOTA MINING&MFG CO	MM	95.2500	9,525.00
1	25000		HARRIS CNTY TEXAS RD SER B UT CPN 7.000% DUE 10/01/98 DTD 1/01/88 CALL 10/01/97 @ 100.000		105.0880*	26,272.00

TOTAL 82,022.00

* - The price shown is derived from a pricing formula. For current market prices contact your account executive.

ACTIVITY DETAIL

DATE	TYPE	ACTIVITY	QUANTITY	DESCRIPTION	PRICE	DEBIT	CREDIT
5 01	1	Dividend		BRISTOL-MYERS SQUIBB CO			120.00
5 02	1	Check Issued		DIV ISS #D 312520		120.00	
5 16	1	Dividend	184.05	REINVESTED DIVIDEND TEF AS OF 5/15/91			

FOR YOUR INFORMATION

Did you know your account is insured up to \$10,000,000? As a client of Kemper Securities Group you enjoy the benefits of this increased insurance coverage. (Includes \$500,000 SIPC coverage of which no more than \$100,000 can be in cash, and an additional \$9,500,000 coverage for securities.)

in account with Kemper Clearing Corp.
Members New York Stock Exchange
and other principal exchanges





CMA Cash Management Account
Identity Statement

Summary Page			
Account No. 262-1325	Turner, No. N22-40-1253	Page 1 OF 4	Statement Period 03/29/91 TO 04/26/91
Your Financial Consultant JAMES L COFFEE JR (713) 658-1200	Office Serving Your Account 2100 FIRST CITY TOWER HOUSTON TX 77002	Questions? Call Your Financial Consultant OR 1-800-CMA-INFO	

HAROLD R DE MOSS, JR
CO BRACHELL & PATTERSON
2000 SOUTH TOWER
PEMBIL PLACE
HOUSTON TX 77002

1

April 1991

1

539

Account Status		As of 04/26/91		As of 05/26/91	
CHA MONEY ACCOUNTS	CASH	\$527.00	\$1.19	\$510.00	\$0.77
SUBTOTAL PRICED INVESTMENTS		\$528.19	\$15,983.00	\$530.77	\$16,444.00
PRICED Portfolio (Some holdings may not be priced)		\$16,463.19		\$16,974.77	
PURCHASING POWER		\$1,981.00	\$1,371.00	\$2,119.00	\$1,551.00
Dividend and Interest Income					
DIVIDENDS (REPORTABLE)		\$2.58	\$0.00	\$10.91	\$290.75
DIVIDENDS (NOT REPORTABLE)					
Total Dividend and Interest Income		\$2.58		\$381.66	
EFFECTIVE YIELD FOR THE PERIOD 03/28/91 TO 04/25/91 CHA MONEY FUND: 6.11%					

Account Activity		The Statement	
Credits		INVESTMENTS SOLD	\$0.00
		DIVIDEND/INTEREST INCOME	\$2.58
		FUNDS RECEIVED	\$0.00
		OTHER CREDITS	\$0.00
		TOTAL CREDITS	\$2.58
Debits		INVESTMENTS BOUGHT	\$0.00
		CHA CHECKS	\$0.00
		VISA CARD TRANSACTIONS	\$0.00
		INTEREST CHARGED	\$0.00
		FEES CHARGED	\$0.00
		OTHER DEBITS	\$0.00
		TOTAL DEBITS	\$0.00
Net Activity			+\$2.58
Year to Date			
The Statement			

SEE THIS MONTH'S NEWSLETTER FOR NEW INVESTMENT OPPORTUNITIES WITHIN YOUR CMA ACCOUNT AND ABOUT THREE FREE SERVICES THAT CAN HELP YOU MANAGE YOUR MONEY BETTER.

EFFECTIVE YIELD FOR THE PERIOD 03/28/91 TO 04/25/91
CHA MONEY FUND: 6.11%

Apr 11 1991

Merrill Lynch, Pierce, Fenner & Smith Inc.
Member, Securities Investor Protection Corporation (SIPC)
Call your broker
or write now to: Merrill Lynch, Pierce, Fenner & Smith Inc., One Wall Street, New York, NY 10005.

FINANCIAL STATEMENT

HAROLD R. DeMOSS, JR.

March 31, 1991

ASSETS:

Cash in Bank	\$ 7,500.00
General Partnership Interests:	
Bracewell & Patterson (law) *(1)(3)	410,730.00
Bracewell & Patterson & Co. (Investments) *(2)(3)	5,097.00
Limited Partnership Interests:	
Sowell 693 Ltd. (cost)	15,225.00
Stocks and Bonds:	
Merrill Lynch, Houston #582-15E85	16,463.00
Lovett Mitchell Webb, Houston	
Acct. No.: 2358-1094	25,647.00
Acct. No.: 2358-1110	138,293.00
Bracewell and Patterson Pension and Profit Sharing Plan	434,756.00
American Capital OTC - IRA Account	10,200.00
Cash Surrender Value Life Insurance (Net of Loans)	85,039.00
Residence, 6231 Valley Forge, Houston Lot 4, Block 7, Tanglewood, Sec. 14	325,000.00
Bay Home, Lots 42, 43, and N 1/2 Lot 44 Sec. 19, Jamaica Beach	160,000.00
1987 Oldsmobile Station Wagon	5,000.00
1987 Buick Riviera	7,000.00
Boat	7,500.00
8 Condo Units, Townhomes on the Park, Houston	<u>275,000.00</u>
TOTAL ASSETS:	\$1,928,450.00

LIABILITIES:

Mortgage on Residence (4)	\$ 91,500.00
Mortgage on Bay Home (5)	94,200.00
Mortgages on Condo Units (6)	333,750.00
First Interstate Bank Notes (condos & car)	<u>27,000.00</u>

TOTAL LIABILITIES: \$546,450.00

NET WORTH: \$1,382,000.00

I certify that the foregoing statement constitutes a true and correct account of my financial conditions.


HAROLD R. DEMOSS, JR.

***NUMBERED NOTES TO FINANCIAL STATEMENT:**

- (1) Net interest in Bracewell & Patterson, law partnership, as of 12-31-90 (latest available information), the valuation being based on benefits payable upon withdrawal. A valuation based on benefits payable on death would be \$1,194,439.00. Partnership arrangements and information do not yield a valuation of my interest based on continued participation in the ongoing partnership. A valuation to give effect to the continuing business operations of the firm and my continued participation based on the customary multiple of three times annual earnings for the last fiscal year would be:

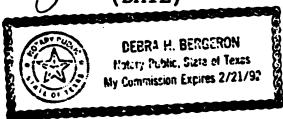
\$839,634.00 (\$279,878.00 X 3 = \$839,634.00)

- (2) Net interest in Bracewell & Patterson and Co., an investment partnership, as of 10-1-90 (latest available information).
- (3) As a Partner in the law firm of Bracewell & Patterson and its affiliate investment partnerships, I share joint and several liability with all of the other partners to third parties for the debts, lease obligations, and other commitments of these entities. This personal liability is limited by the utilization of revenues and assets of these entities to discharge their respective business obligations and my right to contribution and indemnity from all other partners if I am ever called on to respond financially in an amount in excess of my pro rata share of any unsatisfied business obligations.
- (4) Payable to NCNB Texas Mortgage Corporation, Loan Number 7506462, P. O. Box 353, Louisville, Kentucky 40201.
- (5) Payable to Fleet Funding, Loan Number 0030029017, Department 402, Denver, Colorado 80281-0402.
- (6) Payable to O. N. Baker, Attorney at Law, Inc., Employees Profit Sharing Trust, 5901 Allday, Houston, Texas 77036.

AFFIDAVIT

I, Harold Raymond DeMoss, Jr., do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

June 28, 1991
(DATE)



Harold R. DeMoss
(NAME)

Debra H. Bergeron
(NOTARY)

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name: Rebecca Gayle Feeney Doherty.
2. Address: 636 Alonda Drive
Lafayette, Louisiana 70503 Home

102 Versailles Blvd., Suite 600
Post Office Drawer 3507
Lafayette, Louisiana 70502 Office
3. Date and place of birth: June 3, 1952, Fort Worth, Texas.
4. Marital Status: Divorced.
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Northwestern State University of Louisiana
Graduated 1973, Bachelor of Arts Degree in Speech and English,
Master of Arts Degree in Speech, 1975

Louisiana State University Law Center
Graduated 1981, Juris Doctorate

Law School of Vermont
Environmental Law Center, Summer of 1989
Audited the following courses:

Science, Risk and Law of Toxics
Environmental Law
Law of Hazardous & Toxic Pollutants
Wildlife & Forestry Law
Biotechnology Law & Policy
CERCLA
Coastal Zone Management
Environmental Problems in Real Estate Development

No degree was sought, rather, it was the firm's decision for my partner and I to audit the necessary courses to form the basis for an environmental law practice.

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

Graduate Assistant and temporary part-time instructor at Northwestern State University, Natchitoches, Louisiana from 1974 - 1975.

Substitute taught at Cotton Valley High School, Cotton Valley, Louisiana from 1/76 - 9/76 while my son was young.

Taught English at Plain Dealing High School, Plain Dealing, Louisiana from 9/76 - 5/77.

I taught and acted as supervisor for the secondary level gifted and talented program in the northern portion of Webster parish from 9/77 - 5/78.

Upon graduation from law school in 1981 I joined the law firm of Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell, became a partner in 1984 and have remained with them to present.

Dorscott Enterprises was a small partnership entered into with Helen Scott Johnson in 1990 which has been dissolved. The nature of the business was sales. I supplied cash for the initial investment as a passive investment. I had no duties in the enterprise other than supplying the initial infusion of cash.

7. Military Service: None.

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

I attended undergraduate school on a journalism and academic scholarship.

Order of the Coif, 1981

LSU Law Review, 1980, 1981

LSU Law Center Hall of Fame, inducted 1987

Phi Kappa Phi, 1971 - 1975

Alpha Lambda Delta, 1970 - 1971

American Jurisprudence Award for Excellence in Criminal Law, 1979 or 1980

17th Edition of Who's Who of American Women

First Edition of Who's Who in Practicing Attorneys

Editor of The Northwestern State University Annual - three (3) years

I was selected by my fellow law partners to occupy a permanent position on the Steering Committee - the only permanently seated committee within the law firm.

I was asked to present a paper and presentation on seaman status for the Paul M. Hebert Law Center Maritime Personal Injury Seminar held on October 19 - 20, 1990 on "Who is a Seaman Now?".

I was asked to present a paper and presentation for the American Trial Lawyers Convention to be held on July 22 - 23, 1991 in Toronto, Canada on The Longshore and Harborworker's Compensation Act: Current Developments under §905(b).

I was asked to present a discussion and presentation on trial litigation for the Arkansas Bar Association held November 6, 1987.

I was asked to present a discussion and presentation for a seminar sponsored by Hospital Services of Louisiana, Inc. on infectious waste, 1989.

I was asked to present a discussion and presentation for a National Business Institute seminar entitled "Hazardous Waste in Louisiana", December 1990.

