

[Senate Hearing 108-135]
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S. Hrg. 108-135, Pt. 6

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

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HEARINGS

before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

JANUARY 22, JANUARY 28, FEBRUARY 5, FEBRUARY 11, FEBRUARY 25, AND MARCH
10, 2004

Serial No. J-108-1

PART 6

Printed for the use of the Committee on the Judiciary

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

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THURSDAY, JANUARY 22, 2004

United States Senate,
Committee on the Judiciary,
Washington, DC.

The Committee met, pursuant to notice, at 10:00 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Jon Kyl, presiding.

Present: Senators Kyl, Specter, Craig, and Durbin.

OPENING STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator Kyl. Let me call this meeting of the Senate Judiciary Committee to order just one or two minutes early, and if there are members of the dais here who come at 10 o'clock, then I will afford each of them an opportunity to speak. But let me just tell you generally that I am very pleased to have all of you here. We are going to consider the nominations of three candidates nominated by the President for Federal district court and one for the Circuit Court of Appeals.

We will begin with introductory statements from Senators or Representatives who wish to introduce candidates from their State. Following all of those introductions, we will then call the panelists en banc, if there is no objection, to the table for their opening statements and then questioning from members.

We will also, I want to make clear, afford everyone an opportunity to introduce friends and family who may be here today. This is an important event, and I think that every one of the nominees here should be very, very proud to be here, and the family and friends who are here I am sure are equally proud to be here today in support of their family or friend who has the important distinction of being nominated by the President of the United States to serve on the Federal judiciary. And that is why I think it is especially appropriate and it is the custom of the Committee to recognize those who are here in the audience to share in the hearing today.

I want to make one preliminary comment, too. The hearing for nominees almost always is not the kind of formal affairs that you sometimes see on television or you perhaps have seen in a case of a very controversial nominee. And that is because most of the nominees are not very controversial. The reason for that is that there is an extensive vetting process, and those of you who have been nominated know exactly of what I speak. You have got to fill out so many forms. You have got to have so many interviews. You have got to be considered by the White House Office of Legal Counsel, the Attorney General, the American Bar Association.

This Committee and its staff have already engaged in an extensive investigation, and basically when the Committee staff and Committee members conclude that the nominee is well qualified and does not need to undergo a great deal of public scrutiny in this hearing, then the hearing can go very well.

But I do not want you in the audience to assume that because this hearing is likely to fall into that category that members do not care, or that the fact that there are not other Senators here is a sign that they do not care. What you should be appreciative of is the fact that there has been a great deal of preliminary work that has gone into the vetting of these nominees, all of whom have been found very qualified. And that is the reason why you are not likely to see a lot of fireworks here today and it may seem to be a little bit more pro forma. But you should not take from that a lack of interest but, rather, be very proud of the people who have been nominated because they have been found to be very qualified and without significant controversy. At least I hope that is the way the hearing here will go today.

Now, let me begin by calling on those Senators or Representatives who are here to make introductions, and our colleague, a member of the Senate leadership, Senator Rick Santorum of Pennsylvania, is the first to arrive. Therefore, Senator Santorum, the floor is yours.

PRESENTATION OF GENE E.K. PRATTER, NOMINEE TO BE DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA, BY HON. RICK

SANTORUM, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator Santorum. Thank you, Senator Kyl, and I want to echo your remarks about the fine work that this Committee does in reviewing candidates and making recommendations, and I am confident that the person I am going to introduce will be one such non-controversial nominee.

Gene Pratter is a lawyer's lawyer. She is someone who has come with the highest recommendations from all of the bar associations in southeastern Pennsylvania and from lawyers from the left to the right. She is someone who has really invested her career in the law and has contributed greatly to it and to the bar in Philadelphia.

She has also done, as you would expect of someone who is very proficient, she has lent her abilities to numerous non-profit organizations and has contributed greatly to the community, greatly to her law school, which is the University of Pennsylvania, one of the finest law schools in the country, which we are very proud of.

This is the first chance, I just want you to know, to be able to introduce a nominee from Pennsylvania first, and I want to thank you for starting early because this is truly an honor for me, because Senator Specter, as my senior Senator, always goes first, as he should. But it is a pleasure for me to be the first to comment on Gene Pratter, and she is an exceptional individual. She will be an exceptional judge and someone who I have gotten to know over the years from the outstanding work that she has done, not just legally but for the community. And I am honored to be here today to recommend her to the Committee.

With that, I will defer to my colleague to give all the particulars, which he is very good at doing, and to make whatever comments that he would like to make.

Senator Kyl. Thank you, Senator Santorum, and let me call on Senator Specter, a member of this Committee, in just one moment. I was remiss in not doing one thing, and then I would also like to do another.

The scorecard, since we do not pass it out, I will give to you now, and that is that, again, without objection, we will consider all of the nominees on one panel. First on the panel will be Raymond W. Gruender, to be United States Circuit Judge for the Eighth Circuit. And then the other three nominees for Federal district courts are: Ricardo S. Martinez, to be United States District Judge for the Western District of Washington; Gene E.K. Pratter, to be United States District Judge for the Eastern District of Pennsylvania--just introduced by Senator Santorum; and Neil Vincent Wake, to be United States District Judge for the District of Arizona. And I will have some comments about Neil Wake in just a moment.

Secondly, I would like to, without objection, submit a statement by the Ranking Member of the Committee, Senator Leahy, for the record. Without objection, it is submitted.

Senator Specter, the floor is yours.

PRESENTATION OF GENE E.K. PRATTER, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, BY HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator Specter. Thank you very much, Mr. Chairman. I am delighted to be here with my distinguished colleague, Senator Santorum, to formally introduce Ms. Gene Pratter to this Committee. I regret being a trifle late. I compliment you, Mr.

Chairman, on opening on time--practically a violation of the rule of the Committee on the Judiciary to open on time. But I am chairing a hearing of the Subcommittee on Labor, Health, Human Services, and Education, so I will be brief.

Gene Pratter brings very extraordinary credentials to this position. She is a graduate of Stanford University with honors, 1971; a J.D., University of Pennsylvania, 1975. She practices as a general partner with the distinguished law firm of Duane, Morris and Heckscher in Philadelphia, where she has taken on the role of being a lawyer's lawyer in handling matters of unique complexity.

She is a member of all the appropriate bar associations. She has very extensive contributions to the community and brings really extraordinary qualifications to the United States District Court for the Eastern District of Pennsylvania.

Senator Santorum and I have continued the tradition which Senator Heinz had begun many years ago of a bipartisan nominating panel so that the people who come forward have credentials over and above what may customarily be involved in the selection of a Federal judge.

I see Senator Murray waiting, so I will be brief so that I can return to my other commitments. But I think it is a bright day for the Federal bench to have someone of Ms. Pratter's qualifications ascend to this position.

Thank you, Mr. Chairman.

Senator Kyl. Thank you very much, Senator Specter. And it should be obvious that we are on multiple assignments this morning, and I appreciate, Senator Specter, your ability to be here to make that introduction.

Since Senator Murray is here, Senator Murray, let me call upon you next for the purpose of an introduction.

PRESENTATION OF RICARDO S. MARTINEZ, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON, BY HON. PATTY MURRAY, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator Murray. Well, thank you very much, Mr. Chairman. I really appreciate your willingness to do that and your accommodation this morning, and also to the other members of the Committee.

Mr. Chairman, 48 years ago, a young boy was picking strawberries on a Washington State farm for 75 cents an hour. Today, that man stands before the United States Senate after more than 20 years of distinguished legal service, ready to be confirmed as the next U.S. District Court Judge for the Western District of Washington State. His name is Ricardo Martinez, and I am here today to offer my full support for his speedy confirmation. He will be the first Latino to serve as a district court judge in Washington State's history.

Senator Cantwell and I worked with President Bush to select Judge Martinez from a list of very qualified candidates, and today I am proud to be here to introduce him before the Senate Judiciary Committee. I want to especially welcome his family to the Senate today: his wife, Margaret, and their three daughters, Lela, Jessica, and Gabriela. I know they are very proud of their dad today. And I know that back in Washington State there are many people who have worked with him over the years who share their pride.

Mr. Chairman, I have met with Judge Martinez, and I have been very impressed by his professionalism, his decency, and his experience. It is no wonder that he has the strong support of a wide group of attorneys and community leaders throughout

Washington State.

There are many things I could say today about Judge Martinez. I could tell you about his education, that he was first in his family to go to high school, and that he earned undergraduate and law degrees from the University of Washington. I could tell you about his distinguished legal career, his 10 years as a prosecutor for King County or more than 8 years as King County superior court judge. And I could tell you about his current work as magistrate judge for the Western District of Washington, a position he has held for 5 years.

Or I could tell you about his innovative and thoughtful work helping people break their addiction to drugs and crime. Judge Martinez, in fact, helped create the first drug diversion court in the State of Washington and served as one of its first judges. This innovative court gives drug-addicted defendants an alternative to incarceration and has helped graduates kick their habits and lead productive lives. For years, Judge Martinez worked tirelessly to ensure the success of this treatment option.

Or I could tell you about his generous sense of community service, from his work on the Washington State Sentencing Guidelines Commission, the Minority and Justice Commission, to coaching soccer and basketball for the Redmond-Kirkland Boys and Girls Club.

I could tell you all of those things, but instead I would like to share with you and this Committee something that Judge Martinez himself said to the Seattle Times in August. He told the newspaper, ``I've always considered myself extremely lucky. I was driving through Snohomish County the other day, and I saw some migrant farm workers along the road. And I said to myself, `You know, I'm not far removed from them.'''

Judge Martinez has been lucky, but he has also made his own luck by working hard and giving back to our State. He has earned everything that has come his way, and I believe he has earned a seat as our next district court judge. His fairness, thoughtfulness, and compassion set a great example for so many people in our State, and I am proud to support his confirmation before the Senate Judiciary Committee.

Mr. Chairman, Senator Cantwell could not be with us this morning. She asked that I submit her statement for the record as well.

Thank you very much.

Senator Kyl. Thank you, Senator Murray. It will be submitted, and thank you for that excellent opening statement.

Senator Larry Craig has joined us. If you do not have an opening statement, I will--

Senator Craig. I do not.

PRESENTATION OF NEIL VINCENT WAKE, NOMINEE TO BE DISTRICT JUDGE
FOR THE DISTRICT OF ARIZONA, BY HON. JON KYL, A U.S. SENATOR
FROM THE STATE OF ARIZONA

Senator Kyl. Okay. Senator Bond from Missouri is allegedly on his way, and I think he has an introduction. So in the meantime, to keep the hearing moving, let me give you an introduction, which is of one of the nominees from the State of Arizona, which I represent. And Senator McCain joins me in expressing appreciation to President Bush for nominating Neil Wake for the Federal District Court in Arizona.

Neil is an Arizona native. He practiced law for 29 years in Phoenix as a partner in several law firms and recently a sole

proprietor of his firm. He received a bachelor's degree with honors from Arizona State University and a law degree cum laude from Harvard University, where he was a member of the Harvard Civil Rights and Civil Liberties Law Review.

His practice has focused primarily on civil matters and appellate work. He practiced exclusively in Federal and State courts, including the United States Supreme Court, and has been involved in a variety of continuing legal education programs and publications, including articles in the fields of administrative law and appellate procedure.

He has received a great deal of recognition from his peers. Since 1989, he has been listed in the Best Lawyers of America for Business and Appellate Litigation. That is from recommendation of other lawyers, and about 1 percent of the lawyers are recognized in that fashion. Since 1993, he has been a fellow of the American Academy of Appellate Lawyers, a society of fewer than 300 members nationwide who are admitted by invitation only and after careful investigation.

Senator Bond, please take the dais, and I will call on your in just a moment. I was just completing the introduction of a candidate from Arizona.

Neil Vincent Wake was honored by the American Bar Association's Standing Committee on the Federal Judiciary by unanimously giving him the highest evaluation of well qualified for the appointment as judge of the United States District Court. He has a variety of civic activities and bar associations achievements, including being a founding member and current Chairman of the State Bar's Indian Law Section and Appellate Practice Section, served five times as judge pro tem of the Arizona Court of Appeals. He and his wife, Shari, and other parents founded the ICU Care Parents, a support group for parents of critically ill newborns. And knowing Neil and Shari very well, I can attest to a variety of other important community contributions that they have made.

They are the parents of three sons, and I know that Neil Wake will be proud to introduce his family in a moment as well.

As I said, Senator McCain joins me in expressing appreciation to the President for his nomination of Neil Vincent Wake.

Now we are joined by Senator Chris Bond of the State of Missouri. Senator Bond, the floor is yours.

PRESENTATION OF RAYMOND W. GRUENDER, NOMINEE TO BE CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT, BY HON. CHRISTOPHER BOND, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator Bond. Thank you very much, Mr. Chairman, Senator Craig, members of the Committee. It is a real pleasure for me to be here today to introduce to you and present to you a good friend, fellow Missourian, Ray Gruender, who has been nominated to serve on the Eighth United States Circuit Court of Appeals.

I have known Ray both personally and professionally for many years. He is an excellent lawyer. I am just delighted that the President nominated him for this position. I am confident that the Committee, after you review his credentials and listen to his responses, will conclude that Ray is not only well qualified for the bench but he will be a tremendous addition to the Federal judiciary.

I do not need to tell you the United States Courts of Appeals are extremely important, and the decisions that come before these courts have impacts on every aspect of society. And I think that we should have only the finest, most qualified

jurists serving on these bodies. And certainly Ray fits that qualification.

Ray enjoys the respect of the Missouri legal community. Many have told me, in recommending his nomination, that Ray's demeanor, his willingness to listen, and his very clear intellect are great qualifications.

He has an abundance of many other qualities that elevate him as one who is not only qualified through experience, but his work ethic and humility. I believe, as I think most Missouri lawyers do, that Ray will be a judge who is thoughtful, careful, approachable, and one who will respect the role of a judge and the restraint imposed upon the judiciary by the Constitution.

Ray currently serves as the United States Attorney for the Eastern District. He has been there since May of 2001. He supervises 60 attorneys in a jurisdiction that is both urban, suburban, and rural, with all the challenges that come with such a demographic makeup.

As U.S. Attorney, he has embarked on a campaign of aggressive prosecution of Federal gun violations. The largest city in his jurisdiction, St. Louis, has an unfortunate legacy of violent crime. But I believe in no small part due to the aggressive efforts of the U.S. Attorney's Office under Ray Gruender's jurisdiction, there has been a tremendous reduction in the number of murders, the number of homicides in St. Louis. Ray is taking the gun-toting felons off of the street, and it is a very clear remedy, and he has applied it very well.

But Ray has also practiced law for 17 years. He has great experience as a private attorney. He worked as a partner in a well-respected Missouri firm, spent many hours in Federal court and State court representing clients on criminal and civil matters, including admiralty, antitrust, contracts, employment, securities fraud, banking, and a number of tort claims.

But just to give you a snapshot of his personal qualities, as a graduate of Washington University in St. Louis, Ray earned his degree and an MBA and a law degree in only 6 years, finishing strongly in all, while working and putting his way through school. He rose from humble beginnings to become U.S. Attorney, and I think that he would make a great addition to the United States Court of Appeals for the Eighth Circuit.

I thank you, Mr. Chairman, members of the Committee, for scheduling this hearing. I hope that you will be able to move this nomination quickly and that we can get him confirmed yet this year.

Senator Kyl. Thank you very much, Senator Bond. I think it is important that we have had people introduce these candidates who know them personally, and that is a very important contribution to the hearing record. So thank you very, very much, Senator Bond.

Now, unless there are any other introductory statements-- and I know all of the Senators who have made introductory statements will have to go to other duties here, so we will allow Senator Bond to exit, and then I will call each of the nominees forward. And, again, without objection, we will consider all of the nominees as one panel.

Hearing none, then let me ask the following people to come to the dais, and would the staff please get the proper name tags here for us? Raymond Gruender, Ricardo Martinez, Gene E.K. Pratter, and Neil Vincent Wake.

Actually, before you sit, would you all stand and let me swear you in, if I could. Do you all swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Gruender. Yes.

Judge Martinez. Yes.

Ms. Pratter. Yes.

Mr. Wake. Yes.

Senator Kyl. Thank you. Now, that includes with regard to your family members here.

[Laughter.]

Senator Kyl. I am going to ask each of you to take an opportunity to make an opening statement, if you would like, and certainly to introduce friends and family who are here. And, Raymond Gruender, let me begin with you and welcome you to this hearing. I would ask you to make any statement you would like to make, and make those introductions at this time, if you would like.

STATEMENT OF RAYMOND W. GRUENDER, NOMINEE TO BE CIRCUIT JUDGE
FOR THE EIGHTH CIRCUIT

Mr. Gruender. Thank you, Mr. Chairman.

Very briefly, I'd like to thank the Committee for arranging this hearing today. I'd also like to thank President Bush, both for allowing me to serve and nominating me to serve as the United States Attorney for the Eastern District of Missouri, as well as this nomination pending today.

I'd also like to thank Senator Bond for his kind remarks on my behalf, and, finally, I'd like to introduce my family members that have come.

Senator Kyl. Please.

Mr. Gruender. My wonderful wife, Judy, is behind me to my left.

Senator Kyl. Please stand as he introduces you. That is good, and remain standing so we can give you a round of applause here at the end.

Mr. Gruender. And her mother, Jeannette Calhoun; and to my right is my mother, Sharon Gruender; and my good friend, Sharon Lentin, who recently got married. Thank you.

Senator Kyl. Well, thank you all very much, and I would like to give these people who are obviously good supporters of Mr. Gruender a round of applause for your being here today. Thank you.

[Applause.]

Senator Kyl. The role of those in support of the nominees is appreciated by us all, I can assure you.

[The biographical information follows:]

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Senator Kyl. Judge Martinez, we are delighted to have you here. It was a wonderful introduction that you received, and now is your opportunity to make any opening statement you would like and introduce members of your family or friends who are here today.

STATEMENT OF RICARDO S. MARTINEZ, NOMINEE TO BE DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF WASHINGTON

Judge Martinez. Mr. Chairman, thank you so very much. I have no opening statement. However, I would love to introduce my family.

Senator Murray already told you about my wife and children, but let me have you meet them. First of all, my wife, Margaret; my oldest daughter, Lela, who is a student at Howard University right here in D.C.; my daughter, Jessica, graduating from high school this year and getting ready to play Division I soccer next year for Washington State University.

Senator Kyl. Getting a plug in there for you, I can see.

[Laughter.]

Judge Martinez. And my youngest daughter, Gabriela.

Also present today, my brother and sister-in-law, Walter and Cynthia Morris; their son, Walter Morris III; my other sister-in-law who flew in this morning from San Francisco, Alice Morris; and a friend and classmate of my daughter here at Howard University, Mr. Omar Raheem.

And, finally, in the back, the woman who makes my presence here possible because she is a friend, a colleague, and one of my mentors from out of my court. When she took the job as Director of the Federal Judicial Center, that is when this vacancy opened up. Judge Barbara Jacobs Rothstein.

Senator Kyl. Great. Well, thank you all very much for being here in support of Judge Martinez.

[Applause.]

[The biographical information follows:]

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Senator Kyl. I am going to interrupt just briefly, if we could, because Senator Jim Talent from Missouri is here, and I think he will want to follow the kind introduction that Senator Bond made for Mr. Gruender. And then I am going to turn the gavel over to Larry Craig for just a moment here while I have to take a call. So if we could just interrupt the process here and, Senator Talent, the floor is yours.

PRESENTATION OF RAYMOND W. GRUENDER, NOMINEE TO BE CIRCUIT

JUDGE FOR THE EIGHTH CIRCUIT, BY HON. JAMES TALENT, A U.S.
SENATOR FROM THE STATE OF MISSOURI

Senator Talent. Well, I thank you, Mr. Chairman, and I am grateful to the witnesses for allowing me to--well, let's just say it--interrupt here for a minute or two and to have an opportunity to say a few words about a good friend and a good man whom the President has nominated to the court of appeals.

I know Senator Bond wanted to--he and I kind of fought over who would get to say the most about Ray, and he went on, I know, at some length in going through Mr. Gruender's qualifications and his background, his beginnings, the way he worked his way through Washington University, through the law school there, his outstanding performance as a private attorney, his work as the United States Attorney, his faithful adherence to the law, and his faithful enforcement of the law for a number of years. I do not know a person who is more honest and who has more integrity in his private dealings as well as his public dealings. He is a man of great compassion.

One of the reasons I got to know Ray was his involvement in an issue that I have also been involved with over the years, at least marginally, in private life but also in public life, his work as the board president of ALIVE, which is a group that promotes alternatives to living in violent environments for people who have been the victims of domestic abuse. He is a well-rounded person, a great lawyer, a person who I am convinced, Mr. Chairman, and I hope the Committee and the Senate come to believe will render unbiased and unprejudiced judgments in the cases that come before him, according to his lights, who will be consistent in application of his jurisprudence without regard to outcome, and who will be faithful in interpreting the Constitution and the laws.

I just think he is a great nomination, and I hope that the Committee will proceed expeditiously to approve him.

Senator Kyl. Thank you very much, Senator Talent.

Incidentally, Judge Martinez, you had indicated you had a statement, and you introduced your family first. If you want to make any other remarks, you are certainly welcome to do so at this time.

Judge Martinez. No, thank you, Mr. Chairman. What I said was I had no opening statement.

Senator Kyl. Oh, I am sorry.

Judge Martinez. And it is a tremendous honor and privilege to be here today.

Senator Kyl. Okay. Thank you.

Gene Pratter, welcome, and likewise you can make an opening statement and introduce friends and family, if you would like.

STATEMENT OF GENE E.K. PRATTER, NOMINEE TO BE DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Ms. Pratter. Thank you, Mr. Chairman. While I do not have an opening statement, I would like to take the opportunity to thank you for having the hearing. I am thrilled to be here, and I am even more thrilled to introduce to you my family and two of my colleagues.

First, my husband, Bob Pratter, Robert Pratter; our daughter, Paige Pratter, who works here in Washington, D.C., clerking for a district court judge on the Federal court here; and our son, Matthew Pratter, a freshman at Duquesne University. He is particularly happy to be here in his brand-new shoes. My partner, Sheila Hollis, who practices at Duane

Morris' Washington, D.C., office. Sheila, will you stand? There she is. And my long-time legal assistant, Rose Barber, who took the train early this morning to be here, and I can't tell you how important Rose has been to me and to my family over the last decade.

Senator Kyl. We thank you all for being here.

[Applause.]

[The biographical information follows:]

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Senator Kyl. As I said, that is a testament. We understand that none of us are here without the support of a lot of other folks, and it is nice to be able to recognize them.

Neil Vincent Wake, opening statement and/or introduce members of your contingent here.

STATEMENT OF NEIL VINCENT WAKE, NOMINEE TO BE DISTRICT JUDGE
FOR THE DISTRICT OF ARIZONA

Mr. Wake. Thank you, Mr. Chairman. I have no opening statement, but I, too, want to thank President Bush for submitting my name, and I want to thank this Committee and the Senate for their consideration of my nomination.

I also want to express my thanks to Senator McCain and to you, Mr. Chairman, for your support as well.

I'd like to introduce my family. I've got a pretty good contingency here because I have eight brothers and sisters, and a fair number of them are here.

First let me start with my wife, Shari Capra. And my brother, Dan Wake. Dan is the other lawyer in the family, from Denver. And my sister, Joy Wake. And another brother, Ward Wake. And also Ward's family, his wife, Syllvette Wake, and-- she may have stepped out. She stepped out. Oh, well. The reason she probably stepped out is because of the children that she brought: Chantall, who is perhaps not here either, and Aiden, who is only 1 year old. So that probably--

Senator Kyl. She is excused.

[Laughter.]

Mr. Wake. And I also have some very dear friends that I'd like to introduce: Dr. Karen Rigamonti and her daughter, Eva Rigamonti. They are very dear friends of ours from Phoenix, who have lived in Baltimore for quite a while, and they have come down. I want to express my thanks to all of them for being here.

Senator Kyl. Thank you all very much for your attendance here today.

[Applause.]

[The biographical information follows:]

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Senator Kyl. Now, before we begin questioning, I note the presence of Senator Durbin of Illinois. And, Senator Durbin, if you have any statement to make, you are certainly welcome to do so.

Senator Durbin. No, Mr. Chairman. I will waive an opening statement.

Senator Kyl. Thank you very much.

Well, then, the floor is open for questions, and I will begin by calling on Senator Craig.

Senator Craig. Thank you very much, Mr. Chairman. Let me ask this question of all of you, and you can, obviously, we will start over here with you and move across.

If the Supreme Court reached a decision that you believe was fundamentally erroneous, would you follow that precedent or apply your own judgment to the issues of the law placed before you?

Mr. Gruender. Senator, thank you for the question.

The answer to that is crystal clear. Despite any beliefs that I might have, I would be required, as an inferior court judge, to apply the precedent of the Supreme Court, and I would in fact do so.

Judge Martinez. Thank you, Senator.

As a judge now for the last 14.5 years or so, I have always done exactly that. My own personal beliefs play no part in how I apply the law that has been decided by the superior courts.

Ms. Pratter. Senator, if I am fortunate enough to be confirmed, it would be my obligation, and an obligation I would follow, to follow the Supreme Court precedent.

Mr. Wake. Senator, thank you for the question.

It is essential to the system that lower court judges following the controlling authority from higher courts. So, of course, if I were confirmed as a judge, I would follow the letter and the spirit of the precedents that are laid down, regardless of my own views.

Senator Craig. Well, thank you all. There are some on this Committee who struggle with the idea that you must give the exact, correct answer to their philosophy or attitude on a given issue to be, by their decision, a judge. I do not approach reviewing nominees that way and never have. I have always felt what is important is the intellect, the experience and the temperament.

So let me ask one more question of all of you. What do you think is the most important attribute of a judge?

Mr. Gruender. Senator, I believe there are several attributes that are very important. I think a level of academic ability and integrity are very important, a broad exposure to the law and an understanding of the law and, probably even more importantly, a willingness to do the hard work that is required to understand the facts underlying a case and then to get a clear understanding of the applicable law and apply it, and

then, in addition, demeanor, the willingness to come into it with an open mind, to listen to both sides, and to fairly and honestly assess and apply the law.

Senator Craig. Thank you.

Judge Martinez?

Judge Martinez. Thank you, Senator.

It is very difficult for me to add anything to the list of attributes that he has just indicated. I would say that, in my experience, both as a litigator and as a judge, I have always believed, sir, that it is absolutely critical that anyone who puts on a black robe understand how important their demeanor is. Courteousness is critical. You must listen. You must be patient, never embarrass anyone; that is, is the lawyers, the litigants, witnesses, jurors, court staff, anybody else in there. I have always tried to live my life exactly in that fashion. I can promise you I would do the very same thing in the future if I was lucky enough to be confirmed.

Ms. Pratter. Thank you, Senator, for the opportunity to add to that fine list of attributes we have listened to so far, to which I would only add the importance, I believe, of the role of having a good sense of humility that a judge, I believe, should have.

Senator Craig. Thank you.

Mr. Wake. Thank you, Senator.

I must accept and agree with everything that has been said by the others, and it is a little difficult to add to what has been said so well. Let me say only two things:

Obviously, there are a group of essential qualities, and the failure of any one of those qualities can diminish the quality of justice. If I were to point to one in particular, it would be patience and open-mindedness in one's work and private and in one's dealings with litigants and lawyers before the Court, and that patience and open-mindedness is what can leave people with the sense that whether they won or lost, they were treated fairly and that the system works, and that is very much within the control of the judge, more than anyone else.

Thank you.

Senator Craig. Well, I thank you all very much.

One last comment, and it is to you, Judge Martinez. To have a daughter at Washington State University is a bit of a frustration to me. I am a Vandal from the University of Idaho, eight miles away.

[Laughter.]

Senator Craig. Mr. Chairman, there is a tradition between those two schools that has frustrated me for some time, and as a result of that I just do not care for cougars.

[Laughter.]

Senator Craig. And that is that when those two universities played, the losing university student body president had to walk the eight miles and wash the feet of the victor. I have walked that eight miles.

[Laughter.]

Senator Craig. Good luck on your soccer program at Washington State.

Thank you, Mr. Chairman.

Senator Kyl. Thank you, Senator Craig.

Senator Durbin?

Senator Durbin. Thank you very much, Mr. Chairman, and thanks to all who have gathered here today.

Senator Craig has asked a number of questions which I think are very important, having been a lowly attorney practicing before Federal judges in my life, I like to, at least I hope

that the plea for humility is one that is felt on that side of the table, as well as on this side of the table. I think it is very important in public service.

Mr. Gruender, I would like to ask you a few questions, if I can, about an incident which occurred after you were designated as the United States Attorney, involving a resolution passed by the University City, Missouri, City Council concerning the PATRIOT Act. You responded, if I am not mistaken, in an open letter critical of this City Council action. It is my understanding that about 200 communities in 34 different States have expressed their concern and take an exception to the PATRIOT Act. I have had conversations with my U.S. Attorney in Chicago, Pat Fitzgerald, about this act, and he has testified before this Committee.

But I am concerned about some of the rhetoric which was contained in your letter, and I would like you to explain it. You were quoted as saying in that letter that ``resolutions that are grounded in misinformation, such as the one adopted by the University City Council, accomplish little to protect civil liberties and can jeopardize public safety.'' You went on to say, ``The Council's action, which appears to have been made without the benefit of facts,'' has potentially grave consequences. And you wrote that the resolution put ``lives in jeopardy, puts all citizens at risk and might cause a 'catastrophic' loss of life.'' These were your words.

We have really jealously guarded the right of dissent and disagreement in America. And even when popular Presidents have said and done things, we have said that it is the right of American citizens to disagree publicly with that policy.

Not that long ago Attorney General Ashcroft came and testified before this Committee relative to his critics, and basically said, and I quote from the Judiciary Committee testimony as follows. This is Attorney General Ashcroft. ``To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our National unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends. They encourage people of good will to remain silent in the face of evil.''

The tenor of your letter, seems to me, to be very close to the message of General Ashcroft, which is that the critics of this Government, and the critics of the PATRIOT Act, are, in fact, aiding and abetting terrorism. Do you believe that?

Mr. Gruender. Senator, with respect to the University City resolution, I felt the need to respond to that, based on the fact that the University City Council never sought any input from any other sources, apparently--no one on behalf of the Government. My office, the U.S. Attorney's Office, was never contacted to provide information about the PATRIOT Act. The resolution, on its face, was based upon what I believe to be wrong statements about the PATRIOT Act that, as you know, was overwhelmingly passed.

I do not mean to suggest, by any means, that people are not allowed to criticize the Government or the PATRIOT Act or anything else. But as an example, the sort of statements that were made during that debate were that the Government now had the right to obtain a search warrant without judicial approval, which is simply untrue; that we had the right to or the ability to obtain wiretaps without court approval, again, simply not true.

It was based on those sort of statements that I thought needed to be corrected. And then the University City Council

went the additional step of telling its Police Department not to cooperate with Federal authorities, and they did qualify that by saying, if they thought that there were constitutional violations happening as a result. That troubled me because, clearly, the preamble, the sections above that were inaccurate about the PATRIOT Act would lead a police chief or a line officer, perhaps, to believe that we were violating constitutional rights, which simply was not true or that the PATRIOT Act, on its face, did that.

So I felt the need to correct that, and had the additional concern, as, Senator, I am sure you remember the hearings with respect to September 11th and the issues of connecting the dots, after September 11th the U.S. Attorneys, amongst others, were given the tremendous responsibility of preventing and disrupting terrorism. And I thought it was very important that we have a coordinated effort at all levels of law enforcement-- State, local and Federal--work together to share information.

You may also know that a part of the letter that I wrote acknowledged the importance of civil rights and civil liberties and, indeed, I think I pointed out in that letter that, as Federal law enforcement officers, we were sworn to uphold and protect civil rights and civil liberties and, in fact, took that very seriously.

Senator Durbin. Mr. Gruender, I could understand if your public comment was that the University City, City Council was wrong and did not understand the PATRIOT Act and misinterpreted it, but your language went a step beyond that and said that their action put lives in jeopardy. That, to me, suggests that you have gone beyond disagreeing with them.

Do you really believe that that City Council ordinance was in any way aiding or abetting terrorism, putting lives in jeopardy in Missouri or any other place?

Mr. Gruender. Senator, by no means do I mean to suggest that it purposefully was done with that purpose, absolutely not. However, I do think that if a police officer in University City obtained information about a potential cell that was operating in its jurisdiction, and for some reason hesitated to share that information with the FBI, with the Joint Terrorism Task Force, I think there are some potential dangers there, and I do believe that it could result in catastrophic, I mean, hopefully not along the lines of what we saw on September 11th, but I certainly do not want to be the U.S. Attorney in Eastern Missouri and have something like that happen in St. Louis, for instance.

Senator Durbin. Would you feel that, if your nomination is approved to the Circuit Bench, that it would be appropriate for you to recuse yourself in cases involving interpretation of the PATRIOT Act?

Senator Durbin. Senator, I do not think that I have reached any opinions or conclusions about the constitutionality of any particular provision of the PATRIOT Act. Of course, what I would do is look at the statute applicable. I believe it is 28 U.S.C. 455. I would also look at the Code of Judicial Ethics and see if there are any grounds upon which I should recuse myself, but as I sit here today, I do not think that there would be.

Senator Durbin. Mr. Chairman, I do not want to go--I have a few other questions relative to the PATRIOT Act, but I want to certainly give other members or yourself a chance to question, and I can do it in a second round, if it would be appropriate.

Senator Kyl. I appreciate that. We have tried to proceed here a little bit in variance with our traditional procedures,

simply to give everybody a chance to introduce folks and move forward. I have just some general questions, and therefore I would be pleased if you want to just continue and not be concerned about the time constraints, at least at this point.

Senator Durbin. Thank you. I do not want to abuse the Committee, and I thank you for your kindness in allowing me.

Mr. Gruender, let me go a little bit further then in these questions involving the PATRIOT Act. In a commentary submitted to the St. Louis Post Dispatch on February 14th last year, you asserted that the U.S. PATRIOT Act did not permit new, warrantless searches, seizures and wiretaps, and I think you have said as much this morning.

Further, you stated that ``judicially issued independent determinations of probable cause remain the necessary legal standard.''

Under Section 505 of the USA PATRIOT Act, national security letters, which are issued by FBI officials without a court order, can now be used to compel production of business records if the Court certifies they are ``sought for a terrorism or national security investigation. Records demanded can include any record pertaining to the customer's relationship with the institution.''

Now, before the PATRIOT Act, the FBI had to have reason to believe that the records being sought pertained to a suspected spy or terrorist. Further, under the fiscal year 2004 intelligence authorization bill, signed by the President, the list of entities to whom NSLs can be issued now include nearly all types of businesses.

In addition, under Section 215 of the PATRIOT Act, if the Federal Government seeks an order to obtain any tangible thing from any business, including book-borrowing records from a library, there is no evidentiary showing required. The judge shall, under the words of the PATRIOT Act, shall issue the order if the Government simply states that the records are sought for an authorized investigation

Further, the Government need not show that the person targeted by the order is himself or herself engaged in anything illegal.

Now, how do you reconcile this clear statement of the law, of the PATRIOT Act, with the statement that you made to the St. Louis Post Dispatch, in which you said, ``Judicially issued independent determinations of probable cause remain the necessary legal standard''?

Mr. Gruender. Well, Senator, I believe I was referring to-- and I do not have a copy of what I wrote back in February in front of me--but I believe what I was referring to were wiretaps, and it did not refer--oh, and search warrants--it did not refer to the issuance of national security letters.

However, from what you have just read, both require, I believe, judicial approval. And also, if I may, it has always been the case that in a criminal investigation, which generally are not opened unless the FBI or the U.S. Attorney's Office has reason to believe that a crime has been committed, that those sort of records were obtainable, initially, without judicial review through the use of grand jury subpoenas.

Senator Durbin. I put you at a disadvantage because you do not have your letter in front of you. And I want to be fair, and I am going to send you written questions so you can give me a full explanation. But I would suggest to you that our reading of the PATRIOT Act is the opposite of what you just said, that there is no Court approval necessary for national security letters. In fact, it is mandatory. It says, ``The judge shall

issue the order.' And, frankly, I think that what you have just said is inconsistent with the language of the act, which has caused many, on both sides of the aisle here in the Senate and the House, to raise questions about whether we went too far with the PATRIOT Act.

I am not going to dwell on this, Mr. Chairman, because I do not want to put the witness at a disadvantage, having raised this line of questioning when he did not have a chance to review his letter beforehand. But if you would not mind, I would like to send you some specific questions.

I would like to ask all of the witnesses here about the concern expressed to me by Federal judges who have been in contact with me since action by Congress last year, and it relates to mandatory minimum sentences. There are many judges who believe that we have gone too far; that we have taken away the discretionary authority of judges to mete out sentences which they think are fair to individual criminal defendants, that we have created a formula for judges to impose sentences which is inconsistent with common sense and inconsistent with the goal of justice, in many instances.

One anecdotal case which I can relate to you is, in Pekin, Illinois, where we have a Federal correctional institution for women who have been convicted of felonies, I have visited this institution to find many middle-aged and elderly women who are knitting afghans in prison for 10 to 20 years because a drug-dealing boyfriend ratted them out in an effort to win favor with the prosecutor. And the judge, with no recourse, other than the mandatory minimum sentence, had to send many of these now older ladies to prison for lengthy periods of time.