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

Lafayette Bar Association
Louisiana Bar Association
American Bar Association
Acadiana Association of Women Attorneys
Louisiana Trial Lawyers Association
Louisiana Association of Defense Counsel

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

Lobbying organizations:

World Wildlife Fund
Amnesty International - one (1) year
Greenpeace - one (1) year

Other organizations:

Order of the Coif, 1981
LSU Law Review, 1980, 1981
Phi Kappa Phi
Alpha Lambda Delta
Phi Mu Sorority - Officer, Alumni advisor (one year)
Kappa Sigma (Court)
Lafayette Chamber of Commerce
Noetic Sciences
Lafayette Community Theater
Davis Players - a college thespian society
Lafayette City Club
Acadian Association of Women Attorneys

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

State of Louisiana	1981
United States District Court	
Western District of Louisiana	1981
United States District Court	
Eastern District of Louisiana	1981
United States District Court	
Middle District of Louisiana	1981
United States District Court	
Southern District of Texas	1986
United States District Court	
Eastern District of Texas	1989
United States 5th Circuit Court of Appeals	1981
Supreme Court for the State of Louisiana	1981

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

- 1) "Rakas v. Illinois: The Fourth Amendment Revisited", Louisiana Law Review, 1980.
- 2) "Death on the High Seas Act: Two Remaining Problems", Louisiana Law Review, 1981.
- 3) "Update of the Status of Regulation of Infectious Waste in the State of Louisiana" for Hospital Liability & Risk Management Regional Workshop, November 15, 1989.
- 4) "Who is a Seaman Now?" for Maritime Personal Injury Seminar sponsored by Louisiana State University, Paul M. Hebert Law Center, October, 1990.
- 5) "Hazardous Waste Insurance Issues" for seminar sponsored by National Business Institute entitled "Hazardous Waste in Louisiana", December, 1990.

See: attached, #1 of Index 1.

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

Good. March 19, 1991 with Dr. Ernest Wong, Lafayette, Louisiana.

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

None.

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

Not applicable/none.

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

None.

17. Legal Career:

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

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

Prior to graduation I was hired by Judge John Shaw, Western District of Louisiana, to clerk for him. However, I was offered a job with Onebane, Donohoe for a year thereafter. Judge Shaw said as I knew what I wanted to do and my resume did not need the boost of clerking, if I would help find him a clerk he would have no objection to my joining Onebane, Donohoe that year; I did so. I joined the law firm of Onebane, Donohoe, Bernard, Torian, Diaz.

McNamara & Abell in 1981, became a partner in January of 1984 and have remained with them to present.

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

Not applicable/none.

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

Upon graduation from law school in 1981 I joined the law firm of Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell, became a partner in 1984 and have remained with them to present.

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

From graduation of law school until the summer of 1989 my practice was primarily a federal admiralty/maritime practice along with mass tort, i.e., silicosis litigation. In 1989 our firm decided to develop an environmental law practice. I began divesting myself of my admiralty practice, returned to school to study environmental law and began concentrating in environmental law. I have continued development of a litigation, administrative and transactional practice in environmental law.

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

Clients: Oil companies, oil support services companies, trucking companies, insurance companies, banks, corporations and individuals.

Areas: Admiralty/maritime, insidious disease defense, environmental law.

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

I have appeared in court frequently throughout my career. Frequency of appearance has varied over the years with some years having a greater frequency of court appearance and others having less. This past year I have been in court quite often and am presently involved in a trial of potential thirteen (13) weeks duration.

2. What percentage of these appearance was in

- a) Federal courts.

70%

- b) State courts of record.

25%

- c) Other courts.

5% - environmental agencies and administrative law judges.

3. What percentage of your litigation was

- (a) Civil.

100%.

- (b) Criminal.

0%

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

Eight to twelve. I was sole or chief counsel on all cases.

5. What percentage of these trials was

- (a) Jury.

100%

- (b) Non-jury.

0%

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

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

1. Lillian Espinoza Gala v. Ocean Production Company, et al., USDC, Western District of Louisiana, Lafayette/Opelousas Division, CA# 82-0972, litigated from 1982 through approximately 1985, Judge John Shaw. Plaintiff's counsel: Mr. Anthony D. Moroux, Post Office Box 3787, 201 W. Main Street, Lafayette, Louisiana 70502, (318) 233-6186. Co-counsel: Mr. Brad Theard, Attorney for Progress Drilling & Marine, Inc., Suite 4402 One Shell Square, New Orleans, Louisiana 70139, (504) 585-7750 - This matter involved complicated contractual indemnity claims, a closed head injury and an equally complicated settlement before the Department of Labor as well as the tort trial. I was sole counsel for my client Odeco, Inc. in all matters. The case was favorably resolved and the settlement was cleared through the Department of Labor.

2. Harmon W. Kerksieck, et ux vs. McDermott Incorporated, et al., Parish of St. Mary, Louisiana, Civil Docket Number: 82,146, DIV. "E", litigation began in 1989 to the present. Judge Richard T. Haik was the assigned judge; however, due to Judge Haik's nomination and subsequent appointment to the Western District of Louisiana, ad hoc Judge Marcus Broussard is trying the case. Although there were numerous attorneys involved in this litigation representing insurance carriers, the following are the primary defendants: I am chief counsel for my client, Global X-Ray & Testing, Inc. and United Testing. Plaintiff's counsel: Mr. Elwood C. Stevens, Jr., Post Office Box 2626, Morgan City, Louisiana 70381, (504) 384-8611. Co-counsel: Mr. Frank X. Neuner, Jr., Attorney for McDermott, Inc., Post Office Box 52828, Lafayette, Louisiana 70505, (318) 237-7000, Mr. Gary M. Zwain, Attorney for Bayou Testers, Inc., 3838 N. Causeway Blvd., Suite 2900, Metairie, Louisiana 70002, (504) 832-3700, Mr. Jerome M. Volk, Jr., Attorney for Professional Services, 3329 Florida Avenue, Kenner, Louisiana 70065, 504-469-6699, Mr. J. E. McElligott, Jr., Attorney for Highlands Insurance Company,

810 South Buchanan Street, Post Office Drawer 2908,
 Lafayette, Louisiana 70502, (318) 237-1660 - Harmon
 Kerksieck is presently being tried. Trial began on April 29,
 1991 and is expected to continue through mid-July. It is one
 of the first cases in this area dealing with radiation
 cancer/fear of cancer/radiation exposure and can trumpet the
 birth of an entirely new area of litigation should
 plaintiff's counsel be successful.

3., 4. & 5. Mrs. J. J. Touchstone, et al., v. GBO Corp., et al., USDC, Eastern District of Louisiana, CA# 82-1613, Mrs. Oscar Humble, et al v. GBO Corporation, et al, USDC, Eastern District of Louisiana, CA# 84-111 "F", Julius Ducre v. Mine Safety Appliances, USDC, Eastern District of Louisiana, CA# 80-4338 - Judge Feldman, United States District Court for the Eastern District of Louisiana. Plaintiff's counsel: Lawrence D. Wiedemann, 821 Baronne, New Orleans, Louisiana 70112, (504) 581-6180.

These were mass tort litigation silicosis cases where a great many cases were consolidated under select captions and moved forward. Although a full trial was not had, Judge Feldman chose to entertain summary jury trials. I was sole counsel for my client in those summary jury trials and in all matters in all cases before the court. These were mass tort cases which provided experience in handling mass tort litigation. Lone Star Industries, Inc. was my client; all cases settled favorably. It is impossible to list all co-counsel as this changed over the years and counsel numbered into the hundreds. These cases spanned from 1982 to approximately 1986.

6. Harlon Newman and Kathryn Creel Newman v. Chiles Drilling Company, USDC, Western District of Louisiana, CA# 82-0290. This case was one of many listed on the Western District of Louisiana's "Superdocket". It was tried before Judge Robert C. Zampano, visiting judge from New Haven, Connecticut. The case from litigated from 1982 through early 1984. Plaintiff's counsel: Leslie Schiff, Post Office Box 900, 137 W. Landry Street, Opelousas, Louisiana 70570, (318) 942-9771. Defense counsel: Mr. Howard Martin, Attorney for pipe supplier, Post Office Box 3808, 102 Versailles Blvd., Lafayette, Louisiana 70502 (318) 232-4744. I was sole counsel for my client, Chiles Offshore, but tried the case as co-counsel with plaintiff's counsel on a Mary Carter agreement. This was a maritime personal injury claim tried after a Mary Carter settlement had been effected. A zero verdict was obtained.

7. Jeffery Rosenstein v. Arco Chemical Corporation, et al., 15th Judicial District Court, Parish of Lafayette, Louisiana, Docket No.: 82-4396-D, litigated from 1982 through July, 1985, Judge Lucien Bertrand. Plaintiff's counsel: Mr. L. H.

Olivier, 2130 Kaliste Saloom, Suite 103, Lafayette, Louisiana 70508, (318) 989-8576. Co-counsel: Mr. Raymond Jackson, Attorney for Intervenor, Liberty Mutual, P. O. Drawer 3768, Lafayette, Louisiana 70502, (318) 233-5056, Mr. Patrick J. Briney, Attorney for Ken Wildbur, Sr., P. O. Drawer 91410, Lafayette, Louisiana 70509, (318) 237-4070, Mr. F. Ray Mouton, Attorney for IMA Oilfield Specialty Chemical, Inc., 625 St. John, Lafayette, Louisiana 70501, (318) 232-7057, Mr. W. Alan Lille, Attorney for Great Lakes Container Corp., P. O. Drawer Z, Lafayette, Louisiana 70502, (318) 233-7430. I was sole counsel for my client, Arco Chemical Corporation. Jeffery Rosenstein was a slip and fall personal injury case. The defense chose to rest without submitting any evidence and obtained a zero verdict. Our case was made on cross-examination of the plaintiff's case.

8. LeBleu v. Southern Silica of Louisiana, 554 So.2d 852 (La. App. 3rd Cir. 1989) - I directed and supervised this case; however, argument and memo were prepared by Patrick J. Hanna, associate in my law firm. LeBleu challenged the law of the Fifth Circuit within the Louisiana circuit courts and persuaded the Louisiana courts not to follow Ducre v. Executive Officers of Halter Marine, 752 F.2d 976 (1985). A copy of the reported decision is attached. The judge and all counsel are shown within the decision. Lone Star Industries, Inc. was our client. The case was settled favorably. See: #2 of Index 1.

9. & 10. I am and have been chief counsel for Lone Star Industries, Inc. in Louisiana from 1981 to the present and handle all of their silicosis, asbestos and cement dust cases in Louisiana. Of these there are approximately 34 cases in the 14th Judicial District, Calcasieu Parish, Louisiana which are breaking new ground. An example caption of one such case is Ellen Baglio, et al v. Southern Silica of Louisiana, et al, 14th Judicial District Court, Docket No. 85-4092, Calcasieu Parish, Louisiana. The Louisiana Supreme Court has appointed a special designated judge, Judge L. E. Hawsey, Jr., to deal with the overload and to organize the movement of these cases along with 300 plus asbestos cases. Counsel are working with the court to establish uniform discovery procedures, standing court orders, trial methods and experimenting with many innovative options. We have favorably settled twenty-six of these.

There are so many counsel for so many defendants which have changed over time it is impossible to list all here; however, plaintiff's counsel is Mr. William B. Baggett, Jr., BAGGETT, McCALL & RAINER, Post Office Box 1645, Lake Charles, Louisiana 70603, (318) 478-8888 and present counsel for co-defendants are listed on the attached mailing list. See: #3 of Index 1.

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

I was selected as sole counsel for Lone Star Industries, Inc. to handle all of their silicosis, asbestos, cement dust cases within the State of Louisiana.

I have been actively involved for ten years in the handling of mass tort cases before the federal courts and have been involved in the formation of uniform handling procedures for same.

I was actively engaged in an admiralty/maritime personal injury litigation and therein worked within the development of brownwater seaman jurisprudence within the district courts and the Fifth Circuit. In particular and additionally, I supervised my associate, Patrick J. Hanna, in forging some particularized law as to seaman status and rights of subrogation and/or contribution among joint tortfeasors.

In particular I supervised Patrick J. Hanna in the LeBleu v. Southern Silica of Louisiana, 554 So.2d 852 (La. App. 3rd Cir. 1989) case. The 3rd Circuit court of Louisiana was convinced not to follow the U.S. 5th Circuit decision in Julius Ducre, et al v. The Executive Officers of Halter Marine, et al, 752 F. 2d 976 (1985). Although argument and memo were presented by Patrick J. Hanna, associate in my law firm, I supervised and directed the case.