I would like to have your response, and this will be my last question, Mr. Chairman, of each of the panel members about this concept of mandatory minimum sentences and the concern expressed by many Federal judges that Congress should re-examine whether we have gone too far.

Mr. Wake, would you like to start?

Mr. Wake. Certainly, Senator. Thank you very much for the question.

Senator that certainly is a very important question and issue. In my practice, which I have been favored to have a wide-ranging civil litigation practice over the years, I have not had occasion to practice at all in the field of criminal law. Therefore, I lack the hands-on experience on how things really work to make refined judgments about that subject.

Now, I look forward, if I am confirmed, and if I am given the opportunity to serve as a judge, to learning that field of law, just as I have, over the years, learned other fields of law. And when that time comes, and if I should come to judgments that are considered and worth sharing with the Congress, I think it would be appropriate for judges to do that. But at this moment, I am at a disadvantage from that lack of hands-on experience, and I would just give my commitment that, as in all things, I would study everything carefully and take advantage of my opportunity to share with the Congress my observations on the improvement of the justice system.

Senator Durbin. Ms. Pratter?

Ms. Pratter. Thank you, Senator.

Obviously, I am aware of the professional and popular subject, that this is a subject of some discussion and concern. Because my practice has been primarily in the civil area, I have not had the opportunity or need to work with the minimum sentencing legislation directly. It is something that I will have to learn about. I think that what you have described, in

terms of your visit to the prison, is part of the legislative process that is so important, in terms of evaluating what is appropriate for our country, and that is where, at the legislative level, where I think, in the first instance, the citizens have to look.

In terms of the role of the judiciary in meting out and using the minimum sentencing legislation, it is very important for judges to commit to following the legislative pronouncements that they are presented with, and that is what I would do, if confirmed.

But beyond that, having no personal or professional information to add to your wealth of knowledge, there is nothing more I could really say at this time.

Senator Durbin. Judge Martinez?

Judge Martinez. Thank you, Senator.

Senator unlike my fellow nominees over here for the District Court, I have had years of experience with sentencing guidelines. I worked on the Sentencing Guideline Commission for the State of Washington as a judge.

I can tell you, from personal knowledge, that, in my opinion, sentencing is one of the most difficult things for any judge to engage in, no matter what the case, no matter who the individual is. It has always been, for me, one of the hardest aspects of my job.

I have lived under sentencing guidelines for most of my career. Washington State passed the Sentencing Reform Act in 1984, I believe, the same time the Federal guidelines went into effect. As a magistrate judge, one of the few cases that we are not allowed to handle are, of course, felony sentences. We cannot do that aspect of it, so I have not had very much experience with the Federal Sentencing Guidelines.

I think the concern you mentioned of Federal judges--and not just Federal judges, but also State judges--when it comes to the issue of mandatory minimums has merit. Many judges have raised that particular concern. And I believe, Senator, that it is always important to continue to review what is occurring, and I know there are many commissions, the United States Sentencing Commission, for example, and many committees that will not only gather information, but continually look and see if there is a better mechanism that we can use, if there are other things that we can do.

I can tell you this; that I think the vast majority of sentences fall within the range, within the guidelines, and it is those rare ones that stand out, but sometimes those are the ones that are the most troubling.

Senator Durbin. Mr. Gruender?

Mr. Gruender. Like Judge Martinez, I have had some experience, as the U.S. Attorney, and want to note that I am here as a candidate for the Eighth Circuit Court of Appeals and not really as a representative of the Department of Justice.

It is certainly a matter of significant debate amongst many judges, and it is something that I believe is, without passing on the constitutionality of guidelines, which I think has been dealt with in the Mistretta case, or of mandatory minimums, I think that the definition of a crime, as well as the appropriate sentencing, has always been a function of Congress, not really of the judiciary.

That having been said, there are, in mandatory minimums, there are certainly provisions that do allow, in appropriate cases, for those to be gone around, the so-called relief values and cooperation-type matters. But, primarily, I would be reluctant to advise you, from this particular role. I think it

is a matter that Congress should take up, not a judicial matter.

Senator Durbin. Mr. Chairman, I would just add I think Mr. Gruender is correct. I think it is our responsibility, but I believe, in all honesty, that the passage of the Feeney amendment has restricted a lot of judges who, when they deviate from certain minimum mandatory sentences, have to make reports to the Department of Justice, so it creates more pressure for them not to make exceptions, where even they legally can. So that is our responsibility, and I thank the panel for their replies.

Senator Kyl. Thank you, Senator Durbin.

I would just note one opportunity, though, that those reports afford is for the judge to explain why it is necessary to do this and perhaps better inform us to even possibly get us to change some of the laws. So it can have that salutary effect, too, I would just offer.

I have a different question to ask each of you, and one is somewhat along the lines that Senator Durbin asked Mr. Gruender.

You have been United States Attorney, and obviously you had a role to play there. You had to act as the Government's lawyer and to prosecute people when that was called for, and so on. And one of the questions I think is, obviously, that is very good experience for being a judge, but the other question is will that experience, in any way, detract from your ability to perform your functions properly? And I would just like to get your comment, generally, on how you view your experience as the Government's lawyer prior to now going on the bench, if you are confirmed.

Mr. Gruender. Thank you, Mr. Chairman. That is a very good question.

On the positive side, being the United States Attorney gave me a broad exposure to many issues. Every significant issue within the office usually bubbles up to the United States Attorney. So every day my day is filled with a series of legal issues and problems to respond to and to try to answer as best I can. Therefore, it gives me the ability to look at the law practice almost from a management standpoint. It also gives me a broad range--all sorts of criminal exposure of every type, from violent crime to white collar crime, to major corporate crime, to civil rights prosecutions--but also exposure to the civil practice. We have about a dozen lawyers who represent the Government in civil practice.

That having been said, I can see where someone might say, ``Well, is that the only viewpoint that he has?'' No, to the contrary. I have also spent almost an equal amount of time as a defense lawyer. I have represented criminal defendants, I have represented targets who were never charged, I have represented witnesses in criminal cases and victims, and also, in private practice, I have had a broad exposure to civil matters, both representing plaintiffs, claimants and defendants.

Senator Kyl. Well, thank you. I think that is helpful.

The general question I want to ask each of the District Court nominees has to do with the qualifications that some of you alluded to that give confidence to our citizenry that the judges understand life and understand their problems and will mete out justice not just in strict accordance with the law--obviously, you will do it in strict accordance with the law--but informed also by your life experiences.

And in that regard, I was impressed by several of the things in your resumes about things you have done. Gene

Pratter, I just happened to turn to the note that I made about your Nurturing Network program, which I understand assists pregnant women.

And I just wonder if each of you would discuss, briefly, something that you have done either in association with law activities or perhaps even totally outside the law that you think will help make you a better judge because it is a life experience that you have had.

And if any of you would like to mention one of my primary interests--victims' rights--I would like you to do that. Because one thing we have found, and one reason that many of us here are proponents of a constitutional amendment to guarantee victims' rights, is that notwithstanding the fact that we have State law, statutory and even constitutional provisions allegedly guaranteeing rights of crime victims, that, as a Justice Department report noted, they are more honored in the breach than the observance, that, for one reason or another, prosecutors, other lawyers, judges sometimes are lax in enforcing these crime victims' rights.

We are not only dealing with the interests of the State and the Government and the defendant who may be on trial or the parties in civil litigation, but also, of course, we are interested in ensuring that victims do not suffer a second time when they have to go through the judicial process.

So I certainly do not limit my question to that, but anything that might bear on making them more comfortable, that if you are a trial judge you will consider their views as well, I think is an important one.

Let me start with you, Ms. Pratter, and then go to Judge Martinez and then finish with Neil Wake.

Ms. Pratter. Thank you, Mr. Chairman, and I'm sure the folks at Nurturing network would thank you for your reference to them. It is a national program that assists pregnant women, unmarried pregnant women who need to perhaps relocate to other parts of the country, and the network assists them in finding jobs and places to live and health care. And the folks in my firm have played a small role in providing employment opportunities for women who avail themselves of that. And it's been a pleasure to participate in that and many other programs such as assisting in the gathering of business clothing for women re-entering the workforce. And goodness knows those of us in law firms have been very fortunate in terms of both the work opportunities we've had and the compensation, and we've gathered a number of clothes and shared them with others who want to meet the challenges of their present lives by going back to work, and they may need some help in that respect. So I thank you for the reference to those kinds of programs.

With respect to the experiences I've had for 28, almost 29 years as an active lawyer, certainly in civil work sometimes lawyers are given to think of clients as being a faceless corporation, when, in fact, our clients are real people. They're worried about many things. They may, in fact, be most worried about the court procedures. It's sad to hear a client say when the worst thing that could happen to them is to have to go to court. Being sensitive to that and the sensitivity to the delays that can often occur in the litigation process I believe will be with me always. I believe that it's part of--an important part of a judge's job to move matters expeditiously and as economically as possible for all of the people involved in the process.

With respect to the criminal side, I think that a judge's role and job is to treat with great respect and sensitivity the

role of the jurors, for example. The victims, absolutely, their fears and concerns and their families need to be given the opportunity to be heard, to be respected, to show that the system is concerned for them. And, without question, the defendants, of course, their rights and concerns need to be protected, and we need to be mindful of that.

And, frankly, the advocates for the government and for the defendant, the lawyers need to be respected. I have unbelievable respect for the hard work that lawyers put in day in and day out and carrying the mantle of their clients with them.

All of those people, all of those folks in the role of the legal system need to be respected.

Senator Kyl. Judge Martinez?

Judge Martinez. Thank you, Mr. Chairman, and thank you for giving me the opportunity to address this issue regarding victims' rights. I spent 10 years as a prosecutor. One of the things that drove me to do the absolute best job that I could in every single case was knowing that in a majority of cases that I was handling, there was usually a victim, a family member, someone that was completely devastated by what had occurred to them or their family. In every sentencing hearing where I stood, I made sure that they were there and that the court allowed them the opportunity to speak and to be heard.

When I became a superior court judge in 1990, having that sensitivity made me very aware of how critical that is to allow that to occur. As you know full well, victims feel re-victimized again by the system. They feel that they have no constitutional rights at all, that everything goes towards the defendant's side. And I think our understanding as a judge of that, that pain, that grief, that frustration, can go a long ways towards making the process, if not better--because I don't think it ever goes away for them--at least more understandable and they feel they've had a part to play in that entire process.

There was a second part to your question, and that had to do about our involvement with the community. I've always believed--and I think you can tell by looking at my background--that a judge can't cloister himself or herself away from the rest of society. You have to stay involved. That's really the only way people understand that you do understand what is going on in everybody else's lives. And that's why it is important to be involved with feeding the homeless or, in my case, one of the things that I'm very dedicated to is coaching young children at many different levels.

And since I'm here before this Committee and under oath, I have to confess to you that I think I've received more fun and joy out of coaching than all the kids that I ever coached put together.

Thank you.

Senator Kyl. Thank you very much. As I said, I think it is important for people to have confidence in our system, and one way they can have confidence in our system is to know that the judges up there are real people and not just automatons. And that is why I kind of ask this question, so that if anybody is paying attention, they will know that we have people who are not only highly qualified in the law, greatly experienced, but also real people who have actually helped in their local bar associations or community in some capacity.

Neil Wake?

Mr. Wake. Thank you, Mr. Chairman. That's a big question for which we could give long answers, but let me focus on a few

things that strike me personally.

The process of judging requires many skills, technical skills, education, academic skills, administrative skills, but one of the qualities that I think is most important here is a wisdom about life and people--the wisdom that can only come from experiencing the hardships or the difficulties that people have in life and in the litigation system.

You had asked about some activities that we might have been through, and let me point out two for me and my wife. Long ago, my wife became involved--more than me, but I was also involved--in an organization in Phoenix called the Sojourner Center, which is a shelter for battered women and children. Shari was one of the first directors, founding directors, and I did legal work for them, including defending them in a lawsuit over a construction matter without compensation, which, if we had lost the case, it would have been put out of business.

Sojourner Center now is a great success. It is one of the largest private shelters for battered women and children in the country. But we had an enriching experience dealing with other volunteers setting that up, getting it going, working with the people who benefited from that.

We also had another experience some 20 years ago where Shari and other parents founded a group, ICU Care Parents, which is a parents' support group for parents of critically ill newborns. And we made arrangements with the three tertiary-care-level hospitals in the Phoenix area that dealt with critically ill newborns for referrals, and we organized a network of parents who could be called upon to talk and provide other support for parents experiencing that.

That group was a self-sustaining group that people participated and other people came in for about 10 years, and then it merged with another group in Phoenix, the group called Pilot Parents, which is a broader organization for handicapped children and the parents of handicapped children.

Through those activities, we have been able to share many things with many people in our community that I hope would give me, if I am given the opportunity to serve as a judge, to bring that wisdom to bear.

Like Ms. Pratter, I have a particular sensitivity to the effect on litigants of the cost of litigation. As an attorney representing everyone from individuals to business entities, I've seen too many cases where my clients simply elected not to pursue a just claim or not to defend against what I thought was an unjust claim because of the ability of opposing parties to make the costs of that increase.

Judges cannot prevent that entirely, but they can play a major role in administration of cases and getting them to a quick and economical resolution. So that is a second area of particular concern to me.

And, lastly, I would note a concern about the fear that regular folks have about being involved in the court system. This can often be witnesses and often litigants, and a judge has a particular ability to be sensitive to that, to make that easier and less stressful for people. So I think all of those respond in one way or another to the very important values that you are pointing to.

Senator Kyl. Well, I thank all of you for your answers. It shows a breadth of experience and approach and a common thread of concern for litigants in our system of justice, but bring obviously different enriching experiences to the position. And I think as I said, it is important for us to stress those things when we explain to our constituents that we are

confirming people who are not only well schooled in the law but also in life's experiences.

This is, I think, an extraordinary panel, and I am very pleased to have presided over this hearing to hear from each of you and give each of you an opportunity to share your views and also, of course, to introduce those who mean a great deal to you and who have supported you in your careers.

The next stage in the process will be that the full Judiciary Committee will review this testimony and, incidentally, have an opportunity to submit written questions to you, to which, obviously, you should respond as quickly as you can. There will be time afforded for additional statements to be put into the record of this hearing by the members of the Committee. And then after that, the full Committee will hold what we call a markup, which is really a business session, at which the nominees will be considered by the Committee and either voted up or voted down--voted up, sent to the full Senate for its consideration. And we hope that we can do this in a fairly quick fashion.

Obviously, if you have any questions about the process, you can be in touch with the Committee staff here, and they can help work through that.

If there is nothing else from any member of the Committee or any member of the panel, hearing nothing then I am going to declare this meeting adjourned. But I again thank all of you for being here today and I thank our participants on the panel.

This meeting is now adjourned.

[Whereupon, at 11:13 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[GRAPHIC] [TIFF OMITTED] T5617.155

[GRAPHIC] [TIFF OMITTED] T5617.156

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[GRAPHIC] [TIFF OMITTED] T5617.198

[GRAPHIC] [TIFF OMITTED] T5617.199

[GRAPHIC] [TIFF OMITTED] T5617.200

[GRAPHIC] [TIFF OMITTED] T5617.201

NOMINATION OF FRANKLIN S. VAN ANTWERPEN, OF PENNSYLVANIA, NOMINEE TO BE
CIRCUIT JUDGE FOR THE THIRD CIRCUIT

WEDNESDAY, JANUARY 28, 2004

United States Senate,
Committee on the Judiciary,
Washington, DC.

The Committee met, pursuant to notice, at 10:06 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Present: Senator Specter.

Senator Specter. Good morning, ladies and gentlemen. The Committee on the Judiciary will now proceed with the President's nomination of Hon. Franklin S. Van Antwerpen to be United States Circuit Judge for the Third Circuit.

My distinguished colleague, Senator Santorum, is present and I will call on him first before making any comments as Chairman to minimize his time and make a presentation.

Senator Santorum. I appreciate that. I usually yield to my senior colleague, so I will, in turn, reverse back to you, Senator, and certainly always enjoy listening to any comments that you have on matters dealing with Pennsylvania, in particular.

PRESENTATION OF FRANKLIN S. VAN ANTWERPEN, NOMINEE TO BE
CIRCUIT JUDGE FOR THE THIRD CIRCUIT, BY HON. ARLEN SPECTER, A
U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator Specter. Well, we have a very talented jurist who has been nominated for promotion from the United States District Court to the Court of Appeals for the Third Circuit.

Judge Van Antwerpen has is bachelor's degree from the University of Maine, his law degree from Temple. He was a corporate lawyer for a time. He worked with the Northampton County Legal Aid Society. He was a partner in a law firm. He was on the Common Pleas Court from 1979 to 1987, and from 1987 to the present time he has been on the United States District Court for the Eastern District of Pennsylvania.

I have come to know Judge Van Antwerpen very well. He is a highly respected jurist. He has been very active in his community and he brings the combination of education, academic skills, practical experience. Very important, his work on the Legal Aid Society, and he has done an outstanding job on the Federal district court.

It is a relative rarity to be promoted to the Court of Appeals for the Third Circuit, but when the vacancy arose Senator Santorum and I conferred. We have made a practice of having a bipartisan nominating panel. We have worked very hard on the selection of Federal judges because of the importance of the position.

Since *Marbury v. Madison*, the Federal courts control the ultimate questions in our society, and the Supreme Court of the United States makes the decisions on all of the cutting-edge issues. And the Supreme Court, of course, can only reach so many cases, which means that the courts of appeals are the

final arbiters of many, many very vital issues for our country.

The proposed constitutional amendment which I have had in mind has not gone very far when I have suggested that Federal judges run every 6 years and Senators serve for life. So we have the situation where the lifetime appointments are of such great importance. So Senator Santorum and I were really delighted when the President followed our recommendation and submitted Judge Van Antwerpen's name to the Judiciary Committee.

Senator Santorum.

PRESENTATION OF FRANKLIN S. VAN ANTWERPEN, NOMINEE TO BE
CIRCUIT JUDGE FOR THE THIRD CIRCUIT, BY HON. RICK SANTORUM, A
U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator Santorum. Thank you, Mr. Chairman, and I too want to thank the President for following our recommendation and selecting Judge Van Antwerpen for this position. He has been rated unanimously well-qualified by the ABA, which is not necessarily my gold standard, but I think reflects at least some body of thought that he has done an outstanding job in his role as a judge in the Eastern District of Pennsylvania. As you mentioned, he was unanimously confirmed by the United States Senate for that position and has served with great distinction.

I know the judge is sitting back there saying, where is everybody? And I would just suggest that the fewer, the better, and that the relationship of the number of people sitting with Senator Specter to the likelihood of confirmation is an inverse relationship.

And so the fact that you don't see anybody out there lining up to question all but guarantees your confirmation as far as I am concerned. But it is so because of your outstanding work on the bench.

This is a nominee that I know Senator Specter and I are very, very excited about, comfortable with, and I think would be a great addition to the Third Circuit. Senator Specter went through his qualifications, so I don't need to do so. I just want to thank him for his willingness to serve in the judiciary, and particularly for his name being placed in nomination.

This has been a rough road for many, but I am hopeful that because of your outstanding service and your distinguished record that you will have much success here, not only in Committee but when it gets to the floor.

I want to commend my colleague, in particular, who if Republicans stay in control is scheduled to be the next Chairman of this Committee, for the work that he has done in working, as he mentioned, in a bipartisan fashion.

We have had 15 nominees since President Bush took office and we are 15-for-15 in getting our nominees confirmed. I think that shows that we have worked together in a good spirit and put very qualified people here before the Committee.

That is to your credit, Senator Specter, and your leadership on that particular issue.

Thank you, Mr. Chairman.

Senator Specter. Well, thank you very much, Senator Santorum. I think the comment you made about 15-for-15 is a very important comment. The Constitution provides, beyond consent, confirmation by the Senate, advise and consent. The President has listened to our recommendations and we have put forward nominees who have met with universal approval. So that is what we intend to keep doing.

Thank you very much, Senator Santorum.

Judge Van Antwerpen, if you would step forward and raise your right hand?

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

Judge Van Antwerpen. Yes, Senator, I do.

Senator Specter. As a United States District Judge for the Eastern District of Pennsylvania, you have had extensive experience as a Federal judge. How has that experience shaped your views on the proper role of a Federal judge within our legal, judicial, political system?

STATEMENT OF FRANKLIN S. VAN ANTWERPEN, NOMINEE TO BE CIRCUIT
JUDGE FOR THE THIRD CIRCUIT

Judge Van Antwerpen. Senator, I believe that the proper role of a judge is to interpret the law and to apply the law. The role of the other branches, the Congress, in particular, of course, is to formulate policy in the law. Sometimes, the executive branch promulgates administrative rules and regulations.

We in the judiciary take that law and take those regulations and apply them to given fact situations. I also believe that the role of a judge is to take very seriously his oath in doing equal justice to everyone, rich and poor, and to try to have judicial temperament and preside fairly in all matters.

[The biographical information of Judge Van Antwerpen follows:]

[GRAPHIC] [TIFF OMITTED] T5617.202

[GRAPHIC] [TIFF OMITTED] T5617.203

[GRAPHIC] [TIFF OMITTED] T5617.204

[GRAPHIC] [TIFF OMITTED] T5617.205

[GRAPHIC] [TIFF OMITTED] T5617.206

[GRAPHIC] [TIFF OMITTED] T5617.207

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[GRAPHIC] [TIFF OMITTED] T5617.225

[GRAPHIC] [TIFF OMITTED] T5617.226

[GRAPHIC] [TIFF OMITTED] T5617.227

Senator Specter. What has been your most challenging case while serving on the Federal district court?

Judge Van Antwerpen. I think I would have to say that the most challenging case took place shortly after I went on the bench, Senator. I was the judge that tried the entire Philadelphia Mafia, all 18 of them at once, in a four- or five-month trial. It was an extended proceeding. It was ultimately affirmed on appeal. That took a great toll in terms of the effort, the time involved, the judicial rulings that had to be made, the research that went into it.

Senator Specter. Do you think it is tougher to be a prosecutor who investigates and prosecutes organized crime than to be a judge who sits on the bench and tries the defendants?

Judge Van Antwerpen. I think they are all tough jobs, Senator. I couldn't really speak for one or the other, but--

Senator Specter. You haven't been a prosecutor.

Judge Van Antwerpen. Not really. I prosecuted--when I was in private practice, I prosecuted on behalf of the municipalities I represented, but those were only summary offenses.

Senator Specter. You never prosecuted organized crime?

Judge Van Antwerpen. No, sir, but I--

Senator Specter. Well, I have never judged organized crime, so we are even, Judge Van Antwerpen.

Judge Van Antwerpen. Thank you, sir. You certainly have a distinguished record in prosecuting, sir.

Senator Specter. Your ability to constructively interact with your fellow judges on the Third Circuit will be an important element of your work. How will that be different from your work as a district judge, where you made the decision yourself? What role do you think collegiality plays in the Federal bench, contrasting the circuit to the district court?

Judge Van Antwerpen. Collegiality, I believe, does play a very important role. Quite obviously, a district judge can act on his or her own. A circuit judge cannot really do anything without getting at least one other circuit judge to go along with you.

Senator Specter. Do you think that is harder or easier than getting 50 other Senators to do along?

Judge Van Antwerpen. Senator, again, I wouldn't presume to comment on the difficulties of your job, but you work very

hard, I am certain.

Senator Specter. You served as chief counsel for what is now known as North Penn Legal Services. In our society, Judge, how important do you think it is that legal services be available for those who cannot afford it?

Judge Van Antwerpen. I think it is extremely important, Senator. That is why I left a higher-paying job in New York City to go to Northampton County and become the chief counsel of the Legal Aid Society. That is why, even after I went into private practice, I continued to do volunteer work for them.

Senator Specter. Without objection, the full statement of Senator Leahy will appear in the record, and I think the last paragraph is worth reading. Senator Leahy says, ``I look forward to the testimony of Judge Franklin Van Antwerpen, who has been nominated for the Third Circuit. I know of Senator Specter's strong support for this nomination. In contrast to many of President Bush's nominees, Judge Van Antwerpen comes to us with a distinguished career on the bench both on the State and Federal levels. I welcome him to the Committee,' close quote.

That is a good statement to have from the ranking Democrat, Judge Van Antwerpen.

Judge Van Antwerpen. Yes, sir.

Senator Specter. I am going to ask you all the standard questions that the Committee asks because it isn't really unusual for someone presiding at a confirmation hearing, as I am today, to be the sponsor of the nominee.

At first blush, it might appear that there would be a conflict of interest or pre-judgment, but that is the way our system works. But to touch all the bases, I am asking all the questions which the staff has prepared. All the questions I have asked are staff-prepared and I am going to ask you the balance of them, as is the regular practice of the Committee.

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

Judge Van Antwerpen. Well, we know that a statute enacted by Congress has a presumption of validity. Obviously, if it is shown to be unconstitutional and improper, then it would be appropriate to do so, but the burden is on the person asserting its unconstitutionality. It is not something that happens very often, quite frankly.

Senator Specter. Have you ever declared an act of Congress unconstitutional?

Judge Van Antwerpen. I have not, sir.

Senator Specter. The Supreme Court precedents are obviously binding on all the Federal courts. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect even if you personally disagree with such precedents?

Judge Van Antwerpen. That is my obligation, Senator.

Senator Specter. What would you do if you believed the Supreme Court had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment on the merits?

Judge Van Antwerpen. Mr. Chairman, I would follow that precedent. That is my obligation.

Senator Specter. These questions aren't too hard to answer, are they, Judge Van Antwerpen?

If there was no controlling precedent dispositively concluding an issue with which you were presented in your circuit, what sources would you turn to to make your decision?

Judge Van Antwerpen. Well, of course, you still look at precedent. You may not have something exactly on point, but you look at the closest thing that you can find and you look at what other courts have said with regard to that issue. If you are dealing with an enactment by the Congress, there are many things that you could look at in interpreting that Congressional enactment. You could look at the records of the floor debate. You would look at all the usual sources.

Senator Specter. Under what circumstances, if any, do you believe an appellate court judge should overturn precedent within his or her own circuit?

Judge Van Antwerpen. Well, in the Third Circuit there is an internal working procedure whereby one panel does not overturn the legal holding of another panel. Now, there can be circumstances under which a different result would be reached.

For instance, if the precedent or legislation which had prompted the first panel to rule changes--if there is a change in the law, that can happen. In addition, you are often faced with a similar but nevertheless different factual situation. But other than that, the panels in the Third Circuit generally follow this internal procedure.

Senator Specter. The Supreme Court of the United States--this is my question--has cut back considerably on Congressional authority. Since Lopez was overturned under the Commerce Clause, the Supreme Court has adopted a doctrine of declaring acts of Congress unconstitutional if they haven't been, quote, ``thought through,' ' unquote.

I will not press you for an answer, but if you care to offer an opinion as to the propriety of the Supreme Court saying Congress hasn't thought it through. Who is the Supreme Court to think it through, saying the Congress hasn't thought it through?

Judge Van Antwerpen. That is a difficult question to answer, Senator. As a district court judge, I don't really feel it proper for me to comment on the actions of the Supreme Court.

Senator Specter. You wouldn't want to criticize the Supreme Court?

Judge Van Antwerpen. I am a district judge, sir.

Senator Specter. And you probably wouldn't want to criticize Congress.

Judge Van Antwerpen. No, sir.

Senator Specter. So don't answer the question.

[Laughter.]

Judge Van Antwerpen. Yes, sir.

Senator Specter. If, as and when I become Chairman of this Committee, I am going to go into that issue in some considerable depth because I challenge the Court on that determination of unconstitutionality.

If the Court says that a given clause of the Constitution is violated by the Congress, as a district court in California did yesterday on the PATRIOT Act, that is a judicial function--vagueness, unconstitutionality. But on this ``thought through' ' doctrine, I have grave reservations.

Back to the books, Judge Van Antwerpen.

Judge Van Antwerpen. Yes, sir.

Senator Specter. You have stated that you will be bound by Supreme Court and, where applicable, the rulings of the Federal court. There may be times when you will be faced with cases of first impression. Well, I think you have already answered that.

With respect to case management, if confirmed, how do you intend to manage your caseload?

Judge Van Antwerpen. Well, it is a somewhat different system on the circuit court. As you know, a district judge has to engage in case management as a big part of his or her job--scheduling, moving cases, keeping track of them, making sure they don't fall through the cracks.

On the circuit court, a lot more of that is done for you by the clerk of the court, as you well know, Senator. And I think that, nevertheless, you have to maintain internal controls in your office to see to it that you get your opinions done and out on a timely basis. I think my experience as a district judge has taught me how to do that.

Senator Specter. With respect to judicial temperament, when I was on this Committee for a very short time, there were two Pennsylvania judges up for Federal appointment. This was 1982 and Senator Thurmond was presiding, sitting in this chair.

He said to the two judges, two judicial nominees, if you confirmed, do you promise to be courteous, which, translated from South Carolina, is, if confirmed, do you promise to be courteous. And when I heard him ask that question, I thought it wasn't exactly a penetrating question; what was the nominee going to say but yes? And both said yes.

Then Senator Thurmond said, the more power a person has, the more courteous the person should be; translated, the more power a person has, the more courteous the person should be. And I have come to regard that as a very profound statement, perhaps the most profound statement which has been uttered from a Senator during my tenure here, not that there is very heavy competition for being profound.

I always ask that question, knowing what the answer will be, as I haven't been surprised by any of your other answers, Judge Van Antwerpen. Judges have commented to me with some frequency over the years that they remember that question.

I have a lot of confidence in your judicial temperament. I have seen you in action. But there is a quality--when a person puts on that black robe, all the power that that person has, and life tenure, there is a tendency to become impatient with lawyers or litigants, witnesses. Very frequently, there is good cause to be impatient and to be disgruntled. It is a very high calling to maintain that level of courtesy.

So how would you answer Senator Thurmond's question?

Judge Van Antwerpen. Senator, I agree with you completely, Mr. Chairman. It is a very important attribute, judicial temperament. Judicial temperament is difficult to define, but you know it when you see it, and one of the key factors in that is being courteous and polite and respectful, listening to lawyers, listening to witnesses, hearing them out.

There are times that as a district judge things can be harried, as you noted, but I have always done my very best to be polite to people and to be respectful.

Senator Specter. Well, I have great confidence in you on that score, as all the other attributes, Judge Van Antwerpen.

I have made inquiries and I believe that your appointment to the Court of Appeals for the Third Circuit will be the first from the Lehigh Valley. Senator Santorum and I try to have geographical distribution. You take the seat of a very, very distinguished Federal judge, Edward R. Becker, who got the Devitt Award last year as the outstanding Federal judge, a man I have known for many years.

We rode the elevated PTC, Philadelphia Transportation System, together to Penn many years ago. I will not cite the year because I would not want to disclose Judge Becker's age. Before that, Judge Max Rosen held the seat. We came back to a

different area when Judge Hutchinson was on the Third Circuit.

We rotate the district court judgeships and have a bipartisan panel which makes recommendations, and then we turn to the counties to give us their recommendations. We do not make the selection in most cases, but turn to the counties to tell us whom they would like to have, as we did in Lancaster County for Judge Stengel, and to other counties, and recently to Somerset County.

But I believe you will be the first circuit judge from the Lehigh Valley. You have had very distinguished Federal judges-- Judge Kahn, who was chief judge.

Judge Van Antwerpen. Yes.

Senator Specter. Judge Gainey. Did you know Judge Gainey?

Judge Van Antwerpen. I came to the bar just as he was closing out his career. He died around 1969 or 1970.

Senator Specter. Judge Gainey was from Easton and was a very impressive judge, handed down some very major decisions on the antitrust electrical cases going back into the 1950's. As I recollect it, he sent a lot of big-wheel executives to jail for antitrust violations, something we ought to do with the people who violate the antitrust laws on OPEC--another subject which I hope to get into in some detail if, as and when I become Chairman of this Committee.

Well, Judge Van Antwerpen, the paucity of Senators in attendance here is a tribute to their confidence in you. Had they had doubts, they would have been here to express them. We have expedited your hearing, and I thank Senator Hatch for that because it is going to be harder to confirm Federal judges as we get closer to November, in an election year, and especially harder to confirm circuit judges.

But we got Judge Fisher through in record time, and we got Judge Brooks through, who was the only contested circuit judge in 2002. And I am optimistic that we will be in your home district on an induction ceremony in the fairly near future.

Judge would you introduce those who are with you?

Judge Van Antwerpen. Senator, thank you. I have brought with me, first of all, my deputy clerk--they have all taken the day off from work and they will put in for this time appropriately so the Government won't be paying.

Anthony Tumminello is my deputy clerk. Next to him is Amanda Kastello, one of my law clerks. Next to her is Tara LaMorte, one of my law clerks. And the third law clerk is Renee Sewchand, who is seated there.

Senator Specter. Does a man of your background and erudition need three law clerks?

Judge Van Antwerpen. Well, Senator, it certainly helps with the workload.

Senator Specter. Congratulations.

That concludes the hearing.

[Whereupon, at 10:32 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[GRAPHIC] [TIFF OMITTED] T5617.228

[GRAPHIC] [TIFF OMITTED] T5617.229

[GRAPHIC] [TIFF OMITTED] T5617.230

[GRAPHIC] [TIFF OMITTED] T5617.231

[GRAPHIC] [TIFF OMITTED] T5617.232

[GRAPHIC] [TIFF OMITTED] T5617.233

[GRAPHIC] [TIFF OMITTED] T5617.234

NOMINATIONS OF WILLIAM GERRY MYERS III, OF VIRGINIA, NOMINEE TO BE
CIRCUIT JUDGE FOR THE NINTH CIRCUIT; WILLIAM S. DUFFEY, JR., OF
GEORGIA, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF
GEORGIA; AND LAWRENCE F. STENDEL, OF PENNSYLVANIA, NOMINEE TO BE
DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THURSDAY, FEBRUARY 5, 2004

United States Senate,
Committee on the Judiciary,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in
Room 2141, Rayburn House Office Building, Hon. Larry E. Craig
presiding.

Present: Senators Craig, Hatch, Chambliss, Specter, Leahy,
Kennedy, Durbin, Feingold, Schumer, and Feinstein.

OPENING STATEMENT OF HON. LARRY CRAIG, A U.S. SENATOR FROM THE
STATE OF IDAHO

Senator Craig. We would ask everyone to please take their
seats.

Well, let me thank you all for finding your way to the
House Judiciary Committee room this morning and a very special
thanks to the House Judiciary staff and Chairman Sensenbrenner
for allowing us to hold these judicial nomination hearings here
in the House chamber. I understand we are making a bit of
history this morning. To the staff's knowledge, this is the
first time that judicial nominees that are the responsibility
of the United States Senate have been heard in the House
chambers. So we are always pleased to make a little history,
and we might be doing that this morning.

This morning, we will hear testimony from three nominees;
one for the Ninth Circuit Court, William Myers III. He will be
the first panel.

The second panel will be made up of two District judges:
William Duffey for the Northern District of Georgia and William
Stengel for the Eastern District of Pennsylvania.

Because so many of our colleagues have joined us this
morning, let us get opening statements on behalf of these
nominees from all of our colleagues, and then we will ask the
nominees to come forward, I will administer to them their oath,
and we will proceed in that manner.

With that, let me turn, first, to the Ranking Member of the
Committee, Senator Pat Leahy of Vermont.

Senator.

Senator Leahy. Thank you, Mr. Chairman. Thank you for your
usual courtesy of holding up while I tried to find my way
around here. Those of our colleagues who have served in the
other body know their way around here better. I did not have
that privilege of serving in the House, and I still get lost.

But I noticed we have several members here who have an

interest, of course, the two Senators from Pennsylvania, the two Senators from Georgia, and I understand we are going to be joined by the other Senator from Idaho. I will withhold my opening statement, Mr. Chairman, so as not to hold them up.

Senator Craig. Well, then, with that, let me turn to certainly a distinguished member of this Committee, the senior Senator from the State of Pennsylvania, Arlen Specter.

Senator.

PRESENTATION OF LAWRENCE F. STENGEL, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, BY HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator Specter. Thank you very much, Mr. Chair, and good morning, ladies and gentlemen.

It is unique to have the Judiciary Committee of the Senate on the House side, and I, for one, feel honored to be able to sit on this dais. I have been in this room on a number of occasions, but always as a witness. So it is nice to be a member over here on the House side.

I have the honor and pleasure of presenting to this Committee Hon. Lawrence F. Stengel, of Lancaster, for confirmation for the United States District Court for the Eastern District of Pennsylvania. Judge Stengel now serves as a Common Pleas judge in Lancaster and has served with great distinction for more than 13 years. He is a graduate of St. Joseph's University, Philadelphia, the University of Pittsburgh Law School. So he represents all factions, all geographical areas of Pennsylvania.

Those were not the qualities which Senator Santorum and I looked for when we made our recommendation to the President that he be appointed to the bench. What we were looking for was an outstanding academic record and professional record. He practiced law in Pittsburgh for 5 years and came back to his native Lancaster for 5 years until he was appointed to the Common Pleas bench.