5649C

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

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

I provide business advice to the Gardner Nursing Home of Star City, Inc. which is owned by my mother and sister. Depending upon the amount of advice and/or work done the corporation pays me for my services. Rarely does this exceed \$4,000.00 in any given year. I have no business interest in the nursing home.

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

I would recuse myself from any cases which might involve past clients and/or members of my present firm for the proper and necessary amount of time. I would sever all current affiliations which might present a potential conflict. I will follow all guidelines of the Judicial Conference.

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

None.

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

See: attached Ethics in Government Act of 1978 form, #2 of Index 2.

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

See: attached financial net worth statement, #1 of Index 2.

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

I participated in Dave Treen's early campaigns for governor of the State of Louisiana during the early 1970's. My participation was limited primarily to yard signs and other similarly related activities.

I contributed financially to Kathleen Blanco's campaign in the amount of \$200.00 when she was running for Louisiana State Representative approximately three years ago.

5649C

FINANCIAL STATEMENT
NET WORTH

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

(Note: no schedules were provided; information is given as shown.)

ASSETS		LIABILITIES	
Cash on hand and in banks	10351	74	
U.S. Government securities—add schedule	** 25426	00	
Listed securities—add schedule			
Unlisted securities—add schedule			
Accounts and notes receivable:			
Due from relatives and friends *	10000	00	
Due from others	None		
Doubtful	None		
Real estate owned—add schedule ***	See below		
Real estate mortgages receivable	None		
Autos and other personal property	14000	00	
Cash value—life insurance			
Other assets—itemize:			
small interest in oil well	1 390	78	credit
pension fund	19220	93	
shares in Onebane, Domo	6500	00	
IRAs	2397	73	
Total assets	269787	18	
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, cosigner or guarantor	No	Are any assets pledged? (Add schedule)	No
On leases or contracts	No		
Legal Claims	No	Are you defendant in any suits or legal actions?	No
Provision for Federal Income Tax	withheld		
Other special debt	None	Have you ever taken bankruptcy?	No

* Loan to Gardner Nursing Home made on April 12, 1991 to be repaid over the next seven (7) years at 10% interest

** See attached Legg Mason correspondence

*** \$112,000.00 - family home, \$20,000.00 - 5.2 acres of property in

Feleiana Parish, #33,000.00 - condominium owned jointly with sister,

Deboran Shannon, i.e., \$16,500.00

**** Home mortgage with State National Mortgage Corp., P. O. Box 3297,

Baton Rouge, Louisiana 70821-3297



Legg Mason Wood Walker, Inc.

106 Heymann Boulevard
 P.O. Drawer 52328
 Lafayette, LA 70505-2328
 (318) 237-0510

June 20, 1991

Rebecca F. Doherty
 P. O. Box 3507
 Lafayette, LA 70502

Dear Becky,

Listed below are the current assets in which you have a vested interest here at Legg Mason:

Personal Account

\$ 1,139.98 money market account

IRA Account

\$ 397.73	money market account
8,142.00	U S Government obligations
2,000.00	Insured Income Real Estate Partnership with Franchise Finance

Jake's Account

\$17,355.00 U S Government obligations

If you have any further questions, please call.

Yours very truly,

A handwritten signature in black ink, appearing to read "Fred G. Werner".

Fred G. Werner

FGW/dft

Member New York Stock Exchange, Inc.

AG-10
Rev. 1/91

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-504, November 30, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (Last name, first, middle initial) Doherty, Rebecca F.	2. Court or Organization U.S. District Court, Western District of Louisiana	3. Date of Report 6/24/ 91
4. Title (Article III judges indicate active or regular status; magistrate judges indicate full- or part-time) Article III	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> <u>Nominations, Date</u> <input type="checkbox"/> <u>Initial</u> <input type="checkbox"/> <u>Annual</u> <input type="checkbox"/> <u>Final</u>	6. Reporting Period 1990 - 1991

7. Chambers or Office Address

P.O. Drawer 3507
Lafayette, LA 70502 102 Versailles Blvd., Suite 600

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

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

<u>POSITION</u>	<u>NAME OF ORGANIZATION/ENTITY</u>
<input type="checkbox"/> NONE (No reportable positions)	
Partner	Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell
<hr/>	

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

<u>DATE</u>	<u>PARTIES AND TERMS</u>
<input type="checkbox"/> NONE (No reportable agreements)	
Consultant	Gardner Nursing Home, Star City, AR (owned by my mother and sister)
<hr/>	

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

<u>DATE</u> (Honorary only)	<u>SOURCE AND TYPE</u>	<u>GROSS INCOME</u> (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income)		
1 Salaray	Onebane, Donohoe, Bernard, Torian, Diaz, McNamara & Abell	\$126,923.04
2 Consulting Fee	Gardner Nursing Home	\$3,010.00
3		\$
4		\$
5		\$
<hr/>		

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting Rebecca F. Doherty	Date of Report 6/24/91
--	---------------------------

IV. REIMBURSEMENTS and GIFTS – transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCE	DESCRIPTION
<input type="checkbox"/> NONE (No such reportable reimbursements or gifts)	
1 Onebane, Donohoe, Bernard, et al	travel expense for legal work & seminar
2	
3	
4	
5	
6	
7	
8	

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCE	DESCRIPTION	VALUE
<input checked="" type="checkbox"/> NONE (No such reportable gifts)		
1		\$
2		\$
3		\$
4		\$

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "S" for separate liability of spouse, "D" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITOR	DESCRIPTION	VALUE CODE*
<input checked="" type="checkbox"/> NONE (No reportable liabilities)		
1		
2		
3		
4		
5		
6		
7		

* VALUE CODES: J = \$15,000 or less I = \$15,001 to \$50,000 L = \$50,001 to \$100,000 H = \$100,001 to \$250,000
 K = \$250,001 to \$500,000 G = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting
Rebecca F. DohertyDate of Report
6/24/91

VII. INVESTMENTS and TRUSTS – income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)

A. Description of Assets (including trust assets)			B. Income during reporting period		C. Value at end of reporting period		D. Transactions during reporting period					
(1)	(2)		(1)	(2)	(1)	(2)	(1)	(2)	(3)	(4)	(5)	
Net- A-S	Type of asset: "Div.", "Int."		Value at end (J-P)	Method of Valuation: (Q-W)	Value at end (J-P)	Method of Valuation: (Q-W)	Type of transaction: "Sale", "Purchase", "Contribution", "Dividend", "Interest", "Other"	Date: Month- Year	Value (J-P)	Gain/ Loss: (A-S)	Identity of Buyer/Seller (in transaction)	
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)												
¹ (1) unit in oil well	A	credit	J	V	well drilled	2/91	J	A	Source Petro			
² owned jointly with James E. Diaz, Sr.											leum, Inc.	
3												
4												
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18												
19												
20												
1 Income/Gain Codes:			B=\$1,000 or less	B=\$1,001 to \$2,500	C=\$2,501 to 5,000	C=\$2,501 to 10,000	D=\$5,001 to \$15,000					
(See Col. C1 & D1)			B=\$2,501 to \$50,000	B=\$50,001 to \$100,000	B=\$100,001 to \$200,000	B=\$200,001 to \$500,000	B=\$500,001 to \$1,000,000	B=\$1,000,001 to \$2,000,000	B=\$2,000,001 to \$5,000,000	B=\$5,000,001 to \$15,000,000		
2 Value Codes:			B=\$250,001 to \$1,000,000	C=\$100,001 to \$1,000,000	D=\$100,001 to \$1,000,000	E=\$100,001 to \$1,000,000	F=\$100,001 to \$1,000,000	G=\$100,001 to \$1,000,000	H=\$100,001 to \$1,000,000	I=\$100,001 to \$1,000,000		
(See Col. C1 & D1)			B=\$250,001 to \$1,000,000	C=\$100,001 to \$1,000,000	D=\$100,001 to \$1,000,000	E=\$100,001 to \$1,000,000	F=\$100,001 to \$1,000,000	G=\$100,001 to \$1,000,000	H=\$100,001 to \$1,000,000	I=\$100,001 to \$1,000,000		
3 Value Method Codes:			G=Appraisal	H=Cost (real estate only)	I=Assessment	J=Cash/Market	K=Estimated	L=Other	M=Estimated	N=Other	O=Estimated	
(See Col. C2)			G=Appraisal	H=Cost (real estate only)	I=Assessment	J=Cash/Market	K=Estimated	L=Other	M=Estimated	N=Other	O=Estimated	

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
Rebecca F. Doherty	6/24/91

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

Well interest owned is in the name of James E. Diaz, Sr. Two and one half units are owned jointly, one and a half owned by James E. Diaz, Sr. and one unit is owned by Rebecca F. Doherty

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicator function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canova 3C(3)(c), in the outcome of such litigation.

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.A. app. 7, § 501 et seq., 5 U.S.C. § 7333 and Judicial Conference regulations.

^ *REBECCA F. DOHERTY*
REBECCA F. DOHERTY

Signature _____ Date _____

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.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

III. GENERAL (PUBLIC)

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

I handled pro bono the involvement of Ms. Don Lockwood in a suit filed by Herman Hospital. The amount of time involved was perhaps 12 to 15 man hours.

I have handled much of the legal and business problems of Hilda Mae Cudges and her family, Marilyn Cudges and John Cudges for the past ten (10) years. This has included handling problems with credit agencies, mortgage companies, initially filing a lawsuit on her behalf for personal injury sustained while a patient at Our Lady of Lourdes Hospital in Lafayette, Louisiana. As I ultimately had to be a witness in the case I did not carry the case forward; rather, acted as a witness.

A trust was formed with a portion of the proceeds of the award to Hilda Mae Cudges; she is named executrix of the trust. Should she die I am designated to be the executrix of said trust. If my services become required, this would be done pro bono.

I handled consults and court appearances for traffic violations, divorce proceedings for Elizabeth Bernard in Lafayette City Court, divorce in the 15th Judicial District Court in Lafayette, Louisiana.

I have done some minor pro bono work for my ex-husband, Mike Doherty, for Patti Borskey, 113 Coon Drive, Thibodaux, Louisiana and for my secretary, Lisa Cabe'-Maury.

I have worked with the Lafayette area schools to educate the students as to the legal process and their potential involvement in that process. I have spoken to school groups, classes and organizations concerning same. In particular, I have encouraged students to understand and participate in the legal process, to recognize their role as citizens, and to believe they can change the world they live in. Also, I have encouraged those with desire to join the legal profession. In line with that I have provided personal financial support for some law students.

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

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

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

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

The framers of our Constitution and government granted certain powers to each of the branches of government. The judiciary's role was and is to apply and when necessary, to interpret the law. When more than one lawful and plausible interpretation exists within the law, judicial discretion can exist. However, this judicial discretion should be tempered by judicial restraint.

Because language and the process of law are often ambiguous and often the question before the court entails more than one "principle", law wholly without judicial discretion eventually can be seen as arbitrary; however, law wholly without judicial restraint also can be seen as arbitrary.

It is the role of the judiciary to be guided by judicial precedent and the rulings of higher courts in determining the proper outcome of any given case.

QUESTIONNAIRE FOR JUDICIAL NOMINEE

I. BIOGRAPHICAL INFORMATION (PUBLIC)

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

Denis Reagan Hurley; I have been known by no other name.

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

Home - 216 North Country Road
Wading River, New York 11792

Office - Judge's Chambers, Room 4171
Suffolk County Court
210 Center Drive
F.O. Box 9007
Riverhead, New York 11901-9007

3. Date and place of birth.

October 24, 1937
Rockville Centre, New York

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

Married on June 16, 1962, to the former Patricia English, now Patricia E. Hurley.

My spouse has not been employed outside the home since November 1990. Prior to that time, she was employed as a legal assistant/closing clerk by Centerbank Mortgage Company, Inc., 1380 Roanoke Avenue, Riverhead, New York 11901.

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

University of Pennsylvania, Wharton School of Finance and Commerce, Philadelphia, Pennsylvania 19104; attended from September 1955 to June 1959; B.S. in Economics degree, granted in June 1959.

Columbia University Graduate School of Business, New York, New York 10027; attended from September 1960 to June 1962; M.B.A. degree, granted in June 1962.

Harvard Law School, Cambridge, Massachusetts 02138; attended from September 1959 to December 1959; no degree awarded; I voluntarily withdrew from the University, having become initially dissatisfied with the study of law, and having thereupon concluded--with all the wisdom of my then 22 years--that I had made an incorrect career choice.

Fordham University, Evening Division, School of Law, Lincoln Square, New York, New York 10023; attended from September 1962 to June 1966; LL.B. degree, granted in June 1966.

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

Summers of 1959, 1961 and 1963 - employed as a lifeguard by the Town of Hempstead, 200 North Franklin Avenue, Hempstead, New York 11550.

February 1960 to August 1960 - active duty with New York Army National Guard; honorably discharged from inactive reserve on December 31, 1966.

June 1962 to June 1963 - executive trainee - First National City Bank (now Citibank), 399 Park Avenue, New York, New York 10043.

October 1963 to September 1966 - while attending law school in the evenings - bailiff for the Honorable John M. Cannella, United States District Judge, S.D.N.Y., U.S. Court House, Foley Square, New York 10007.

September 1966 to July 1968 - associate - Bond, Schoeneck, and King, Esqs., One Lincoln Center, 100 W. Fayette Street, Syracuse, New York 13202-1355.

July 1968 to March 1970 - Principal Assistant District Attorney, Felony Trial Bureau, Suffolk County District Attorney's Office, Criminal Courts Building, Center Drive South, Riverhead, New York 11901.

March 1970 to December 1972 - associate - Pike, Behringer & Hurley*; Otis Pike, Thomas E. Behringer, Jr., John E. Hurley and Denis R. Hurley; 130 Ostrander Avenue, Riverhead, New York 11901.

January 1973 to September 1974 - associate - Pike, Hill, Behringer & Hurley†; same partners as above with the addition of L. Barron Hill; 130 Ostrander Avenue, Riverhead, New York 11901.

* See footnote to page 3, *infra*.

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October 1974 to August 1975 - partner - Behringer, Hurley, Hurley & Fellicane*; Thomas E. Behringer, Jr., John E. Hurley, Denis R. Hurley and Richard Pellicane; 130 Ostrander Avenue, Riverhead, New York 11901.

September 1975 to December 1977 - partner - Behringer, Hurley & Hurley*; Thomas E. Behringer, Jr., John E. Hurley, and Denis R. Hurley; 1380 Roanoke Avenue, Riverhead, New York 11901.

January 1978 to December 31, 1982 - partner - Behringer, Hurley, Hurley & Danowski*; Thomas E. Behringer, Jr., John E. Hurley, Denis R. Hurley and Peter S. Danowski, Jr.; 1380 Roanoke Avenue, Riverhead, New York 11901.

Also--while a member of Behringer, Hurley, Hurley and Danowski--I served (a) as a member of the Suffolk County Legislature, Veterans' Memorial Highway, Hauppauge, New York 11788 (from January 1, 1978 to December 31, 1979) and (b) as a Senior Assistant County Attorney in the Suffolk County Department of Law, H. Lee Dennison Building, Veterans' Memorial Highway, Hauppauge, New York 11788 (January 1980 to March 1981).

In addition, I taught Business Law, in the evenings, at Long Island University, Southampton College, Southampton, New York - 1971-72, 1972-73, 1984-85, and at Suffolk County Community College, Riverhead, New York - 1984-85, 1985-86, 1986-87, 1987-88, 1988-89 and Spring of 1990.

From January 1, 1983 to date, I have been an elected New York State Judge, first in the Family Court (until December 31, 1987) and thereafter, and presently, in the County Court. For the period from July 1987 to December 31, 1988, I served--on assignment--as an Acting New York State Supreme Court Justice.

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

New York Army National Guard; Active duty from February 1960 to August 1960; Active reservist until December 1, 1962, when transferred to the inactive reserve in which status I remained until January 31, 1966, when I received an Honorable Discharge. Rank at

* None of the above individuals are still partners. L. Barron Hill is deceased; Otis Pike is a syndicated newspaper columnist, who resides at 132 Ostrander Avenue, Riverhead, New York 11901; each of the other individuals is presently practicing law at the following locations: Thomas E. Behringer, Jr., Esq., 3 Woodland Avenue, Westhampton Beach, New York 11978; Peter S. Danowski, Jr., Esq., 616 Roanoke Avenue, Riverhead, New York 11901; John E. Hurley, Esq., 50 Main Street, Westhampton Beach, New York 11978; and Richard Pellicane, Esq., 25 Bowden Square, Southampton, New York 11968.

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time of discharge - Private First Class; Serial Number: 21-001-559, Selective Service number: 30-4-37-719.

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

In college, I was a member of the National Economics Honor Society.

In law school, I was a member of the Law Review for three years.

In addition to above honorary society memberships, I received the following honors and awards that may be of interest to the Committee. In law school, I graduated in top 5% of class (day and evening students combined); received the following awards at the conclusion of my final year: Senior Frize (for second highest weighted average in Evening Session for senior year); Fordham Law Alumni Association Medal in Constitutional Law (for highest course grade in Evening Session), and the Baker, Voorhis Prize for graduate of the Law School (day and evening students combined) with highest grade in New York Practice and Procedure; also received in years prior to my last year, awards for highest grade in Evening Session in Damages, and in Jurisprudence.

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

Member of Suffolk County Bar Association: I served on the following committees of that Association: (a) past Chairman-Criminal Law Committee (mid-1970s); (b) past member, in the mid-1970s, of the Judiciary Committee and again member of the same Committee in 1981 (resigned from the Committee, upon seeking interview as judicial candidate in January 1982); (c) past member of the Public Interest Law Committee and of the Legislation and Law Reform Committee; (d) presently member Bench Bar Committee. I am also presently a member of the Alexander Hamilton Inn of the Court.

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

I do not belong to any organizations that are active in lobbying before public bodies.

I currently belong to the Suffolk County Bar Association, the Bench Bar Committee of that Association, and the Alexander Hamilton Inn of the Court. In addition, I am a member of the Wading River Field and Tennis Club, P.O. Box 212, Wading River, New York 11792.

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

Courts of the State of New York - admitted at March 1967 Term of the Appellate Division, Second Judicial Department.

United States District Court, E.D.N.Y. - admitted on May 30, 1975.

United States Tax Court - admitted March 28, 1979.

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

Constitutional Law-Section 6 of the Subversive Activities Control Act Held Unconstitutional as Violative of the Fifth Amendment. Aptheker v. Secretary of State, 378 U.S. 500 (1964). 33 Fordham Law Rev. 309 (1964).

Contracts-Implied Warranty; Reformation-No Implied Warranty in Absence of Reliance; Government Held Liable for One-Half of Loss Incurred by "Fixed Price" Contractor. National Presto Industries, Inc. v. United States, 338 F.2d 99 (1964), 33 Fordham Law Rev. 507 (1965).

Insurance-Conditional Receipt-Life Insurance Company Held Liable for Death Benefits Where Applicant Reasonably Believed That a Contract for Temporary Insurance Had Been Negotiated. Allen v. Metropolitan Life Ins. Co., 44 N.J. 294, 208 A.2d 633 (1965), 34 Fordham Law Rev. 336 (1965).

While I was a member of the Suffolk County Legislature, i.e. from January 1, 1978 to December 31, 1979, I wrote a number of articles that were published in some of the local weekly newspapers. The articles typically provided status reports on pending matters before the Legislature. Enclosed in the envelope accompanying this questionnaire (Exhibit A), are copies of those of the articles that I was able to locate, along with copies of the aforementioned Law Review case notes.

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

Excellent. My last physical examination was conducted on March

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26, 1991, by Howard G. Munro, M.D., 867 Old Country Road, Riverhead, New York 11901.

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.

Family Court Judge

I took office to the ten year term, elective position, of New York State Family Court Judge on January 1, 1983. I so served until I was appointed as an Acting Supreme Court Justice in July 1987.

The Family Court's subject matter jurisdiction embraces almost every aspect of family law, including adoption, child abuse and neglect, child support, spousal maintenance, as well as visitation and custody matters. Its jurisdiction, however, does not include the power to dissolve a marriage or to make orders affecting title to real or personal property owned by one or both of the parties to a marriage, which subjects may only be addressed by the Supreme Court.

County Court Judge

I am presently a New York State County Court Judge for the County of Suffolk. I was elected to the ten year position in November 1987, and took the oath of office on January 1, 1988. However, I was an Acting Supreme Court Justice for the first year of my County Court term.

The County Court has unlimited original jurisdiction as to any act or omission which constitutes a crime under the laws of the State of New York. In Suffolk County, essentially all felonies--except for those involving controlled substances--are prosecuted in the County Court. The drug felonies are handled in two parts of the Supreme Court. Misdemeanors and offenses are prosecuted in the Justice Courts and District Courts within the County.

In addition to the unlimited, original criminal jurisdiction, the County Court has subject matter jurisdiction over certain civil suits including those in which a money judgment of \$25,000 or less is sought.

However, the great bulk of the County Court's caseload consists of criminal matters, which covers the spectrum from burglaries to murders.

Acting Supreme Court Justice

The Supreme Court in the State of New York is the trial court of unlimited original jurisdiction. I was appointed as an Acting

Supreme Court Justice in July 1987, and continued in that capacity until December 31, 1988. By way of explaining that assignment vis a vis my elections to the bench, I was a Family Court Judge when first appointed to the Supreme Court, and continued serving on the Supreme Court bench for the first year following my election as a County Court Judge. At the conclusion of that year, i.e. 1988, I assumed my present responsibilities in the County Court.

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

1. **Significant opinions.** I believe the following opinions to be among the most significant that I have written:

From among reported decisions: People v. Lynn, 143 Misc.2d 690, 541 N.Y.S.2d 762 (Co.Ct., 1989); Larrinelli v. Parrinelli, 138 Misc.2d 49, 524 N.Y.S.2d 159 (Sup.Ct., 1988); Matter of Shirley C., 136 Misc.2d 843, 519 N.Y.S.2d 328 (Sup.Ct., 1987); Ponzini v. Ponzini, 135 Misc.2d 486, 515 N.Y.S.2d 974 (Fam.Ct., 1987); Fezner v. Schumeyer, 133 Misc.2d 1018, 508 N.Y.S.2d 724 (Fam.Ct., 1986); Matter of Carew, 131 Misc.2d 835, 502 N.Y.S.2d 361 (Fam.Ct., 1986); Lafferty v. Brogden, 127 Misc.2d 455, 486 N.Y.S.2d 644 (Fam.Ct., 1985); Matter of Hickey, 124 Misc.2d 667, 477 N.Y.S.2d 258, 18 Ed.Law Rep. 677 (Fam.Ct., 1984);

From among unreported decisions (copies of which are enclosed in Exhibit B): Mental Hygiene Legal Services, et al v. Surles, et al, Index No. 12978-88 (Sup.Ct., December 15, 1988); Matter of the Adoption of Sarah K., Docket No. A-25-84 (Fam.Ct., September 18, 1984) rev'd 110 App.Div.2d 18, 492 N.Y.S.2d 957 (2nd Dep't 1985); the Appellate Division decision was, in turn, reversed by the Court of Appeals in 66 N.Y.S.2d 223, 496 N.Y.S.2d 384 (1985), cert. denied sub nom. Kosher v. Stamatis, 475 U.S. 1108, 106 S.Ct. 1515 (1986).