Senator Santorum and I have established a bipartisan-- really, a nonpartisan--Judicial Selection Panel to screen candidates, and we rotate among the counties to give representation, and once qualifications are established, and they are outstanding with Judge Stengel, it is up to the county to make the selection. We look to the county to tell us whom they want for judge, and no litmus test, no ideology, just the outstanding candidate and then a local selection.

We have established a station in Lancaster, which is not had a judge recently, but I am pleased to confirm that Judge Stengel has committed to sit in Lancaster. Senator Santorum and I are interested in giving the litigants and the lawyers the opportunity not to have to travel long distances to Philadelphia or Pittsburgh or Wilkes-Barre or Scranton, so that it is an added plus that Judge Stengel will be there to facilitate the business of the court.

So I am delighted to be here this morning, Mr. Chairman, and might I yield, at this point, to my distinguished colleague, Senator Santorum?

Senator Craig. Thank you very much.

Let me turn to Senator Rick Santorum of the State of Pennsylvania, please.

PRESENTATION OF LAWRENCE F. STENGEL, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, BY HON. RICK SANTORUM, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator Santorum. Thank you, Mr. Chairman.

I was just whispering to Senator Crapo that one of the great advantages of coming from Pennsylvania is having the senior member of the Judiciary, which means you always go first, and so I appreciate Senator Specter for many things, but one is the ability to go first at these panels, where you usually have very long lines here. I appreciate your seniority.

Let me also say I appreciate the fact that Senator Specter has carried on now, for the many years he has been in the United States Senate this concept of a nonpartisan Judicial Selection Committee. And when we went through this process for openings in the Eastern District, Senator Specter and I made it known that one of the areas that we wanted to get nominees from was from Lancaster County because Lancaster County, which is a large county in the Eastern District, has a place for a Federal judge to sit, but has not had a Federal judge recently. And several names came forward from the panel but, without question, the legal community in Lancaster came forward to us and clearly stated their preference, on a bipartisan basis, for a sitting Common Pleas judge in Lancaster, and that was Judge Stengel.

We have rarely seen situations where the community has come forward in such strong terms to recommend someone among their ranks, and I think that just goes to show that the quality of this man not just on the bench, but his community service, his outstanding work as a husband and father, and this is someone who I am very pleased to be here to introduce to this body.

Senator Specter has reviewed his record. I will not repeat it, but it is the qualities that have made this man a good to date that I assure the members of the Judiciary he will be an excellent judge on the Eastern District.

Senator Craig. Thank you both very much.

I see we have been joined by Senator Kennedy and Senator Durbin.

Senator Durbin, we are proceeding with open statements by the Senators who are here to endorse their candidates. Do you wish to make any statement prior?

Senator Durbin. I will waive an opening statement.

Thank you very much.

Senator Craig. Now, let me turn to those who are here to speak on behalf of William Duffey for the Northern District of Georgia, Saxby Chambliss, a member of this Committee.

Saxby? Senator Chambliss?

PRESENTATION OF WILLIAM S. DUFFEY, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF GEORGIA, BY HON. SAXBY CHAMBLISS, A U.S. SENATOR FROM THE STATE OF GEORGIA

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

Senator Leahy, you mentioned those of us who served in the House have an easier way maybe of finding our way over here. I am reminded again this morning by some of my House colleagues or former House colleagues that I have to come over here to get a dose of reality every now and then. So they never forget to remind me of that.

I am very pleased to be with my colleague, Senator Zell Miller, here this morning to recommend to this panel the confirmation of Bill Duffey, who is currently the U.S. attorney for the Northern District of Georgia, for a judgeship position on the bench of the Northern District of Georgia.

Bill Duffey has been a long-time good friend of mine but,

more importantly, I have known Bill Duffey as just one of the more outstanding lawyers in our great State, and I am very pleased to say that we are blessed with a number of great lawyers, and Bill ranks up at the top. That is why he is in the position that he is in today as U.S. attorney for the Northern District.

Bill has long and distinguished legal career, beginning when he joined the Air Force back in 1978. He was a member of the JAG corps then and served his country in a very valiant way. Bill continued in private practice for many years in South Carolina and then moved to Atlanta, practiced with the very prestigious law firm of King & Spalding in Atlanta, which is now one of his partners, former U.S. Attorney General Griffin Bell, among many other distinguished individuals.

Bill is certainly recognized by his peers as being an outstanding lawyer. He was given the ABA rating, unanimous rating, of well-qualified. So the gold standard certainly has been met in Bill's case.

Bill has the support of his family who I would like to take just a minute to introduce--his wife Betsy, his sons Charles and Scott, who are with him today. And Bill will be quick to tell you that his success is due, in large part, to the great support that he has had from his family.

I could not be more proud of an individual being nominated by my nonpartisan Committee that selects nominees. Senator Miller has a representative on that committee, and it was the unanimous recommendation of that Committee that Bill Duffey be recommended for this position.

So I am very pleased to be here this morning to support my good friend, an outstanding lawyer and an outstanding American, Bill Duffey, for this confirmation.

Thank you.

Senator Craig. Senator, thank you very much. Now, let me turn to Senator Zell Miller of the State of Georgia.

PRESENTATION OF WILLIAM S. DUFFEY, JR., NOMINEE TO BE DISTRICT
JUDGE FOR THE NORTHERN DISTRICT OF GEORGIA, BY HON. ZELL
MILLER, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator Miller. Thank you, Mr. Chairman. I too am honored to be here with my good friend and colleague, Senator Chambliss, to present to you William S. Duffey, who has been nominated by President Bush to be the United States District Judge for Georgia's Northern District, where I live. And we present him today as a fellow Georgian who has impeccable credentials and who has strong support from all corners of the State of Georgia.

Mr. Duffey is no stranger to this esteemed Committee. On September the 4th, 2001, President Bush made an outstanding choice by nominating Mr. Duffey to serve as United States attorney for the Northern District of Georgia, and the Senate confirmed his nomination unanimously. President Bush has done well again by now nominating Mr Duffey to serve as United States District Judge for Georgia's Northern District.

When I look at William Duffey and look at his career, I am reminded of what Booker T. Washington once said, that ``nothing ever comes to one that is worth having, except as a result of hard work.'' William Duffey is a man who has worked very, very hard indeed and who has served our State and our Nation well. I know that he will do the same outstanding job for our country as District Judge.

Senator Chambliss has already mentioned to you some of his

background, a member of the very prestigious King & Spalding law firm in Atlanta, and he also talked about his experience before that. But while at King & Spalding, Mr. Duffey was involved in two very high-profile internal investigations, one for EF Hutton, after the investment firm pleaded guilty to fraud charges, and the other for Exxon, after the Valdez disaster.

And then from 1994 to 1995, he served as deputy independent counsel in charge of the Arkansas fees of the Whitewater investigation. I mention this because you can see Mr. Duffey is no stranger when it comes to handling and being involved in tough issues and tough cases.

I would also like to note that Mr. Duffey has served as chair of the Paul Coverdell Leadership Institute. The institute was started by predecessor, the great Senator Paul Coverdell, in 1996, as a way to find good leaders for elective office.

Mr. Duffey comes before you today not only highly recommended by me and by Senator Chambliss, but also by many, many others. I have heard some of his peers describe him as very fair. I have heard him described as a straight shooter. I have heard him described as a man of extraordinary ethics.

I know Mr. Duffey well, and I know that he has the skill and the ability to serve ably in this judicial position. I hope that this Committee and the full United States Senate will give their vote of approval to William Duffey today, just as they did, so wisely, back in 2001.

Thank you, Mr. Chairman.

Senator Craig. Zell, thank you very much for that opening statement.

Now, let me turn to my colleague and partner from Idaho, Senator Mike Crapo, to speak on behalf of William Myers for the Ninth Circuit.

PRESENTATION OF WILLIAM GERRY MYERS III, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT, BY HON. MICHAEL CRAPO, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator Crapo. Thank you very much, Mr. Chairman, Senator Craig.

I appreciate the opportunity to be with you here today to recommend the confirmation of William G. Myers, III, to the Ninth Circuit Court of Appeals. I have visited with many of the members of the Committee personally and appreciate this opportunity to meet with the Committee in its open session.

On May 15th, President Bush nominated Bill Myers to serve as a judge on the Ninth Circuit Court of Appeals, the same court where I clerked following my law school experience. Bill would serve the vacancy created on the Circuit Court last year when Judge Thomas Nelson, one of the two Idaho-based judges on the Ninth Circuit, became a senior judge on the court.

The entire Idaho delegation supports this nomination, and we appreciate your leadership, Senator Craig, in moving this nomination through the Judiciary Committee.

Bill has the experience and the temperament which will allow him to serve with distinction on the Ninth Circuit. As legislative counsel to our former colleague, Senator Alan Simpson, of Wyoming, Bill gained firsthand experience with the very nominations process he is now going through.

Bill's experience as assistant to the Attorney General during the first Bush administration will serve him well also. I understand that his boss at that time, former Attorney General Dick Thornberg, has endorsed Bill's nomination.

From there, Bill continued in the Executive Branch, serving as deputy general counsel for programs at the Department of Energy. Bill returned to the private sector in 1993, serving as an advocate for Federal lands issues and also as a member of a Boise law firm, where he handled litigation, legislative advocacy and transactional work.

As an attorney, he has handled cases from the State Court level to the U.S. District Court level, as well as at the United States Supreme Court. Most recently, Bill served as solicitor for the U.S. Department of Interior, a position for which Senate confirmation was required and achieved.

Bill is also a past vice Chairman of the Public Lands and Land Use Committee of the American Bar Association Section on Environment, Energy and Resources. As those of us from the Western States that make up the Ninth Circuit know, this knowledge and firsthand experience with energy, agriculture and public lands issues is certainly an asset, if not a requirement, for a judge sitting on the Ninth Circuit Court of Appeals. The public lands expertise is particularly key for a State like Idaho, where 64 percent of the almost 34 million acres is now owned by the Federal Government.

I am pleased to recognize the broad bipartisan support we are seeing for this nomination from people who have worked with Bill and know him well. This includes support from President Bush, many members of Congress, former Senator Alan Simpson, former U.S. Attorneys General Thornberg and Barr, President Jimmy Carter's Interior Secretary and four-term Idaho Governor, Democrat Cecil Andrus, and President Clinton's ambassador to Ireland and two-term Wyoming Governor, Democrat Mike Sullivan.

I am also aware that there are certain special interest groups that are expressing some criticism over this nomination. It is important to note that this criticism is largely over the policies advocated by the administrations or the clients that Bill served as a requirement of his job. Such criticism has no bearing on the experience, temperament or overall qualification of Bill Myers himself to capably serve on the Ninth Circuit.

The size and caseload of the Ninth Circuit makes it even more critical that vacancies are filled immediately. The Ninth Circuit serves a population well over a third larger than the next-largest circuit. The Ninth Circuit has the largest caseload of any circuit. The median time for completing a case decision in the Ninth Circuit is 14.4 months. The same appeal would take 9.9 months in the Fifth Circuit or 8.5 months in the Second Circuit. I have the fullest confidence that Bill Myers possesses the qualities necessary to capably serve the citizens of the Ninth Circuit, and I join my colleague, Senator Craig, in urging this Committee to vote favorably on this nomination.

Thank you very much, Mr. Chairman.

Senator Craig. Mike, thank you very much for that testimony.

We have been joined by our colleague, Senator Feingold. Do you wish to make any opening comment prior?

Senator Feingold. Mr. Chairman, I will defer and ask questions.

Senator Craig. Thank you, Mike.

We will proceed then with our first panel. Let me then, prior to calling any of our nominees forward, turn to the senior Ranking Member on this Committee, Senator Pat Leahy.

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

Senator Leahy. Thank you, Mr. Chairman. As I said, I know the other Senators have to come and go. You and I have to stay, so I waived my opening statement earlier.

This is interesting what is happening. I recall, after the attacks of September 11th, and the anthrax letters in October 2001, we continued to work. I held hearings, even though I had received one of those letters, we held hearings in the Capitol. One of the nominees actually had to drive here because the flights were cancelled, and we are now under major inconvenience in the Senate with office buildings closed. One will open in a few hours, the others not until later this week or next week.

So I commend all of the Senators on both sides of the aisle who have worked hard to make sure we can go forward with this, and I commend you, Mr. Chairman, for doing it.

I look forward to the testimony of William Myers to the Ninth Circuit Court of Appeals, and I think that it is extremely important that this Committee in the Senate realize what is involved with our advise and consent. It is important to recognize the Senate has already confirmed 171 of President Bush's judicial nominees. In the 17 months, when the Democrats were in the majority, I was Chairman, we confirmed 100 of President Bush's nominees. In the other 20 months that the Republicans have been in charge, another 71 were confirmed. So we have confirmed them in record number. That is in sharp contrast to the way President Clinton's nominees were held up, usually, if one or two people objected.

Every one of the judges, no matter what level they are, they have lifetime appointments. They are going to have a major impact on our Nation. William Myers has been nominated to the Circuit Court with an expansive reach. The Ninth Circuit, as the Chairman knows better than anybody else sitting here right now, encompasses Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington.

In addition to the tens of millions of people within those States, there are hundreds of millions of acres of public land. It plays an enormous role--the court does--in interpreting and applying a broad range of environmental rules and protections. Now, those rules are important not just to us today, but to millions of Americans yet to be born and have come under increasing attack, I believe, during this administration. We want to know if Mr. Myers' nomination fits into the pattern of actions by the President to roll back our environmental laws.

What are at stake are environmental protections which can be struck down. Taxpayers do not pay polluters, according to the extreme expanse of the Takings Clause that some judges have begun to adopt. We would want to know what Mr. Myers' understanding of the Takings Clause is and whether he intends to force taxpayers to pay whenever a regulation affects land use in some ways and what standards will he use in deciding these matters.

We want to know whether he endorses an interpretation of the Constitution that prevents citizens from suing their States if there are environmental violations. What is at stake, of course, is whether citizens can sue for environmental protection.

In the era of ballooning Government deficits and cuts in environmental enforcement budgets, there is much at stake if courts eliminate or minimize the critical role of private attorneys general, who are needed to ensure that polluters are complying with Federal mandates.

A judge has a duty to enforce protections imposed by

environmental laws. The Senate has a duty to make sure that we do not put judges on the bench whose activism and personal ideology will prevent fair and impartial adjudication.

The President has sent the Senate an unusually large number, and I have been here for 30 years, both Republican and Democratic Presidents, and I have never seen such a large number of judicial nominees who seem to be ends oriented in their approach to the law. Some appear to be too extreme, and they have not gone through.

Now, we are seeing nominees who many feel are being awarded lifetime appointments to the Federal Courts as part of a spoil system for those who are well-connected, and I am sad to report that many of my concerns about the President's nominees have already been borne out in the short time they have been on the bench. They have shown themselves to be judicial activists and ends oriented, issuing troubling opinions on civil rights, constitutional liberties and environmental protections. It was a Bush-appointed judge who dissented from the Circuit Court's decision to enjoin logging while a lawsuit by environmental groups challenged the implementation of a U.S. Forest Service restoration project involving timber sales in the Sierra Nevada Mountains.

So I look at his record. I want to explore his time at the Department of Interior. I notice that his hometown newspaper, his hometown newspaper, where they know him best, opined that the solicitor at the Department of Interior, ``Myers sounds less like an attorney and more like an apologist for his old friends in the cattle industry.'' These are matters that we have to explore.

Now, there are those who have supported him. There are also letters of opposition from more than 90 groups or advocates for civil rights, disability rights, senior citizens, women's rights, human rights, Native Americans and the environment, actually, the unprecedented step of the National Congress of American Indians, representing more than 250 Tribal Governments has come out in opposition to the nominee.

I know that Mr. Myers has never tried a jury case, never served as counsel in any criminal litigation, as far as I know, and that is probably why the American Bar Association gave him its lowest passing grade. We have to think about that.

So, to go back to something that the Chairman said, we are operating under unusual circumstances, and I do not think we have held a hearing in this hearing room before. The Senate has. I think Chairman Sensenbrenner, and Mr. Conyers, and the members of the House Judiciary deserve a lot of thanks for their hospitality and also the staff, both the Republican and Democratic staff, of the House who suddenly have these interlopers, I appreciate what they have done.

So thank you, Mr. Chairman.

Senator Craig. Thank you, Senator, for that opening statement.

Senator Kennedy has now joined us. Do you wish to make an opening statement?

Senator Kennedy. No. Thank you very much.

Senator Craig. Well, then let me ask our nominee for the Ninth Circuit, William Myers, to please come forward.

Mr. Myers, while you are standing, let me administer the oath. Would you please raise your right hand.

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

Mr. Myers. I do.

PRESENTATION OF WILLIAM GERRY MYERS III, NOMINEE TO BE CIRCUIT
JUDGE FOR THE NINTH CIRCUIT, BY HON. LARRY CRAIG, A U.S.
SENATOR FROM THE STATE OF IDAHO

Senator Craig. Please be seated.

Before I ask you to make any opening comments you would wish to make and to introduce your family, I will make my opening comment in your behalf.

To my colleagues, and to those of you assembled, I have the honor and the pleasure this morning of chairing a Committee while it considers the nomination of my good friend, William G. Myers, III, to be a Circuit Judge on the Ninth Circuit.

Bill, welcome to the Committee. I trust you will find it friendly, but probably very probative. I look forward to hearing your testimony. I would also like to welcome another good friend who has already given his testimony, Mike Crapo, who has joined us this morning, and he expressed on behalf of all of the Idaho Congressional delegation its unanimity of support on behalf of Bill Myers.

Bill Myers was nominated by the President on May 15th, 2003, for this extraordinary opportunity to serve the United States as a Circuit Judge. As you know, our State of Idaho, as Senator Leahy mentioned, resides within the Ninth Circuit. Bill's chambers will be in Boise, Idaho. Once confirmed, Bill will fill the vacancy created by Judge Thomas Nelson. Senator Crapo has already spoken to the senior judge and his taking senior status. Judge Nelson has served our country and the Ninth Circuit very honorably.

I feel Bill's experience in the three branches of Government will serve him well as a judge.

First, he served this body--by that I mean the Senate--when he was lured to Washington, D.C., by Senator Alan Simpson. One of Bill's key responsibilities was to staff Senator Simpson as a member of this Committee, including nominations to the very court to which Bill now aspires. Bill staffed the nomination of Judge Stephen Trott of the Ninth Circuit, whose chambers are also in Idaho. And Al Simpson endorses the nomination of Bill, and I ask that his letter become a part of the record.

Second, after working in the Senate, Bill began his first tour of duty in the Executive Branch, first, as an assistant to Attorney General of the United States Dick Thornberg. Senator Crapo has already mentioned that, and later, as deputy general counsel for Programs at the Department of Energy. Former Attorneys General Dick Thornberg and William Barr endorse Bill's nomination, and I will make their letters a part of the record.

Recently, Bill completed another appointment to the Executive Branch as solicitor at the Department of Interior, where he was the third-ranking official in the Department and in charge of over 300 attorneys. President Carter's Secretary of Interior and of course Governor of Idaho, Cecil Andrus, endorses Bill's nomination, and his letter will become a part of the record.

Let me also add to that record letters from Quapaw Tribe of Oklahoma, the Chickasaw Nation, bipartisan letters from 15 attorneys general, the Governor of our State, Governor Dirk Kempthorne, and Michael Dennis, director of Conservation, Real Estate and Private Lands for the Nature Conservancy. I believe those letters demonstrate a phenomenally broad base of support that William Myers received.

Third, as a private practitioner, Bill has represented

clients before the justice of the peace and the Justices of the Supreme Court in a wide variety of litigation and transactional matters. This diversity of practice is important. It has imbued Bill with one of the fundamental precepts of our constitutional system of Government, separation of powers. Perhaps nowhere is the importance of this bedrock principle more important than in the judiciary. Because judges are not elected and serve for life, they have the greatest opportunity to usurp the authority of the other branches. I am convinced that Bill understands and respects, from years of firsthand experience, the constitutional role given to each branch.

As Thomas Jefferson said, I had rather ask an enlargement of power from the Nation, where it is found necessary, than to assume it by judicial construction which would make our powers boundless.

Now, let me tell you a little bit about Bill Myers, as I know him personally. I came to know Bill well when he represented the cattlemen and women in the early 1990's. He was a reasonable and effective voice for his clients who comprise the single-largest sector of America's agricultural economy, but the call of the West became too strong to ignore, and Bill and his family moved to Idaho.

Returning to private practice in one of the country's preeminent law firms, Bill continued to dutifully represent his clients, as all lawyers must. When the Bush-Cheney administration took office, Bill told me he was willing to again serve the public, and I prevailed upon him to seek and become the solicitor at the Department of Interior. The President nominated Bill for that post, with the advice and the consent of the Senate. He took office on July of 2001.

A few critics of this administration's natural resource policies would have you believe that Bill should not be confirmed. They bandy about perceived wrongs, in my opinion, but all they have demonstrated, with certainty, is two truths; that, first, the solicitor is the chief legal officer in a department that is controversial in every administration by the very nature of its mission and, second, these critics desire to capture the judiciary by opposing nominees who do not display activist tendencies that might work to their advantage.

The second point I wish to remind these critics of the sage advice of a Founding Father by the name of Alexander Hamilton, when he wrote that ``Considered men of every description ought to prize whatever will tend to beget or fortify integrity and moderation in the courts, as no man can be sure that he may not be tomorrow the victim of a spirit of justice by which he may be a gainer today.''

Critics of the nomination purposely confuse the appropriate role of the lawyer and the judge by suggesting that Bill Myers has been a strong advocate of his clients. He will continue to advocate from the bench, they would suggest. Of course, they offer nothing but supposition in support of this logic.

If their theory were correct, no practitioner would be qualified to serve the judiciary, and their fears are allayed by a fair review of Bill's public service. His record as solicitor shows balance and mainstream decisionmaking; for example, opposition to trespass to innholders in the National Parks of Alaska, empowerment of trespass livestock on the Federal lands of Nevada, expansion of a national monument in New York, support for reinternment of Native American remains, recognition of tribal boundary rights in New Mexico, record penalties for failure of companies to pay gas royalties, support of settlements of trial water rights claims, enhanced

payments of royalties on the outer continental shelf.

Bill brought to the Office of the Solicitor the skills he honed in the private practice and in public service. He displayed the integrity, intelligence and temperament essential in good governing and absolutely critical in good judging.

The President recognized these qualities again by nominating Bill Myers to this judgeship. Leaders in the field of law have written to the Committee supporting Bill's qualifications to be a circuit judge. I ask that their letters become a part of the record. They include Congressman Henry Hyde, Wyoming Supreme Justice Marilyn Kite, attorney general of the State of Idaho, Lawrence Wasden, Chairman Carol Dinkins, for the ABA Committee of the Federal Judiciary.

I thank you. I am proud to bear witness on behalf of Bill Myers to be the next Ninth Circuit judge in Idaho. Presidents, Attorneys General, Cabinet Secretaries, Senators and enumerable clients have all reposed special trust and confidence in Bill's integrity, his intelligence and his temperament. These qualities are the standards the Senate has used to measure the worth of judicial nominees since the founding of this great Republic. I wholeheartedly recommend that we consent to this nomination, and I offer this testimony to all of my colleagues and to the entire Senate.

With that, Mr. Myers, let us turn to you for any opening comments you would like to make, and I would trust that you might want to introduce that marvelous family of yours.

STATEMENT OF WILLIAM GERRY MYERS III, NOMINEE TO BE CIRCUIT
JUDGE FOR THE NINTH CIRCUIT

Mr. Myers. Thank you, Senator. I appreciate that opportunity, and I want to thank the Committee for holding this hearing. It is an inconvenience for you to come to the House side, given current events. I know it is extraordinary, and I appreciate that.

I would take advantage of the chance to introduce my family, if I might. Behind me, I have my mother and father, Ruby and Gerry Myers, and seated next them are my wife, Sue Myers, my daughters Kate and Molly, and then next to Kate is my mother-in-law Pat Benzer, and behind her, my sister-in-law, Linda Benzer.

Senator Craig. Thank you. We welcome you to the Committee. Please proceed.

Mr. Myers. I have no opening statement, Senator. I stand for questions.

[The biographical information of Mr. Myers follows:]

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Senator Craig. Well, thank you very much for consenting to be nominated, first, Bill, to the Ninth Circuit. It is a controversial court. In fact, some judges on the Supreme Court would suggest that it has become the most dysfunctional Circuit Court in the Nation. I guess they measure that on the number of cases brought from the Circuit to the Supreme Court that they have overturned.

You have heard, by opening statements of my colleague, Senator Leahy, that there are questions of your record brought by a variety of groups from across the country. So, in my first 10 minutes of questioning, let me touch on a couple of areas that I would like you to respond to.

Too often we hear various interest groups, opposed to particular judicial nominees, issue sound-bite attacks that are backed up by nothing more than probably the shrillness of their rhetoric. Such is the case, I think, with you, Mr. Myers, as being viewed by some as anti-environmental. So let me proceed with questions in that area in my first round.

For example, Mr. Myers, have you not worked as a volunteer in seven different national parks, probably logging more hours of total volunteerism than any nominee we have ever had before this Committee?

Mr. Myers. Well, I certainly don't know about the other nominees, but, yes, you are correct, Senator. I have spent a fair amount of time volunteering for both the National Park Service and occasionally for the national forest in the U.S. Forest Service System. I think, as I looked back in preparation for this hearing, at the time, I was surprised myself as to the amount of time I have put in. Over the last 15 years, I have averaged about 12 days a year in volunteer work on such things as campground cleanups, trail maintenance, visitor services and information, back country patrols and the like. It has been a wonderful opportunity to get outside and enjoy the grandeur of our National park system and do a little bit for the Park Service.

Senator Craig. I hope you took your daughters with you.

Mr. Myers. Most of that was before children, when I had the time to go.

[Laughter.]

Senator Craig. All right. As Interior Department solicitor, you successfully settled numerous cases brought by environmental groups against the Federal Government.

Can you tell us about a few of the high-profile disputes that you settled in favor of environmental groups, such as the Penobscot--I can usually handle Western Indian names, but not always--Penobscot River matter in Maine, that \$49-million settlement with Shell Oil based on its activities in the Gulf and the expansion of Governor's Island National Monument in New York Harbor. Touch on those different cases, if you would,

please, for the record.

Mr. Myers. The first one that you mentioned, Senator, involved the Lower Penobscot River, which is home to the Penobscot Indian Nation. It also happens to be the location of eight power projects, hydropower projects, and three dams. It also would have been, historically, the run for Atlantic salmon and some fish that are perhaps not as charismatic, such as the Atlantic eel and the Atlantic shad. Because of the dams, those passages were blocked to the migrating salmon.

A deal was worked out, while I was at the Department of Interior as solicitor, with the involvement within the Department of the Park Service, the Bureau of Indian Affairs, the Fish and Wildlife Service, and the Indian Nation, the hydro interests that were present on the river and the State of Maine. We were able to reach an accord and establish a system of going forward whereby those three dams will either be removed or significantly altered to allow for fish passage.

We also provided for compensation and mitigation to the Indian Nations for any impact that might have on them, and I think it was a good example of a project which, by virtue of collaboration and a lot of time around the table, hammered out quite an extraordinary deal to bring about an expansion of that fish passage.

The other one I believe you mentioned was the Shell Oil matter in the Gulf of Mexico. It came to light that the company had been flaring gas from one of its off-shore platforms without permission of the Federal Government and without keeping adequate records of that flaring. Once that was discovered, we obviously were quite concerned at the Department of Interior, worked with the Department of Justice, and as a result of that, we were able to reach a settlement which involved a record payment in the history of the Minerals Management Service by a company for these types of violations. It was \$49 million in payment for the illegal activity, for the loss of the natural gas, for the failure to maintain adequate records. In addition, the company agreed going forward to get its recordkeeping in order and to no longer flare that gas illegally. The coffers of the Treasury were enhanced by \$49 million.

The final example that you raised was Governor's Island National Monument, which is in New York Harbor. It is a wonderful island that most people only see perhaps as tourists when they travel between the mainland or Manhattan Island and Ellis Island and the Statue of Liberty. It was originally a fortress built for the protection of the harbor and the river, and includes Castle Williams and Fort Jay that date back to the early 1800's.

It has been in Federal hands for some 200 years, but the decision was made by President Clinton to place a portion of the island in National Monument status. When this administration came in, we supported that designation, but we discovered that because of a statute that was on the books, the statute required, in spite of the monument designation, that the island be sold with a right of first refusal to either the City or State of New York. We were able to work with the City and State of New York, arrange for the transfer in order to meet the legalities of the statute, in essentially a simultaneous transfer back that not only maintained the original monument, but actually increased the acreage to obtain some additional property that was crucial for the monument's protection.

Senator Craig. Well, thank you very much.

Let me point out that in the Colvin v. Snow, and several other similar cases, you specifically authorized the regional solicitor in Nevada to seek enforcement actions against ranchers who refused to pay applicable grazing fees for their use of public lands, and you did not support the Government's pursuit of a preliminary injunction against a farmer that had destroyed Marble Creek, one of the last natural streams flowing out of the National Forest System lands in California's White Mountains, by entering onto public lands with a bulldozer and replacing the sediments in the creek with a pipeline.

Would you speak to those examples of actions you took as solicitor.

Mr. Myers. Certainly, Senator. I appreciate that question. Both of them deal with ranching on BLM lands.

The first one was a standard trespass action, if you will. Occasionally--rarely, thankfully--ranchers who utilize Federal lands will allow their livestock to trespass off of the area that is designated for them by the Bureau of Land Management or the U.S. Forest Service. When that happens, it is a trespass because those livestock are grazing where they should not be.

In the Colvin matter, that came to our attention. It was brought to my attention, and I said, certainly, let's prosecute this. It is important I think to establish that so that other ranchers who might consider similar trespass actions know that that is not permitted.

The second example is a little more dramatic, frankly. That was entitled, a case, of Harris v. United States in which a rancher, while administrative litigation and settlement discussions were pending, decided to exercise self-help and took a bulldozer to a creek, approximately a quarter-mile stretch of the creek, wiping out obviously the riparian habitat, destroying the creek, and he then went on to install a pipeline to divert the water for his livestock use. In order to access the creek, he took out about--oh, I don't remember the exact reach--but a 15-year-old fence that was between his bulldozer and the creek.

When BLM personnel discovered this, they immediately came to us. We went to the Department of Justice, requested that a motion for a preliminary injunction be filed in the Federal Court to enjoin Rancher Harris from further such activity to prohibit him from approaching that creek with anything more than a shovel, in order to maintain a ditch right that he had, to give the BLM a day's notice before he would go to his allotment and to be prepared to pay the damages. The Court has entered that injunction.

Senator Craig. Well, my time is almost up, so I am going to move on to our other colleagues. We are using 10 minutes so that we can move through those of you who have assembled. So let me first turn to Senator Leahy.

Senator Leahy. Thank you, Mr. Chairman.

Mr. Myers, I think, as you know, of course, you are being considered for this position as a Federal judge, one whose job it is to interpret our Federal statutes and apply Federal laws, and you made some pretty significant statements about the role of the Federal Government with regard to protecting the environment, and they do trouble me.

You wrote, for example, that the Government's ``endless promulgation of statutes and regulations harm the very environment it purports to protect.''

You have also compared the Federal management of public lands to King George's tyrannical reign over the 13 Colonies, asserting that public land safeguards the fueling of a modern-

day revolution in the American West.

Which statutes and regulations were you referring to?

Mr. Myers. Senator, those comments, that was approximately 1995, I believe.

Senator Leahy. It was 1995.

Mr. Myers. And at that time, I was representing Federal Lands' livestock interest and writing on their behalf. I was not referring to a specific statute or regulation. It was more of a tenor that a certain element of the industry believed was the case and that they were concerned on the assumption--and I think correct assumption that the vast majority are law-abiding citizens--that they were concerned that regulations intended to properly punish wrongdoers were having an adverse impact on their ability to lawfully ranch on Federal lands and, as a result, was making it more difficult for them to--

Senator Leahy. Mr. Myers, that is not really answering the question.

I look at this statement, and having been born in part of the area that was originally part of one of the 13 Colonies, and we still think of history as being recent where I come from, I still want to know, I mean, there must be something in here if you are going to compare our Government, and its regulations, and its statutes to King George's reign over the 13 Colonies. I mean, you just cannot say, well, generally. You know, you would not accept that if you were in a court. You would not accept that from a lawyer.

This is a pretty explosive statement. Can you give me even one, even one statute or regulation you were referring to that equates the U.S. Government to King George's tyrannical reign over the 13 Colonies?

Mr. Myers. Putting that article in the context of the time, that was the year that the regulations came out from the Department of Interior significantly changing the way that ranchers would operate on Federal lands, and it was in the context of that setting that ranchers were concerned about the impact of those particular regulations.

When I said or made the statement that there was concern about the tyranny of the regulations, it was not in reference to Government employees or--

Senator Leahy. I am not suggesting that. I mean, we are talking about our Government.

Mr. Myers. Right. It was--

Senator Leahy. I love our Government. I respect our country, and to have our Government referred to as being like King George's time, it sort of strikes this Vermonter, well, with some apprehension. I am not suggesting you are nailing the loyal, hardworking employees and all. All I want to know is, I mean, tell us which statutes and regulations you believe are so harmful and unneeded that they make us like King George. I mean, words have meaning, Mr. Myers, and you are a very intelligent man, and when somebody goes and makes a statement that goes that far, I mean, you must have something that you are basing it on.

Mr. Myers. Other phrases which were not of my authorship, but had been used in that time, were ``Sage Brush Rebellion,''
``War on the West,''

and it was all--
Senator Leahy. Mr. Myers, these are not the people who were up here for--I really wish you would answer my question. I do not care what other people said. What statutes and regulations were so harmful or unneeded?

Mr. Myers. It was in the context of the regulations of Secretary Babbitt regarding rangeland reform. It was called

``Rangeland Reform 1994,'' and this was 1995.

Senator Leahy. So that was unneeded?

Mr. Myers. No, Senator, my point was that the overall approach of the regulations was having an adverse impact on the vast majority of the people that I was representing, at least in their perception. That is what they told me, and that was the message that they asked me to carry forward.

Senator Leahy. So this was not your thought. I mean, which is it?

Mr. Myers. I was writing--

Senator Leahy. So you are not prepared to identify any statutes or regulations that you felt were totally unneeded and may still be on the books.

Mr. Myers. It was in the context of the rangeland reform regulations that I wrote that.

Senator Leahy. So you felt those were unneeded, harmful. I am not trying to put words in your mouth. I am trying to figure out what you were meaning.

Mr. Myers. I was advocating on behalf of my clients who believed that they were harmful to their business.

Senator Leahy. Well, let's go to another point. How are we on time, Mr. Chairman?

Senator Craig. You have got about four left.

Senator Leahy. Mr. Myers, you made a statement in a Hastings Law Review article about special interest groups working on environmental issues. Let me quote what you said. You said, ``Like water searching for the path of least resistance, interest groups will seek the path of least governmental resistance. If the organizations are unable to fulfill their agenda through legislation and the executive branch, then they will focus their efforts on litigation that may provide a favorable judgment. The conventional wisdom of lobbyists holds that chances of obtaining a favorable judgment increase when judicial nominees are confirmed who are sympathetic, either through judicial philosophy or political philosophy, to the causes of that group.''

Now, you spent most of your career as a lobbyist or activist in anti-environmental efforts. I mean, it seems to me you are writing about yourself in there.

Now, having said that, why should we feel that you are going to stand and be objective and not be the person you are advocating for who would be in sympathy with interest groups you have represented for so long?

Mr. Myers. I believe it is the great strength of our judicial system that, while the conventional wisdom is that you look for a friendly judge, quite often that effort is disappointed because judges who are on the bench do an excellent job of disregarding public appeal or personal opinion and apply the law to the facts.

So while I do think that that conventional wisdom holds within advocacy groups, it is my belief that it is often disappointed. And I can assure you that if I am so fortunate as to be confirmed, it will not play a role in my decisionmaking.

Senator Leahy. Well, I will have other questions that I will submit for the record, but I have the same test, and I have used this for 29 years here with judicial nominees. And I have voted for and against nominees of both Republican and Democratic Presidents. I do not give an automatic pass even if it is a President of my own party.

I ask for a judge, if a litigant walks into that courtroom that--it doesn't make any difference whether that litigant looks at the judge and thinks, well, gee, I am the wrong

political party, I have the wrong political philosophy, I am the plaintiff or I am the defendant, or I am rich or I am poor, black, white, whatever. I think they look at the judge and say I want to get a fair hearing. Win, lose, or draw, it is going to be a fair hearing. And to get my vote, you are going to have to convince me that everybody, both those who advocated for and those you advocated against--it is basically very clear who you advocated for. But a lot of people come to the courts from the side you advocated against, that they are going to get a fair hearing from you.

Thank you, Mr. Chairman.

Senator Craig. Thank you, Senator.

Now let me turn to Senator Ted Kennedy. Ted?

Senator Kennedy. Thank you, Mr. Chairman.

Welcome, Mr. Myers. We are going to try and get over the fact that you work for Al Simpson.

Mr. Myers. Thank you, Senator.

Senator Kennedy. That is a big, big burden.

Actually, as you know, he has been a good friend and someone all of us have a good deal of admiration and respect for.

Senator Craig. Then we are trusting that all of you will take Al's advice in this matter?

Senator Kennedy. We are always glad to listen.

[Laughter.]

Senator Leahy. If he had nominated Al, it may be a different thing.

Senator Kennedy. Thank you.

In 2001, as the Solicitor General of the Interior Department, you issued a formal opinion that undercut the Interior Department's ability to limit mining that harmed public lands, and that opinion paved the way for a foreign company to erect a 1,650-acre open-pit gold mine in the heart of a California desert conservation area in America's most culturally and ecologically sensitive areas. The previous administration had decided not to permit the mine, known as the Glamis Imperial Gold Mine, because as described by the Advisory Council on Historic Preservation, allowing the mine to be built would mean that the Quechan Tribe's ability to practice their sacred traditions as a living part of their community life and development would be lost.

As a result, under the previous administration, the Interior Department concluded that the mine would violate the Federal Land Policy Management Act, which prohibits mining that causes unnecessary or undue degradation of Federal lands. And under the FLPMA, the Interior Department has a duty to protect the public lands from mining that cause either unnecessary or undue degradation. However, your opinion as the Solicitor General concluded that the words ``unnecessary or undue'' actually meant their exact opposite, ``unnecessary and undue.''

And in the case of the Glamis Gold Mine, your interpretation meant that although the open-pit mine would have caused undue degradation of America's public lands, it was legal because it was necessary to the foreign mining interests.

A Federal court recently concluded that your opinion misconstrued the clear mandate of the FLPMA, which by its plain terms vests the Secretary of the Interior with the authority, indeed the obligation to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land. The court also held that you ignored well-established canons of statutory construction.

Those are the two observations, including the basic rules that Congressional language should be given its ordinary meaning and every word should be given effect whenever possible. The court concluded that in enacting the FLPMA, Congress' intent was clear. Interior is to prevent not only unnecessary degradation but also degradation that, while necessary to mining, is undue or excessive.

I am troubled by the implication of your view that under the FLPMA the Interior Department could prevent only mining that is both unnecessary and undue. Under your reading of the law, the Act wouldn't not prevent even the most environmentally devastating mining efforts unless those efforts were completely unnecessary to the mining operation.

Since we can expect that mining companies will act in their own self-interest and will not engage in unnecessary efforts, it is hard to see how your view of the law would prohibit any mining efforts at all.

So doesn't your interpretation of the FLPMA pull the rug out from under the requirements that the Interior Department protect the Federal lands?

Mr. Myers. Thank you, Senator, for the question. Let me address that.

The decision that you refer to, a recent decision by Judge Kennedy in the district court, looked at a facial challenge to the regulations that were promulgated by the Department of the Interior in 2001 dealing with this kind of mining activity. The judge ruled in favor of the Department, finding that the regulations were valid because they would not allow undue or unnecessary impairment of the public lands. And the Department's regulations were promulgated in some part because of my opinion that preceded them. So the Department, my client, felt vindicated by the judge's decision.

With regard to the specifics of the issue, in my opinion, I did find some ambiguity in that key phrase. The first administration to define that phrase was the Carter administration in 1980 when it promulgated the regulations after the passage of FLPMA, or the Federal Lands Policy Management Act, in 1976. That regulatory definition for unnecessary or undue impairment withstood the test of time for some two decades and never received a Federal court challenge.

In the year 2000, that Carter administration definition was changed with the addition of a standard known as the substantial irreparable harm standard. And in my opinion, that was the focus. Was the addition of the substantial irreparable harm standard in faithful compliance with the underlying statute? In my opinion it was not, and the Department of the Interior removed that standard and the court approved that decision.

Senator Kennedy. Well, the court said, with regard to your opinion, ``misconstrued the clear mandate, which by its plain terms''--that is about as tough a comment about a position, in terms of the court. And then, to continue, the court also held that you ignored the well-established canons of statutory construction.

You might have had your own kind of thinking that there has been some change. Those are two observations that are about as tough a criticism as one could have.

Let me continue. I am troubled by the implications of your view the Interior could prevent only the mining that is both unnecessary and undue. Under your reading of the law, the FLPMA wouldn't prevent even the most environmentally devastating mining efforts unless those efforts were completely unnecessary

to mining operations. Since we can expect that mining companies will act in their own self-interest, will not engage in unnecessary efforts, it is hard to see how your views of the law would prohibit any mining efforts.

I would like to ask you about another aspect of the involvement of the Glamis Mine matter. As you know, the Quechan Tribe was directly affected by the Interior's decision to permit the mining interests from outside this country to create an open-pit mine near cities that were crucial to the tribe's religious and cultural life. Your opinion in the Glamis matter is disturbing not only because it misinterpreted the Federal law, but also because you and the Secretary made a decision in this matter without any government-to-government consultation with the members of the Native American tribe, whose religious liberty and cultural heritage was at stake. Yet the Department of Interior met with the representatives of the foreign mining company, seeking to build a gold mine in the California desert conservation area.

Because of your position in the Glamis Mine matter and other matters affecting Native Americans, the National Congress of American Indians, which to my knowledge has not taken a position on any other of President Bush's judicial nominees, has written to this Committee opposing your nomination. And could that letter be a part of the record, Mr. Chairman?

Senator Craig. Without objection.

Senator Kennedy. So why did the Interior decide not to consult with the tribe before making a decision that so clearly affected the tribe's religious freedom and culture?

Mr. Myers. The Department of the Interior, through the Bureau of Land Management, which was the agency with the primary authority over this mine site, consulted with the tribe about their concerns.

Senator Kennedy. But did you ever talk with them at all?

Mr. Myers. No, I did not, Senator. I proceeded to look at this issue when I first arrived at the Department. When I got there, the regulation that was underlying this decisionmaking had been suspended by the Department. In addition, there were four Federal pieces of litigation pending. So when I got into the Department, I was handed a notebook with a number of hot issues, and one of those was this particular mine site because of the litigation and the suspension of the regulations.

So I turned to it immediately to determine on a fairly narrow point of law whether there was a problem with the underlying legal decisionmaking.

Senator Kennedy. Well, the Department met with the mining company, but you did not feel that it was necessary to meet with the tribe.

Mr. Myers. It wasn't, Senator, that I felt it was unnecessary--

Senator Kennedy. Well, did you ever make a recommendation that you should meet with the tribe?

Mr. Myers. That I should meet with them?

Senator Kennedy. Yes, or you or someone else, did you ever make that recommendation?

Mr. Myers. Well, I was informed that the Bureau of Land Management was consulting with them, and I thought that was appropriate.

Senator Kennedy. Did you know whether they had talked to, met with them on this case?

Mr. Myers. Yes, I was told--

Senator Kennedy. But you did not feel as the person that was involved--did you ever meet with the other side?

Mr. Myers. I did, but not upon invitation. My door was open, and they called for a meeting.

Senator Kennedy. Well, your door is open. I am asking, it is open to one side and not open to the other? Did you ever feel--

Mr. Myers. No.

Senator Kennedy. --that when one side came in, the other side ought to be invited in?

Mr. Myers. It was, Senator, open to both sides and--

Senator Kennedy. But one--just so I have it straight. It was open.

Mr. Myers. Yes, sir.

Senator Kennedy. But one side came in, and then when you saw the one side, did it ever occur to you that you probably ought to see the other side, too? Or are you going to leave it up to the Indians?

Mr. Myers. It didn't really, Senator, because I had already started my opinion, and--

Senator Kennedy. You started your opinion?

Mr. Myers. I had started it prior--

Senator Kennedy. When? After you talked to the gold mine?

Mr. Myers. No, sir. Before.

Senator Kennedy. Before. Before you even gave consideration to seeing--well, you know, even if your job is to interpret the law, the legal standard has to be assessed in light of the facts. And I think it would have been helpful to learn the facts, the view, the tribe's view of the facts.

Is my time up?

Senator Craig. Your time is up.

Senator Kennedy. I have other questions, if I could.

Senator Craig. Surely.

Senator Kennedy. Thank you, Mr. Chairman.

Senator Craig. We will do another round.

I am going to take my colleagues in order of their arrival. Let me turn to Senator Durbin.

Senator Durbin. Thank you, Mr. Chairman.

Mr. Myers, thank you for joining us. You may be aware from press accounts that we are in the midst of an investigation of this Committee and computer theft of documents from Democratic Senators and their staff. And the question I am about to ask you does not relate to you in any personal way, but it is going to be a standard question which I will ask of all the candidates who come before this Committee.

In preparation for your testimony today before the Judiciary Committee of the Senate, did you meet with any staffers on the Senate Judiciary Committee staff?

Mr. Myers. Yes, sir.

Senator Durbin. And did you also meet with any representatives of the Department of Justice?

Mr. Myers. Yes, I did.

Senator Durbin. And any other Federal agencies, the White House or any other agencies in preparation for today's testimony?

Mr. Myers. Yes.

Senator Durbin. And could you tell me if during the course of preparing for this testimony you were given any documents or information which would lead you to believe that they were from Democratic Senate staff members or Democratic Senators?

Mr. Myers. Not at all.

Senator Durbin. I thank you for that very much. We do not know the nature and extent of this theft and burglary of the computer documents. I know my office was one of the offices

that was targeted for the theft of these documents. And once we have established that, I will just say for the record, Mr. Chairman, I am going to ask this Committee to ask of all of the nominees who have come before us during that period of time basically the same questions I have asked of you. But I am very happy that you have responded as you have today.

Let me ask you just a few questions relative to your background and the position which you are seeking. Do you feel that you are in the mainstream of thinking when it comes to environmental protection?

Mr. Myers. Yes, Senator. The only reason I pause is because my statements and my writings have been on behalf of clients, whether that's in public service or in the private sector. And I would submit to you that those individuals are in the mainstream, by and large. Some may not be.

Senator Durbin. I know that the role of an attorney is an advocate. I want to ask you: Is there anything that you have written on behalf of your clients that you do not personally believe?

Mr. Myers. I have advocated in some cases where I told the clients I frankly did not think it was a winnable case, that I thought my reading of the law and the precedents suggested that it was going to be difficult. Certainly there was a colorable argument and a fair argument to be made on their behalf, but I gave them advice that it would likely be difficult to win going in, and yet I carried their argument forward.

Senator Durbin. But you have taken that to a different level. What you have said to me is you have said to a client someone else, some court, may not agree with what I am about to write here.

Mr. Myers. Right.

Senator Durbin. I want to ask you personally, the things that you have written, the legal statements that you have made on behalf of your clients, did you believe them?

Mr. Myers. To the extent that as an attorney I believed it was important to believe in my clients, and my standard, Senator, essentially, in a nutshell, if you will, is that the client deserves the representation as long as they are not asking me to do something that's unethical, immoral, or illegal. And if they pass that bar, then I am willing to absorb their cause as my own because I believe it makes me a better advocate.

Senator Durbin. Well, let me then get into some specific things that you have written, and you can tell us now whether you agree with them or believe them today or whether they were merely what you considered to be a lawyer's responsibility when you did these things.

You have said some things relative to the Commerce Clause, and, of course, that is an important issue for us because for 70 years that has been settled law, that the Commerce Clause was basically the hook by which the Federal Government had authority to extend the rights, liberties, and even restrict some activity by entities, businesses, and individuals. And yet what I find in your writings, for instance, in a case in my own home State, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, you argued that Federal regulation of land use is beyond Congress' Commerce Clause power because that area is traditionally regulated by State and local governments.

Since the Commerce Clause, Mr. Myers, is the authority upon which many of our most essential health, safety, environmental, and anti-discrimination laws are based, I would like to ask you: Are you arguing with that school of--or are you supporting

that school of thought which rejects the use of the Commerce Clause to give the Federal Government its power over issues involving health, safety, environment, and discrimination?

Mr. Myers. Clearly, the Commerce Clause has an important role to play, and the Congress' interpretation of that clause in exercise of its duties to pass legislation is key. There are many examples on our statutory code books of the proper exercise of that for environmental, for health, safety, and welfare type of standards.

In the argument that I was making in the SWANCC case, there was a question that the clients had about the applicability of the Commerce Clause to this particular municipal land waste site in this abandoned strip mine and whether that was a correct extension. So I made that argument on their behalf, along with the Clean Water Act arguments.

Senator Durbin. Did you believe it? Is that your point of view? Is that the view you will take to the bench if you are, in fact, confirmed?

Mr. Myers. Well, the Supreme Court didn't reach that issue in its decision. It stuck with the Clean Water Act--

Senator Durbin. No, no. I want to know what is in your mind. I want to know what you believe. Is that what you believe and is that the philosophy you will take to this lifetime appointment?

Mr. Myers. I think the best answer to that, Senator, is that I would like to follow the Supreme Court's decisions on that. If I, frankly, were to sit here and opine on a personal belief on this or that, then litigants who might come before the Ninth Circuit on which I would sit, if I am so fortunate to be confirmed, would be combing through this transcript to discern my personal views. And I, frankly, would not want litigants to think they needed to even go there, that they should believe that I would follow the precedents of the Ninth Circuit and of the Supreme Court.

Senator Durbin. Mr. Myers, that is what all nominees say. All we can go on is what you have done and what you have written and what we apparently can conclude that you believe.

Let me go to a second issue, the issue of property rights, which has been central to your life as a lobbyist and your life as a member of the Bush administration and the Department of Interior.

The case is Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, and you argued that the constitutional right of a rancher to put his property to beneficial use is as fundamental as his right to freedom of speech or freedom from unreasonable search and seizure. That statement, Mr. Myers, runs in direct conflict with Supreme Court precedent, which says that there are certain rights, certain fundamental rights which are really elevated when it comes to our Government. And they have identified the right of free speech and the right of freedom from unreasonable search and seizure.

Are you arguing and do you believe that the right to private property is at the same level, as you say here, ``is as fundamental as the right to free speech''? Do you believe that when it comes to assessing the Government's activity relative to property rights, that it should be subject to the strict scrutiny test which is reserved for the most precious and guarded rights in our Constitution?

Mr. Myers. I think probably the best answer to your question, Senator, is to refer to the brief from which you are citing, and in that passage to which you refer--I did not write the brief, but it was a reference to the Supreme Court's

decision in 1994 in the property case of Dolan v. City of Tigard. And in that decision of the Supreme Court, the Supreme Court said that the Fifth Amendment, which contains, as you know, the Takings Clause, is as much a part of the Bill of Rights as any other amendments in the Bill of Rights and that it should not be, to use the Court's words, ``relegated to the status of a poor relation.'' And using that precedent from the Supreme Court, that was the point that we were trying to make in that--

Senator Durbin. So you don't back off? This is what you believe? When it comes to strict scrutiny and the most guarded rights under the Constitution, the right to property is equal to freedom of speech, freedom of religion, freedom from unreasonable search and seizure? That is your belief?

Mr. Myers. My use of the analysis of strict scrutiny would be, I think, primarily in the context of equal protection and due process. But I would stand on the Supreme Court's decision in Dolan v. City of Tigard as a statement of the Supreme Court, which is binding upon the Ninth Circuit.

Senator Durbin. All right. Let me move to another area. In the Sweet Home case, you also--excuse me, I have that--yes, I believe it was in that same case. You praised what you called the Supreme Court's ``retreat from the protection of privacy.'' Do you believe that though it is not enunciated in the Constitution that we have a fundamental right to privacy as citizens in this country?

Mr. Myers. Well, the Supreme Court has been crystal clear on that, and the answer is yes.

Senator Durbin. Why would you then celebrate what you called the Supreme Court's ``retreat from the protection of privacy''?

Mr. Myers. Frankly, Senator, I'm not sure of the context of that quote, but it may have been a reference to the decision of the Supreme Court that was recent to the time of that writing in the case of Bowers v. Hardwick, which was universally seen as a retreat from some of the Supreme Court's previous precedents on privacy. My statement was merely a reflection of general knowledge to that extent. It was not a unique thought to me.

Senator Durbin. May I ask you, when it comes to your legal experience, you have indicated that you have had no criminal litigation experience. How many civil cases have you taken to verdict, either with or without a jury?

Mr. Myers. I would guess a dozen.

Senator Durbin. A dozen cases to verdict?

Mr. Myers. Yes.

Senator Durbin. All right.

Senator Craig. Senator, your time has expired.

Senator Durbin. Thank you very much.

Senator Craig. Let me turn to my colleague, Senator Feingold. Russ?

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

Congratulations, Mr. Myers. Welcome to your family.

Mr. Myers. Thank you.

Senator Feingold. Environmental issues are of greater concern to me and the people of the State of Wisconsin and, of course, many important environmental issues come up before the Ninth Circuit. So I would like to focus my questions on those types of issues.

I would like to first follow on a matter that Senator Durbin just brought up. You authored a Supreme Court amicus brief on behalf of the National Cattlemen's Beef Association

and others in the so-called SWANCC case. That case involved a challenge to the Federal Government's authority to prevent waste disposal facilities from harming waters and wetlands that serve as vital habitats for migratory birds, and as was indicated, you argued in your brief that the Commerce Clause does not grant the Federal Government authority to prevent the destruction and pollution of isolated interstate waters and wetlands.

For 30 years, the Clean Water Act has protected our Nation's waterways, including lakes, ponds, and streams, and so I also am interested in your views on the Commerce Clause and the Clean Water Act in general.

Let me follow up on what Senator Durbin asked you in a little different way. Is it your view that the Commerce Clause is the only possible constitutional authority for passing the Clean Water Act? Might one also find Congressional authority over protection of wetlands in not just the Commerce Clause but the Property Clause, the Treaty Clause, or the Necessary and Proper Clause?

Mr. Myers. Well, I would hesitate at this moment to speculate on other bases for the Clean Water Act. Clearly, it is constitutional. Whether a particular clause is the basis for that or not, I refrain from speculating on simply because that may be the basis of an argument that might come before me.

It might be helpful, Senator, for me to put in context for you the brief that I did file.

I was representing, as you said, landowners, large landowners in the form of cattle ranchers, who were concerned that the Corps of Engineers' interpretation of the Clean Water Act might impinge upon a Congressional exemption that those farmers and ranchers enjoyed. Under the Clean Water Act Section 404(f), there is an exemption for ordinary farming and ranching activities. And the concern was that if the Corps of Engineers were to require a permit for an alteration of a stock pond, that that would have a fairly dramatic impact on that statutory exemption. And that's why I filed that brief on their behalf.

Senator Feingold. So you would not exclude the possibility of those other provisions in the Constitution being a basis for the constitutionality of the Clean Water Act?

Mr. Myers. Well, I can fairly say I wouldn't exclude them, yes.

Senator Feingold. Is it your view that Congress exceeded its constitutional authority in passing the Clean Water Act?

Mr. Myers. No.

Senator Feingold. The Department of Justice on behalf of the Army Corps and EPA has filed approximately two dozen briefs in Federal court since this SWANCC decision. In these briefs, the DOJ has consistently argued that the Clean Water Act does not limit coverage of the Clean Water Act to navigable in fact waters. For example, in one brief, DOJ argued, ``SWANCC does not limit the coverage of the CWA to navigable in fact waters and wetlands adjacent thereto.'' The brief continues: ``To exclude non-navigable tributaries and their adjacent wetlands from the coverage of the Act would disserve the recognized policies underlying the Act since pollution of non-navigable tributaries and their adjacent wetlands can have deleterious effects on traditionally navigable waters.'' That is the end of the quote.

Do you agree with the administration's consistent interpretation of the SWANCC case?

Mr. Myers. Well, let me speak to my interpretation because I don't know which cases those are that you might be referring

to, and I don't want to speculate when I don't have that level of familiarity.

Senator Feingold. One would be the brief in *United States v. Rapanos* in the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Myers. Okay. The Supreme Court ruled in favor of the solid waste agencies, and I suppose you could say by reference to my amicus party, since we were on the side of the petitioners, and determined that the Clean Water Act did not extend to isolated, intrastate, non-navigable wetlands.

Senator Feingold. You disagree with the administration's approach?

Mr. Myers. If their approach is consistent with my understanding as just announced, I would not disagree with it. That's my understanding of the ruling in *SWANCC*.

Senator Feingold. Senator Durbin asked you--let me just ask you directly again. How do you read the Supreme Court's *SWANCC* decision? What waters, if any, do you believe should not receive Federal Clean Water Act protection post-*SWANCC*?

Mr. Myers. Well, I don't want to sound flippant, but obviously the particular abandoned mine site that was the subject of the litigation we could safely state is exempt. Then the question is what other types of water bodies might be like that abandoned mine sit that would be used for landfill. And the core principles that I understood from the decision--and, frankly, I haven't reread it in many years, but it was that if you have an isolated, intrastate, non-navigable wetland, that is not subject to Clean Water Act jurisdiction.

Senator Feingold. Now, let me ask you about another--

Mr. Myers. For purposes, Senator, of a 404 permit.

Senator Feingold. In the *Headwaters Inc.* case, the Ninth Circuit has ruled that the *SWANCC* decision should be read narrowly and that wetlands, streams, and other small waters remain protected by the statute, and implicitly that the rules protecting those waters are constitutional.

Would you follow the circuit's precedent if confirmed, or would you try to change it?

Mr. Myers. I would follow it, Senator.

Senator Feingold. Let me ask you about a different matter then. This year marks the 40th anniversary of the Wilderness Act, and I had the pleasure of being involved in creating a Senate Wilderness Caucus, and wilderness issues are very important to me and my constituents in Wisconsin.

During your time at the Interior Department were you involved in discussions regarding possible changes of the interpretation of FLPMA, wilderness inventory power and the ability to designate wilderness study areas to the planning process prior to 2003?

Mr. Myers. The matter that I think you're referring to, Senator, was the settlement of a piece of Federal litigation in the District Court in Utah brought by the State of Utah and others against the Federal Government, and the settlement that was reached was essentially to suggest that the authority of FLPMA, the Federal Lands Policy Management Act, was very clear on the ability to establish wilderness areas under Section 603 of that Act.

Senator Feingold. Right. But were you involved in discussions regarding possible changes to the interpretation?

Mr. Myers. Yes, I was.

Senator Feingold. And what were the nature of those discussions and what was your role?

Mr. Myers. Well, the discussions were should we settle this

case, and if so, what would be the parameters of that settlement? So I was a participant in that to discuss whether under the Wilderness Act and under FLPMA the settlement was appropriate. It was filed and the District Court accepted it.

Senator Feingold. As Solicitor General for the Interior Department, as you indicated, you approved the filing of a settlement with the State of Utah last April that will remove the possibility of administrative protection for millions of acres of potential wilderness on BLM lands outside of Alaska. This approval came despite the fact that every Interior Secretary in the previous 26 years, including James Watt, affirmed and used BLM's authority to administratively protect lands as wilderness study areas. Would you please explain how you reached the decision to undertake this dramatic policy reversal in litigation?

Mr. Myers. I think I need to clarify, Senator, that the settlement that was reached in the negotiations between the State and the Department of Justice continued to protect designated wilderness and designated wilderness study areas under FLPMA Section 603.

Senator Feingold. Did you conclude that you would not have prevailed on the question of the ability of BLM to carry out wilderness inventories in the State of Utah v. Norton?

Mr. Myers. We decided that under the authority that Congress had clearly set out under Section 603, that the inventorying for wilderness and the designation of wilderness was, under the Act, subject to a 15-year expiration date, which seemed fairly clear from the reading of the Act, and that was the context from within which the settlement was reached.

Senator Feingold. Did you arrive at the conclusion, when the Tenth Circuit had already held that the State of Utah-- excuse me one second. How did you arrive at the conclusion, when the Tenth Circuit had already held that the State of Utah did not have standing to challenge BLM's wilderness inventory authority and therefore Utah could not have possibly much less prevailed on that issue?

Mr. Myers. There were two separate authorities in the context of the litigation for wilderness study area designation. Clearly under Section 603 under the mandate of FLPMA, the administration was given 15 years in which to designate proposed wilderness and to forward that by the Secretary of the Interior, Former Secretary Andrews, to the President, and from the President to Congress for designation. And that included wilderness study areas as well as proposals for specific wilderness.

Those proposals went forward and those wilderness areas and wilderness study areas exist today. The disconnect was whether there were other provisions outside of Section 603 that provided that authority, and I didn't think there was.

Senator Feingold. Well, I want to pursue this some more, and this will be important to me as we go forward. I am concerned that this has the appearance of a case of utilizing closed door negotiation of a settlement to make a controversial policy reversal without public input and with no accountability to Congress. As I understand it, this has a binding effect on the future. But in fairness to you, I will follow up on the arguments you have made with regard to the ability to do something with regard to wilderness for 26 years. I think this has very serious implication. But I do thank you and I will pursue this with you further.

Thank you, Mr. Chairman.

Mr. Myers. Thank you, Senator.

Senator Craig. Your timing is excellent. Thank you.

Let me at least opine for the record that my colleagues who have asked questions today are from states where limited if hardly any Federal land exists. For those of us from the West who work with our Federal public policy on occasion, if not all the time, sometimes we find it in conflict, sometimes we find it balanced, but I would guess that most westerners are oftentimes frustrated by the authority the Federal Government holds over them both in individual and collective acts. I say that not to you, Mr. Myers, but for the record, as a westerner who grew up in a public lands State, often frustrated by the Federal Government, and probably one of the driving motives that made me a U.S. Senator.

But as a Senator, both myself and my colleagues make public statements, and every 6 years we are held accountable for those. You have obviously made public utterances or at least made statements for a public record. I understand in 1988 you were writing about the nominee, Judge Bork, at the time, and you opined that whether some of the opinions herein may 1 day come back to haunt you. I suspect you have not been ``Borked'' and neither have any of us, but I think oftentimes, as we move ahead with our careers and our lives, that those of us who make public statements find a need to adjust, modify, or openly stand by that which we make.

Let me go back to a couple of items that have been brought up by our colleagues as it relates to mining and grazing, very important issues for public land management, very important issues for States and private interests, depending on your point of view and the law itself.

You have been criticized for your involvement in permitting the process for a proposed gold mine in Southern California. My colleague from Massachusetts mentioned it, the Klamath Gold Mine. But in fact, you were not involved, I understand, in the permitting process at all, but rather you simply issues a solicitor opinion regarding the proper scope of the Interior Department's authority under the Federal Land Policy Management Act, that we call FLPMA, which allowed Klamath Gold, the owner of several claims in the area, to proceed with a pre-existing mining proposal. Is that not correct?

Mr. Myers. That's correct, Senator.

Senator Craig. So on what basis if any could someone assert that you handled this Klamath Gold Mine claim?

Mr. Myers. Well, I certainly had no involvement in consideration of the proposed plan of operation. That is the authority and expertise of the Bureau of Land Management. As you suggested, my role in that matter was looking at a fairly narrow point and determining whether the Department had the Congressional authority that it needed to make certain interpretations.

Senator Craig. I am going to pursue this line of questioning, but my colleague from California has just arrived, and of course this particular decision and action took place in her State.

Senator Feinstein, we are talking about the Klamath Gold Mine Claim and that decision. Let me proceed.

Had not the Babbitt Interior Department approved this same proposal supported by two draft environmental impact statements in 1996 and 1997, and two separate Native American Tribal Cultural Resource studies in 1991 and 1995? Up until the last week of the Clinton administration, was that not the position?

Mr. Myers. Yes, Senator, that is correct.

Senator Craig. Then I understand that Former Secretary

Babbitt's denial of Klamath's mining claim was based on a 1999 solicitor opinion which in turn was based upon a novel interpretation of Federal law. Your opinion rescinded that interpretation. Did you draft your opinion based on Klamath lobbyists, had exclusive insider access to the Department of the Interior? How did you arrive at your opinion in that case?

Mr. Myers. Well, as I mentioned earlier, when I arrived at the Department this issue was alive and well. The department had already put on hold the regulations that were the basis for the decision, and they were in suspension mode basically, and I had four, by some counts, five pieces of Federal litigation pending. So it was an issue that I needed to turn to, and I relied on my colleagues in the Solicitor's Office to give me the history of the mine site, the history of Solicitor Leshy's opinion, and we coordinated obviously to discuss whether or not that was a fair reading of FLPMA.

Senator Craig. In fact, as I followed that case and saw your decision, I felt you had little choice but to rescind the prior opinion because it simply could not be defended in the courts. Is that correct?

Mr. Myers. My concern specifically was with the key phrase that was the basis for the previous decision, and it's known as ``undue impairment'' and that is within the Federal Land Policy and Management Act. That portion of the Act deals with the California Desert Conservation Area and is rather specific. The Act, as passed in 1976, gave Congress--excuse me--gave authority to the Secretary to promulgate regulations if he or she so chose, and that if those regulations were promulgated, they should consider undue impairment of the area. No Secretary, since the passage of the Act in 1976, had taken the opportunity that Congress had provided to promulgate the regulations. It was simply my thinking that before the Department should try to apply the standard, that it should take the initial step of promulgating regulations under the Administrative Procedures Act with notice and comment to the public, so that that process would be followed according to the statutory mandate.

Senator Craig. Thank you.

For the balance of my time let me turn to the issue of grazing, one of the legal and appropriate utilizations of public land resource in the opinion of many westerners and I would hope most Americans. It was referenced earlier by one of my colleagues that to compare the Federal Government's management of public lands to King George's tyrannical rule over American colonies and claim that public land safeguards are fueling a modern-day revolution in the American West.

Since I have served on this Committee, Mr. Myers, I have become familiar with but not more tolerant of the practice of hard left groups deliberately taking nominees' quotations out of context and/or misrepresenting what the nominees said or wrote, then trying to smear the nominees' basis on their misrepresentation. It is even less proper for Senators I think to give credence to those who play that game. Here is one against Mr. Myers that does not stand up to even 5 minutes worth of research. So what I am going to do now is read the quote. ``So wrote our Founding Fathers in the Declaration of Independence''--I believe this is these words--``describing the tyrannical actions of King George in levying taxes and turning even the simplest enterprise into exercises in bureaucratic and regulatory entanglement. A modern-day revolution has been brewing in America's West, and it is founded on a similar set of grievances. In the late 1970's and early 1980's it was

called the Sagebrush Rebellion. For the past several years it has been known as the War on the West. This has become a rallying cry amongst many westerners who object to the Government over-regulation and efforts to limit their access to Federal range lands, revoke their property rights and generally eliminate their ability to make a living on the land.'

I believe that is the fullness of the context. And I think that what I sense you are reacting to--and you can certainly put it in your own words--but what I have reacted to when using phrases like ``the War on the West'' or the ``Sagebrush Rebellion''--and when I was elected to Congress in the early 1980's it was brewing might loudly--was an attitude or a frustration that there is reasonable regulation and appropriate regulation, and then there is excessive regulation that denies or limits so dramatically the ability of certain legal and historic uses of our public lands. I will stop there. I will not put words in your mouth. I will turn to you for any response to those comments.

Mr. Myers. Well, let me pick up where you left off, Senator. Certainly there are appropriate regulations for use of Federal lands, and specific to grazing. In fact, the Taylor Grazing Act of 1934 was passed in large measure because ranching interests wanted to regulate the use of the western lands against cattle barons who were coming out from the railheads and unloading livestock by the cattle car and running rampant over all of the lands that these ranchers had already established. So I think there is a clear history of the importance of environmental regulations on ranching.

I would like to point out as well, within the context of the article that you just mentioned, that my statement at the beginning about the War on the West and the Sagebrush Rebellion was to put in historical context where we found ourselves. The theme or thesis of the article was that it would be much better if the Federal Government would work with environmental stewards to enhance the environment, and in fact, other quotes from that article are specific, where I say that environmental stewardship is both good business and good citizenship.

Senator Craig. Most westerners would agree with that statement.

A little time left, but we have had new colleagues--I should not say new colleagues--but colleagues join us, and let me turn to them in the order in which they have come for their first round if they choose.

I believe, Senator Schumer, you arrived ahead of Senator Feinstein, so we will start with you.

Senator Schumer. Thank you, Mr. Chairman. First let me say I am glad to be back in this room. I want to thank my House colleagues for their courtesy. As many know, I served for 16 years on this Committee. I was in this seat for several years till seniority moved up. I think I may have been--no, I think I was a little further over.

Senator Craig. Chuck, before you arrived this morning, I am told by our staffs that we are making history here, that nomination hearings have never been held here by the Senate. So you are possibly making double history today.

Senator Schumer. Well, I did make history when I sat here because I was the only person to serve on the impeachment proceedings in both the House and the Senate. From my point of view, it had a happier outcome in the Senate than in the House, but I am still glad to be here.

I might note that having served under a bunch of these Chairs, Henry Hyde and Peter Rodino and Jack Brooks, and not

Manny Seller, but he held the seat I held in the House and was Chairman of Judiciary for decades. So I am glad to be here.

Second, I just wanted to note, as others have, we are at a little bit of a disadvantage today because of the ricin attack. Our staff's access to all of our computers, which I presume are now secure--

Senator Craig. Made secure by the Chairman of the full Committee, Senator Hatch, correct.

Senator Schumer. We thank him for that, very much so, but we are at a little bit of a disadvantage. Whether we need--we may, Mr. Chairman, I would just like the record to show, may need another hearing to flesh out the record here if we find--and I hope the Chairman--he has always been good this way--would understand that.

Senator Craig. The record will remain open and you can certainly submit questions and the nominees will respond appropriately.

Senator Schumer. Maybe they can have the record remain open for a little extra period of time, because we are not getting back to our office in the Hart Building until tomorrow, and the Dirksen Building, where my Judiciary staffers are, is not going to open I think till Monday.

Mr. Myers, first I want to welcome you and thank you for being here.

Mr. Myers. Thank you, Senator.

Senator Schumer. You and I disagree on a whole lot of things, and I am going to ask some pretty sharp questions, but that does not mean that I do not hold you personally in high regard, and I do not want particularly your children--I have two daughters. Are those your two daughters?

Mr. Myers. They are.

Senator Schumer. So I have two daughters a little older than yours, and I know if they were sitting here they would be a little puzzled why people are asking such tough questions of their nice Dad.

Senator Craig. So, Dad, behave yourself, okay?

Senator Schumer. Yes, exactly. So I just wanted to tell them, your dad is a good man, and he is seeking public service and we admire that.

Now, as you probably know, Mr. Myers, I have three standards when I choose and vote on judges. They are excellence, they should be legally excellent, not somebody's brother-in-law or some political hack. A Federal Judge, particularly a Court of Appeals Judge has enormous power. The second standard is moderation. I do not like Judges too far right or too far left. Judges who are ideologues tend to want to make law, not interpret the law. And the third is diversity. I do not think the bench should just be white males. That third category has to be taken as you look at a whole school of nominees, so it is not really relevant.

And I do not have much doubt on your excellence provision part of you, but I do have doubts on the moderation part, and that is where I will ask my questions.

You have had a long and distinguished record of passionate advocacy for private mining and ranchers' interests, and I respect that, respect the work you have done in the private sector, and respect the fact that when it comes to environmental policies you clearly have had deeply-held beliefs which you have worked hard to make the law of the land, and those deeply-held beliefs are represented in part by some of the comments you have made regarding environmental protection laws and those who support them.

Now, I know my good friend from Idaho has said, ``Well, these quotes should not matter.'' I think they matter very much. We do not know of Mr. Myers' record as a judge or as a law professor because I guess you have never served as either of those. So it is not only the cases he litigates, because we have had lots of people come before us and say, ``I didn't agree with the case I litigated, but I was being a good lawyer.'' So the comments that people make are all we have and I think they are extremely relevant and I think I would be not doing my obligation to the 19 million people of New York, or for that matter the 280 million people of America if I did not ask about them, because they do come off as hardly moderate. Here are some of them.

In one article--this was not rhetoric in the courtroom, it was an article--you said, ``Environmentalists are mountain biking to the courthouse as never before, bent on stopping human activity wherever it may promote health, safety and welfare.'' I do not think most people in this country would think environmentalists are trying to stop health and safety. You may think they go too far in promoting health and safety, but to say they are stopping it, wow. The cases you were discussing include suits to halt the racially discriminatory placement of waste treatment facilities, to protect irrigation canals from toxic chemicals, and to halt logging in protected national forests.

Some of my democratic colleagues will tell you that much to their chagrin, I agree that there are abuses in our litigation system, and that frequently Americans resort to courts all too quickly when no one is at fault, there is no appropriate remedy or the matter could better be handled legislatively or extrajudicially. That said, the cases you were discussing hardly seem to be the examples of wild-eyed litigation run amuck, and your comment is hardly reflective of the moderation and temperament we look for from judicial nominees. It is not just one quote we are plucking out of here. There is a whole long series. Let me read you a few others.

You compared the Government's management of public lands to King George's tyrannical rule over the American colonies. I have heard that before I came in Senator Leahy asked you a little about that one. But here are some others that I am going to ask you to respond to. You wrote that the Federal Government's ``endless promulgation of statutes and regulations harms the very environment it purports to protect.''

And specifically regarding the Endangered Species Act and the Clean Water Act, you said that they have ``the unintended consequences of actually harming the environment.'' I do not think most people think that of the Endangered Species Act and particularly the Clean Water Act.

You claimed that it's ``fallacious to believe that centralized government can promote environmentalism.'' Well, that seems to be a view that was more appropriate 100 years ago, and discounts all the advances and changes and progress that we have made in this country. There is a broad consensus in America, Democrats, Republicans, liberals, conservatives, economists, that there are externalities, that if I run a power plant, it may be in my business's interest to send noxious fumes and smog into the air, and it may not even hurt my State. We have this problem in the Northeast. Because the winds blow the stuff over, away from my State and into the Adirondack Mountains. The only resort is the central government, and you seem to just dismiss it.