2. **Reversals, and affirmances with significant criticism.** Two of my decisions have been reversed (one of which reversals by the Appellate Division was reversed, in turn, by the New York Court of Appeals). The two reversals by the Appellate Division were:

- a) Matter of Sarah K., 110 App.Div.2d 18, 492 N.Y.S.2d 957 (2nd Dep't 1985), which decision was reversed by the Court of Appeals in 66 N.Y.2d 223, 496 N.Y.S.2d 384 (1985)*, cert. denied sub nom. Kasher v. Stamaris, 475 U.S. 1108, 106 S.Ct. 1515 (1986).

Sarah K. involved the efforts of the biological parents of a child born with Down's Syndrome to revoke their consent to her adoption. Following a lengthy trial, I rejected their constitutional attack on the controlling portions of the New York State adoption statute, but did find that the statute had been applied to them in an unconstitutional fashion. That finding was premised on the content of the official consent forms that the parents had signed, which caused them to conclude--and reasonably so in my judgment--that their "consent" remained tentative, and revocable, until told to a judge at their scheduled court appearance. Their conclusion in that regard--though consistent with the explanation contained in the consent forms--was at odds with the statute. Under the statute, their consent became irrevocable before they re-thought their position and sought the return of their child--notwithstanding the fact that the date set for them to discuss the matter with a Family Court judge had not yet arrived.

In sum, I found the statute constitutional, but unconstitutional as applied to Sarah K's. biological parents due to the notice defect. To rectify that wrong, their revocation was treated as timely, thus entitling them--under New York law--to a best interest hearing. By way of background, during that type of proceeding, the prospective adoptive parents and the biological parents who have revoked their consent, are on "equal footing". The court's role is to compare the two couples, in conjunction with the needs of the child, and then--based on the youngster's "best interest"--either permit the adoption to continue on course, or direct its termination and the child's return to his or her biological parents.

In the present case, I found--at the conclusion of the best interest hearing--that the child's best interest would be served by her adoption.

Both sides appealed to the Appellate Division. That court, as synopsized by the Court of Appeals in its

* A copy of my unreported decision is included in Exhibit B, which was submitted under subdivision 1, supra, of this question.

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decision in Sarah K., concluded as follows:

"The Appellate Division, in three opinions, reversed, two justices finding the statute unconstitutional on its face for failing to require that the extrajudicial consent form advise the biological parents that even timely revocation will at best result in a judicial determination of custody based on a 'best interests' test, two justices concluding that the particular consent forms mislead respondents, and one justice concurring in part, dissenting in part, on the ground that the appropriate remedy for any confusion here was the hearing to determine the child's best interest".

The Court of Appeals reversed the Appellate Division, then reinstated the trial court's determination in favor of the adoptive parents, but upon a different ground, viz. that the biological parents were untimely in seeking to revoke their consent to Sarah's adoption.

- b) Baer v. Town of Brookhaven, 137 App.Div. 2d 472, 504 N.Y.S.2d 221 (2nd Dep't 1986), aff'd 73 N.Y.2d 943, 540 N.Y.S.2d 234 (1989). This case involved the constitutionality of the Town of Brookhaven's definition of "family" in its zoning ordinance.

The plaintiffs, five unrelated women, lived within a single family residence district of the Town. The municipality's definition of family limited the number of unrelated individuals within such districts to four. Accordingly, the Town charged the plaintiffs with violating that limit, and they, in turn, attacked the constitutionality of the four person restriction, relying on the then recent Court of Appeals' decision of McMinn v. Town of Oyster Bay, 66 N.Y.2d 544, 498 N.Y.S.2d 128 (1985).

I held that the plaintiffs lacked standing to raise the constitutional issue. The plaintiff Baer was the landlady of the other four occupants of the home, all

of whom paid her substantial rent. As such, it seemed to me that the five plaintiffs did not constitute a family either under the challenged definition in the Brookhaven ordinance or under the more expansive, constitutionally sound, definition fashioned by the State's highest court in McMinn. Not being aggrieved by the ordinance, they were not, in my judgment, the proper parties to litigate its constitutionality. A copy of my decision, which was not reported, is included in the accompanying envelope marked Exhibit C.

The Appellate Division reversed. It did not consider standing as a threshold issue; rather, the appellate justices proceeded directly to the ordinance and found it unconstitutional. In dictum, the suggestion was made that the Town would have "the right pursuant to a properly adopted ordinance to restrict the manner of the use of the property of the plaintiffs, which is in essence that of a boarding house".

The Appellate Division decision was affirmed by the Court of Appeals*.

3. Significant opinions on federal or state constitutional issues. I have written four opinions on constitutional issues, two of which were discussed above, viz. Matter of Sarah K., supra, and Baer v. Town of Brookhaven, supra.

Of the other two, Mental Hygiene Legal Services, et al v. Surles, supra*, was significant in the sense that it addressed a question of first impression in the State of New York, viz. the constitutionality of administering antipsychotic medication to an involuntarily committed minor psychiatric patient, based on his parent's consent, and upon the advice of his doctor--but over the patient's objection.

- * Of my decisions that were affirmed, none had any "significant criticism of [my]...substantive or procedural rulings" in the sense of an extended discussion of my rationale. However three of the affirmances were affirmed, as modified--with the modifications representing the appellate court's conclusion that a portion of my decision was incorrect. Those three cases were: Thurmond v. Thurmond, 155 App.Div.2d 527, 547 N.Y.S.2d 385 (2nd Dep't 1989); Elson v. Elson, 149 App.Div.2d 141, 545 N.Y.S.2d 311 (2nd Dep't 1989); and Wes Sheet Metal Corp. et al v. Flushing Savings Bank, et al. 132 App.Div.2d 608, 517 N.Y.S.2d 768 (2nd Dep't 1987).
- ** Copy of decision included in Exhibit B, submitted pursuant to answer to question 15 (1), supra.

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The last of the four cases is People v. Van Hook, County Court, Suffolk County, Indictment No. 261-87 (1980) (case not reported; copy of decision enclosed in accompanying envelope, marked Exhibit D). The defendant, by way of motion, claimed that the jury panel selection process in Suffolk County--which is based upon the procedure set forth in Sections 506 and 507 of the New York State Judiciary Law--is constitutionally flawed. Although the issue raised was not unique--and, in that sense, perhaps not significant--I have enclosed a copy of my decision for the Committee's review.

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

From 1972 to 1977, I served--initially as a member and later as the vice president--on the Board of Education of the Little Flower Union Free School District in Wading River, New York. Membership on the Board is by appointment--rather than by election--with all appointments being made by the Board of Directors of Little Flower Children's Services of New York.

I have been a candidate for one non-judicial, elective public office, that being the part-time position of Suffolk County Legislator. I was a candidate for that position in 1977, was elected on Election Day of that year, and served one term, i.e. from January 1, 1978 to December 31, 1979. I did not seek re-election.

17. Legal Career

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

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

I did not serve as a law clerk to a judge. However, I would like to submit, for the Committee's consideration, the fact that from October 2, 1963 to

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September 2, 1966--while attending law school in the evenings--I was the bailiff for the Honorable John M. Cannella, United States District Judge, S.D.N.Y. That position not only afforded me the opportunity to observe the functioning of the court on a daily basis for almost three years, but also--notwithstanding my title--to do considerable legal research and some other tasks more typically performed by a law clerk with respect to matters pending before the Judge.

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

I was never a sole practitioner.

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

Please see my answer to question 8, *supra*, in which I listed my complete employment record since graduation from college. My legal career since becoming a judge is also set forth, in greater detail, in my answer to question 14, *supra*.

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

Following graduation from law school, I was employed as an associate attorney by Bond, Schoeneck and King, Esqs., of Syracuse, New York. In that capacity, I rotated among a number of different departments, as a trainee. Those departments included Trusts and Estates, Labor and Litigation.

In July of 1968, I returned to Long Island, and was employed as a member of the felony trial bureau of the Suffolk County District Attorney's Office in Riverhead, New York. That position afforded me the opportunity to, *inter alia*, prosecute a number of non-jury, and jury felony trials on behalf of the People of the State of New York.

In March of 1970, I entered private practice--first, as an associate, then, as a partner in a Riverhead-based law firm. I remained in private practice in Riverhead until I became a judge in January 1983.

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During that time, viz. from March 1970 to December 31, 1982, I was engaged in a fairly extensive and varied practice. The subject matter of my practice included negligence, environmental issues, real estate and municipal law. It also included criminal matters, first as a defense attorney, and thereafter as a special prosecutor. With respect to that latter capacity, I was first appointed as a special prosecutor in December of 1974 by the Honorable Leon D. Lazer, Supreme Court Justice, to prosecute all of the then pending cases which involved defendants who had been represented by the Honorable Henry F. O'Brien prior to his election as District Attorney; also subsequently appointed as a special prosecutor by other County Court Judges and Supreme Court Justices in a number of other situations. As a special prosecutor, my responsibilities included the handling of the prosecution of an individual who, while standing accused of various burglaries, accused the then District Attorney of having engaged in criminal conduct; in all, I prosecuted - as a special prosecutor, and while in private practice - about two hundred charges, against a host of different defendants, covering the spectrum from traffic tickets to murder cases, and from local Justice Courts to the New York Court of Appeals.

It should also be noted that in my capacity as the Senior Assistant County Attorney in charge of the Tort Unit of Suffolk County Department of Law from January 1980 to March 1981, I oversaw the investigations and settlement evaluations of all federal civil rights claims pending in the E.D.N.Y. against the County during that time. However, the court appearances were handled by four Assistant County Attorneys under my direction.

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

In addition to servicing a number of individuals and small businesses, I represented from time to time, on individual cases, such clients as the Towns of Southampton, Southold and Riverhead; the County of Suffolk; the District Attorney of Suffolk County in his representative capacity; the Royal Globe Insurance Companies [on negligence cases pending in the State Supreme Court], and the Group for the South Fork [the major environmental entity serving the East End of Long Island]. Moreover, for several years in the mid-1970s,

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I was the attorney for Polity, the student government at the State University of New York, at Stony Brook; in that capacity, I conducted a weekly legal clinic at the University for members of the student body, and handled all the student government's legal affairs, including litigation, during that period of time.

My practice was general in nature, but with some degree of specialization in criminal law and municipal law.

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

My time in court varied over the years. From July 1968 to March 1970, while I was a member of the Felony Trial Bureau of the Suffolk County District Attorney's Office, and for the few years I spent as a Special Prosecutor, I was in court almost on a daily basis. During my tenure as a Suffolk County Legislator (viz. from January 1, 1978 to December 31, 1979) I was rarely in court. For the other periods of my private practice, I was in court occasionally, i.e. about once, possibly twice a week.

2. What percentage of these appearances was in:

- (a) federal courts;

Less than 1%. I rarely appeared in federal court. The law firm--being in the East End of Long Island--confined its practice almost exclusively to Suffolk County, which jurisdiction was without a federal courthouse until long after I became a judge.

- (b) state courts of record;

Just short of 100%.

- (c) other courts;

None.

3. What percentage of your litigation was:

- (a) civil:

50%.

- (b) criminal;

50%.

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

I estimate that I tried approximately forty-five to fifty cases to verdict or judgment before I became a judge. In each instance, I acted as sole counsel.

5. What percentage of these trials was:

(a) jury;

75%.

(b) non-jury;

25%.

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

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

1. Riteaway Beverage Inc., Wayside Beverage Corp., Circle M Beverage Barn, Huntington Beverage, Inc., and N.T.W. Beverage Corp., v. The County of Suffolk, and Kenneth A. Rosenblum, in his capacity as Commissioner of the Suffolk County Department of Consumer Affairs, and the New York State Liquor Authority, Supreme Court, Suffolk County (Index No. 82-5320)(case not reported).

On March 24, 1981, the Suffolk County Legislature enacted "A Local Law Requiring A Deposit on All Beverage Containers Sold in Suffolk County". The law was scheduled to become effective on April 1, 1982, and was the first so-called "Bottle Deposit Bill" to be enacted in the State of New York.