So I want to ask you about those quotes. I will get back to

them.

You argued that the Federal public land safeguards are fueling, ``a modern-day revolution in the American West,' ' that our environmental regulations are ``designed to turn the West into little more than a theme park.' '

Well, you may not agree, but there are tens of thousands, millions of citizens who want to enjoy the environment as is. And to say that our forests or our lakes or our rivers or our deserts are a theme park?

You called the Migratory Bird Rule, ``an unwarranted and despotic intrusion by the Federal Government over every brook, creek, cattle tank, mud puddle, slough damp spot in every owner's backyard.' ' How do you say that? Slew. I am from Brooklyn. I do not know too many sloughs.

You called the California Desert Protection Act, one of Senator Feinstein's most--we all respected her for the job she did getting it passed. I am not going to ask you about it. I imagine she will, but you called it an example of legislative hubris. And the list goes on and on, not one quote, not two, but it seems these are your deeply-held beliefs. I respect those beliefs. I even respect the right to go to court and litigate those beliefs, or for you to defend those who are litigated against.

The question is, when you become a judge on the Ninth Circuit, when you have had such deeply-held beliefs, how can we be assured that you will simply impose the law? That when a company is violating the Clean Air or Clean Water Act, that you will not think that these are harsh despotic regulations and try to undo them, because they are the law of the land supported by Democrats and Republicans alike?

My fear, to be honest with you, sir, is that when it comes to environmental protection we will be putting the fox in charge of the hen house, that you will do your mightiest from the bench not to interpret the law, but to write it in a way that you like because you feel so passionately that the law has gone amuck. So you do not strike me as a moderate. You strike me, at least on environmental issues, as someone quite extreme, that if you had to put all Americans and rate them from 100 who are the most liberal to 1 being the most conservative, you would not even be a 10, you would be a 1 or a 2. The question is whether 1's or 2's or for that matter, 99's or 100's-- because I feel I like moderate judges--should be on the bench. And--

Senator Craig. Senator, you have now taken 11 minutes of the 10-minute time.

Senator Schumer. I have more to say here, and I apologize.

Senator Craig. We will get back to you on the next round.

Senator Schumer. I would ask that my entire statement be read in the record, but let me just add--

Senator Craig. Without objection.

Senator Schumer. Let me just ask Mr. Myers to please put in whatever context he chooses, the quotes that I outlined, the three, that endless promulgation of statutes and regulations the very environment it purports to protect, that the Clean Air Act--Clean Water Act and the Endangered Species Act--but I am particularly interested in Clean Water--have the unintended consequences of harming the environment, and, ``that it is fallacious to believe that centralized government can promote environmentalism.' '

Thank you, Mr. Chairman.

Senator Craig. Mr. Myers?

Mr. Myers. Thank you, Senator. I will do my best to respond

to my comments. I think my starting point is perhaps your starting point, and that is the question of moderation, which you defined as essentially a desire to confirm non-activist judges. I agree with that completely. I think one of the strengths that I bring to this table today is the fact that I have had an opportunity to work in the three branches of Government, not as a judge of course, but as a litigator, as a member of the Senate staff, and in three cabinet-level agencies at various times and in various positions.

In that context I've had an opportunity to see firsthand the importance of separation of powers. The reason I raise this is because it's important in the context of moderation. Every court, every judge, should respect the appropriate role of the Executive Branch, and the Legislative Branch and not try to do those jobs.

But as soon as I say that, I want to follow along with the statement that if the case or controversy before that judge raises constitutional issues or statutory errors, then the judge has to follow the law, and if it takes the judge into the Executive Branch to say, ``You, Department, violated the law,'' then that is appropriate. If it takes the judge to the Congress because Congress passed a statute which that court believed to be unconstitutional, that's appropriate.

But within that context is the separation of powers that is important, and that a judge should not don robes, and then at the bench attempt to legislate. That is the role of Congress, and I respect that.

In the context of the quotes that you raised, there is a theme there because when I made those statements, I was an advocate for the Federal lands livestock industry. That was who I was talking for. That industry is spread over some 270 million acres of primarily western land, a very diverse geographic range, obviously.

It is an industry which I think has a strong record of environmental protection and stewardship, for the simple, self-serving reason that the rancher who destroys his Federal grazing land is going to have no place to go next year with his livestock because he has just destroyed the very environment that he relies upon for his business.

So when the regulations came out in the mid-'90's to regulate that industry, in a fair attempt, I think, to get at a few bad actors, I believe that the unintended consequence was that while trying to get at the few bad actors, it was having a consequence on the 90 percent-plus good actors who were taking care of the land, and that if the result was to run those ranchers out of business, then it was having the effect of taking good stewards off the land and that that was not a good consequence.

That is basically the answer to all of the quotes you mentioned.

Senator Schumer. Let me ask about a few specifics with--oh, okay, I have been told that Senator Feinstein has another appointment. I am just going to ask, then, one.

Do you really believe it is fallacious to believe that centralized government can promote environmentalism?

Mr. Myers. No, Senator. A centralized government--i.e. Congress--has an important role to play in environmental protection. And the Clean Water Act, the Clean Air Act--there are probably 70 environmental statutes that give evidence to that truth.

Senator Schumer. So what did you mean when you said that?

Mr. Myers. I was talking about the regulations that were

being applied to the ranchers, who I believed at the time were environmental stewards, and my concern about the impact of those regulations on good ranching operations.

Senator Schumer. Thank you, Mr. Chairman.

Senator Craig. Thank you, Chuck.

Now, let me turn to Senator Dianne Feinstein. She, like I, resides within the Ninth Circuit. She is a distinguished member of this Committee.

I turn the next ten minutes over to you, Senator.

Senator Feinstein. Thank you very much, Senator.

Mr. Myers, my dilemma with you after reading some of your writings, which are to some extent bombastic and engage in substantial hyperbole, is to try to determine whether these are your true feelings and whether they will infiltrate your performance as an appellate judge and the decisions you will make.

A former official has written me a letter and I would like to just read part of it, if I might. It is a former Interior Department official. ``Myers has advocated a very narrow reading of the Commerce Clause that would take Congress out of the picture when it comes to protecting the environment. He doesn't think that the Federal Government has much of a role in addressing environmental issues at all. This is a radical agenda that is clearly at odds with prevailing law. Nonetheless, if Myers is confirmed on the Ninth Circuit, he would likely seek to undercut Congressional action on environmental and public lands management issues.''

Would you respond to that, beyond what you just said to Senator Schumer about obviously the Congress having the right to legislate?

Mr. Myers. Yes, Senator. Let me also respond, if I might, to your first comment about occasionally being bombastic. That is true. There are times when I have written things which, looking back on them in time, were probably a poor choice of words, but at the time seemed like the advocacy that I was being asked to advance.

Having said that, the concern that you are expressing as related to you by a former Interior official of some sort, I think, is, shall I say, not completely informed because he or she has not recognized in that writing that you have just quoted the efforts that I have made while in public service to take a balanced approach.

Prior to your arrival here today, I talked, for instance, about a case in California where the BLM had to take action against a rancher to prohibit that rancher from taking a bulldozer to a stream, installing a pipeline, destroying the riparian habitat and the fence that stood between him and the stream.

That case came to me as Solicitor. I quickly said, yes, we have got to get on top of this. The Department of the Interior, through the Department of Justice, filed a motion for preliminary injunction. The court thankfully granted that injunction and we stopped that rancher. That is, in my opinion, the kind of example that you need to consider as you are deliberating whether I would disregard statutory mandates or Congressional authority, and I am here to tell you that I would not.

Senator Feinstein. See, that is my dilemma to figure that out because I could not vote for you to be judge based on the views you have expressed in your writings. I, in some, have found that people who have been advocates can put that aside and can be a fair judge, and in others I have drawn the

conclusion that I don't believe they can.

You have a very mild manner. I expected to see a 300-pound, huge, muscled man after I read your writings.

Senator Craig. Now, Senator, you know me better than that.

Senator Feinstein. No, you are not 300 pounds, and I won't comment on the muscles.

Senator Craig. No, no. I am talking about those whom I might be an advocate of in relation to the Ninth Circuit.

Senator Feinstein. One thing that I have been very proud about--and Senator Schumer alluded to it--was the Desert Protection Act. It protected 7.7 million acres of pristine California wilderness, 5.5 million as a national park preserve; provided habitat for over 760 wildlife species. It created the Joshua Tree National Park, the Death Valley National Park, the Mojave Preserve; provided recreation for 2.2 million people and more than \$237 million in sales, \$21 million in tax revenue, and thousands of new jobs. Yet, you call it an act of legislative hubris.

Could you explain what you mean by that?

Mr. Myers. That was bombastic.

Senator Feinstein. Correct.

Mr. Myers. And I frankly am thinking of that phrase when I said that I used words that were probably a poor choice. So accept that apology, please.

With regard to the specific issue, at the time that I wrote that article the concern that was being expressed to me from ranchers in the California desert area was that after, as you well know, 100 years of stewardship of the land, that by taking their grazing permits and placing them under the authority of the Park Service, which does not have extensive authority regulating ranching, that they would find that they would be no longer to economically ranch in that area.

Senator Feinstein. Let me stop you here. Were you aware at the time that I had specifically crafted that bill so that grazing could continue at the present level?

Mr. Myers. Senator, yes. I, to your credit, I believe, know that you worked, I believe, quite long and hard with ranchers to try to protect their interests in that area, and that was told to me by those ranchers.

The specific point that I was making on their behalf was that if they were, in fact, unable to continue ranching for economic purposes that they would take with them their water development for the livestock, and that that water development and those water sites they had developed for livestock were redounding to the benefit of a lot of desert animals that needed the water as well as the livestock did.

So the point that I was making in the context of that writing was that it would perhaps have resulted in some unintended consequences once that water dried up, once the ranchers left, and that, in fact, would have had an environmental impact on the animals that used them, the non-domestic animals.

Senator Feinstein. I don't understand that.

Mr. Myers. Okay. It was explained--and I have never ranched in the California desert, but obviously--

Senator Feinstein. You should go sometime. It is quite beautiful.

Mr. Myers. Ranchers develop water sites for their livestock throughout that desert region because it is obviously a desert. Other animals, such as big-horn, sheep, deer, and the like, birds, would use those watering sites for their nourishment.

If the ranchers were no longer able to economically ranch,

they would leave the area. They would let the water sites either fall into disrepair or they would remove them outright, thus removing not only water for the livestock, but water for the big-horn sheep, the deer, the birds, et cetera.

Senator Feinstein. Which is not quite true, not to debate this because it is not relevant. But they call them guzzlers and there are a whole series that volunteers place throughout the desert for big-horn sheep and burros and other animals. The bill provided for a willing seller, willing buyer. In fact, some of the ranchers have decided to sell out to the Park Service.

I think the bill was put together in a very sensitive way and I was rather dismayed that you called it legislative hubris, but that is fine because you have used a lot of hyperbole. My concern is that you will take these views into the chamber as a judge, and that, in fact, what they do is show a very restrictive view of the Commerce Clause. And that is a very important clause in terms of giving the Congress the ability to determine law.

So therefore, in the Ninth Circuit, I would be concerned that that restricted view would prevail and that you would be willing under that view to strike down many good things that this Congress does.

Mr. Myers. If I may respond, Senator, I would ask you also to look at the comment where I used the unfortunate phrase ``legislative hubris.'' I did use a few other phrases that I think were good, one being that environmental stewardship is good business, that environmental stewardship is good citizenship.

And I quoted the famous early 20th century conservationist Aldo Leopold for his statement that conservation means harmony between people and the land. I believe he said something to the effect that when land does well for the land and the people do well by the land--when, by reason of that partnership, both are better off, that is conservation. And that was theme I was trying to run throughout that article.

Senator Feinstein. I would like to ask you a question about property rights. You were counsel of record in the case of *Babbitt v. Sweet Home Chapter Communities for a Greater Oregon*, and your brief argued that private property deserves the same level of constitutional protection as speech. Specifically, you wrote that, quote, ``Every bit as much as a regulation that restricts speech, the regulation of private property must be held up under the strong light of constitutional scrutiny.''

Is it your view of the Takings Clause that environmental regulations deserve the same level of scrutiny as the regulation of speech?

Mr. Myers. Senator, within that brief--and perhaps a little context will be helpful. That brief was filed on behalf of farmers and ranchers who were concerned that the Corps of Engineers' interpretation of the Clean Water Act would impact an exemption that Congress gave farmers and ranchers to proceed with normal farming and ranching activities, and thus not require a 404 permit.

Now, within that context, the quote that you are referring to was a reference to a Supreme Court decision in 1994, *Dolan v. City of Tigard*. In that decision, the Supreme Court said that the Fifth Amendment, and referring specifically to the Takings Clause, was as much a part of the Bill of Rights as the First Amendment and the Fourth Amendment. And the Court went on to say that the Fifth Amendment should not be, to use its words, relegated to the status of a poor relation.

Senator Craig. Senator, your time is up.

Senator Feinstein. Thank you, Mr. Chairman.

Mr. Myers. Thank you.

Senator Craig. Let me turn to our colleague from Georgia.

Senator Chambliss, do you have any questions of the nominee?

Senator Chambliss. Thank you, Mr. Chairman.

Before we leave this particular Sweet Home case, Mr. Myers, I want to go back and let's make sure we get on the record a real clarification of what you just said because it appears that you stand accused of expressing the radical opinion in an advocacy brief that you filed in 1995 that the Takings Clause in the Fifth Amendment means what it says, namely that private property shall not be taken for public use without just compensation.

Now, the brief I am talking about which you submitted in the Supreme Court is an amicus on behalf of the National Cattlemen's Association. It did not argue that the Endangered Species Act itself was unconstitutional.

Is that correct?

Mr. Myers. That is correct.

Senator Chambliss. Hadn't the U.S. Supreme Court--and I believe you just stated this, but let me again clarify it--hadn't the Supreme Court at the time of this amicus brief recently decided the Dolan case which stated, and I quote, ``We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances?''

Mr. Myers. That is the quote to which I referred in the brief.

Senator Chambliss. Right. Let me also note that the Supreme Court stated in the 1972 case *Lynch v. Household Finance* that, ``The dichotomy between personal liberties and property rights is a fake one. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights and property are basic civil rights has long been recognized,'' end of quote.

The point is that the fundamentality of property rights in our constitutional system is neither new nor radical. If there is a legitimate effort underway to amend the Constitution to remove the Takings Clause, I am not aware of it. But it is not up to judges to remove it. Until it is legitimately removed, it ought to be respected.

Would you care to comment further on that, please, sir?

Mr. Myers. Well, Senator, I would not try to draw any hierarchy among the amendments, or for that matter any particular clause of the Constitution. The Constitution speaks for itself and has the status in our Nation and in our democracy that it deserves.

In that brief, I was referring to a statement by the Supreme Court, I think, a year or two prior to the filing of the brief that was specific to a takings issue which did have, I thought, some fair argument to be expressed in the Sweet Home litigation which the Court was considering.

Senator Chambliss. The problem your clients had with the Endangered Species Act was that the Babbitt Interior Department regulations defined the term ``harm'' in the statute in a way that essentially precluded any private landowner's use of property on which an endangered species might find habitat, and, importantly, that the Government had no intention of

compensating affected landowners.

Is that correct?

Mr. Myers. Well, Senator, thank you for that.

And, Senator Feinstein, I need to correct a statement I made to you in response to the same question. I think I referred to an exemption under 404(f) of the Clean Water Act. The Sweet Home case was an ESA case dealing with habitat modification and I was confusing that with the SWANCC. I apologize.

Back to your question, yes, the issue there was whether habitat modification, as suggested in the regulations that were under review in the case, would have an impact on normal farming and ranching activities such that if a rancher went out and modified the habitat, which, of course, is what ranchers and farmers do, whether that would expose them to fairly significant criminal liability. That is why they were interested in filing an opinion in that case.

Senator Chambliss. Those provisions of the statute are, of course, in addition to the Takings Clause of the Fifth Amendment. And I understand that the Supreme Court ruled against your client's position in this case, but it seems to me that the argument is well-grounded in the plain language of the Constitution and the statute at issue that acknowledged the basic validity of the statute cannot be credibly tarred with the empty moniker of ``extreme,'' just as a comment.

Lastly, I notice in your biographical information that you are an outdoorsman, that you enjoy visiting our National parks, and I am sure State parks in the western part of the country. And above and beyond taking vacations in State parks, you give a lot of time, a lot of volunteer time to making sure that our State parks are environmentally safe and clean.

Is that correct, and would you have any comment about your love for the outdoors as it might apply to the way you might form your basis of opinions?

Mr. Myers. Yes, Senator. I appreciate the question. My love for the out-of-doors was instilled early in me by my father and mother, who are sitting behind me. My father was an assistant scout master, and I soon found myself in Cub Scouts and then Boy Scouts, and progressed to the rank of Eagle Scout.

We as a family would often go camping for our family vacations in State parks, occasionally in national parks. Hunting and fishing are a part of my life today, although not as much as I would like. And I have been fortunate as an adult to continue that. My family and I still camp in national parks and in State parks. I still get out and, in fact, almost on a weekly basis we venture up into the foothills behind Boise, Idaho, into the national forest to recreate.

And as I calculated it, looking at this hearing and what I had done in environmental matters, for the last 15 years I have averaged about 12 days a year volunteering in national parks-- Yosemite, Yellowstone, the Smoky Mountains, Rock Creek, Manassas Battlefield Park--doing such things as back-country patrols; visitor interaction; minor first aid; minor law enforcement, like put your dog on a leash; campsite clean-up; trail-clearing and the like.

Senator Chambliss. Well, I commend you for your public service that is over and above what most of us do.

Thank you very much, Mr. Chairman.

Senator Craig. Senator Chambliss, thank you very much.

We have been joined by the Chairman of the full Senate Committee and I now turn to Hon. Orrin Hatch.

Orrin?

Chairman Hatch. Well, I welcome all three of you to the Committee, and we are very grateful to the House of Representatives, and specifically the chairman, Jim Sensenbrenner, and the ranking member, Mr. Conyers, for making this room available to us. It is very nice of them under the circumstances, although it looks like later today we should be able to get back to somewhat normal in the United States Senate.

I welcome you all here. Mr. Stengel, I am happy to note that you are a fellow University of Pittsburgh law graduate and worked for Dickie, McCamey, Chilcote, and Robinson. They offered me a job right out of the University of Pittsburgh Law School, and one of the great defense firms in the country. I won't be able to stay for yours and Mr. Duffey's hearing, but I just want to welcome both of you here.

Let me take a few minutes with Mr. Myers.

Mr. Myers, you stated in response to an unfavorable newspaper editorial in November of 2002, quote, ``I serve at the pleasure of the President. I will continue to provide the President and Secretary Norton with legal advice in support of their policy goals, just as any lawyer should advocate his or her client's goals within the bounds of professional responsibility and ethical conduct,'' unquote.

I think I quoted that accurately, and correct me if I am wrong here. The Solicitor's job is not really policymaking, but rather to defend the laws and the policies of the Department which either already exist or are established above your then pay grade. Is that right?

Mr. Myers. Yes, Mr. Chairman, that is correct. There are different ways to approach the office of the Solicitor. Some, I think, have approached it more as a policy office, and that, I assume, was with the consent of the Secretary for whom he or she served. That was not my approach coming in, and as I was interviewed for the position by the Secretary, I told her that that would not be my desire to come in and make policy, that there were other assistant secretaries in the building who would have that obligation and duty; that my job would be to give her and the constituent organizations within the Department legal advice. She seemed quite satisfied with that and I was hired.

Chairman Hatch. Well, it never ceases to amaze me how some in the media and others whom we could mention seem to think that an advocate should only advocate what they believe rather than what the law says or what the advocate believes the law says, or what the advocate's client believes the law says.

My gosh, we put through 377 Clinton administration judges, and if we took the position that whenever they disagreed with us they shouldn't sit on the bench, my gosh, none of them would have sat on the bench. So it is amazing to me.

Now, you probably wouldn't have accepted the Solicitor's job unless you generally agreed with the policies that you thought President Bush and Secretary Norton would support. I presume that is correct.

Mr. Myers. Well, probably more accurately, I would have never been offered the job.

Chairman Hatch. Well, probably so.

Now, you spoke to this in the same November 2002 letter to the editor, quote, ``I hope it does not come as a surprise that the Bush administration has a different policy from the Clinton administration on innumerable issues, including livestock grazing on Federal lands and the importance of working landscapes and rural communities,'' unquote.

Now, the question is whether doing your job as Solicitor to defend policies that diverge from the Clinton-Babbitt regime makes you an extremist and an ideologue, unfit for service on the Federal bench. Of course, the answer has to be an emphatic no.

For example, I wonder if the Committee is aware or whether your opponents care that according to the National Journal, quote, ``President Clinton filled some of his top environmental jobs with environmental activists,'' unquote, including Bruce Babbitt himself, the former president of the League of Conservation Voters.

Now, given your record of trying to cooperate with environmentalists, in your words--let me see if I can find those words--quote, ``working with all sides to reach a locally-supported consensus and rejecting the scheming of those engaged in the environmental conflict industry,'' unquote, do you think that former officials from the Babbitt years at Interior ought to be disqualified from Federal judgeships because of their association with Clinton administration policies?

Mr. Myers. No, I don't. In fact, a friend in the environmental advocacy arena said of me that, had he been President, he may not have nominated me, but that didn't mean I wouldn't make a good Federal judge. I think that was a fair comment and I would hope--

Chairman Hatch. Well, I think it is a fair comment and it is an accurate comment. I mean, my goodness, if we all have to agree on one politically-correct way of thinking, my gosh, we are going to have very few judges that are worth a doggone in this country.

Even some environmentalists agree that their political disagreements with a nominee don't disqualify him or her from the Federal bench. For instance, the Casper Star Tribune, a newspaper normally inclined to criticize the Bush administration, reported in May 2003 that the director of the Northern Rockies office of the National Wildlife Federation said the following about Mr. Myers--basically, what you said--quote, ``He has different opinions on policies than I do, but I don't think that makes him unfit to serve on the Federal bench,'' unquote.

Are you aware of that quote?

Mr. Myers. I am.

Chairman Hatch. Okay. I agree with that and I would hope that the Committee agrees, especially given all the rhetoric I have heard about how the judiciary ought not to be politicized.

Let me ask one more question along these lines. Among your critics is the National Parks Conservation Association, whose senior director commented as follows on your nomination, quote, ``His history has been in defending commodity uses, not public uses of Federal lands. His confirmation would be another nail in the administration's attempt to hand over public lands to private industry,'' unquote.

Now, this incoherent conclusory statement assumes several things, first that the clients you have represented in your career are as rigidly ideological as the speaker, who clearly believes that public lands have only one valid use, and that is as scenery; second, that President Bush nominated you to advance a particular policy agenda as a Federal judge.

Would you care to respond to these types of, I think, incompetent attacks?

Mr. Myers. I wasn't aware of the comments by the National Parks Conservation Association, but I guess with respect to

that particular organization, I would stand on my personal record that I cited a moment ago that I have spent my free time in serving national parks, such as picking cigarette butts out of fire pits. I have a great love for the national parks. That is where we recreate and that is where we go for sustenance, for spiritual refreshment, and that is a personally-held view.

The larger view, though, and the one that is really important for this Committee is whether I would carry into a judicial position, if I were so lucky as to be confirmed, an ideology that would result in a bias against or for any litigant.

And I think it should be noted that every nominee, I suspect, that comes before you has both proponents and opponents, and some of those people may hope that once that person becomes a judge that they can either count on them to do the right thing or cower in fear that they will do the wrong thing.

I hope that both of those groups, the proponents and the opponents, are disappointed; that when a person takes on those robes, takes the oath of office, swears to uphold the Constitution, that that means that they will follow the law and the facts, wherever the law and the facts take them, without regard to personal opinion, public opinion, friends, or foes.

Chairman Hatch. My time is just about up, but you do understand the difference between the role of being an advocate and being a judge?

Mr. Myers. Oh, absolutely. I have been the advocate at the bar pleading my case to the judge. Sometimes I win, sometimes I lose.

Chairman Hatch. And sometimes you are considered right, sometimes you are considered wrong, but you are doing the best you can to advocate for your particular client.

Mr. Myers. Right.

Chairman Hatch. Now, you understand that your personal beliefs are irrelevant when it comes to deciding what the law really means?

Mr. Myers. Well, as I mentioned earlier, Senator, Mr. Chairman, if my client wishes me to pursue a colorable argument and does not ask me to act unethically, immorally, or illegally, and that argument has a foundation in the law and is not sanctionable, frankly, under Rule 11, then that person deserves to be heard before the court, and I will take the best argument that I can muster within those confines.

Chairman Hatch. But as a judge?

Mr. Myers. As a judge, the judge has a duty to hear both sides, and obviously that is why we have the advocacy system so that there is a balance of views presented to the judge. And then the judge, looking at precedent and with respect for the judicial process and the decisions of the court that has gone before, must determine what the law and the facts say.

Chairman Hatch. Well, I know your reputation. It is an excellent reputation.

Mr. Myers. Thank you.

Chairman Hatch. I know of your intellectual capacities, and your intellectual capacities are excellent. I know of your honesty; that is excellent. I look at your family behind you and they don't seem to be too odd to me.

Mr. Myers. Well, I didn't put that in the record.

Chairman Hatch. They look downright good to me, is all I can say. And I suspect that anybody who is fair will judge you on the basis of your reputation, which is a good one, a great one; your family, the honesty that you exhibit, and the

abilities that you have. And if they do that, you will be unanimously approved by the U.S. Senate, and that is what I intend to see happen and I hope that it does.

Mr. Myers. Thank you, Mr. Chairman.

Chairman Hatch. Thank you so much. We are glad to have you here, and the other nominees as well.

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

Let me again turn to my colleague from Illinois, Senator Durbin.

Senator Durbin. Thank you very much, Mr. Chairman. I have two or three questions that I would like to follow up on.

Mr. Myers, all of us in public life, whether appointed or elected, are naked to our enemies and are the object of accusations, valid and invalid. And I preface my remarks by acknowledging that fact, but asking you if you would for the record, speak to the two investigations by the Inspector General of the Department of the Interior into your conduct at that department.

If you would tell us what the status of each of those investigations is, whether they have been completed, I would appreciate it. You don't have to go into long detail on these. We have them before us, but if you would tell us your side of the story for the record, I would appreciate it.

Mr. Myers. Well, certainly, I would be happy to. You mentioned two investigations into my conduct. Actually, there was only one into my conduct. The other was with regard to conduct of attorneys in my office and I was interviewed as part of that process. That dealt with an issue as to whether a settlement reached in some administrative litigation was legal or not.

Senator Durbin. The Frank Robbins--

Mr. Myers. That is correct, yes, sir. I was not involved in the negotiations or discussions of that settlement, other than to tell a subordinate attorney that he had authority to try to settle that case.

Senator Durbin. Did you approve the settlement?

Mr. Myers. No, I did not.

Senator Durbin. Were you aware of the terms of the settlement?

Mr. Myers. No.

Senator Durbin. So it went from your subordinate's decision to what level before it was policy of the Department?

Mr. Myers. Well, the subordinate attorney worked with the Bureau of Land Management, which was the party on behalf of the Department of the Interior to the settlement. Some 6 months after the settlement was signed, press reports came out with statements that it was perhaps illegal. Obviously, I saw those press reports. I asked for a copy of the agreement.

I then dispatched different attorneys in my office to look into the allegations, together with employees from the assistant secretary's office who has authority over BLM. So I initiated in my own right an inquiry into the statements to determine whether or not they were correct.

Senator Durbin. Excuse me, but in the initial settlement negotiations you played no role?

Mr. Myers. That is correct.

Senator Durbin. And did not review them once they were agreed to?

Mr. Myers. Right.

Senator Durbin. And you are saying that is standard procedure?

Mr. Myers. Well, it was in that case for me, Senator,

because I only knew it as an administrative piece of litigation, which is to say it was wholly contained within the Department of the Interior as a dispute between the BLM and the rancher. That is how it was presented to me, so it did not seem particularly remarkable and if this attorney wanted to try to settle that, then fine.

Senator Durbin. On the first instance, the Inspector General's investigation of your relationship with your previous and now current law firm--

Mr. Myers. Yes, right.

Senator Durbin. --would you speak to that?

Mr. Myers. I will. August of last year, I actually received a call from a reporter from the Washington Post asking me to respond to some statements. Rather than respond with complete lack of understanding, I instead went about finding what this was and determined that a couple of groups had looked at my entries on my planning calendar, and based on those entries in the planning calendar they raised concerns that I was violating my ethical obligations under relevant statutory and regulatory provisions, as well as an agreement that I entered into prior to entering the Department.

When I saw the seriousness of the allegations, I went to the Secretary of the Interior, I told her, and I asked her in writing to initiate an investigation, which she did by contacting the Inspector General. Simultaneously, those allegations had been forwarded to the Office of Government Ethics. They also asked the IG to look into it.

The IG undertook a, I think, three-month review, looking not only at the meetings that were on the planning calendar, but essentially at everything I had done over the last two-and-a-half years. The IG produced his report and gave it to the Office of Government Ethics, who had requested it officially.

The Office of Government Ethics wrote back to the two groups and stated, in summary, basically that Mr. Myers showed a strong intention to comply with the statutes, regulations, and obligations that he had ethically, and that, in fact, he did so.

Senator Durbin. I would ask you to clarify two things. In the Inspector General's report, they indicate that they initiated their inquiry not on the basis of your request, but rather a complaint received on August 5 from Public Employees for Environmental Responsibility and Friends of the Earth.

And the second part--and I don't know the answer to this; perhaps you have just given me the answer--they say the Office of Governmental Ethics therefore requested that an investigation ascertain the specifics of the discussions that took place during each of the 27 meetings in order to determine if Myers had actually violated the terms of his ethics agreement or the criminal conflict of interest law.

I took it from that that even though this was issued November 24 of last year that it is still ongoing; there are still aspects of this investigation ongoing. Is that true?

Mr. Myers. No, sir. It is closed.

Senator Durbin. It is closed.

Mr. Myers. The Office of Government Ethics issued its written opinion on the 5th of December. And with regard to how this matter came to the IG's attention, I guess I frankly don't know whether the two groups forwarded their concerns on August 5 directly to the IG. I know they did forward them directly to the Office of Government Ethics by a letter, and when I heard about it I just--before the OGE asked for an inquiry, I went to the Secretary and said please get to the bottom of this.

Senator Durbin. Now, when you went to work for the Department of the Interior, you, I think--tell me if this is true--represented that you would not get involved with your former law firm or clients for a period of time in the Department of the Interior. Is that correct?

Mr. Myers. That is basically correct. There are a series of regulations that apply to that.

Senator Durbin. Now, do you feel then that it would be appropriate if you are successful in this nomination to recuse yourself from cases involving your former law firm or former clients?

Mr. Myers. Well, what I would do--and what this episode was useful for was providing me with an excellent reminder of the importance of the rules of conduct that are applicable to any Federal official, including judges. So if I am fortunate enough to be confirmed, the first order of business will be to crack the Code of Judicial Conduct and put it on my desk, understand it thoroughly, and find out how a judge goes about dealing with recusal issues. Frankly, sitting here, I don't know the answers to those questions.

Senator Durbin. Well, I want to give you some time to look at that code and then respond to the question I just asked. I will send that to you in writing with a few other questions, if you don't mind, Mr. Chairman.

Let me ask you about this property rights debate that we have been involved in here and your reference to the Dolan decision. I want to make sure I can put this in the context of other issues that might present themselves or have presented themselves to the courts.

If you believe, if it is your point of view that Dolan says that property rights are equal to rights of free speech and other rights guaranteed under the Bill of Rights, I would like to ask you how then you think we should have resolved issues like civil rights, where we said that the fact that you own the restaurant and the fact that you own the hotel and it is your property is not enough for you to discriminate against Americans based on their race. Clearly, we decided--at least the courts decided that property rights were trumped, overruled by more important rights. How do you resolve that?

Mr. Myers. I think the answer is in the Supreme Court's decisions, Senator. The Supreme Court, in interpreting the Takings Clause and the Fifth Amendment, has never interpreted it as an absolute. The Court, since the landmark case of *Pennsylvania Coal v. Maine* in, I think, the 1920's basically said that property rights are subject to reasonable regulation by government entities.

And we, of course, have that everyday. Where I live, where you live, we are all subject, and our property rights are subject to city, county governments, as they should be. So it becomes a matter of degree and a matter of context. If there is a physical invasion by the government of one's property, you are likely to have a better chance of making out a case for a takings. If it is a, quote, ``invasion'' of your property rights by economic regulation, you have a less chance of making out a takings. And the court has over the years tried to structure a format and a context in which to make that analysis. It has done so through the Dolan case and others.

Senator Durbin. Let me ask you, following up on your analogy here, was not the passage of the Americans With Disabilities Act, in fact, a physical invasion of the property rights of individuals, a requirement that certain entities--businesses, localities and such--change the property that they

own to accommodate Americans with disabilities? And would you view this as an improper takings?

Mr. Myers. On that one, I am going to hesitate because I don't know whether that particular question has been litigated or is in litigation or may come before me if I were to become a judge. I think it is fairly obvious that accommodations for persons with disabilities impacts one's property. Whether that rises again to the level of a takings, I don't know.

Senator Durbin. Let me just close, if I might, Mr. Chairman, by--you have written two stirring defenses of Robert Bork's nomination to the Supreme Court and said in one of them, the Denver Law Review, ``Judge Bork's judicial philosophy was well within the parameters of acceptable constitutional theory, worthy of representation on the Supreme Court.'' Judge Bork stated and believed that *Griswold v. Connecticut*, which established the right to privacy, was an unprincipled decision. Do you share that view?

Mr. Myers. No, Senator. *Griswold* is probably the bedrock decision in the right of privacy string of cases that the Supreme Court has decided. It is regularly cited in subsequent Supreme Court decisions such as *Planned Parenthood of Southwest Pennsylvania v. Casey* and *Roe v. Wade* and other decisions. So I think that is well-settled.

Senator Durbin. Do you think Bork's position, then, was in the mainstream and should have been represented on the Supreme Court?

Mr. Myers. My comment in that regard was, I think, back in 1988, maybe 1990, when I was fairly fresh out of this Committee's chambers, having been Senator Simpson's staffer on the Bork nomination. And the point that I was making was that it was not particularly my personally-held view of his status within the mainstream, but with reference to others whose opinions were worthy of consideration.

Specifically, Justice Stevens said that he was very well qualified and would be a welcomed addition to the Court. Former Chief Justice Burger said that it would shock him to think that Judge Bork was any more of an extremist than he himself was. The ABA had given Judge Bork its highest rating. Based on that, it seemed to this lowly staffer's opinion that that was somewhere in the mainstream.

Senator Durbin. Thank you, Mr. Myers, for your patience and cooperation.

Mr. Chairman, thank you, and I would like to ask on behalf of Senator Leahy that this letter from professors in the Ninth Circuit be entered into the record at this point.

Senator Craig. Without objection.

Senator Durbin. I would also like to express my apologies to the other nominees and their families, who have waited with varying degrees of success--Mr. Duffey and Mr. Stengel--for their opportunity to come before the Committee. Thank you very much.

Senator Craig. Thank you.

Let me turn to my colleague from Georgia for any further questions he might have of nominee Myers.

Senator Chambliss. Mr. Chairman, just very quickly--Mr. Myers, I want to go back to this Robbins settlement issue just to make sure that we are very clear as to the status of that.

Do you recall the first time you actually reviewed the settlement that was executed in December of 2002 and January of 2003 between the BLM office in Wyoming and Frank Robbins, who was a Wyoming rancher?

Mr. Myers. It was approximately a half year after it was

entered into.

Senator Chambliss. And what evidence did the various environmental activist groups cite in support of their contention that you, quote, ``specifically authorized the settlement,`` close quote?

Mr. Myers. I think there is some confusion there. What I specifically authorized was a subordinate attorney's attempt to try to reach a settlement between two parties.

Senator Chambliss. We understand the Department of the Interior IG report that has already been referred to is currently investigating one field solicitor and perhaps others who were directly involved in negotiating this Robbins settlement.

Didn't you have a role in appointing the investigative team which was chosen specifically because they had no connection with the Robbins matter?

Mr. Myers. That is correct. I asked the Associate Solicitor for Lands and Minerals Management to work with an appointee chosen by the assistant secretary with authority over that area and for the two of them to see if they could get to the bottom of it.

Senator Chambliss. Is there any conceivable reason why you would be a target of the Robbins investigation?

Mr. Myers. Well, no, and as far as I understand, I am not.

Senator Chambliss. In fact, I would like to state for the record that I have received information that the IG in charge of the Robbins settlement, Mr. Chairman, will provide written confirmation to the Committee that, in fact, Mr. Myers was not a target of this investigation. Such a letter will simply clarify the obvious that there is complete absence of evidence that the Robbins settlement, assuming there is something improper about it, reflects poorly on Mr. Myers' conduct while he served as Solicitor.

Thank you, Mr. Chairman.

Senator Craig. I thank you, Senator, and when that is available, we will make that a part of the record.