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I was retained by each of the above listed plaintiffs, all of whom were major retail and wholesale beverage distributors within the County. On their behalf, I commenced an action seeking declaratory and injunctive relief against the law's implementation upon the grounds, *inter alia*, that (a) the subject matter had been preempted by the State of New York and thus local legislation in the field was impermissible, and (b) the statute was void for vagueness.

Following the commencement of the Riteway action, two other lawsuits were initiated by other Suffolk County beverage distributors demanding essentially the same relief. Those actions were Clare Rose, Inc., et al v. County of Suffolk (Index No. 82-5433) and The Coca-Cola Bottling Company, Inc., v. County of Suffolk (Index No. 82-5713).

The three actions were consolidated. Acting together, counsel for the plaintiffs obtained a temporary restraining order, on March 30, 1982, staying the enforcement of the law pending further order of the court. When that stay was vacated, a further stay--by way of appeal--was obtained from the Appellate Division, Second Department which provided that it would remain in effect until the issues raised were resolved at trial.

The case was then tried, non-jury, before the Hon. John Burke, Supreme Court Justice. The trial, which lasted about five days, was held during the late Spring of 1982. Following its completion, but before a decision was rendered by the trial court, the New York State Beverage Container Deposit Law was enacted. That rendered both the Suffolk County legislation, and the Riteway litigation academic. The actions were discontinued, and the matters concluded.

Riteway was significant for it represented the initial challenge to the first bottle deposit bill enacted within the State of New York. My involvement consisted of, *inter alia*, commencing the first of the three lawsuits, perfecting, together with other plaintiffs' counsel, the appeal to the Appellate Division which resulted in the stay of the law's implementation pending a resolution of the trial issues, and fully participating in the trial.

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The names, addresses and telephone numbers of the attorneys for the other parties involved in the consolidated litigation, as reflected in the court file, and as partially supplemented by my current investigation, are as follows:

Martin Bradley Ashare, Esq.
Sr. Assistant County Attorney
Department of Law
Attorney for Defendants County of Suffolk
and Kenneth A. Rosenblum
H. Lee Dennison Building
Veterans' Memorial Highway
Hauppauge, New York 11788
[Mr. Ashare is no longer with the Department of Law; he is now a partner in the firm of Bracken & Margolin
1 Suffolk Square - Suite 300
Islandia, New York 11722
Telephone no. (516) 234-8525]

Howard E. Pachman, Esq.
Pachman, Oshrin & Block, P.C.
Co-counsel (with Shea & Gould) for Plaintiff
Coca-Cola Bottling Company, Inc.
6080 Jericho Turnpike
Commack, New York 11725
[Mr. Pachman is now practicing as
Howard E. Pachman, P.C.
366 Veterans' Memorial Highway
P.O. Box 273
Commack, New York 11725
Telephone no. (516) 543-2200], AND

Leon P. Gold, Esq.
Shea & Gould
Co-counsel (with Howard E. Pachman) for Plaintiff
Coca-Cola Bottling Company, Inc.
125 Avenue of the Americas
New York, New York 10020
Telephone no. (212) 827-3000

Martin F. Kendrick, Esq. (deceased)
Smith, Sovik, Kendrick, McAuliffe &
Schwarzer, P.C.
Attorneys for Plaintiffs Clare Rose, Inc., et al
300 Empire Building
472 South Salina Street
Syracuse, New York 13202
Telephone no. (315) 474-2911

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Stanley Stein, Esq. (no longer with State Liquor Authority)

Attorney for Defendant
State Liquor Authority
250 Broadway - 18th Floor
New York, New York 10009

Telephone no. (212) 417-4002

I have been advised that Mr. Stein's home address is: 3 Fernwood Court, New Columbia, New Jersey 08022

2. State of New York (State University of New York) v. Gerry Manginelli, et al. Supreme Court, Suffolk County (Index No. 77-3751)(case not reported).

The defendant Manginelli was the President of the Student Governing Organization at the State University of New York at Stony Brook. He, and other students, planned a demonstration, to protest certain changes in the University's scholastic calendar. The demonstration commenced at 2:00 p.m. on February 23, 1977, and portions of the Administration Building at the University were occupied by a group of students, which at one time approximated 300 to 400 in number. At approximately 5:00 p.m., the building was declared closed, but the students did not vacate the building. Thereafter, at approximately 1:30 a.m. on February 24, 1977, an order to show cause was granted to the University directing the defendants to vacate the Administration Building. After that order was served at about 1:45 a.m., some 150 students remained in the building and the building was not cleared until 4:00 a.m.

Thereafter, a second order to show cause was served upon the defendant Manginelli and 25 other students directing them to appear and show cause why they should not be held in contempt for not properly vacating the building upon service of the earlier court order.

The contempt application against the defendant Manginelli, and the other 25 students, was assigned to New York State Supreme Court Justice Charles R. Thom.

The Student Government Organization was a client of mine at the time and, therefore, I appeared for the charged students. The contempt hearing was held on March 23rd, and March 25th, 1977. At the conclusion of the University's presentation

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of proof, I moved to dismiss on the ground of failure to establish a prima facie case. That motion was granted as to 17 defendants, and denied as to the remaining 9 defendants.

At the conclusion of all the evidence, Justice Thom reserved decision. By decision dated April 18, 1977, he found each of the 9 defendants in civil contempt, and imposed a fine of \$527 against each of them. In addition, he sentenced the defendant Manginelli to twelve days incarceration. That portion of the Judge's decision, i.e. the 12 day jail sentence, was made the target of an appeal by me to the Appellate Division, Second Department. However, Judge Thom modified his sentence within a few days of its imposition, re-sentenced the defendant to time served, and, accordingly, the appeal was not pursued. Thus ended the Manginelli case.

I found the case interesting, as well as significant, for I believe it represented one of the last major student demonstrations in the metropolitan area. Legally, it posed the following question, as framed in my brief to the Appellate Division:

"In punishing a defendant for civil contempt for violating the provisions of a temporary restraining order, may a Court properly punish the defendant for acts which occurred prior to service of the temporary restraining order, as well as for acts which occurred after service of the order and which constituted the contemptuous conduct in question?"

I personally handled all aspects of the above litigation on behalf of the 26 defendants. The University was represented by Richard C. Cahn, Esq., (of counsel to Walter J. Relihan, Jr.). Mr. Cahn is presently a member of the law firm of Cahn, Wishod, Wishod & Lamb, 534 Broad Hollow Road, CS 9034, Melville, New York 11747-9034; telephone no. (516) 694-2300.

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3. People v. Roger Barry Petersen, Indictment Numbers
404-75, 438-75, 868-75 and 1133-75.

Henry F. O'Brien, Esq., became District Attorney of Suffolk County in 1974. Prior to his election, he had been a defense attorney, and many of the cases that he was handling in that capacity were still pending when he took office. Accordingly, he asked, pursuant to Section 701 of the New York State County Law, that a special prosecutor be appointed to prosecute those matters, and I was so designated by order of a County Court Judge. One of the defendants listed in that order was Roger Barry Petersen.

The following year, 1975, the District Attorney and the County Police Commissioner were investigating one another based on rumors of alleged criminal wrongdoing by each of them. Incidentally, those rumors were later found by the Special Prosecutor appointed by the Governor to investigate the "District Attorney--Police Commissioner countercharges", to be unsubstantiated. In any event, Mr. Petersen was central to that dispute, for he became the accuser of the District Attorney. As such, he remained under police control, and in their custody, for an extended period of time during the controversy.

On November 24, 1975, the defendant Petersen satisfied the various burglary charges against him by pleading guilty to two felonies, and two misdemeanors before County Court Judge Henderson Morrison. As part of the plea bargain, it was agreed that I would recommend that he serve two, one year, consecutive sentences.

The case was then adjourned to obtain a pre-sentence report. However, prior to sentence, the defendant indicated that he wanted to withdraw his plea, insisting that the terms of the plea, and concomitant incarceration, were contrary to his earlier understanding with the Police Commissioner.

As a result, a hearing was held before Judge Morrison on January 21st, 22nd and 26th 1976. At issue was whether Roger Barry Petersen's plea on November 24, 1975 was knowingly, intelligently and voluntarily made, or, as he claimed, was the product of coercion, misrepresentation and fraud practiced upon him by his attorney and the Police Commissioner. During the hearing, I called numerous witnesses--including the Police Commissioner--and my adversary called Mr.

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Petersen to the stand.

Judge Morrison denied the relief requested by the defendant, sentenced him pursuant to the plea bargain, and the case was thus concluded.

The matter was the most significant of the numerous assignments as special prosecutor that I had during the mid-1970s, given the defendant's dual status as an accused under four indictments, as well as being the accuser of the District Attorney at the same time.

The names, current addresses and telephone numbers of the attorneys associated with the case are as follows:

Desmond J. O'Sullivan, Esq.
112 Maple Place
Port Jefferson, New York 11777
Telephone no. (516) 923-2300
[Mr. O'Sullivan was Mr. Petersen's attorney until the hearing before Judge Morrison. At that hearing, Nicholas Castellano, Esq. represented the defendant; Mr. Castellano is now deceased].

The Special Prosecutor appointed by the Governor to investigate the countercharges made by the Police Commissioner and the District Attorney against one another--and who thus had considerable contact with Roger Barry Petersen as the accuser of the District Attorney--was:

Joseph P. Hoey, Esq.
[Mr. Hoey is retired; however, he may be reached through his former law firm, Suzzi, English, Esqs., 1505 Kellum Place, Mineola, New York 11501; telephone no. (516) 741-6565]. Mr. Hoey's chief assistant was Stephen M. Behar, Esq., 72 West Main Street, Central Islip, New York 11730; telephone no. (516) 581-1471.

The above cases, viz. Riteway Beverage, Inc., Manginelli, and Petersen, were significant cases, in my judgment, for the reasons indicated.

The cases which follow had no major significance beyond their obvious importance to the lawyers and litigants involved. No novel questions of law were presented nor major community concerns addressed; rather the outcome of

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each turned solely on the jury's factual determination of the issues as framed by the evidence. However, these cases, numbered 4 through 10, are representative of the type of matters which I tried during my tenure in private practice.

4. Vastola v. Lizza & Sons, Inc., Supreme Court, Suffolk County, (Index No. 13607966)(case not reported).

Vastola was a negligence case, which was bifurcated for purposes of trial in the sense that the liability issue was to be determined initially, to be followed by a damages phase, if necessary.

The firm was retained to represent the defendant by the Royal Globe Insurance Companies, as the insurance carrier for Lizza & Sons.

The liability phase of the case was tried on April 14th, April 18th, and April 19th, 1972, with the jury returning a defendant's verdict on the latter date. The trial judge was New York State Supreme Court Justice John P. Cohalan, now deceased.

I personally handled all phases of the defense for Lizza & Sons, both pre-trial and at trial.

The plaintiff was represented by Cecil Haber, Esq., of Dillon, Haber & Dillon, 32 Broadway, New York, New York 10004; (reference to the Manhattan Telephone Directory, and Manhattan Information, indicate that there is no longer any listing for the firm, or Cecil Haber in Manhattan).

5. Giordano v. Cosma, Supreme Court, Suffolk County (Index No. 17430169)(case not reported).

Giordano was a negligence case, which was bifurcated for purposes of trial in the sense that the liability issue was to be determined initially, to be followed by a damages phase, if necessary.

The firm was retained to represent the defendant Cosma by his insurance carrier, viz. the Royal Globe Insurance Companies.

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The liability phase of the case was tried on March 27th, March 29th, and March 30th, 1972. Immediately prior to the jury indicating that it had reached a verdict, the case was settled for a nominal amount. The court elected to take the verdict, even though it was then academic in view of the settlement that had been reached a few minutes before. The jury reported that the verdict it had reached was for the defendant. The trial judge was New York State Supreme Court Justice George F.X. McInerney.

I personally handled all phases of the defense for Mr. Cosma, both pre-trial and at trial.