Let me close so that we can move to our other nominees, and I appreciate everyone's patience. I think you can see that we here on the Judiciary Committee take all nominations very seriously, for the obvious reason that those of you who are successful will wield a great deal of power in a lifetime appointment over the citizens of our country. It is critically important that we understand your judicial temperament, your background, your capabilities, and try to ascertain from that your sense of the law and your responsibilities in it.

In my opinion, the Ninth Circuit needs Bill Myers. Of the circuit's 26 active judges, 17 were appointed by Democrat Presidents. Only nine judges are Republican appointees. A remarkable 14 of the 26 judges--that is 54 percent of the court--were appointed by President Clinton. In 2000 alone, a presidential election year, President Clinton appointed four judges to the court.

Let me also note--and I wish my colleague, Senator Schumer, were here, but I will dutifully note his absence, noting that I am not speaking behind his back. I do want to note what Senator Schumer said about Bush's nominee to the Ninth Circuit, Judge Jay Bybee, before voting to confirm him to that court.

Here is what Chuck Schumer said: ``Jay Bybee, make no mistake about it, is a very conservative nominee. It is fair to put him in a similar category with many of the more conservative nominees we have had. If Mr. Bybee were nominated to another court that is hanging in the balance or where most

of the nominees were conservative, I would probably vote against him. If he were nominated to the Supreme Court, for example, there would be a difficult calculus. But Mr. Bybee is nominated to the Ninth Circuit Court. The Ninth Circuit is by far the most liberal court in the country.' Most of the nominees are Democrats, from Democrat Presidents, as I have quoted the record. ``It is the court that gives us the pledge of allegiance case, which is way out of the mainstream on the left side. Therefore, I think Jay Bybee will provide some balance.''

Similarly, confirming--and these are now my words-- similarly, I believe that confirming the nominee that is before us today, Bill Myers, will take another step in restoring what is important, a measurement of balance, to the Ninth Circuit.

I thank you very much for being before us, Bill. I think you have represented your case and your presence admirably. And we will look forward, I hope, to speedy completion and confirmation of you. Thank you very much.

Mr. Myers. Thank you, Senator.

Senator Craig. Well, let me again state, as the Chairman did, how much we appreciate everyone else's patience and tolerance today. I have watched your faces go from those of bright and alert to sometimes a rather dull glaze. So let's get bright and alert again, if you will, because we will not detain any of you very long. It is obvious by the exit from the room at this moment that while many of you may have thought the audience had gathered in your behalf, that is probably not the case. So I would ask William Duffey and Lawrence Stengel to please come forward.

While you are standing, will you please raise your right hand and repeat after me? I do swear that the testimony that you are about to give before the Committee will be the truth, the whole truth and nothing but the truth, so help you God.

Mr. Duffey. I do.

Judge Stengel. I do.

Senator Craig. Please be seated. Some of you have had your families introduced, but let me give both of you that opportunity. I think we all recognize the privilege that you have been--the nomination is a privilege, certainly, and I think you all respect that highly.

Mr. Duffey, let me again turn to you for the purpose of introduction of your family, if you would.

STATEMENT OF WILLIAM S. DUFFEY, JR., NOMINEE TO BE DISTRICT
JUDGE FOR THE NORTHERN DISTRICT OF GEORGIA

Mr. Duffey. Thank you, Mr. Chairman. It is indeed a privilege to be afforded this opportunity to be considered by the United States Senate for confirmation, as it has been a privilege to be nominated by the President of the United States to this post. But I would not be here without my family: Betsy, who is my wife of almost 27 years, and my two sons, Charles and Scott, who have been instrumental in supporting me throughout this process.

[The biographical information of Mr. Duffey follows:]

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Senator Craig. Mr. Duffey, thank you, and thank your family for being here. I must tell you that a friend of Paul Coverdell's is, without question, a friend of mine.

Mr. Duffey. Thank you, Mr. Chairman.

Senator Craig. Now, let me turn to Lawrence Stengel.

Judge Stengel. Stengel.

Senator Craig. Stengel, okay. I wrote down ``Casey.''

Judge Stengel. Same pronunciation, no relation.

Senator Craig. All right, thank you very much. Would you please introduce your family?

STATEMENT OF LAWRENCE F. STENDEL, NOMINEE TO BE DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Judge Stengel. I would be glad to. Thank you, Senator. It is a privilege for me and for my family to be here. My wife, Theresa; my children, Tim, Emily, Peter, Julia, and the speaker of our house, Joseph, who is on the floor.

[The biographical information of Judge Stengel follows:]

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Senator Craig. I have been watching Joseph. He has demonstrated phenomenal tolerance. And I thank you for that, Joseph, and welcome before the Committee.

Let me turn, if I can, to my colleague, Senator Chambliss, for any questions you might have of either of these nominees.

Senator Chambliss. Just very quickly, Mr. Chairman, I have already made comments relative to my knowledge of Mr. Duffey's background. Obviously, I am extremely supportive of the confirmation of both of these gentlemen.

Mr. Duffey, let me just ask you one or two things, though, for the record relative to your particular practice before the Federal bench, as well as the State bench. I understand you have had extensive trial experience, both obviously post being named United States Attorney, but as well as previous to that time.

Would you just generally give us a history of your background relative to your trial experience?

Mr. Duffey. Yes, Senator Chambliss. I have been a lawyer since 1977, and in every assignment that I have had in those now almost 26 years my responsibilities have been in the courtroom.

I began my career as a Judge Advocate in the Judge Advocate General's Corps, in the United States Air Force. I had the unusual opportunity my second 2 years on active duty to be assigned as what was known as the circuit trial counsel, which gave me responsibility with one other lawyer for trying all the

Air Force's felony cases throughout the Southeast United States. I was responsible for 44 cases, and 22 of those I tried to verdict.

In private practice at King and Spalding, which I have had two terms with, I was either in commercial litigation or the special matters group of King and Spalding, and all of that work was involved in litigation generally of complex civil and criminal matters.

When I was with the independent counsel's office, I was responsible for three parts of the Whitewater investigation, made grand jury appearances, and was responsible for one case that actually was prosecuted and concluded.

And since being the United States Attorney, I have been actively involved in all of our litigated matters and have had the privilege of representing the United States in two arguments before the Eleventh Circuit Court of Appeals. And I have tried two cases while United States Attorney, which is not the norm for United States Attorneys.

Senator Chambliss. Let me ask both of you a question I ask all of our nominees, and that is obviously as a lawyer you have the obligation to represent your client as a strong advocate. And we all as lawyers, I hope--I was in that same category with the two of you of working very diligently for my clients over the years that I practiced law.

When you become a judge, obviously, and you put on the robe, you step into a different atmosphere, and that atmosphere is one of paying close attention to precedents that have been established and getting away from the personal feelings that you have to make sure that we follow those precedents that are established by all of our courts, from the Supreme Court on down.

Do each of you know and understand the difference between following precedents and legislating from the bench, and are you prepared to accept the new responsibility that you would have to make sure that you do not legislate from the bench?

Bill?

Mr. Duffey. Senator, I think that that is the principal responsibility of a judge, is to follow precedent and to apply the law as it has been announced by the Supreme Court or the circuit which I am in, the Eleventh Circuit. It is a wholly different discipline from being an advocate, in that it is my responsibility, should I be confirmed, to make sure that I follow the precedent, follow the law, as it has been announced by the courts.

Senator Chambliss. Thank you.

Mr. Stengel?

Judge Stengel. Well, Senator, I have been sitting as a State court trial judge since October of 1990 and have had the obligation and the privilege over that time to consider many criminal and civil cases. I have tried at this point probably several hundred criminal and civil cases, and have attempted in each case to diligently apply the law of our commonwealth and of the Federal courts, where applicable, to the cases I have been handling. So, yes, I think that is central to the role of an effective judge.

Senator Chambliss. Thank you. Thank you, Mr. Chairman.

Senator Craig. Saxby, thank you very much for those questions.

Senator Chambliss has asked the question of precedent that I think is critical to ask judges as it relates, certainly, to the district court in relation to the circuit court, in relation to the Supreme Court. Let me ask, then, I think, a

follow-up question. It is something that the Committee attempts to seek of those who are before them as nominees, and so I ask this of both of you.

Given your background and prior experience, could you speak for a moment about the role and significance of judicial temperament and indicate what element of judicial temperament you consider to be the most important?

Mr. Duffey?

Mr. Duffey. I think judicial temperament is one of the most important qualities that this Committee or anybody evaluating judges has to take into account. Everybody who is in a courtroom--sometimes the only encounter that they have with the judicial system is that particular trial or that particular hearing. And they will leave that courtroom, whether they are a litigant or they are an observer or they are a member of a jury, with an impression of the court system based upon that experience.

Therefore, I think it is incumbent upon the judge to allow everybody to leave that hearing with the belief that they have treated the parties fairly, that they have allowed the litigation to proceed and for the advocates to perform their jobs to the utmost of their ability, that they have treated all people with dignity, and that ultimately through the conduct of the trial, the hearing or the proceeding that it was done with objectivity and fairness, and that people left feeling as if justice has been done. And that can only be done, I believe, Mr. Chairman, by somebody who sits on the bench that creates that atmosphere.

Senator Craig. Thank you.

Mr. Stengel?

Judge Stengel. Senator, I think that temperament involves elements of courtesy. I think it is essential that the judge who is in charge of the courtroom exhibit an attitude of courtesy to everyone who participates, from witnesses to litigants, to uncooperative witnesses, to pro se defendants. I think that to listen courteously and to consider the position of that person in that case is critical.

Much of temperament from the bench has to do with listening. We are not great speakers necessarily or people who have a lot to say during a proceeding. Ours is, I think, to listen carefully, listen critically, and make sure that the situation in the courtroom leads to a fair hearing both in how it appears and how it actually is.

In a State court trial practice, I have litigants--1 day, you may have a world-famous forensic pathologist in a case. The next day, you may have a seriously mentally ill pro se criminal defendant. And I think that the message is the same and the procedure is the same, and that each person who comes in there deserves to be heard, deserves to be treated fairly. And I think a lot of that comes from the attitude and the conduct and the temperament of the person in charge.

Senator Craig. Mr. Stengel, you have served 14 years as a judge.

Judge Stengel. Nearly 14, sir, yes.

Senator Craig. I think you have already spoken to this, but maybe you could take another moment to tell us why that experience prepares you obviously now for the Federal bench.

Judge Stengel. I view the roles in a very similar way. I view the move to the Federal court as a way of continuing a career which has been a very satisfying career to me in public service at another level and in another framework.

I think certainly in a state court courtroom, there is a

great volume of cases. I would look to the Federal courts perhaps as involving cases of greater complexity, but perhaps less volume. But the volume that I have managed over nearly 14 years, I think, has given me skills and a sensitivity to the importance of case management and in not only conducting full and fair hearings, but doing so in an expeditious way so that people who are waiting for a result, people who are waiting for a hearing, get in the courtroom and get the decision. And I think it is a question of administration most that I think would have prepared me in my State court work for a position on the Federal bench.

Senator Craig. Mr. Duffey, you have spent over 25 years practicing law and have served both as a prosecutor and as a defense counsel. What do you think is the biggest challenge you will face in your new role if you are confirmed as a district judge?

Mr. Duffey. Well, thank you, Mr. Chairman. I feel as if my background has maybe uniquely prepared me for this opportunity. As you mentioned, I have the blessing of having served in almost any role that you could serve in a trial court, save for presiding over the proceeding. Not only was I a prosecutor, but I did, as you observed, defend a lot of criminal cases.

A significant portion of my practice in my old law firm was in plaintiff's work, albeit on the commercial side. But I not only saw the litigation process from the needs of somebody instituting the action, but also then defended a number of companies and individuals in litigation in the civil side.

I have thought a lot about this transition and I believe that all of those things that have been in my background have prepared me, and I look forward to moving toward a place where I can apply those skills that I have developed and apply the experience that I have had. In managing a courtroom and a docket so that the people that are in the position that I am in now and I have been in the past have the opportunity to adequately represent their clients and move cases toward resolution.

Senator Craig. Obviously, that experience is extremely valuable, I would trust. I am not an attorney. I have never stood before a judge in that regard.

Mr. Duffey. I believe it is invaluable.

Senator Craig. Yes. Well, gentlemen, to both of you thank you very much for your time, your patience, and your responses. I would trust this Committee will move you expeditiously from the Committee to the floor for confirmation, and I would hope that that would happen sooner rather than later. Obviously, you are needed on the bench, as caseload in most States is sizable, and I am sure you would be needed at work. So I thank you both for your testimony and for your patience and the patience of your families.

We will keep the record of this Committee open. We will hold the record open for written questions until 5:00 p.m. on Friday, February 13. Otherwise, we will get into a recess. The staff has hopefully been able to access computers and draft statements, and all that can happen in a timely fashion.

Based on your record, you two may be subject to written questions asked of you, and so we would hope that you would respond to those as quickly and timely as possible.

With that, I don't know of anything else to come before the Committee and the Committee will stand in adjournment.

[Whereupon, at 1:03 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

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NOMINATIONS OF DIANE S. SYKES, OF WISCONSIN, NOMINEE TO BE CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT; JAMES L. ROBART, OF WASHINGTON, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON; AND JUAN R. SANCHEZ, OF PENNSYLVANIA, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WEDNESDAY, FEBRUARY 11, 2004

United States Senate,
Committee on the Judiciary,
Washington, DC.

The Committee met, pursuant to notice, at 2:15 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Specter, Craig, Kohl, and Feingold.

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

Chairman Hatch. I apologize for being a little bit late. I just could not get away from where I was.

We are pleased to welcome to the Committee this afternoon three outstanding nominees, one for the Federal appeals court bench and two for the district court bench. And I will speak about each of them in just a minute, and can we hold our remarks until our colleagues are able to say theirs? Is that okay with you?

Senator Specter. I am one of your colleagues.

Chairman Hatch. Well, I think that is a good idea.

Senator Specter. Both ways: on the Committee and introducing one of the nominees.

Chairman Hatch. That is great. Well, then, we will start with Hon. Arlen Specter. Then we will go to Hon. Rick Santorum, then Hon. Herb Kohl, if he is here. Well, since it is Wisconsin, I think we will honor the Chairman of the House Judiciary Committee and go to him. and then if Senator Feingold shows up, then we will do him.

Senator Specter. He is here.

[Laughter.]

Chairman Hatch. You can say, ``I am late.'' Okay. Senator Feingold will be next, then Hon. Senator Patty Murray, and then finally Hon. Maria Cantwell. So we go in that order. We will put, Congressman Sensenbrenner, right after Senators Kohl and Feingold, if that would be all right. So we can keep that all together.

We will start with you, Senator Specter.

PRESENTATION OF JUAN R. SANCHEZ, NOMINEE TO BE DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA, BY HON. ARLEN
SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator Specter. Thank you very much, Mr. Chairman, and thank you for convening these hearings and the prompt listing of the judicial nominees. With the many problems facing the Federal courts, it is very important to keep the nominees going, and you have done an outstanding job under difficult circumstances.

Senator Santorum and I have the honor to introduce State Common Pleas Court Judge Juan Sanchez for the United States District Court for the Eastern District of Pennsylvania. Judge Sanchez comes to this position with an excellent academic, professional, and judicial background. He was born in Puerto Rico, came to the United States, and attended the City College of New York, graduating in 1978 cum laude; a law degree from the University of Pennsylvania; and since that time, has had a diversified practice in the civil practice with the Public Defender's Office, with the Legal Aid Society, the sole proprietor of a law firm, and more recently for 6 years being a very distinguished judge of the State court, the Common Pleas Court of Chester County.

Judge Sanchez has moved through the process on the bipartisan nominating panel which Senator Santorum and I have established. The President has submitted his name to the Senate because of his outstanding qualifications and also in the interest of diversity.

A very large group of proud Chester County officials have come here today: William H. Lamb, a former Associate Justice of the Supreme Court of Pennsylvania, his most prominent position when he was a fellow district attorney with Arlen Specter in the good old days in Philadelphia; James McErlane; Skip Brion, the Chairman of the Chester County Republican Group; three of the judges, fellow judges from the Court of Common Pleas-- President Judge Riley, Judge Ott, and Judge Mann. And I would go on and list everybody here, but there are a lot of people waiting to make their presentations. But it is a great pleasure to introduce Judge Sanchez to this panel and to urge his speedy confirmation.

Thank you, Mr. Chairman.

Chairman Hatch. Thank you, Senator Specter.

We will go to Senator Santorum, then Senator Kohl, and then Senator Feingold.

PRESENTATION OF JUAN R. SANCHEZ, NOMINEE TO BE DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA, BY HON. RICK
SANTORUM, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator Santorum. Thank you, Mr. Chairman. It is an honor for me to be here to introduce to the Committee Judge Juan Sanchez. And even though he is a native Puerto Rican and grew up in New York, he was wise enough to begin to practice law in Chester County, Pennsylvania, and has a distinguished record that Senator Specter outlined. And I just want to add the tremendous amount of work that he has done in community service. Chester County has a large migrant worker population, largely Hispanic population, and Judge Sanchez has done a lot in the area of bilingual education at the YMCA and a lot of other things to really help integrate that community and has really been an outstanding role model for many members of that community in Chester County. And he has a distinguished legal record that Senator Specter--academic and legal record. He was unanimously well qualified by the American Bar Association. He has a distinguished time as a trial court judge in a large suburban county, Chester County. And as Senator Specter said, he has tremendous support--Republican, Democrat, across the board. When we asked for a suggestion for judge in Chester County--it was sort of their time as a large suburban county to have one of these vacancies--there was unanimous support for Judge Sanchez because of not just his great legal ability and his excellent record but, candidly, because of the tremendous community service that he has provided and the great model that he is in that county.

And so it is a pleasure for me to be here to support his nomination.

Chairman Hatch. Thank you, Senator Santorum. That is heady praise for our nominee, and I appreciate both of you being here and appreciate your busy schedules.

We will turn to Senator Kohl at this time.

PRESENTATION OF DIANE S. SYKES, NOMINEE TO BE CIRCUIT COURT
JUDGE FOR THE SEVENTH CIRCUIT, BY HON. HERB KOHL, A U.S.
SENATOR FROM THE STATE OF WISCONSIN

Senator Kohl. Thank you, Mr. Chairman. Along with Senator Feingold and Chairman Sensenbrenner, it is my pleasure to introduce Wisconsin Supreme Court Justice Diane Sykes to the Senate Judiciary Committee today. She has been nominated to fill one of the Wisconsin seats on the Seventh Circuit Court of Appeals to replace retiring Judge John Coffey.

Justice Sykes brings an impressive background to this important position. She is a lifelong resident of Wisconsin. She was born in Milwaukee, attended Marquette University Law School, clerked for Federal Judge Terry Evans in Milwaukee, and practiced law for a Wisconsin law firm at the very top rank.

Justice Sykes left private practice in 1992 to serve as a Milwaukee County circuit judge, a position she held until 1999. She was then appointed to the Wisconsin Supreme Court in 1999, and she won re-election to a 10-year term in the year 2000. She is to be commended for her devotion to public service and praised for her qualifications for the Seventh Circuit Court of Appeals.

We are not the only ones who recognize her abilities today. The bipartisan Wisconsin Federal Nominating Commission, which has been screening judicial candidates for Wisconsin Senators

of both parties for 25 years, selected Justice Sykes and three others from a very impressive list of applicants for this position. All four finalists were very well qualified, and all deserved to have their names forwarded to the President for his selection. Wisconsin's process should be a model, Mr. Chairman, because it finds qualified applicants and takes much of the politics out of judicial selection.

The American Bar Association agrees with our evaluation as well. A substantial majority of the Committee rated her well qualified. Mr. Chairman, we expect Justice Sykes to not only be a credit to Wisconsin, but also to administer fair justice for all who come before her. We look forward to Justice Sykes' hearing today and ultimately her support by the full Senate.

I thank you and I ask unanimous consent that Senator Leahy's statement be recorded.

Chairman Hatch. Thank you so much. We will put that in the record and record it.

Senator Feingold, and then Congressman Sensenbrenner.

PRESENTATION OF DIANE S. SYKES, NOMINEE TO BE CIRCUIT COURT
JUDGE FOR THE SEVENTH CIRCUIT, BY HON. RUSSELL FEINGOLD, A U.S.
SENATOR FROM THE STATE OF WISCONSIN

Senator Feingold. Thank you, Mr. Chairman. It is also my privilege to welcome Justice Diane Sykes to this hearing and to introduce her to the Committee.

Justice Sykes is a true product of Wisconsin. She was born in Milwaukee and attended Brown Deer High School. She left our State to go to college at Northwestern University only, but then she returned to work as a reporter for the Milwaukee Journal and then to attend Marquette University Law School where she was a member of the law review.

After law school, she clerked for Judge Terry Evans, then a U.S. District Judge for the Eastern District of Wisconsin. So if Justice Sykes is confirmed to the Seventh Circuit, Judge Evans will be her colleague on that court.

After clerking, Justice Sykes practiced law for 7 years with the Milwaukee firm of Whyte and Hirschboeck. In 1992, as Senator Kohl indicated, she was elected to a circuit court judgeship in Milwaukee County, and then in September 1999 then-Governor Tommy Thompson named her to a vacancy on the Wisconsin Supreme Court. She was re-elected in the year 2000 and she continues to serve on the highest court in our State.

Mr. Chairman, I think it is important to note, as Senator Kohl noted, that Justice Sykes' nomination is the result of a collaborative, bipartisan process of judicial selection in our State. The Wisconsin Federal Nominating Commission was first formed nearly a quarter century ago by former Senators William Proxmire and Gaylord Nelson. It has been used continuously since that time by Democratic and Republican Senators under both Democratic and Republican Presidents. The Wisconsin Federal Nominating Commission is an independent panel selected by Wisconsin elected officials and the State Bar of Wisconsin. The commission charter provides that it will review applications for Federal district court and court of appeals vacancies in Wisconsin, as well as United States Attorney vacancies.

Senator Kohl and I have worked very hard to maintain and strengthen the commission throughout our time in the Senate. The composition of the commission assures that selections for these important positions will be made based on merit, not politics. Over the past 25 years, the commission process has

yielded very high quality nominees and has served to depoliticize the nomination process in our State. Despite some initial resistance, the Bush administration ultimately agreed to have candidates for the Seventh Circuit vacancy go through the commission process.

Under the joint leadership of Dean Joseph Kearney of the Marquette University Law School and Professor Frank Tuerkheimer of the University of Wisconsin Law School, the commission worked extremely hard under a very tight deadline. As Senator Kohl indicated, they recommended four highly qualified candidates, including Justice Sykes. Senator Kohl and I, working with Representative Sensenbrenner, the senior Republican officer holder in the State, decided to forward all four names to the White House, and then President Bush selected Justice Sykes from the four.

I have always maintained that with cooperation and consultation between the President and home State Senators, the judicial nomination process can be far less contentious and, frankly, far less frustrating than it has been over the past several years. Recognizing that ideological differences are inevitable in the process, as control in the Senate and the White House changes hands, it would serve those who choose and confirm Federal judicial nominees well to follow this example of the Wisconsin Federal Nominating Commission.

I met with Justice Sykes last summer as a part of the commission process. I had a chance to question her closely about her background, her qualifications, and her judicial philosophy. Certainly there are a number of topics on which we do not see eye to eye. But I found Justice Sykes to be candid and forthcoming, and I believe she is well qualified to fill this seat on the Seventh Circuit. I have great respect for Justice Sykes' commitment to public service. Talented young lawyers have many more options that they could pursue for far more compensation. But Justice Sykes is one of this group who have chosen public service. I also have great respect for the commission process, and I fully support Justice Sykes' nomination.

Mr. Chairman, it is my hope that the work of the Wisconsin Federal Nominating Commission, the nomination of Justice Sykes, and her smooth confirmation will send a signal to the White House and to my colleagues on both sides of the aisle and to the country that we can, in fact, work together in a bipartisan way to fill these judicial vacancies. And I want to again welcome Justice Sykes and her family to the Committee, and I look forward to her taking the Federal bench in the Seventh Circuit.

Thank you, Mr. Chairman.

Chairman Hatch. Well, thank you, Senator. We appreciate that.

I would note for the record that Justice Sykes received more votes in Wisconsin than either Kerry or Dean did.

[Laughter.]

Chairman Hatch. I thought that was pretty good. But I appreciate this bipartisan approach towards your nomination.

We are always honored to have any meeting with the distinguished Chairman of the House Judiciary Committee, but to come over all the way from the House to testify here today, we are grateful to have you here, and we will recognize you at this time.

PRESENTATION OF DIANE S. SYKES, NOMINEE TO BE CIRCUIT COURT
JUDGE FOR THE SEVENTH CIRCUIT BY HON. F. JAMES SENSENBRENNER,

JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Representative Sensenbrenner. Thank you very much, Mr. Chairman. I will not repeat the biographical information that Senators Kohl and Feingold have given relative to the nomination of Justice Diane Sykes to the Seventh Circuit bench. Let me say that I probably have known Diane and known of her longer than either of my two Senate colleagues because her father, Jerry Schwerm, was the village manager in a community in my district as I was elected to the State legislature. Every once in a while he brought his teenage daughter along to some of the functions that we were at, and she has always struck me as someone who has a great deal of intellect, a good temperament, and unimpeachable integrity. And as she has progressed through law school and into private practice and then on to both the trial court bench and the State Supreme Court bench, she has certainly been able to develop and hone those skills and will be an outstanding representative as a judge on the Seventh Judicial Circuit. What the two Senators have not said is that the ABA has rated her well qualified for the position that she has been nominated to.

I would like to say a few words about the commission process as well. There is a tradition in Wisconsin that the commission is used to try to take as much of the politics out of judicial nominations as possible. And that will only work if the commission members themselves rise above politics and approve names for sending on to the White House that would be acceptable to whatever President is in office at the time. And I think that all 12 members of the commission--the two deans, the two State bar representatives, the members that Senators Kohl and Feingold have appointed to the Commission, as well as the four members that I have appointed to the commission--all took that charge very seriously. And the four names that were approved by the commission and sent to the White House all would have met the White House's political and ideological tests for approval by the White House, this White House, to be sent to the United States Senate.

I have talked with Justice Sykes as well, and I am convinced that she will impartially administer justice to all that come before the appeals court, as she has done on the appeals court on Wisconsin and as a trial judge in Milwaukee County. She obviously has got strong support by the voters. When she ran in the statewide election for her full 10-year term in April 2000, she won a contested election with 65.52 percent of the vote, and I think that is a tremendous endorsement of the people of Wisconsin in her judicial abilities.

So I would urge her speedy confirmation, and thank you for the time.

Chairman Hatch. Thank you, Mr. Chairman. We are delighted to have you here, and we know how busy you are, and we certainly expect you to head back to the House. And that is certainly good praise for the nominee, and we are very grateful for that.

Now we will turn to Senator Murray. We are delighted to have you and Senator Cantwell here, and we appreciate your taking time out of your busy schedules to be here to testify. Senator Murray?

PRESENTATION OF JAMES L. ROBART, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON, BY HON. PATTY MURRAY, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator Murray. Thank you very much, Mr. Chairman and members of the Committee. I am honored to be here today to introduce Jim Robart to this Committee. For more than 30 years, he has been a respected and important part of the Seattle legal community. Senator Cantwell and I worked with President Bush to select him from a list of very qualified candidates, and today I am proud to offer my full support for his speedy confirmation.

I especially want to welcome his wife and friends. His wife, Mari Jalbing; his long-time friend, Doug Adkins; and Mr. Adkins' daughter, Blakeley, are all Washington State residents, and they are here with him today.

Jim and Mari have been foster parents to six children, and while they could not all join us in person today, I know they share the pride that so many in my State feel on Jim's nomination.

Mr. Chairman, I met with Jim Robart, and I am impressed by his professionalism, his decency, and his experience. After more than 30 years of distinguished legal service, he is ready to be confirmed as the next U.S. District Judge for the Western District of Washington State. And I can tell you that he has the strong support of a wide group of attorneys and community leaders throughout Washington State.

There are many things to say about Jim Robart. He earned an undergraduate degree at Whitman College, graduating magna cum laude, and he got his law degree at Georgetown University. He has 30-plus years of experience in private practice, and he is currently the managing partner at Lane, Powell, Spears, Lubersky, and is an expert in complex litigation. He was the lead counsel in a constitutional challenge on a Washington initiative that would have required all State residents to vote on all tax increases. The Washington State Supreme Court found the initiative unconstitutional. And he has also handled several other important cases in my home State, including many energy cases and disputes regarding intellectual property. He has received a unanimous well qualified rating by the American Bar Association.

Jim Robart also has a generous sense of community service through his work with at-risk and special needs youth. He has done extensive work with the Seattle Children's Home, which offers mental health services and special education for Seattle's most at-risk youth, and is associated with the Children's Home Society of Washington, which is renowned for providing parenting skills statewide to many troubled families. And, of course, I should mention that Jim and Mari's dedication is evident as foster parents to six children.

Those things are all important, but they only provide glimpses into a man whose professionalism, fairness, thoughtfulness, and compassion set a great example for many people in my State. Mr. Chairman, I am proud to be here today to introduce Jim Robart to this Committee, and I urge his speedy confirmation.

Thank you.

Chairman Hatch. Thank you, Senator Murray. We appreciate your taking the time to be here. It is great praise for this nominee, and we are grateful to you. And we know how busy you are. If you need to leave, we would be happy to excuse you.

Senator Cantwell, you are last but not least. I want you to know that.

PRESENTATION OF JAMES L. ROBART, NOMINEE TO BE DISTRICT JUDGE

FOR THE WESTERN DISTRICT OF WASHINGTON, BY HON. MARIA CANTWELL,
A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator Cantwell. Thank you, Mr. Chairman. I appreciate that. As a former member of the Committee, it is good to be back with my colleagues here.

Mr. Chairman, I join with my colleague Senator Murray in introducing this incredibly talented nominee for the vacancy of the District Court of the Western District of Washington, James Robart. And Senator Murray has already introduced his family who is here to support him as well.

In one sense, today's hearing is a homecoming for Mr. Robart. Early in his career, he served as an aide to former Senator Scoop Jackson and to Senator Mark Hatfield, so I am sure that they would both be very proud of his accomplishments during his long legal and productive career and that he is before this Committee for this nomination today.

Following his public service as a staff member in both Houses, Mr. Robart returned to Washington State--as Senator Murray said, is a second-generation native graduate of Whitman College and Georgetown Law School--where Mr. Robart has worked as an attorney for the past three decades. And during this time, as Senator Murray outlined, he has earned a reputation for fairness and integrity that is well known. That is why his evenhanded and thoroughness I think is very appropriate, the fact that we selected him by our bipartisan Committee and recommended him for this vacancy.

Members of the Washington State legal community and the White House and my colleagues have all worked together to review these nominees in a process that I think has worked well. I would add that this approach I think has helped produce a very high quality group of nominees, and I believe it should be a model for many other States in our country.

Together, we all agree that James Robart is the right person for this job and that the people of the Western District of Washington will be well served by his presence on the bench. I will not go over some of his legal accomplishments that Senator Murray articulated, but I think that his many years in the managing partner position and practice there at Lane Powell have served him well, and you will be very impressed by this nominee's answering of questions today before this Committee. And I urge your support.

Thank you.

Chairman Hatch. Well, thank you, Senators. We appreciate both of you. For you to take time out to come here means a lot to us, but it also means a lot to the nominee, and we are grateful to you.

If we can have the three nominees come to the table, I am going to put all three of you up there even though sometimes we split them. But we will put you all up here and save a little bit of time here.

If you will all stand and just raise your right hands, do you swear that the testimony you are about to give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Justice Sykes. I do.

Mr. Robart. I do.

Judge Sanchez. I do.

Chairman Hatch. Thank you. Well, we are delighted to have all three of you here. We are trying to do our best job on this Committee, and we are working hard to try and do a bipartisan job on this Committee and get as many judges on the bench as we

can possibly get so that the people of this country are not bereft of justice. So we are grateful to have you all three here.

Now, what I would like to do is take a few moments and let you speak and say whatever you would care to. I would like you to introduce your families to us. We welcome all members of the respective families, and we will go from there.

So, Justice Sykes, we will begin with you.

STATEMENT OF DIANE S. SYKES, NOMINEE TO BE CIRCUIT JUDGE FOR
THE SEVENTH CIRCUIT

Justice Sykes. Thank you. And, Mr. Chairman, I thank you and the members of the Committee for the honor of this hearing, and I would like to thank the President for the honor of this nomination. I am very grateful to Senator Kohl and Senator Feingold for their generous support of my nomination and for their very kind words of introduction. I am also grateful to Congressman Sensenbrenner, Chairman Sensenbrenner, for his presence here today in support of my nomination and for his friendship.

I have no opening statement, but I would like to introduce the members of my family who are here with me today. My older son, Jay, is a freshman in high school, and he had two tests and a biology presentation. And so he--

Chairman Hatch. Well, that is not an excuse.

[Laughter.]

Chairman Hatch. That is as good an excuse as I can think of.

Justice Sykes. Well, I told him that if am fortunate enough to be confirmed that he is not getting out of the investiture. However, he did stay home to go to class. But my younger son, Alex, is here.

Chairman Hatch. Please stand.

Justice Sykes. He is in sixth grade, and he very generously agreed to skip school and come.

Chairman Hatch. He looks like he could pass just about anything.

Justice Sykes. I am very glad that he is here to participate in this important moment for our family.

Chairman Hatch. Good to have him here.

Justice Sykes. My father, Gerald Schwerm, and my stepmother, Judy Schwerm, are here as well.

Chairman Hatch. We are so grateful to have you here. We welcome you and you have to be very proud.

Justice Sykes. You have heard about his career in public service as well.

My sister, Kathryn Lynden, and her husband, Jim Lynden, are here. My stepbrother, David Stegeman, is here. I am very grateful for their support here with me today. And also my administrative assistant at the Wisconsin Supreme Court, Joyce Dohse, and her husband, Bob, are here in support of me as well.

Chairman Hatch. We welcome all of you. We are grateful to have you here. It does help to have friends here in the Judiciary Committee from time to time.

[Laughter.]

Justice Sykes. Thank you. I welcome your questions.

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Chairman Hatch. Thank you.
Mr. Robart, we will turn to you.

STATEMENT OF JAMES L. ROBART, NOMINEE TO BE DISTRICT JUDGE FOR
THE WESTERN DISTRICT OF WASHINGTON

Mr. Robart. Mr. Chairman, thank you very much. I greatly appreciate the opportunity to have my hearing today. I am very thankful for Senators Murray and Cantwell for taking time to

come. I know that's a special honor, and I very much appreciate it.

Joining me today is my spouse, Mari Jalbing.

Chairman Hatch. So delighted to have you here. Thank you for coming.

Mr. Robart. Our daughter, Blakeley Adkins.

Chairman Hatch. Good to have you with us.

Mr. Robart. And my long-time friend, Douglas Adkins.

Chairman Hatch. Douglas, happy to have you here.

Mr. Robart. Thank you very much, Senator.

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Chairman Hatch. Well, thank you.

Judge Sanchez, we will turn to you.

STATEMENT OF JUAN R. SANCHEZ, NOMINEE TO BE DISTRICT JUDGE FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

Judge Sanchez. Thank you, Chairman Hatch. I do not have any prepared remarks, but I would like to take the opportunity to thank you and thank Senator Leahy for the invitation to appear before the Senate Judiciary Committee. And I would like to take this opportunity to thank Senator Specter and Senator Santorum for their kind words and the support they have given me throughout this process, and also to the President for the tremendous honor he has bestowed upon me, my family, my friends, and my colleagues and the Chester County community.

I have some guests here that have traveled from Chester County to support me this afternoon, and it is with tremendous honor that I introduce some of my friends and some are the best lawyers in Chester County: former Justice of the Supreme Court of Pennsylvania, William H. Lamb, who is in the back.

Chairman Hatch. Happy to have you here, Mr. Justice.

Judge Sanchez. My mentor and good friend, Mr. James McErlane, a senior partner with the law firm of Lamb and McErlane, who is in the back.

Chairman Hatch. Grateful to have you here, Mr. McErlane.

Judge Sanchez. My staunch supporter and good friend, Skip Brion, who is the Chairman of the Chester County Republican Party.

I have with me the honor of introducing my friend and colleague, Paula Francesco Ott, who was the first woman to be elected as a trial judge in Chester County.

Chairman Hatch. We are honored to have you here.

Judge Sanchez. We have our President Judge Howard F. Riley. I have the honor also of having with me a good friend, Hon.

William Mann.

Chairman Hatch. We are happy to have both you judges here.
Just great.

Judge Sanchez. Damaris Acevedo, my fiancée.

Chairman Hatch. Happy to have you here.

Judge Sanchez. And some special guests that have traveled
from Chester County: John Stanzione, Debbie and Steven Long,
and Peter Hart.

Chairman Hatch. Happy to have you all here.

Well, thank you so much. This is great.

Judge Sanchez. Thank you.

[The biographical information follows:]

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Chairman Hatch. We are grateful to have all of you here, and we look forward to moving your confirmations as quickly as possible. And from what I see, there should be no real difficulty in moving those confirmations.

I think what I will do is turn to my colleagues and see what questions you would care to ask, if any, of these nominees.

Senator Kohl. Thank you very much. I will ask Justice Sykes a couple of questions.