The plaintiff was represented by Thomas J. Connelly, Esq., 1390 Deer Park Avenue, North Babylon, New York 11703; telephone no. (617) 566-4500.

6. People v. Michael E. Herlihy. Supreme Court, Suffolk County (Indictment No. 188-74, case not reported).

In this case, I represented the People as a special prosecutor.

The defendant was charged in a two count indictment with criminal sale of a controlled substance in the third degree, and criminal possession of a controlled substance in the fifth degree.

A four day trial was concluded before Acting Supreme Court Justice Paul D'Amaro on June 14, 1976. The jury found the defendant guilty of the sale count, and the court dismissed the possession charge. The matter was then scheduled for sentence.

Several weeks prior to the sentencing date, I discovered that one of the jurors had lied during *voir dire*. She had said that she knew no one in the police department when, in fact, she was engaged to marry a member of the force. I relayed that information to Justice D'Amaro and the defense attorney immediately. The verdict was then set aside upon defendant's motion, with my consent. That was followed by his plea to the possession count, and the imposition of sentence. The case was thus concluded.

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The defense attorney was Benedict Vuturo, Esq., now deceased.

The trial judge, Paul D'Amaro, has retired from the bench. His present address is: 5 Lindquist Lane, Deer Park, New York 11729; telephone no. unlisted.

7. People v. Henry Doe, a/k/a Clyde Curtis, County Court, Suffolk County (Indictment No. 798-65) (case not reported).

I represented the People as an assistant district attorney. The defendant was charged with criminal sale of a controlled substance, and criminal possession of a controlled substance, both in the second degree.

A jury trial was conducted on March 27th, 28th, 31st, and April 1st, 1968. The defendant was found guilty as charged on the latter date, and sentenced thereafter.

The defense attorney was Nancy Carley, Esq. Ms. Carley is now retired. Her present address and telephone number are: c/o McNally, 5241 SW 7th Street, Plantation, Florida 33317; telephone no. (407) 665-4665.

The trial judge was County Court Judge Pierre Lundberg, who has since left the bench and returned to private practice. He may be contacted at Smith, Finkelstein, Lundberg, Isler & Yakaboski, Esqs., 456 Griffing Avenue, P.O. Box 389, Riverhead, New York 11901; telephone no. (516) 727-4100.

8. People v. Burton, County Court, Suffolk County (Indictment No. 334-69)(case not reported).

I represented the People as an assistant district attorney.

The defendant was charged with burglary in the third degree and petit larceny.

A jury trial was conducted before County Court Judge Gordon M. Lipetz on October 23rd, 24th, 27th and 28th, 1969. The defendant was found guilty of the lesser included offense of criminal trespass in the third degree under the burglary

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count, and of petit larceny, and was subsequently sentenced.

Judge Lipetz has retired. His present address and telephone number are: 777 South Federal Highway, Apt. 112, Pompano Beach, Florida 33062; telephone no. (305) 785-6906.

The defense attorney, Kenneth Rohl, is now a New York State Supreme Court Justice. He may be contacted at the Criminal Courts Building, Center Drive South, Riverhead, New York 11901; telephone no. (516) 852-2163.

9. People v. William Costanza, County Court, Suffolk County (Indictment No. 13768)(case not reported).

I represented the People as an assistant district attorney.

The defendant was charged with criminal sale of a dangerous drug, and criminal possession of a dangerous drug, both in the second degree.

A jury trial was conducted before County Court Judge Pierre Lundberg on October 6th, 7th, 8th, 9th and 10th, 1969. The defendant was convicted as charged, and later sentenced.

For information concerning Judge Lundberg, please see case 7, supra. The defense attorney, John E. Clarke, Esq., maintains his office at Saxon Avenue & Moffitt Boulevard, P.O. Box 9, Islip, New York 11751; telephone no. (516) 666-3838.

10. People v. Jeffrey Glen Smith, County Court, Suffolk County (Indictment No. 512-67)(case not reported).

I represented the People as an assistant district attorney.

The defendant was charged with selling dangerous drugs, in violation of Section 1751 of the Public Health Law.

A jury trial was held before County Court Judge Gordon M. Lipetz on June 9th, 10th, 11th, 12th, and 13th, 1969. The defendant was found guilty as charged, and thereafter sentenced.

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For information concerning Judge Lifetz, please see case 8, *supra*. The defense attorney, William O'Leary, Esq., maintains his office at 61 Main Street, Southampton, New York 11968; telephone no. (516) 283-8524.

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

In addition to the trials in which I participated before becoming a judge, I was involved in a number of "non-trial" legal matters which I consider significant, including two appellate cases which I handled as a special prosecutor. The first case, *People v. Rice*, 41 N.Y.2d 1018, 395 N.Y.S.2d 626, 363 N.E.2d 1371 (1977), involved a constitutional attack on the section of the New York Penal Law rendering consensual sodomy between adults, a crime. A defendant so charged moved, pre-trial, to dismiss the accusatory instrument on the ground that the subject statute was unconstitutional. The trial court granted the application, but that determination was reversed by the Appellate Division. The Court of Appeals affirmed the Appellate Division, thereby sustaining the People's position which I had presented to the Court on their behalf.

It should be noted, however, that although the case was argued primarily on its merits, the Court of Appeals declined to address the constitutional question. Instead, its affirmance was expressly stated to be without prejudice to a renewed attack upon the same ground, should the defendant ultimately be convicted after trial. Parenthetically, the Court of Appeals several years later did invalidate the state's consensual sodomy statute in *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), cert. denied 451 U.S. 987 (1981).

The other appellate case which I believe was significant is *People v. Barry A.*, 40 N.Y.2d 990, 391 N.Y.S.2d 67, 359 N.E.2d 663 (1976), cert. denied sub nom. *New York v. Luis J.*, 431 U.S. 908, 97 S.Ct. 1706 (1977). Here again, I served as a special prosecutor. The defendant was charged, in three separate indictments, with various violations of the New York Penal Law, including Class A-II felonies involving the sale of drugs. The alleged acts occurred when the defendant was 18 years of age. Under the state's Criminal Procedure Law, the defendant was not eligible for youthful offender treatment since he was charged with Class A-II felonies.

Had he been eligible for, and afforded youthful offender status, an adverse adjudication would not have constituted a criminal

-27-

conviction, and the maximum period of potential incarceration would have been far less than as an adult offender. His counsel urged that having eligibility for such favorable treatment hinge on the nature of the crime charged, rather than upon a conviction, was unconstitutional as violative of due process and equal protection.

The court accepted the argument of defense counsel and found the challenged Criminal Procedure Law section unconstitutional. However, I think that through my efforts, and the efforts of my adversary, *inter alia*, the issue involved was fully and fairly presented to the Court of Appeals, and I, therefore, am satisfied with my representation of the People, notwithstanding the outcome of the appeal.

PART III FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

QUESTIONNAIRE FOR JUDICIAL NOMINEES

DENIS R. HURLEY

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

None, except for anticipated retirement benefits--beginning at age 62--from the New York State Retirement System.

I am not presently vested, having approximately 8.5 years of credited service, against a minimum of 10 years. However, I have recently been advised that upon making a lump sum payment to the Retirement System, I will be credited for lapsed periods of prior service. By combining my present years of service as a judge, with my prior lapsed years of government service, I will become vested. Accordingly, I intend to make the necessary lump sum payment within the next two months. Once that is done, I will be entitled to receive--again, beginning at age 60--approximately \$30,000 per year in retirement benefits, paid-out monthly.

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

I am not aware of any potential conflict of interest which may arise.

However, if confronted by a potential conflict of interest I will proceed in accordance with the Judicial Canons of Ethics.

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

No.

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

In answer to this question, a copy of my completed financial disclosure report (AO-10; Rev. 1/81) is enclosed in the envelope marked as Exhibit E.

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

Net worth statement completed, and attached hereto as pages 2 A and 2 B.

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

I have never held a position, or played a role, in a political campaign except on the three occasions I was a candidate for public office, viz. (a) for the office of Suffolk County Legislator in 1977 (took office in January 1978); (b, for the office of Family Court Judge in 1982 (took office in January 1983); and (c) for the office of County Court Judge in 1987 (took office in January 1988).

FINANCIAL STATEMENT

NET WORTH

2 A

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	21,544	Notes payable to banks—secured	0
U.S. Government securities—add schedule	0	Notes payable to banks—unsecured	0
Listed securities—add schedule*	0	Notes payable to relatives	0
Unlisted securities—add schedule	7,500	Notes payable to others	0
Accounts and notes receivable:		Accounts and bills due	1,000 ±
Due from relatives and friends	40,000	Unpaid Income tax	0
Due from others	0	Other unpaid tax and interest	0
Doubtful	0	Real estate mortgages payable—add schedule ***	148,800
Real estate owned—add schedule **	350,000	Chattel mortgages and other liens payable	0
Real estate mortgages receivable	0	Other debts—itemize:	0
Autos and other personal property	75,000		1
Cash value—life insurance	0		1
Other assets—itemize:	2,500 ±		1
5% partnership interest in Leo F. McGinity et al (11-609-2834)		Total Liabilities	119,800
Total assets	496,544	Net worth	236,721
		Total Liabilities and Net worth	496,544
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	No	Are any assets pledged? (Add sched-ule.)	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		

In April 1989, I purchased 750 shares of common stock in the Long Island Commercial Bank, One Suffolk Square, Islandia, New York 11722. I paid \$10 per share, for a total of \$7,500, which I believe is the investment's current market value.

-continued on next page-

2 B

** Real Estate owned consists of personal residence at 216 North Country Road, Wading River, New York (approximate market value of \$300,000), and adjoining .67 acre parcel immediately to South on Wading River/ Manorville Road, Wading River, New York (approximate market value of \$50,000).

*** Indebted to Centerbank Mortgage Company, P.O. Box 10013, Waterbury, Ct. 06725-0013, under home mortgage (loan no. 0000057635) in the amount of \$96,800, and under a home equity loan (account no. 67-501924) for \$52,000.

PART III GENERAL (PUBLIC)

QUESTIONNAIRE FOR JUDICIAL NOMINEES

DENIS R. HURLEY

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

Our law firm participated in a program administered by the Suffolk County Bar Association to provide counsel to indigent individuals charged with a crime. The legislative authority, and guidelines, for the program are set forth in Article 18-B of the New York County Law.

Those attorneys who elect to participate are reimbursed for their expenses, and receive some compensation--but at a considerably reduced rate--for their services. Pursuant to an informal partnership agreement, two of the firm's partners, viz. Thomas E. Behringer, Jr. and Peter S. Danowski, Jr., served for several years as so called "18-b" attorneys, and devoted approximately 10% of their criminal court time to such service. I, and the other partners in the firm, were not on the 18-b list, but we did participate--though indirectly--in the program via the firm's involvement.

Parenthetically, although I did not furnish legal services to the disadvantaged independent of the firm's involvement in the 18-b program, I did devote substantial effort and time to community service while in private practice including, among other things, serving for six years as a member of the Board of Education of the Little Flower Union Free School District of Wading River [the student body of which consists wholly of youngsters--usually from disadvantaged backgrounds--displaced from their homes, and residing on the grounds of Little Flower], and as a member of the Riverhead Town Narcotics Guidance Council, through which I, and other adults, were available to provide advice--including, in my case, legal advice--to youngsters concerning matters related to the use of drugs.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementa-

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tion of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I was a member of the Riverhead Rotary Club from the mid-1970s to September 1, 1979. At that time, Rotary was a community service organization which limited its membership--under its national and/or international charter--to men.

During my membership, no women, to my knowledge, ever sought to join the local Club. Nor do I recall ever discussing the absence of women in the organization with any Club members.

As you know, Rotary's discriminatory membership policy has since been corrected. I am advised that presently there are thirteen women in the Riverhead Club, and the present president is a local businesswoman. The address of the Riverhead Rotary Club is P.O. Box 518, Riverhead, New York 11901.

I was also a member of the Loyal Order of the Moose from April 4, 1981 to July 1982. It is my understanding that the rights afforded to women members were not the same as those enjoyed by the men members of the organization. The address of the Five-head Chapter of the Loyal Order of the Moose is P.O. Box 505, 51 Madison Street, Riverhead, New York 11901.

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

There is no selection commission in Suffolk County nor, to my knowledge, elsewhere in the E.D.N.Y. which initiates recommendations for the federal bench.

My experience in the judicial selection process has been as follows:

- (a) In November 1990, I contacted Senator Alfonse M. D'Amato's Washington office and indicated that I would like to be considered as a possible candidate for the position of United States District Judge for the E.D.N.Y. I was advised to contact the chairman of the Senator's Judicial Screening Committee to obtain a questionnaire, which I did.
- (b) Following the completion and return of that questionnaire, I was scheduled for an interview with the screening committee, which was held in New York City on December 17, 1990.

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- (c) Thereafter, I was interviewed at the Justice Department in Washington, D.C., on February 21, 1991.
- (d) In mid-April, the Justice Department submitted my name to the Chair of the Standing Committee on the Federal Judiciary of the American Bar Association, for that Committee's investigation and, ultimately, evaluation of my qualifications for the position sought.
- (e) In early May, I was furnished with various forms to complete as part of the F.B.I.'s investigation, including a Standard Form 86 (Questionnaire for Sensitive Positions), together with a supplement to that form. On May 15, 1991, I was personally interviewed by a Special Agent who, *inter alia*, took possession of the completed questionnaires, and took my fingerprints.

The above represents my pre-nomination experience in the judicial selection process.

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

No.

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

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

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

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

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- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

By way of format in answering this question, I will outline my beliefs as to the proper role of a judge at the trial level. This will be done with reference to the criticisms often associated with judicial activism. The reader will then be in a position to compare my comments with his or her personal views regarding judicial activism in evaluating my application to serve as a United States District Judge.

The cornerstone of our judicial system of dispute resolution is found in the adversarial nature of the proceedings. Issues are framed by the pleadings and proof--as challenged, crystallized, refined and advanced through the arguments of counsel made on behalf of opposing parties vitally interested in the outcome of the litigation. Through this process, a defined, or at least definable question or series of questions is presented to the court for its determination.

A judge's role is to apply the law to the issue presented. On occasion, of course, there may be an absence of a clearly controlling statute, regulation or decisional precedent. That should not be viewed, however, as an invitation to a jurist to fill the perceived void by interjecting his or her personal belief as to a desirable conclusion to the controversy. The appropriate approach when confronted with such a situation, in my view, is to focus on the issues before the court, and then develop a decision which is derived--by analogy or otherwise--from existing even though, perhaps, peripheral authority bearing on the subject.

It is also my belief that a trial court's decision should be carefully tailored to the particular factual and legal context of the case under consideration. To do otherwise, i.e., to render a decision broader in scope than required to resolve the immediate dispute, is not only unnecessary but, more importantly, undesirable. Firstly, a portion of the court's holding may have been made without benefit of the scrutiny embodied in the adversarial process. Secondly, it may constitute--to the extent of its overbreadth--an infringement on the policy making functions exclusively entrusted under the Constitution to our Nation's elected officials.

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Pivotal to our system of government is its separation of powers. Each branch must recognize and respect the roles and responsibilities of the other two. And those in all branches should be joined, or so it seems to me, in avoiding any erosion of the lines of demarcation.

Judicial activism is subject to various interpretations. It means different things to different people. However, to the extent it may signify a violation of the separation of powers doctrine, it is contrary to my perception of the proper role of a United States District Judge.

FD-10
Rev. 1/791

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act, Chap. 30, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
Hurley, Denis R.	United States District Court, Eastern District of New York	6/28/91
4. Title (Article III Judges indicate active or senior status; Magistrate Judges indicate full- or part-time) Nominee for position of United States District Judge, E.D.N.Y.	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date <u>6/27/91</u> <input checked="" type="checkbox"/> Initial Annual Final	6. Reporting Period 1/1/90 to 6/19/91
7. Chambers or Office Address My current office address is: Suffolk County Court, 210 Center Drive, P.O. Box 9007, Riverhead, New York 11901-9007		

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

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

<u>POSITION</u>	<u>NAME OF ORGANIZATION/ENTITY</u>
<input type="checkbox"/> NONE (No reportable positions)	
County Court Judge, Suffolk County	- State of New York
Adjunct instructor of Business Law (evenings)	- Suffolk County Community College (Spring 1989; Spring 1990)

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

<u>DATE</u>	<u>PARTIES AND TERMS</u>
<input checked="" type="checkbox"/> NONE (No reportable agreements)	

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

<u>DATE</u> (Honors only)	<u>SOURCE AND TYPE</u>	<u>GROSS INCOME</u> (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income)		
¹ County Court Judge, Suffolk County - salary (1989)		\$92,607.59
² County Court Judge, Suffolk County - salary (1990)		\$91,089.98
³ County Court Judge, Suffolk County - salary (1/1/91 to 6/19/91)		\$47,309.78
⁴ Centerbank Mortgage Co., Inc. (1989 through November 1990) (S)		\$ ---
⁵ Suffolk County Community College - salary for Spring semester 1989 (\$1,710) and Spring semester 1990 (\$1,679.16)		\$ 3,389.16

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting Hurley, Denis R.	Date of Report 6/28/91
--	---------------------------

IV. REIMBURSEMENTS and GIFTS – transportation, lodging, food, entertainment.
 (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCE	DESCRIPTION
<input type="checkbox"/> NONE (No such reportable reimbursements or gifts)	
1 Exempt	
2	
3	
4	
5	
6	
7	
8	

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCE	DESCRIPTION	VALUE
<input type="checkbox"/> NONE (No such reportable gifts)		
1 Exempt		\$ _____
2		\$ _____
3		\$ _____
4		\$ _____

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical " (S)" for separate liability of spouse, " (J)" for joint liability of reporting individual and spouse, and " (DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITOR	DESCRIPTION	VALUE CODE*
<input checked="" type="checkbox"/> NONE (No reportable liabilities)		
1		
2		
3		
4		
5		
6		
7		

* VALUE CODES: A = \$15,000 or less E = \$15,001 to \$50,000 I = \$50,001 to \$100,000 M = \$100,001 to \$250,000
 B = \$250,001 to \$500,000 F = \$500,001 to \$1,000,000 N = \$1,000,001 and more

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting
Hurley, Denis R.Date of Report
6/28/91

VII. INVESTMENTS and TRUSTS -- income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of instructions.)

Description of Assets (including trust assets)		B. Income during reporting period		C. Gross Value at end of reporting period		D. Transactions during reporting period	
						Exempt	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
						If not exempt from disclosure	
						(1) Type (2) Date: Buy/Sell or redem- ption (3) Day	
						(2) Date: Buy/Sell or redem- ption (3) Day	
						(4) Value Code (J-F)	
						(5) Identity of party (if private transaction)	
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)						EXEMPT	
*1) Savings Accounts #050007633-5 and #050007	B	int.	K	T			
*265-6, Suffolk County Nat'l. Bank, Wading River, N.Y. (J)							
*2) Mortgage owned by	A	int.	J	T			
*3) Leo F. McGinity et al (11-609-2834). I have a 5% interest in partnership							
3) Common stock (750 shares) in the Long Island Commercial Bank, Islandia, N.Y.	A	none	J	W			
*4) Ten percent interest in office building in West- hampton Beach, N.Y.; my interest was sold to one of my former law partners, Thomas F. Behringer, in 1990 for \$30,085.00	E	cap gain	J(sold in 1990)				
*5) Residential real estate parcel (.67 acre) Wading River, N.Y. (S)	A	none	K	W**			
** I paid \$7,500 for the stock in April of 1989, which I believe is its approximate current value.							
** I paid \$10,000 for the parcel in the mid-1970s. Based on comparable sales, I believe its current value to be about \$50,000.							
1 Income/Gain Codes: A=\$1,000 to \$10,000 B=\$11,001 to \$2,500 C=\$2,501 to 5,000 D=\$5,001 to \$15,000 E=\$15,001 to \$100,000 F=\$100,001 to \$1,000,000 G=\$1,000,001 to \$10,000,000 H=\$10,000,001 to \$250,000 2 Value Codes: J=\$1,000 to \$2,500 K=\$2,501 to \$50,000 L=\$50,001 to \$100,000 M=\$100,001 to \$1,000,000 N=\$1,000,001 to \$10,000,000 O=\$10,000,001 to \$250,000 3 Investment Codes: P=Real Estate only Q=Business (See Col. C3) 4 Market Value 5 Other 6 Estimated 7 S-Cash/Market							

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting Hurley, Denis R.	Date of Report 6/28/91
--	---------------------------

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

None

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

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.A. app. 7, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature

Date June 28, 1991

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.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

PERSONAL AND UNOFFICIAL

DENIS R. HURLEY
JUDGE

Judge's Chambers
 County Court of Suffolk County
 Criminal Courts Building
 Center Drive South
 Riverhead, New York 11901

3 July 91

Judicial Ethics Committee
 Administrative Office of the
 United States Courts
 Washington, D.C. 20544

RE: Supplement to June 28, 1991,
 Financial Disclosure Report
 (AO-10; Rev. 1/91)

Dear Sir/Madam:

Under covering letter dated June 28, 1991, I sent to your office my initial Financial Disclosure Report.

I would like to supplement my answer to Question II, entitled "Agreements", on page 1 of that form. I answered that question by indicating "None". However--although I have no present agreement within the purview of that question--I anticipate that I will be vested in the New York State Retirement System within the next few months. Accordingly, please attach this letter to my June 28th Financial Disclosure Report to reflect that the complete answer to Question II should read as follows:

"None, except for anticipated retirement benefits--beginning at age 62--from the New York State Retirement System.

I am not presently vested, having approximately 8.50 years of credited service, against a minimum of 10 years. However, I have recently been advised that upon making a lump sum payment to the Retirement System, I will be credited for lapsed periods of prior service. By combining my present years of service as a judge, with my prior lapsed years of government service, I will become vested. Accordingly, I intend to make the necessary lump sum payment within the next two months. Once that is done, I will be entitled to receive--again, beginning at age 62--approximately \$30,000 per year in retirement benefits, paid-out monthly."

If any further information is required, please call me at (516) 852-1884.

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Thank you.

Very truly yours,

Denis R. Hurley
Denis R. Hurley

RH:kmc

Inclosures: three additional copies of this amendment letter.

STATEMENT OF FINANCIAL POSITION
HIGHSMITH, STRAUSS, GLATZER & DEUTSCH, P.A.
May 31, 1991

ASSETS**CURRENT ASSETS**

Cash	\$59,313	
Client advances	34,077	
Due from partnership	7,445	
Due from shareholder	51,202	
Other	500	
	TOTAL CURRENT ASSETS	\$152,537
PROPERTY AND EQUIPMENT		
Furniture and equipment	250,302	
Leasehold improvements	116,658	
Transportation equipment	123,512	
	<u>490,472</u>	
Less accumulated depreciation	367,320	123,152
OTHER ASSETS		22,691
		\$298,380

LIABILITIES AND SHAREHOLDERS' EQUITY**CURRENT LIABILITIES**

Notes payable to bank	\$14,772	
Notes payable to others	0	
Payroll taxes payable	0	
Income taxes payable	10,439	
Due to employee benefit plans	80,000	
Due to shareholder	3,959	
	TOTAL CURRENT LIABILITIES	\$109,170

SHAREHOLDERS' EQUITY

Common stock (\$1.00 par value)	1,001	
Paid-in capital	1,481	
Retained earnings	209,648	
	<u>212,130</u>	
Less treasury stock (2,000 shares)	22,920	189,210
		\$298,380



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