Justice Sykes, you are still in the early stages of a 10-year term on the Wisconsin Supreme Court. Could you tell us why you want to leave that position for the Seventh Circuit?

Justice Sykes. Yes, Senator. I absolutely love my job. It is a great privilege and an honor to serve the people of the State of Wisconsin as a member of the Wisconsin Supreme Court, and it was a privilege to serve as a trial court judge in Milwaukee County for 7 years prior to that.

I view this opportunity as an opportunity to do the work of an appellate judge that I have been doing on the Supreme Court for the last 4 and a half years for the people of three States: my own home State of Wisconsin as well as the States of Illinois and Indiana within the jurisdiction of the Seventh Circuit Court of Appeals. And that is the reason that I pursued this appointment. I absolutely enjoy the work that I'm doing now. It is challenging and rewarding, and I have tried to make a contribution to my current court for the last 4 and a half years, and I see this as an opportunity to do the same sort of work at a different level in our judicial system and serve the people of three States.

Senator Kohl. For many years, conservatives have criticized liberal judges for being activist, and now we hear much about conservative activism as the current Supreme Court has struck down parts of more statutes in the past few years than at almost any time in our history. How would you define ``judicial activism''? And do you agree that it is to be avoided?

Justice Sykes. I agree that it is to be avoided. The judicial philosophy that I abide by in my work as a judge, both as an appellate court judge in the State's highest court and as a trial court judge, is a philosophy of judicial restraint. I do not believe in legislating from the bench. I believe in deference to the legislative branch of government and the policy choices that the legislative branch of government makes in enacting statutes.

And so my approach to judicial decisionmaking is one of deference to the legislation branch and one of judicial restraint.

Senator Kohl. Thank you. And, finally, the Governor of Wisconsin has indicated that he is rather pleased that you are being elevated to this position. Why does he have that

position? Do you know why he feels that way?

[Laughter.]

Justice Sykes. That is by virtue of the Wisconsin Constitution. We have an elected judiciary, as you know, in the State of Wisconsin, a non-partisan elected judiciary. In the event of a midterm vacancy, the sitting Governor replaces judges of the lower courts or justices of the State Supreme Court for an interim period until the next election cycle when that appointed justice runs for election on the statewide ballot.

Senator Kohl. Thank you.

Chairman Hatch. We will turn to the Senator from Idaho.

Senator Craig. Well, Mr. Chairman, I have no questions of any of the three. I congratulate all of you on your nominations. I trust that your experience--and I have reviewed some of your record--will serve us well in your future endeavor, and I congratulate you all.

Judge Sanchez. Thank you, Senator.

Justice Sykes. Thank you, Senator.

Mr. Robart. Thank you, Senator.

Chairman Hatch. Senator Feingold?

Senator Feingold. Mr. Chairman, I have no questions. Thank you.

Chairman Hatch. Well, thank you.

Let me just ask a few. Frankly, I know your backgrounds, have studied them. I know quite a bit about each of you, and I am very pleased with your nominations. I think you are good people who will do a good job on the bench. And I agree with Senator Kohl; there should not be judicial activism from the left or from the right. And it particularly rankles me when it comes from the right. But it rankles me both ways. I want you to know that. At least one circuit court in this country is considered the activist poster child for all activist judges, and it has hurt that court tremendously. So we hope in your case, Justice Sykes, that you will add a lot of dignity to whatever court you are on, but in particular this court.

Now, your ability to constructively interact with your fellow judges on the Seventh Circuit is going to be a very important element of your work. Could you speak for a moment about the role of collegiality? And please indicate how you plan to contribute to it once you join the Federal bench.

Justice Sykes. Yes, thank you, Mr. Chairman. I believe that collegiality is a very important component of operating as an appellate court judge. And I have attempted to keep that in mind in every decision on every case that I participate in with my colleagues on the Wisconsin Supreme Court.

I think that involves a process of keeping focused on the legal issues and the facts of the cases that are before the court instead of personality differences or differences of opinion that members of the court have had in the past.

I think it also involves setting aside slights and really checking your ego at the door, if that's at all possible in a conference room that has a lot of intellectual give and take. It's very important to set aside those personal differences, set aside any differences, any power struggles, anything that's extraneous to the facts and the law in the case at hand, and keep focused on the facts and the law in the case at hand in order to reach a collegial decision with the other members of the court. And when we disagree, we attempt to do it agreeably. And when we are in dissent or in opposition to one another, we attempt to do that respectfully.

Chairman Hatch. So we don't expect any biting dissents from

you?

[Laughter.]

Justice Sykes. Well, biting, no. But strong and forceful perhaps.

Chairman Hatch. But we have biting dissents from time to time. It is just good for the judiciary. No, I am just kidding.

I understand that you teach several times a year in the Challenges and Possibilities Program at the Green Bay Correctional Institution, a rehabilitative program for inmates at the prison. Could you just tell the Committee a little bit about your work there?

Justice Sykes. Yes. It's a rehabilitative program at the Green Bay Correctional Institution, which is a maximum security institution in the State of Wisconsin. It houses mostly younger offenders, and the program attempts to get these prison inmates ready for reintegration into society by working on concepts such as acceptance of personal responsibility for their acts, developing victim empathy, and also learning more about the legal system and the process that their cases were adjudicated by. Many of these inmates believe that the system is out to get them and that they have been unjustly convicted, and so the purpose of this program is to sort of break down some of those barriers so that there is a greater chance at real internal rehabilitation for these inmates. And my role in this program has been to, three or four times a year, teach a session on sentencing law in Wisconsin so that the inmates in the prison understand why it is that the sentence that was imposed in their case was, in fact, imposed according to the law of the State of Wisconsin.

Chairman Hatch. Well, I appreciate your doing that. I think you do a lot of good in doing that type of service. Personally, I think you are a wonderful nominee, and we look forward to having you confirmed. If we could get all the Senators to agree, I would put her on--I would put all three of these on tomorrow's markup if we could agree to it. Would you mention it to your colleagues? I will mention it to mine and see if we can do that. I think Senator Leahy would agree. Now, if he does not, then we would have to wait until after the recess. But I would try to move you as quickly as I possibly can.

Justice Sykes. Thank you.

Chairman Hatch. All three of you.

Mr. Robart, you come before us highly recommended. I notice that you worked with the Evergreen Legal Services in the State of Washington. How has that experience affected you as an attorney? And, also, how will it affect you as a judge?

Mr. Robart. Thank you, Senator. The opportunity of working in a large law firm is a special one, but one of the things that it does is it tends to select out a particular group of clients that come for the very specialized services that large law firms tend to offer.

I think my time at Evergreen Legal Services had two very important functions for me. One was I was introduced to people who in many times felt that the legal system was stacked against them or was unfair. And one of the things, I think, that my time there helped accomplish was to show them that the legal system was set up for their benefit and that it could be, if properly used, an opportunity for them to seek redress if they had been wronged.

And the second part of it is that working with people who have an immediate need and an immediate problem that you are able to help with is the most satisfying aspect of the practice of law. I think in terms of--if I am fortunate enough to be

confirmed by the Senate, I will take that experience to the courtroom with me, recognize that you need to treat everyone with dignity and with respect, and to engage them so that when they leave the courtroom they feel like they had a fair trial and that they were treated as a participant in the system.

Chairman Hatch. Well, thank you. That is a great answer.

Let me go to you, Judge Sanchez. You know, in your questionnaire you mentioned that you taught at Westchester University, Immaculata University, and Villanova University School of Law. Now, how, if at all, do you think that your teaching experience made you in your job as a Federal district court judge?

Judge Sanchez. I enjoy teaching because I firmly believe that teaching people about the law teaches them to respect our institutions and become better citizens. So I have a real passion for teaching, especially youngsters at college, high schools, and intermediate schools, and I make myself available to do that as much as possible because it is important for citizens to understand and respect the law and our public institutions. And I think that that will make me a good district judge because I have utmost respect for the law and work to improve it. And I think those qualities and the appreciation I have and love for people will allow me to serve with honor and distinction on the Eastern District Court.

Chairman Hatch. Well, thank you. I think that an important element of our judiciary is that all persons have equal access to the law. Now, you have had extensive pro bono experience as a public defender, and that ought to really help you to serve--

Judge Sanchez. It's a humbling experience.

Chairman Hatch. Yes, it is a humbling experience, but it will really help you to serve well in the impartial administration of justice. So I commend you for that, and I am proud of what you have done there. And I think all three of you are excellent nominees, and I will personally do everything I can to see that you are put through the Judiciary Committee as fast as we can. Maybe we can--I don't want to get your hopes up. We may not be able to get you on tomorrow's markup, but if we can, I would like to do so because I don't see any reason to delay at all in any of these judges, but particularly in your cases.

So we will see what we can do. If we can't, don't be disappointed, because as soon as we get back from the recess, you will be on that list, if you are not on tomorrow. But I just want to compliment each of you for the excellent people you are, the excellent reputations that you have, and the excellent service that you have given. And I think your families and friends and fiancée ought to be pretty impressed, is all I can say.

Did you want to say something else?

Judge Sanchez. I just wanted to say thank you, Chairman Hatch, for the opportunity.

Chairman Hatch. That is okay. You can add that. I wouldn't try answering anything else.

[Laughter.]

Chairman Hatch. You never know.

Well, with that, I am proud of all of you. I have extensively looked at your records. I find them to be exemplary and the highest caliber in all three cases, and I think my colleagues will as well. So we will move ahead on that basis and wish you all well. And when you get there, just remember one thing. The closest thing to godhood in this life is being a Federal judge--at least a lot of Federal judges believe that.

[Laughter.]

Chairman Hatch. And one of the worst things about some of them is they get on the Federal bench and they really do believe they are gods. And all of a sudden they don't seem to have the humility that they have otherwise. Now, I am not saying all of them. Naturally I am proud of our Federal judiciary. But occasionally, the ones occasionally who violate these principles generally turn out to not do justice nearly as well as those who don't violate them.

So just remember everybody who comes before you has problems. Everyone that comes before you has different abilities. Some of these young lawyers don't know the Rules of Evidence as well as others know it. Some of them will need a little help and assistance and maybe a little forbearance from time to time. Some of the big shots are so good that sometimes they become a little overbearing, and it isn't a bit bad to set them down every once in a while and tell them they are getting overbearing.

But I think it is good to let people try their own cases and not have the judges trying the cases for them. On an appellate basis, it is difficult for you not to try and try their cases for them because you have got to ask very intelligent questions so that you can get to the bottom of whatever you think is important in that particular case that appears before you.

But my experience is that the Federal judiciary consists of a wide variety of people of the highest caliber, and we are so fortunate in this country. In my viewpoint, it is the judiciary that has saved the Constitution through all these years. It has not been the Congress of the United States. We pass unconstitutional legislation all the time--maybe not knowingly, but sometimes even knowingly, I think. I don't want to name names, but don't think I can't.

[Laughter.]

Chairman Hatch. And then, you know, the Presidents sometimes put up legislation or put up suggestions or act in executive ways that sometimes are unconstitutional. So it is important to have an honest, decent judiciary to correct those ills. And I am counting on all three of you to be humble, good, honorable, intelligent judges who will help us to have the best, continue to maintain the best judiciary in the history of the world.

So, with that, we are grateful to have you all here and your families, we welcome all of you, and we praise all of you for the good people you are, and we will recess until further notice.

[Whereupon, at 2:59 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

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NOMINATION OF ROGER T. BENITEZ, OF CALIFORNIA, NOMINEE TO BE DISTRICT
JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WEDNESDAY, FEBRUARY 25, 2004

United States Senate,
Committee on the Judiciary,
Washington, DC.

The Committee met, pursuant to notice, at 10:15 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch and Feinstein.

Chairman Hatch. I apologize for being a little bit late. I got detained on a District of Columbia matter of great importance, and so I apologize to you.

We are going to start this morning by turning to my distinguished colleague from California, Senator Feinstein, for any comments that she would care to make, and then we will begin with our first panel, which would be Roger T. Benitez, the nominee to the U.S. District Court for the Southern District of California.

PRESENTATION OF ROGER T. BENITEZ, NOMINEE TO BE DISTRICT JUDGE
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, BY HON. DIANNE
FEINSTEIN, A U.S. SENATOR FROM THE STATE CALIFORNIA

Senator Feinstein. Thanks very much, Mr. Chairman. I would like to thank you for holding this hearing on the nomination of Roger Benitez for the district court.

Magistrate Benitez is being considered for the last of the five new judgeships that you helped us with and which were created by Congress in 2002 for the Southern District of California. I would like to tell you a little bit about his life story because it is impressive.

He was born in Cuba. When he was 10, his family fled to America after losing everything when Castro came to power. Pursuing the opportunities that education afforded him, Judge Benitez obtained his undergraduate degree at San Diego State University and his law degree at Western State University.

After law school, he practiced as a private attorney for 19 years in a general civil practice and then was appointed to the State Superior Court by Pete Wilson in 1997. He served on the Superior Court bench for 4 years before he joined the Federal bench as a magistrate.

Judge Benitez's selection was historic because he is the first ever magistrate judge in El Centro, California. As Judge Marilyn Huff indicated in her written testimony--and I would like to enter that testimony into the record, and I would like to make a point that that testimony is concurred in by all of the Federal judges in the Southern District.

Chairman Hatch. Without objection, it will be entered into

the record.

Senator Feinstein. Thank you.

As Judge Huff indicated, Judge Benitez's role in setting up the court in El Centro reflects really a significant accomplishment. In 2003, he handled more initial appearances in criminal cases, 1,494, than all 10 magistrates combined from the Northern District of California. He is getting a special hearing because he has received a poor rating from the ABA Standing Committee on the Judiciary. And given this rating, I think it is important to put his nomination into context.

Like the previous district court nominees from California considered during the Bush administration, Judge Benitez is the product of our State's bipartisan Judicial Advisory Committee. The Committee consists of three members selected by Senator Boxer and myself and three members selected by the Bush administration. A nominee is only forwarded to the President if he or she garners the support of a majority of the committee. This process is designed to produce moderate, bipartisan nominees, and it is a model I hope the administration can more frequently emulate.

The Committee unanimously recommended Magistrate Benitez to the President. Given this strong endorsement, I was surprised by the negative ABA rating, and because I had never voted for anyone with a negative ABA rating, I thought I ought to look into it. So I directed a representative on my committee, Mr. David Casey, who is the new president of the American Trial Lawyers Association, to reinvestigate Judge Benitez. Mr. Casey contacted dozens of lawyers and made more than 30 phone calls, came back to Washington to report to me, and he confirmed the committee's commitment to its original recommendation in favor of Judge Benitez.

I find this compelling and give it great weight. I am also impressed by the many testimonials in support, in favor of Judge Benitez. As I mentioned, the entire Federal bench of the Southern District has written to the Committee endorsing him. And, additionally, a number of community leaders, the mayor of El Centro, the Board of Supervisors, the chief public defender of the county, the president of the Imperial--I beg your pardon? Oh, the president of the Imperial County Bar Association. It said ``president of Imperial County,' ' and I thought, you know, I know they can be difficult, but I didn't know they had seceded.

[Laughter.]

Senator Feinstein. The sheriff and coroner of Imperial County, and I just want to read a couple of excerpts of what his supporters say. They say he is a man of the highest ethical standard, that he has superb demeanor, intelligence, pragmatism, and fairness. And the chief public defender notes that he has good judicial temperament and is courteous to his employees and the attorneys who appear before him.

I would like to note that he has served as a member of the DeAnza Rescue Unit for over 15 years. That is a volunteer search and rescue organization that operates in Imperial, San Diego, and Riverside counties.

I am very eager to hear the American Bar Association's testimony because, as we tried to go back over the accusations of temperament, ill-advised temperament and that kind of thing, it turned out that it all revolved around one incident, which involved the calendaring of a case on Christmas Eve. My staff got the case transcript, and the attorney in the case said, ``My goodness, you know, this shouldn't prevent his consideration as a judge.' '

So after more than 30 additional phone calls and talking to dozens of lawyers, Mr. Casey was not able to come up with anything that he felt should disqualify Judge Benitez.

Chairman Hatch. Well, thank you, Senator. That is very good testimony.

I happen to have a very high regard for David Casey and know how serious he takes appointments to the Federal bench. Plus he is a very good leader of the American Trial Lawyers Association, and I have a lot of respect for his integrity. And, Judge Benitez, Mr. Benitez, you come very highly recommended by others.

I think what we are going to do is have you come to the table, and please stand and we will swear you in. Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Judge Benitez. I do.

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

Chairman Hatch. Please take a seat. Let me just say a few words here myself.

Senator Feinstein takes this job very seriously on the Judiciary Committee. She is one of our better members as far as I am concerned, and I am pleased with her recommendation here this morning. And I am pleased also to welcome to the Committee this morning Judge Roger Benitez, whom President Bush has nominated to fill a vacancy on the United States District Court for the Southern District of California.

Judge Benitez comes before us today as a highly regarded Federal magistrate, with an impressive record of judicial service. Born in Havana, Cuba, Judge Benitez's life embodies the spirit and the strength of this Nation. After coming to this country, he overcame numerous obstacles to put himself through college at San Diego State University and then obtained his law degree at Western State University College of Law in 1978, and then has distinguished himself in a diverse and successful law practice in Imperial County, California.

Judge Benitez, as I reviewed the impressive list of groups and individuals whom you have represented, I wonder if there is anyone in El Centro that you didn't represent. You were appointed to the Imperial County Superior Court in 1997 and re-elected in 1998. I believe you have served with distinction until 2001, and since then you have served as a Federal magistrate judge in the Southern District of California.

Now, I would note that the bipartisan Committee selected Judge Benitez for his current position after a thorough review of his record and experience. Another bipartisan nominating commission found Judge Benitez to be highly qualified and recommended that he be appointed a district judge.

Despite these accomplishments and endorsements, a majority of the American Bar Association Standing Committee on the Federal Judiciary returned a rating of ``Not Qualified'' for Judge Benitez. In such instances, it has been the practice of this Committee to invite representatives of the ABA to explain their basis for this rating. Later in this hearing, we will hear from Tom Hayward, who is Chair of the ABA Standing Committee, and Richard Macias, a former member of the Committee and circuit member who conducted the evaluation that led to Judge Benitez's rating. And I welcome them on behalf of the Committee.

Finally, we will also hear from Judge Benitez's current

supervisor, the Chief Judge of the Southern District of California, Judge Marilyn L. Huff. We welcome you, Judge Huff, to the Committee, and we understand you will attest to Judge Benitez's fitness for the Federal bench, also his legal aptitude and experience, his integrity, and, most notably, his judicial temperament. It is my understanding that concerns pertaining to temperament served as the basis for the ABA's rating, but I expect that Judge Huff's testimony today should satisfactorily address any lingering questions about Judge Benitez's temperament. I understand that Judge Huff is in the middle of a very important trial, and it is, I think, great testament to you, Judge Benitez, that despite her extremely busy schedule, she was eager to come to Washington on relatively short notice to testify on your behalf.

I would note that Judge Huff's testimony is endorsed by all 11 active judges of the Southern District of California. Now, these are the people with whom Judge Benitez has worked closely for the past 3 years. They all support the nomination of Judge Benitez. They have put the weight of their admirable reputations behind Judge Benitez's nomination.

In addition to this testimony, the Committee has received written testimony and letters which strongly support Judge Benitez's nomination. So without objection, I will submit all of these for the record. Since we will not hear from these witnesses in person, I would like to take a moment just to share some of their views on Judge Benitez.

U.S. District Court Judge John Houston got to know Judge benitez both professionally and personally when they worked together as magistrates in the Southern District. Judge Houston writes that he has ``observed his good character, integrity and temperament along with his dedication to public service to be invariant. In addition, Judge Benitez's experience as a lawyer and State court trial judge will make him an invaluable member of our bench and a source of pride for the citizens in this district for many years to come.''

Now, the presiding judge of the Superior Court of Imperial County, Raymond Cota, was extremely surprised to learn of the ABA's rating. He was born and raised in Imperial County and has worked closely with Judge Benitez. He wrote that he has ``never, in 25 years as an attorney and judge in Imperial County, heard any unflattering remarks or criticism of Roger Benitez of any sort.''

Randy J. Rutten, the president of the Imperial County Bar Association, submitted this testimony: ``I am the current president of the Imperial County Bar Association. On August 6, 2003, the Board of Directors of the Imperial County Bar Association unanimously and enthusiastically voted to endorse and support the nomination of Roger T. Benitez as an Article III judge for the Southern District of California. Our decision was based on Judge Benitez's reputation in the legal community as well as in the community in general.''

Gary Wyatt, Chairman of the Board of Supervisors, the County of Imperial, offered this testimony regarding Judge Benitez: ``In 1997 he was appointed to the Superior Court by the then Governor of the State of California. Before he was appointed, he was vetted by the Judicial Nominations Evaluation Committee of the State of California. As part of that evaluation, confidential questionnaires were sent out to over 150 lawyers and judges asking for information concerning his legal ability, ethics, work ethics and temperament....During his tenure on the Superior Court, Judge Benitez proved himself to be a capable jurist who was valued and respected by the bar

and his fellow judges. He had a reputation for being able to handle difficult legal tasks, exhibiting good judicial temperament and always being more than willing to assist his fellow judges, even if it meant asking other judges if he could help them with their calendars....Because of his excellent reputation in the legal community and the community in general, our board of supervisors has unanimously adopted a resolution...endorsing and recommending the confirmation of Hon. Roger T. Benitez to the position of district judge for the Southern District of California.'

Eduardo A. Rivera, former Democratic mayor of the City of Calexico and an attorney, wrote: ``Judge Benitez is fair, rational, intelligent, and just. I have been treated with respect in all of my private practice dealings with Judge Benitez before he assumed the bench and have been treated fairly and equitably in his courtroom. Judge Benitez is compassionate and fair. It is therefore with dismay that I find some attorneys who have deemed his courtroom demeanor and temperament as improper. At no time in the last 25 years have I ever seen Judge Benitez exercise bad judgment or be discourteous with any person he has dealt with in either his capacity as a private attorney or as a State or Federal judge.'

Neil Gerber, an attorney in the municipality of El Centro, stated, ``As a State court judge, and then as a Federal magistrate, Magistrate Benitez was always well prepared, engaging, and fair. His judicial temperament was excellent in all respects. He himself displayed the highest respect for the courts, and inspired the same feeling in those who entered his courtrooms. Both as a State court judge and as a Federal magistrate, Magistrate Benitez enjoyed the highest reputation for ability and integrity among the local bar.'

Now, these and other statements of support indicate clearly that Judge Benitez has the legal experience, ability, aptitude, character, integrity and temperament to serve as a Federal district judge. So I am looking forward to hearing and reviewing the testimony today as we consider this nomination, and I will look forward to chatting with you, Judge Benitez, and then with our American Bar Association, which, really, we owe a debt of gratitude to for the work that they do in general with regard to Federal judges. I have a lot of respect for the current Standing Committee, and it is upsetting to find that they did come up with this type of rating. But we will listen to them and give every respect to them that we can, but we are also going to listen to you, Judge Benitez, and go from there.

Now, I also am pleased to announce that this hearing is the first of a pilot program to provide closed-captioning, and I am pleased Senator Leahy and I, with the Secretary of the Senate, were able to come to these arrangements. So we are very pleased to start closed-captioning, and you are the first one to be subjected to that. But that will be a good thing, I think.

Well, let me ask you, Judge Benitez, do you have any opening statement you would care to make before we ask some questions? You might press that button.

STATEMENT OF ROGER T. BENITEZ, NOMINEE TO BE DISTRICT JUDGE FOR
THE SOUTHERN DISTRICT OF CALIFORNIA

Judge Benitez. Thank you, Mr. Chairman, Senator Feinstein, ladies and gentlemen, staff members, and ladies and gentlemen of the public. I don't have an opening statement, but if I could, I would like to take a moment to introduce my family and

some of my friends.

Chairman Hatch. We would love you to do that.

Judge Benitez. Thank you.

I would like to commence with the chief judge our district, Chief Judge Marilyn Huff.

Chairman Hatch. We are very honored you would take time to come and help us with this matter.

Judge Benitez. My wife, Kitty Benitez; my mother, Elsa Hegan. Starting from the left, my son, Dr. Benitez; his close friend, Dr. Shannon Thyne; my daughter, Mary Benitez; and her close friend, Zack Friesland.

Chairman Hatch. Well, we are delighted to have all of you here. We welcome you to the Committee, and we hope it will be a nice experience for you. We will have to see.

Judge Benitez. Mr. Chairman, I thank you and I thank the Committee and I thank the President for giving me the opportunity to be here today. I will certainly answer any questions that you or Senator Feinstein may have, or any other Senator may have.

Chairman Hatch. Well, thank you so much.

Judge Benitez. Thank you.

[The biographical information follows:]

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Chairman Hatch. Let me start off by saying that we have a

vote, so we will see how far we can go for the next 7 or 8 minutes, and then Senator Feinstein and I--maybe you should go vote, and if you come back, you can ask questions until I get back. How will that be?

Senator Feinstein. I will not be able to come back.

Chairman Hatch. Oh, you will not be able to come back? Well, then, why don't I let you begin with your questions. If you can't come back, I would rather give you this opportunity, if you would like.

Senator Feinstein. Thank you very much. I appreciate that.

Critics, Judge, have asserted that you tried to punish a lawyer by scheduling a hearing on Christmas Eve. We read the transcript of the incident, which occurred on December 10, 2002. On that day you considered three requests for continuances. Two of the requests you scheduled for December 19th; the third you scheduled for December 24th. I did not detect any animosity or hostile exchanges from the transcript. The lawyer who had the hearing rescheduled for the 24th did not object to the proposed date and actually said that day would be fine.

Can you describe the event for us in that it seems to circulate around about all of these sort of objections to you? Can you explain how you determined the date when a hearing slot is open on the court calendar?

Judge Benitez. Thank you, Senator. Yes, I will do my best to be brief.

We try to schedule our hearings so that we have--we do not have a cluttered calendar 1 day and a light calendar another day. It is the practice in our court, because of the volume that we handle, to have the attorneys as they come into the courtroom to come to our courtroom deputy, who is my assistant, and to discuss with the courtroom deputy what dates, if any, they are going to continue any matters to.

Unfortunately, on that particular date, my normal or usual courtroom deputy was out. It was her first week of maternity leave, and we had a courtroom deputy who was filling in from San Diego.

We do things a little differently in El Centro because, again, of the geographic location and because of the volume that we have. She talked to the attorney that was making the special appearance, and she noted on my calendar, which is customary for them to do, the dates that the matters would be continued to. Two of those matters were scheduled for December 19th and one was scheduled for December 24th.

As I call the matters, I always ask the attorneys whether or not that is a date that is agreeable with them, and, of course, I then confirm it with the client. I did that in that case. On all three occasions, the attorney that was appearing specially indicated that, yes, the date that I had chosen was okay.

Subsequently--and I can imagine and understand why--the attorney who was supposed to specially appear discovered or learned, because we normally call them to advise them of the new dates, that we had scheduled him to come out to El Centro on two different dates, and it did not make sense for us to do that. And, frankly, I wished I would have caught it when I was on the bench but I didn't. And so what we did was that very next day, once we discovered the mistake, I issued a minute order rescheduling the matter that had been scheduled for the 24th to the 19th so that that lawyer would only have to make one trip to El Centro.

Senator Feinstein. The argument against--

Chairman Hatch. Senator, I think I will run over and vote.
Senator Feinstein. All right.

Chairman Hatch. You have about 10 more minutes before you need to leave, and then I will try and hurry back so that we will not detain this hearing longer than it should be.

Senator Feinstein. Fine.

Judge Benitez. Thank you, Mr. Chairman.

Chairman Hatch. So I will just leave you.

Senator Feinstein. Thank you.

The argument circulating around your candidacy or your nomination seems to be one of temperament. Do you have a sense of from whence that cometh? And how do you look at your temperament as a magistrate judge as it would be as a full Federal judge?

Judge Benitez. Thank you, Senator, for asking that question. We have a high-volume court that we operate in El Centro. Consequently, sometimes we don't have the liberty to perhaps be as relaxed or as--I don't want to say ``friendly,' ' but as accommodating as we might be if we had a lighter calendar. It's important that we keep our calendar moving. And, consequently, although I certainly strive to be fair and I strive to be courteous, but we have to move our cases along. And so what we do is we have a system which is what allows us to keep the cases moving.

And so perhaps sometimes because of the fact that we are trying to work with the numbers that we work with and may be perceived by attorneys--perhaps those who don't know me, they may perceive the fact that I'm trying to move the calendar along as a sign of bad temper.

Another thing that's very important in our area, Senator, is this: An awful lot of the people that appear before us are not familiar with the system. And an awful lot of them have a belief, not well-founded but they have a belief that perhaps the prosecutors, the defense lawyers, and the judges are all part of the same team. And so, therefore, I think it is important for them to understand that I'm not part of the team and that I have to maintain a certain distance. And the courtroom is not the place for me to engage in familiarities. Although I have made it a practice to welcome lawyers when they come to El Centro and I make it a practice to wish them a good trip home, generally we try to stick to the business at hand. It is serious business. I take it seriously. And I generally ask for people that appear in my courtroom to do likewise.

Senator Feinstein. I would like to ask you a question about choice and the right to privacy, and this has to do with the 1973 Supreme Court decision *Roe v. Wade*. At that time the Court held that the Constitution's right to privacy did encompass a woman's right to choose. It established a trimester system of when the woman would have the absolute right, first trimester, when the State could enter the picture, et cetera.

Do you believe that the Constitution encompasses a right to privacy?

Judge Benitez. Well, thank you, Senator. Let me add that if I'm fortunate enough to be confirmed, my job as a district judge is to follow precedent, to take a look at what the law is and to apply the law to the facts of the case before me and to make a decision based on the law and based on the facts.

I believe that the right to privacy is well established in our jurisprudence. It has been considered by the Supreme Court on several occasions, and certainly if I am confirmed, I will more than follow the precedent that has been set.

Senator Feinstein. Then do you believe that that right to

privacy exists or encompasses the right of individuals then to make that decision as laid out by *Roe v. Wade*?

Judge Benitez. I believe that *Roe v. Wade* is, in fact, the law of the land, and I will definitely follow *Roe v. Wade*.

Senator Feinstein. Thank you.

Here is another one. In a September 2001 case, *U.S. v. Alvarez-Texta*, you issued an order for the defense attorney to show cause why he shouldn't be held in contempt of the court after he failed to appear for two criminal court cases. Can you tell us why you believe this order was necessary? And can you describe your views on using the court's contempt powers? Should they be used often or sparingly?

Judge Benitez. Thank you, Senator. I am glad you asked that question because in six and a half years on the bench, I have never held a lawyer in contempt. I have threatened to hold a lawyer in contempt once, and that was the case.

What happened in that case, Senator, was that at the initial preliminary hearing, the lawyer who had been appointed to the case was not able to attend. We did not know why, but he was not able to attend. He asked a second lawyer to appear on his behalf. It was going to be a relatively routine matter, but what happened was that when I asked the defendant whether he would agree to the continuance, he contradicted the lawyer that had been sent to appear for the first attorney. And he said that, no, he did not want his preliminary hearing continued.

And, Senator, as you know, the preliminary hearing, the right to a preliminary hearing is the right of the defendant and not of the attorney. And so at that point in time, I was faced with a situation where I had a lawyer who was saying that he wanted to continue the preliminary hearing, but the client did not.

Over his objection, I went ahead and continued it anyway because the Government was not ready to proceed and, frankly, neither was the court because we had not allotted time for an evidentiary hearing.

At the second hearing, when I continued the case, a different lawyer, that is, a third lawyer showed up for that hearing. Again, that lawyer was not prepared to go forward with the preliminary hearing.

Now, Senator, very important and valuable rights are at stake. A defendant is in custody. Time is marching on, and that defendant has a right to have a preliminary hearing. In addition, in the Southern District it is customary for a disposition, if it going to be agreed upon, to be agreed upon prior to an indictment being issued. Generally once an indictment is issued, the disposition is going to change considerably.

I felt that it was important that this defendant have the attorney that had been appointed to represent him to be there. So what I did is I indicated that I would issue an order to show cause for the attorney to be there the next day or show cause why he should not be held in contempt.

Now, Senator, subsequent to that, I received a phone call from the attorney. The attorney gave me a perfectly valid explanation why he could not be there. He apologized for not being able to be there. He told me that the problem was going to be resolved in a particular way. In fact, we did have that hearing the third time. That would be the third hearing in the case. A fourth lawyer showed up specially appearing for the attorney that had originally been appointed. We did, in fact, resolve the problem. The case was dismissed and refiled.

And, Senator, perhaps as a footnote, I should state that

when I appointed a lawyer to the new case that was filed, I reappointed that same lawyer that I had previously ordered to show cause.

So as I said, in six and a half years, I have never held a lawyer in contempt, and this is the only time that I can recall ever threatening to hold a lawyer in contempt.

Senator Feinstein. Thank you. I think that sets the record straight.

Do you have any sense of why the Bar Association came up with the finding they did?

Judge Benitez. Senator, I know that the American Bar Association has a difficult task at hand, and I know that they do investigations and they come up with their conclusions. And I'm really not in a position to speculate or to second-guess.

Perhaps it may be that some of the attorneys that were contacted were not attorneys that regularly appear in my court. Maybe they don't really know me as well. It may be a geographic factor. I really don't know, Senator. It would be sheer speculation on my part.

Senator Feinstein. Well, that really--well, let me ask one other question, because with a district court it is always a question of dockets and handling dockets. And you have handled so many preliminary hearings at one time, nearly 1,500 in a short period of time. How do you do that? And would you continue that same process as a district court judge?

Judge Benitez. Well, Senator, thank you for asking that question. We have established in El Centro what I think is a fairly efficient, cooperative effort on the part of everyone--the attorneys, the agencies that we work with, and the court staff, of course. And that allows us to be able to move through cases pretty quickly while yet allowing time for the parties to express their issues and to fully brief them and argue them if they feel like it's something that they need to do. But it is more of a system that we have set up, again, partly because of the unique geographic location that we have and partly because of the number of cases that we have and the nature of the cases that we have.

I think that in the past when I was on the Superior Court bench, I think, I hope, that I had a reputation for being able to manage my calendar efficiently and quickly. And as was pointed out, it was not unusual for me when I was on the Superior Court bench, if I finished my calendar, to ask another judge if perhaps I could help him or her with the calendar.

Senator Feinstein. Thank you very much.

I have just received a note that there is about 60 seconds left on the vote, so I am going to enter into the record a statement by the ranking member, Senator Leahy, and recess the Committee for a short time. And Senator Hatch, the Chairman, will be back very shortly.

Judge Benitez. Thank you, Senator.

Senator Feinstein. Thank you very much.

[Recess 10:45 to 10:56 a.m.]

Chairman Hatch. Well, if we can resume the hearing.

Judge Benitez, before I begin with my questions for you, I would like to make a note of sentiment. I expressed during a hearing on Judge Alexander Williams--he was a Clinton district court nominee who received a rating of ``Not Qualified'' from a substantial majority of the ABA Standing Committee and who we nevertheless confirmed as a district court judge for the District of Maryland.

Now, during the hearing I told Judge Williams, ``I am aware of the letter from the ABA, and I just want to assure you that

I do not treat the ABA's findings on nominees as the last word, although I have to say that I think they are trying to do the best job they can.'

Now, I feel the same way today as I did back in 1994. And Judge Williams has proven to be an adequate and good judge, even though there was some strong feeling that maybe he would not be.

In your case, I do have strong disagreements, at least from what I know today, with the ABA's vote based on my review of your record.

Now, is it correct that you were selected by a bipartisan Committee to serve as U.S. magistrate judge? This is a position which you have held since the year 2001.

Judge Benitez. That is true, Senator. Before I was selected, I was screened by a bipartisan selection merit Committee that is established pursuant to Federal law.

Chairman Hatch. Is it also correct that you were found highly qualified by a bipartisan nominating Committee and unanimously recommended by that commission to be appointed to the U.S. District Court for the Southern District of California?

Judge Benitez. Thank you, Senator. I believe that is true.

Chairman Hatch. Do you have any thoughts of whether or not either of these two commissions could have found you not qualified and still nominated you to these prestigious positions?

Judge Benitez. Senator, that would probably call for some speculation on my part, but I would think probably not.

Chairman Hatch. Okay. Now, your home town paper, the Imperial Valley Press, said this about your nomination: ``It would be hard for even the ABA to dispute that Benitez has a fine legal career. He flourished in private practice in El Centro, was appointed to an Imperial County Superior Court judgeship where he did well, and in recent years excelled as a Federal magistrate in Imperial County, handling a tremendous workload. To us and many, many others, Benitez seems more than qualified for a Federal judgeship.''

Now, from what I see I agree with that assessment, Judge Benitez. You overcame significant obstacles to work your way through school, establishing a thriving legal practice, and you have significant experience in the judiciary. Would you please tell the Committee how your background has prepared you to be a Federal trial judge?

Judge Benitez. Thank you, Senator. I started out as a private practitioner. I practiced law in a broad spectrum of cases. I practiced law in numerous counties, several States over the years, and I have experienced an awful lot of proceedings and cases and sat before many, many, many judges. And I have had an opportunity to observe them and how they work.

I was appointed to the Superior Court bench in 1997. There I presided over a significant State calendar, including assisting in setting up a domestic violence calendar for Imperial County. I tried several major felonies. I presided over what we used to call the jail court, which was a really hectic calendar where we handled preliminary hearings, pleas, probation violations, and we did it all in 1 day.

As I said, I tried several major felonies, and I'm pleased to say, Senator, that none of the cases that I ever tried were ever reversed, nor was there a writ of habeas corpus granted on any of those cases.

Subsequently, I was appointed to be the magistrate judge.

Again, I have seen the Federal court system from I guess what you would say the inception of the case. I've seen how the cases move along the system.

Personally, Senator, as you know, I was born in Cuba. I came to the United States in 1961. When I arrived in the United States, I could not speak English. I worked my way through school, and I believe that as an immigrant, someone who came to this country, I have a certain degree of empathy for people who have had similar backgrounds.

I think all of that assists me in being able to reach what I hope are good judgments about people and good judgments about cases and to determine what the law is and to determine what the issues are and to be able to sort through all of that in order to come up with a fair and just decision.

Chairman Hatch. Well, you have been active in community and civic affairs throughout your career. Would you care to highlight some of your contributions in the area of assisting disadvantaged youth, for instance?

Judge Benitez. Well, thank you, Senator. I have been very active in the community. I have long been a believer that you have to give back more than you have taken. And so I started out--shortly after getting out of law school, I became very involved in youth soccer associations. I put together a traveling team. I put together kids who tried out for the Olympic development program. Many, if not most, of those kids were disadvantaged kids, mostly Hispanic kids.

I was very involved in youth swimming over the years. I was president of the swim club. Again, many of the kids in that program were disadvantaged kids.

I was very much involved in the high school mock trial program put on by the Constitutional Rights Foundation. I have been involved in that program, in fact, I just finished a weekend of involvement in that program just last weekend. Again, many of those kids are kids that come from disadvantaged homes. They get quite an exposure to the legal system, to how our justice system works, and I think it's a terrific opportunity for them to learn about our system.

Not necessarily involved with youth, but I was appointed to the Planning Commission of our city and sat as the Chairman of that Planning Commission for one term, served on the commission for two terms. I was appointed by the board of supervisors of the county to serve on the board of directors of the Private Industry Council, which is an organization that administers and oversees funding under the Job Training Partnership Act, which is an act enacted by the Congress of the United States.

I was a member of the Bioethics Committee of the local community hospital and served in that position for many, many years, and as was stated earlier, I was a member of the DeAnza Search and Rescue Unit, which is a volunteer organization that essentially calls upon us to spend numerous hours, whether it be hot or cold outside, searching for and rescuing people that are distressed in Imperial County, Riverside, and in Mexico.

Chairman Hatch. Well, thank you. You know, there have been some criticisms of your temperament. Do you have any comments about that?

Judge Benitez. Well, Senator, I--I try, I try my best to be the best person that I can be, and sometimes that may not be good enough. And there are people who may misinterpret or misconstrue something that I say or something that I do. But I assure you, I have always been a believer in the Golden Rule. I believe that people are entitled to be treated the way you would want to be treated. And I have adhered to that rule.

Being face to face with people that have been charged with the most horrible crimes--murder, rape, child molestation--notwithstanding their position or their situation in life, I believe that it is important that people be treated with respect and with dignity. And I hope to be able to do that if I'm fortunate enough to be confirmed.

Chairman Hatch. Well, you know, some people worry because, having tried a lot of cases in Federal court myself, I spent a lot of time there myself, the closest thing to godhood in this life is a Federal district court judge, as you know. And some really believe it. And Utah has had a very checkered reputation from time to time with Willis Ritter and a few others who have been pretty tough when it comes to temperament, although I always got along well with him. But to make a long story short, Judge Benitez, I believe that the Committee is going to confirm you and send you to the floor and confirm you on the floor. But I suggest to you that should that happen, it is very, very important not to try the attorneys' cases for them, to help younger lawyers if they are having difficulty with evidentiary rules or other problems in the courthouse, and to basically have a good judicial temperament so that people who try these very difficult cases at least do not have to contend with an officious judge. And all I can say is, from what I know about you, you should be able to do that going away.

So we are grateful to have you here, and with that, it has been a pretty easy set of questions for you. I don't know what Senator Feinstein asked you, but I think she feels along the same lines as I do. So we will just let you take your seat, and then we will turn to the ABA and hear what they have to say.

Judge Benitez. Thank you, Mr. Chairman.

Chairman Hatch. Now, if at any time you feel that you would like to respond to the ABA, I would be happy to recall you as a witness. Is that okay?

Judge Benitez. That's fine. Thank you, Mr. Chairman.

Chairman Hatch. Okay. Thank you.

Chairman Hatch. Let me call the ABA, Tom Hayward, who is the Chair of the ABA Standing Committee on the Federal Judiciary, and Richard Macias, who is the ABA Standing Committee circuit investigator. So we are happy and honored to have both of you here.

If you will, we will turn to you, Mr. Hayward, and then we will turn to you, Mr. Macias, and go from there.

STATEMENTS OF THOMAS Z. HAYWARD, JR., CHAIR, AMERICAN BAR
ASSOCIATION STANDING COMMITTEE ON FEDERAL JUDICIARY, AND
RICHARD M. MACIAS, CIRCUIT INVESTIGATOR

Mr. Hayward. Thank you, Mr. Chairman and members of the Committee. My name is Thomas Z. Hayward, Jr. I am a practicing lawyer in Chicago, and I am the Chair of the American Bar Association's Standing Committee on the Federal Judiciary. With me today is Richard M. Macias, a former member of our committee, and circuit member for this investigation. We appear here to present the views of the association on the nomination of Roger T. Benitez to be a United States District Court Judge for the Southern District of California. After careful investigation and consideration of his professional qualifications, a substantial majority of our Committee is of the opinion that the nominee is ``Not Qualified'' for the appointment. A minority found him to be ``Qualified.''

Before discussing the specifics of this case, I would like to review briefly the committee's procedures so that you have a

clear understanding of the process the Committee followed in this investigation. A more detailed description of the committee's procedures is contained in the committee's booklet entitled ``Standing Committee on Federal Judiciary: What It is and How It Works.''

The ABA Standing Committee investigates and considers only the professional qualifications of a nominee--his or her competence, integrity, and judicial temperament. Ideology or political considerations are not taken into account. Our processes and procedures are carefully structured to produce a fair, thorough, and objective peer evaluation of each nominee. A number of factors are investigated, including intellectual capacity, judgment, writing and analytical ability, industry, knowledge of the law, breadth of professional experience, character, integrity, compassion, courtesy, open-mindedness, patience, freedom from bias, commitment to equal justice under the law, and general reputation in the legal community.

The investigation is ordinarily assigned to the Committee member residing in the judicial circuit in which the vacancy exists, although it may be conducted by another member or former member. In the current case, Mr. Macias, in his capacity as a former member for the Ninth Circuit, was asked to undertake this investigation because the current Committee member from the Ninth Circuit was already undertaking another investigation.

The investigator starts his investigation by reviewing the candidate's responses to the public portion of the Senate Judiciary Committee questionnaire. These responses provide the opportunity for the nominee to set forth his or her qualification, such as professional experience, significant cases handled, and major writings. The circuit member makes extensive use of this questionnaire during the course of the investigation. In addition, the circuit member examines the legal writings of the nominee and personally conducts extensive confidential interviews with those likely to have information regarding the integrity, professional competence, and judicial temperament of the nominee, including, where pertinent, Federal and State judges, practicing lawyers in both private and Government service, legal services and public interest lawyers, representatives of professional legal organizations, and others who are in a position to evaluate the nominee's professional qualifications. This process provides a unique ``peer review'' aspect to our investigation.

Interviews are conducted under an assurance of confidentiality. If information adverse to the nominee is uncovered, the circuit member will advise the nominee of such information if he or she can do without breaching the promise of confidentiality. During the personal interview with the nominee, the nominee is given a full opportunity to rebut the adverse information and provide any additional information bearing on it. If the nominee does not have the opportunity to rebut certain adverse information because it cannot be disclosed without breaching the confidentiality, the investigator will not use that information in writing the formal report and the committee, therefore, will not consider those facts in its evaluation.

Sometimes a clear pattern emerges during the interviews, and the investigation can be briskly concluded. In other cases, conflicting evaluations over some aspect of the nominee's professional qualifications may arise. In those instances, the circuit member takes whatever additional steps are necessary to reach a fair and accurate assessment of the nominee.

Upon completion of the investigation, the circuit member submits an informal report on the nominee to the Chair, who reviews it for thoroughness. Once the Chair determines that the investigation is thorough and complete, the circuit member then prepares the formal investigative report, containing a description of the candidate's background, summaries of all interviews conducted--including the interview with the nominee--and an evaluation of the candidate's professional qualifications. This formal report, together with the public portions of the nominee's completed Senate Judiciary Committee questionnaire and copies of any other relevant materials, is circulated to the entire 15-person committee. After carefully considering the formal report and its attachments, each member submits his or her vote to the Chair, rating the nominee ``Well Qualified,' ' ``Qualified,' ' or ``Not Qualified.'

I would like to emphasize that an important concern of the Committee in carrying out its function is confidentiality. The Committee seeks information on a confidential basis and assures its sources that their identities and the information they provide will not be revealed outside of the committee, unless they consent to disclosure or the information is so well known to the community that it has been repeated to the Committee members by multiple sources. It is the committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information. However, we are also alert to the potential for abuse of confidentiality. The substance of adverse information is shared with the nominee, who is given full opportunity to explain the matter and to provide any additional information bearing on it. If the information cannot be shared with the nominee, the information is not included in the formal report and, I repeat, is not considered by the Committee in reaching its evaluation.

Now, turning to the investigation of Judge Benitez, Magistrate Judge Benitez was nominated on May 1, 2003. Carol Dinkins of Houston, Texas, who was then Chair of the Standing Committee, assigned Mr. Macias to the investigation, as I previously explained. He began his investigation shortly after receiving the nominee's May 21, 2003, responses to the public portion of the Senate Judiciary Committee questionnaire. The investigation took longer to complete than most investigations because negative information about the nominee's professional qualifications was uncovered.

On July 22, 2003, Mr. Macias submitted to Chair Dinkins an informal report of the results of his investigation, including summaries of all of his confidential interviews and a description of his interview with the nominee. Because the report contained information adverse to the nominee, Chair Dinkins asked Mr. Macias to conduct additional interviews with both lawyers and judges to assure that the concerns expressed in the report were reflective of the views of a very broad spectrum of individuals who had knowledge of the professional qualifications of the nominee. On October 10, 2003, Mr. Macias' formal report was transmitted to all members of the committee. Those who had questions were encouraged to contact Mr. Macias directly. After all of the Committee members had an opportunity to study the report and all the attachments, each member reported his or her vote regarding the rating of the nominee to the Chair. A substantial majority of the Committee found the nominee ``Not Qualified' ' and a minority found him ``Qualified.' ' This vote was reported to you, Mr. Chairman, on October 21, 2003.

I would now ask my colleague, Mr. Macias, to describe the

investigation of the nominee.

Mr. Macias. Mr. Chairman, my name is Richard M. Macias. I am an attorney from California and, as Mr. Hayward indicated, I am a former member of the committee. I served a full term on the Committee starting in 1994 and have provided frequent assistance on an as-needed basis since then. I have personally conducted approximately 60 investigations for the Committee and have reviewed many more reports prepared by other Committee members.

In 2003, I was asked to undertake the investigation of the qualifications of Roger T. Benitez to serve as a United States district judge. My investigation was conducted in the same manner all investigations by the Standing Committee are conducted, as Thomas Hayward just explained.

My investigation took place during the summer of 2003. In addition to carefully reviewing pertinent materials, such as the nominee's responses to the questionnaire, his legal writings, and other documents that he sent me to review, my investigation of the professional qualifications of Judge Benitez included approximately 67 confidential interviews with members of his legal community, including 23 judges and 44 lawyers. During each conversation, I asked how the person knew the nominee and what the person knew about the nominee's professional competence, judicial temperament, and integrity that would bear on his competence to be a United States district judge. I interviewed almost all--if not all--of the district court judges and magistrate judges of the Southern District of California and the Imperial County Superior Court judges. I also made a particular effort to locate and speak with attorneys who had made court appearances before the nominee.

I also met privately with the nominee in his office in El Centro on two separate occasions. During our meetings, each of the many concerns over Judge Benitez's qualifications that had been raised during my investigation was discussed, and the nominee was given a full opportunity to respond to and rebut the adverse information and to provide any other additional data, information, or materials that he wished me to consider. Because I received more negative comments concerning this nominee than I had ever received about any other person I have investigated, I met with Judge Benitez twice and spent considerably longer conferring with him than what is normally required.

A substantial number of the judges and lawyers I interviewed raised significant concerns about Judge Benitez's judicial temperament and his courtroom demeanor. Many of the interviewees were initially reluctant to discuss the nominee until I assured them that everything they told me would be held in the strictest confidence. Over the past 10 years, I have conducted many investigations for the Southern District of California and, fortunately, I have established a reputation as someone who keeps his word and can be trusted to keep matters confidential when asked to do so.

The lawyers with whom I spoke were civil and criminal practitioners, both prosecutors and defense lawyers, from San Diego and Imperial County, where Judge Benitez practiced law from 1979 to 1997, sat as an Imperial County Superior Court judge from 1997 to 2001, and has served as a Federal magistrate judge for the Southern District of California from 2001 to the present.

Over and over I received negative comments regarding Judge Benitez's judicial temperament. Interviewees repeatedly told me

that Judge Benitez displays inappropriate judicial temperament with lawyers, litigants, and judicial colleagues, that all too frequently, while on the bench, Judge Benitez is arrogant, pompous, condescending, impatient, short-tempered, rude, insulting, bullying, unnecessarily mean, and altogether lacking in people skills.

Interestingly, a significant number of judges and lawyers with whom I spoke specifically reported that Judge Benitez would often become irrationally upset and outraged if an attorney who had been appointed to represent a defendant had a scheduling conflict and asked another equally competent and prepared attorney to appear before the nominee on behalf of the defendant. Scheduling conflicts are a fact of life for litigators; they are a common, everyday occurrence. The people who specifically mentioned this behavior as one example of the nominee's injudicious temperament assured me that almost no other magistrate judge in California or Arizona would be the least bit perturbed under similar circumstances.

A number of people with whom I spoke expressed grave doubts over Judge Benitez's ability to competently handle the more demanding docket caseload of a Federal district judge and efficiently manage a district courtroom, based on their perception of his very slow and rigid manner of handling his current court calendar in El Centro.

Based on their exposure to the nominee's mode of relating professionally to others in his official capacity as a judge, interviewees expressed doubt over Judge Benitez's ability to become an accommodating and collegial member of the Federal district court.

Many of the interviewees further expressed the sentiment that the nominee's temperament problems are compounded by the fact that Judge Benitez fails to appreciate the depth of concern by the bench and bar regarding his temperament and has not demonstrated that he is willing or able to address these concerns.

I discussed each of the negative comments I received with Judge Benitez when I interviewed him in person. His response was to consistently deny the accuracy of what I had been told. He was unable to explain why so many people would make incorrect, negative comments about him. Frankly, in light of the substantial number of negative comments brought to Judge Benitez's attention, we would have hoped he might have responded that he had not fully appreciated how he was perceived by others and that he would strive to markedly improve his temperament and demeanor. No such conciliatory comments were forthcoming from the nominee.

Our Committee members, after reviewing my report on the nominee, were particularly concerned about the clear, consistent pattern to the criticisms that emerged from the interviews. A substantial number of Judge Benitez's professional peers that I interviewed complained about his lack of interpersonal skills and were deeply concerned that he lacked the judicial temperament essential for a district court judge. My colleagues on the Committee were not dissuaded over the seriousness of these allegations by the fact that I reported that I interviewed some lawyers who told me that they had not encountered any problems when they had appeared before Judge Benitez.

After careful consideration of my report, a substantial majority of the Committee was of the view that Judge Benitez is ``Not Qualified'' for a life-tenured appointment to the district court. A minority of the Committee found him to be

``Qualified.''

Our Committee takes most seriously its responsibility to conduct an independent peer evaluation of the professional qualifications of judicial nominees. There is no simple formula that we can apply to determine if a nominee is ``Well Qualified,' ' ``Qualified,' ' or ``Not Qualified.' ' Our recommendation is not the result of tallying the positive and negative comments we receive about a particular nominee or giving an assigned weight to other factors that bear upon professional competence. Rather, in making our evaluation, we draw upon our own professional experience, the cumulative experience of the Standing Committee as a whole, the information and knowledge we gain about the nominee during the course of the investigation, and our independent judgment. We do our utmost to impartially apply the same standards and criteria to every nominee, and we take our job very seriously, especially when, like today, we have negative information to report about the professional qualifications of a nominee for a lifetime appointment to the Federal bench.

Thank you for the opportunity to appear before you today. Tom Hayward and I stand ready to respond to any questions you might have.

Chairman Hatch. Well, thank you so much. I appreciate the hard work that the Standing Committee does and that the investigators do. It is a lot of work, it is a lot of effort, and we appreciate the work that you put in.

We have to weigh these things and balance them, and like I say, we have a lot of letters, a lot of information from people who know the judge very well who think he is terrific for this position. So it is no reflection on the ABA if we decide to ignore your recommendations. And it is no reflection sometimes on the nominee if we decide to accept your recommendations. So it is a tough decision sometimes,

Mr. Hayward, I particularly appreciate you and the work that you do. I know it is a lot of work. I know it takes a lot of time. Sometimes there is not much thanks for doing what you do, and many times you are a political football kicked around by this Committee. We know that has been the case in the past, and we hope that somehow or other I think we have come a long way from those days when there really was, in my opinion, some politics on the Committee.

Mr. Hayward. Thank you, Mr. Chairman, and I agree with that observation.

Chairman Hatch. And I think you have done an excellent job, and I appreciate your presence today to answer questions from the Committee regarding the ABA's evaluation of Judge Benitez's nomination. But let me just ask some basic questions so we all understand this a little bit better regarding procedures followed by the Standing Committee.

Now, it is my understanding that one investigator is initially assigned to a particular nomination.

Mr. Hayward. Yes.

Chairman Hatch. However, there may be cases where a second investigator joins the case. For example, a second investigator may be appointed where it appears at any time during the evaluation process that the nominee may receive a ``Not Qualified' ' rating. I think that is correct.

Mr. Hayward. Yes.

Chairman Hatch. What was the thinking regarding a second investigator in this case?

Mr. Hayward. My judgment as Chair when I received the first informal report and we asked Mr. Macias to do additional

investigation, that if it had been a close call, Mr. Chairman, in terms of review of the report, I most certainly--and always do, as my predecessors have--appoint a second investigator. In this case, the finding as recommended to your Committee, sir, was a substantial majority found the nominee not qualified. It was on that basis that we asked, after Mr. Macias had gone back a second time, done additional interviews, talked with the nominee, that I reviewed his report, made the judgment that the trend in the report was so strong in terms of our finding that a second investigator would not change that report and, accordingly, authorized the formal report to go forward to our Committee and for the Committee to make its recommendation on the basis of that report.

Chairman Hatch. In the case of Judge Benitez, that was a split report, as you say. You say a substantial majority of the committee.

Mr. Hayward. Right.

Chairman Hatch. Is there a way of quantifying that?

Mr. Hayward. Yes, sir. As you know, including myself, there are 15 persons on the committee. A substantial majority is more than 10, and in this particular case, the Chair does not vote unless there is a tie. I did not vote, so 14 members of the Committee voted and 10 or more found the nominee not qualified.

Chairman Hatch. Now, it is clear that Judge Benitez enjoys widespread support from his colleagues and peers from what has come to us.

Mr. Hayward. Right.

Chairman Hatch. And as you know, in 1997 he was appointed to the Superior Court of Imperial County by the then Governor of the State of California.

Now, prior to his nomination, he was vetted by the Judicial Nomination Evaluation Committee of the State of California, and as part of that evaluation, confidential questionnaires were sent out to 150 lawyers and judges asking for information concerning his legal ability, ethics, and temperament. Now, that Committee found him to be qualified to be a judge, and in his present nomination, Judge Benitez was also found to be highly qualified by a bipartisan nominating commission tasked with selecting exemplary candidates for service on the Federal bench.

Now, that Committee unanimously recommended Judge Benitez for this position, and 3 years previous to that recommendation, he was selected by another bipartisan commission to serve as a magistrate judge after a thorough review of his record and experience.

Now, Judge Benitez's nomination is unanimously supported by the board of directors of the Imperial County Bar Association. He has the support of all 12 active judges of the Southern District of California and the support of the presiding judge of Imperial County, Mr. Raymond Cota, Judge Raymond Cota. And they all agree he is qualified. The only evidence we have that he is not qualified are the anonymous comments of his detractors as reported by your Committee without specifics.

Now, I think naturally a question that needs to be asked is: Do you have any real explanation why the ABA rating is so inconsistent with other commission findings and the endorsements in favor of Judge Benitez?

Mr. Hayward. I think my answer, Mr. Chair, in all due respect to the individuals who have sent those recommendations to the Committee directly or those findings, is that the job that the American Bar Association's Standing Committee undertakes on behalf of this Committee is to provide this

Committee with a peer review. The peer review consists of three legs: temperament, professional competence, and temperament--integrity, temperament, and professional competence.

We had no problem in evaluating this nominee with respect to two of those criteria--integrity and professional competence. We provide this Committee with our independent review. Remember, except for the investigator, all of the members of our Committee are distinguished practicing lawyers from around the country representing each of the circuits who have read hundreds of evaluations, undertaken hundreds of evaluations, that we provide this Committee and you, Mr. Chairman, with our best judgment, our best call. And you are right, Mr. Chairman, there are many other considerations that go into your nomination and confirmation of a nominee.

What we try to do as a Committee advising the Senate Judiciary Committee is make the call as I have described in my testimony, as Mr. Macias has described in his testimony, and, unfortunately, in this particular case, it does not comport with the many recommendations that you have from distinguished Chief Judge Marilyn Huff through other members of the bar. But I give this Committee and the Chair my assurance as Chair, having carefully reviewed Mr. Macias' report, that it was balanced, that it was not a close call in this particular incidence, and the best explanation I can give you, Mr. Chairman, is over the years that we have been doing this, since early in the Eisenhower administration, but certainly as the Chair indicated, over the last few years, we enjoy the confidence of the people that we are dealing with that they may open up to us in a manner that they may not open up to others that are more local, that are doing the investigation. And with the assurance of confidentiality, we call them as we see them.

Chairman Hatch. I understand that and I appreciate it. And I have no doubt, Mr. Macias, that you are a well-informed, decent investigation who is just trying to do the best you can. And if people report this to you, you have got to report it back.

I am also aware that there are a lot of--in some of these instances, there could be enemies and there could be people who can cause troubles to a nominee who aren't as honest as they should be. So it is something we have to weigh, but it is a matter of great concern to me. It is tough to do your job, and I respect people like yourself who have to do this job.

Well, we want to thank both of you for being here.

Mr. Hayward. I would just like to underline, Mr. Chairman, along your last comments, if I could, with all due respect, that if we do receive an adverse comment, I just want to re-emphasize that unless we can tell the nominee about it in general so the nominee has an ability to respond to our investigator, we reject it, we discount it. So if there is any incident where somebody just is trying to poison the well, so to speak, we pick that out.

Chairman Hatch. I believe that.

Mr. Hayward. And if it is a one-off type criticism, such as Senator Feinstein indicated, we also look into that, and that doesn't sway our recommendation one way or another.

Chairman Hatch. Well, as you know, we on this Committee sometimes have done lousy decisionmaking with regard to judges. So we are not going to blame you guys for doing the best you possibly can, and you are one element of this consideration. And you have been honest in admitting that we have many other elements we have to consider. And should we confirm Judge Benitez, we don't want the ABA to think that we are just

rejecting your recommendations, but that we have taken them into consideration, and we certainly will. I mean, we respect you and we respect what you are doing, and we will do our best on the Committee.

Mr. Hayward. Mr. Chairman, thank you for those comments, and on behalf of the American Bar Association and my committee, I would say to you, Mr. Chairman, that all the members of the Judiciary Committee thank you for the confidence that you place in us each time a nomination comes forward, that we will do the peer review and provide you with our best advice concerning that particular nomination.

Chairman Hatch. Well, thank you, Mr. Hayward. Thank you, Mr. Macias.

Mr. Macias. Thank you, Mr. Chairman.

Chairman Hatch. We appreciate having your input.

Chairman Hatch. Now we are going to call on Judge Huff at this point for any comments that she would care to make one way or the other, and then we will--unless, Judge Benitez, do you need to make any further comments? We would be happy to--let the judge sit in the middle, and you can use this one over here.

Judge Benitez. Mr. Chairman, let me just say this: I, too, think that the ABA has a difficult task at hand. I appreciate the work that they have put into their investigation. I wish that the outcome would have been different. I wish I could definitively find out how we can have the two conflicting versions of who I am, but I can't. And anything that I would say would be speculation.

All I can say is this: Obviously there is a problem, or at least it is a perceived problem. And if given the opportunity to serve as a district judge, I will certainly attempt to address those issues that have been raised by the ABA.

Chairman Hatch. Well, thank you. I appreciate that.

Judge Benitez. Thank you, Mr. Chairman.

Chairman Hatch. Judge Huff, we will take your statement. We are honored that you would take time to come back here, and I think it is a tribute to Judge Benitez that you would take the time to be with us.

STATEMENT OF HON. MARILYN L. HUFF, CHIEF JUDGE, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Judge Huff. Thank you. I had to recess a death penalty case to come here, but I did believe that it was important.

I favor the confirmation of Roger Benitez as a district judge, as do significantly all of my active district judge colleagues on the bench, as we believe that he does have the skills and judicial temperament to help us with our heavy caseload. My written testimony has been submitted for the record.

Chairman Hatch. We will put it in the record.

Judge Huff. So I will summarize, then, my comments with respect to Magistrate Judge Benitez.

I think it is significant to know and thank Senator Feinstein for setting up the bipartisan merit selection committee. That committee, after significant investigation at the local level, with knowledge of the lawyers and judges who were speaking, unanimously recommended Roger Benitez for one of these positions to help us with our heavy caseload.

At the same time, we as district judges of the court had appointed Magistrate Judge Benitez as a magistrate judge for Imperial County. Significantly, he was the first full-time

magistrate judge in Imperial County, and the best way that I can reconcile the comments of the ABA with our different perceptions of Judge Benitez is I do attribute some of the criticism to the natural growing pains in setting up a new, functioning, and very busy court in a geographically distant community approximately 2 hours away from San Diego.

Magistrate Judge Benitez came to our attention based on the recommendations of a merit screening panel that consists of lawyers and community representatives. They forwarded his name as one of the five finalists for magistrate judge. We district judges then undertook our own due diligence, and significant to us was what kind of judicial temperament did Superior Court Judge Benitez possess. We learned that he possessed the attributes to be an excellent magistrate judge. He was diligent, resourceful, efficient, knowledgeable, and, most significantly for your consideration here today, compassionate, fair, and considerate.

Based on his excellent reputation, our interview, and the favorable results of his FBI and IRS background investigations, we appointed him as United States magistrate judge in January 2001.

As I said, we set up a new court. Previously, we had all defendants transferred to San Diego and didn't appoint counsel until, some days, 3 days later. When we took a look at the numbers, we realized that approximately 30 percent of the initial appearances were happening in Imperial County. Our Acting United States Marshal estimates that for the 3 years that Magistrate Judge Benitez has been on the bench, he has saved approximately \$5.2 million for the United States Marshals Service over this 3-year period because they were able to house the prisoners in Imperial County rather than in the more expensive San Diego contract facilities.

We believe that Magistrate Judge Benitez has actually improved the quality of justice for indigent defendants in Imperial County. He set up a system that is functioning and works well, and, significantly, unquestionably he has been a diligent judge. His 4,524 initial appearances as of February 13 in Imperial County saved the court the repetition of these appearances in San Diego.

We have reviewed his work, and beyond his work ethic, he has demonstrated an ability to set up a functioning and successful divisional court. For example, in 2003, he handled 1,494 initial appearances for criminal cases. To put this in context, I took a look at the Northern District of California. They have ten magistrate judges. We have ten magistrate judges. Their ten magistrate judges collectively only handled 1,341 initial appearances, and Magistrate Judge Benitez handled more than all ten of the district judges in the Northern District of California. And Judge Benitez took a look at the statistics and said that out of all of the districts in the United States that, except for five districts, he singlehandedly handled more initial appearances than any of them, the whole court combined. So he has been a very diligent worker.

He has, in the court's view, been an asset to the Federal bench. We have taken a look at the ABA criticism and taken a look at that significantly. I have attempted to parse through the information to try to find out if there are trends here. As chief judge, I would be concerned if there was a concern about judicial temperament.

As required by law, until the law recently changed, we were required to review transcripts of all guilty pleas taken by Magistrate Judge Benitez. So over the life that he has been

there, for 3 years, we have had no criticism based on our review of the actual transcripts of his judicial temperament or compassionate quality. Indeed, to the opposite, we have found him to be a very wonderful and diligent Federal magistrate.

In sum, we do believe that he will make a positive contribution to the administration of justice in the Southern District of California and help us to reduce our heavy caseload. We believe he possesses the intellect, experience, and temperament to be an excellent district court judge. We also have the ability to broaden the diversity on our court because, as you have heard, he has a wonderful life story. He is the embodiment of the American dream. As an immigrant, he came to the United States with very little, and he has risen to become a very respected judge.

We were surprised and disappointed to learn that the ABA has a different view of his qualifications. While I deeply respect the ABA and its judicial evaluations process, in this case I am more persuaded by the unanimous recommendation of the bipartisan merit selection committee, the additional investigation done by David Casey at the request of Senator Feinstein--he is the president of the American Trial Lawyers Association--and the views of my fellow district court colleagues, the active judges, who collectively believe and support that Magistrate Judge Benitez will be an excellent district judge.

I am open to any questions you have.

Chairman Hatch. Well, thank you so much. I think it is a tremendous honor for Judge Benitez to have you take the time to come back and be with us and give what I consider to be very, very excellent testimony. It is a real tribute to you, Judge Benitez. And, look, I give weight to the ABA findings, but they are not always right, and I mentioned the Williams case just as a perfect illustration, an African-American nominee who was found not qualified by, I think everybody on that Standing Committee, and we just overruled them, and we find that he is doing an excellent job today.

In the case of Judge Benitez, I think you have come through a lot in your life, and I think that will redound very well to the benefit of those who appear before you. The only thing I can say is if there is any truth to any lack of temperament--and let me tell you, being a magistrate judge is not a walk in the park. You sometimes have to be firm. Just being a district court judge, you have to be firm. You cannot let lawyers walk all over you. And in this day and age, lawyers tend to think they can do that to judges, even. And any time a judge settles them down, they take offense to it.

In my day, when I started out, we were very respectful in all ways to judges, and especially those who might not have temperament. But the fact of the matter is we know that there is a different segment of the whole Bar Association in various communities that doesn't always abide by the rules of decorum, and then they blame the judges for getting tough with them in the courtroom.

And, frankly, we understand that. We have become such a litigation-minded community throughout America that it has also become a community that is less reasonable than it should be. And I know that, Judge, you have experienced that as a district court judge, and nobody minds an advocate doing the very best he or she can in front of the court and raising very strong positions. But you do mind people who go way beyond where they should be, abuse the rules of evidence, and do other things that literally cause a judge, whether magistrate or district or

even a circuit judge, to come down pretty hard on them. And we expect judges to come down hard from time to time.

So I would say, Judge Huff, that your testimony is the most significant testimony here today outside of Judge Benitez's, and it is very persuasive to me, as is Judge Benitez's testimony. And I am certainly going to recommend confirmation, and I believe this Committee will do so in spite of some of the tough times we have on this Committee from time to time. So we will do our very best to get you confirmed, and I would just suggest you be the very best judge you possibly can because you will bring credit to a lot of people outside of your family and your own immediate circumstances if you do a great job as a Federal district court judge. And I am going to count on your doing that.

Judge Huff, we are just very honored to have you here, and we respect you and respect the work that you do.

Judge Huff. Thank you, and thank you so much for getting us the positions. We really do appreciate it.

Chairman Hatch. Thank you. We will do our best in the future, too.

[The prepared statement of Judge Huff appears as a submissions for the record.]

Chairman Hatch. Well, with that, we are going to recess until further notice.

[Whereupon, at 11:50 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

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NOMINATIONS OF PETER W. HALL, OF VERMONT, NOMINEE TO BE CIRCUIT JUDGE FOR THE SECOND CIRCUIT; JANE J. BOYLE, OF TEXAS, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS; MARCIA G. COOKE, OF FLORIDA, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA; AND WALTER D. KELLEY, JR., OF VIRGINIA, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA

WEDNESDAY, MARCH 10, 2004

United States Senate,
Committee on the Judiciary,
Washington, DC.

The Committee met, pursuant to notice, at 2:33 p.m., in room SD-226, Dirksen Senate Office Building, Hon. John Cornyn, presiding.

Present: Senators Cornyn and Leahy.

OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator Cornyn. This hearing of the Senate Judiciary Committee will come to order. I appreciate Senator Hatch, the Chairman of the Committee, for allowing me to chair this hearing as the list of four distinguished nominees includes one from Texas as well as those from Vermont, Virginia, and Florida. It is an honor to welcome each of you here today as well as your families and friends and guests to the Committee.

I note that all four nominees--one for the Federal appeals court bench and three for the district court bench, are

distinguished lawyers, each having received a ``well qualified'' rating from the American Bar Association. Peter Hall is the nominee to be U.S. circuit judge for the Second Circuit. In addition, we have three nominees to the Federal district courts: Jane Boyle, the nominee for the Northern District of my home State of Texas; Marcia Gail Cooke is the nominee for the Southern District of Florida; Walter Kelley, Jr., is nominee for the Eastern District of Virginia. I commend President Bush for nominating each of you, and I look forward to your testimony.

Now, we have a number of Senators who want to naturally introduce their nominees from their State, and out of deference to them, I will proceed to your introductions, and then follow accordingly as Senators arrive, and I know they have got to balance a variety of different responsibilities so we will try to accommodate each of the introducers as much as we possibly can.

But first let me turn, of course, to the distinguished ranking member, Senator Leahy, for his opening statement.

Senator Leahy. Mr. Chairman, I am going to be here for a while, and I see the distinguished senior Senator from Virginia, my Senator when I am away from home, and the distinguished Senator from Vermont, my Senator when I am home, and I would be happy to withhold as a courtesy to the two of them, if they would like to go first.

Senator Cornyn. Very well.

We would be delighted to hear from you, Senator Warner, any comments you would care to make.

PRESENTATION OF WALTER D. KELLEY, JR., NOMINEE TO BE DISTRICT
JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA, BY HON. JOHN
WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator Warner. Thank you, Mr. Chairman. And I thank my good friend Senator Leahy, who is recognized in this institution as setting the decorum and standards which all of us aspire to.

Colleagues and other distinguished guests here in this important hearing of the U.S. Senate, I am privileged to introduce Walt Kelley and his family. I am going to ask Walt, since my voice is a little raspy and I have got to preserve it for a tumultuous speech I am going to give on the floor shortly, would you introduce your family?

Mr. Kelley. Certainly. I am delighted to have with me today my three children, Collier Kelley, Catherine Kelley, and Thurman Kelley.

Senator Warner. Stand up there, young man.

[Laughter.]

Mr. Kelley. And also my wife, Jennifer Kelley, and my mother, Frances Kelley, and a couple of dear friends who are adopted family, Roy and Bev Graeber. They all came up from Norfolk today.

Senator Cornyn. Excellent. Welcome to each of you. Thank you for being here.

Senator Warner. I thank the Chair and the members for welcoming this family. As we all know, these are arduous tasks that are taken on by jurists, and the family support is essential to the discharge of their responsibilities.

Now, this fine individual fills the vacancy of Judge Henry Morgan, and sort of like you, Senator Leahy, you and I have been here long enough, we are down on the third rung of judges that we are reporting. When we first came, those that we first

put in are gone, and the second are retiring, and here you and I are on the third round in filling this particular post.

Senator Leahy. We are like the old war horses.

Senator Warner. Yes, we are the old war horses.

Judge Morgan informed Senator Allen and me about his intent to take senior status, so we began our usual very thorough search, and it is interesting. I approach these things very pragmatically because I was privileged at one time to be in the profession of law. And this fine individual came to the forefront in each of our meetings, when we talked about various persons that we consult with in connection with judicial appointments. And it was clear to the good Senator Allen and myself that this man was eminently qualified.

He graduated from Washington and Lee where I was privileged to graduate from, and then after working for years as press secretary to a Member of the United States House of Representatives, he returned to Washington and Lee and earned his law degree magna cum laude. Subsequent to law school, Mr. Kelley served as law clerk to a judge on the United States Court of Appeals for the Second Circuit in New York City, and we are fortunate that after his 1-year clerkship was completed, he returned to his home town in Norfolk to practice law.

Since then, for 22 years, he has practiced law for two of Virginia's best law firms, Wilcox and Savage, and Troutman Sanders. And during these two decades-plus of his legal career, his practice has focused primarily on complex business litigation before the Federal courts.

I am going to ask unanimous consent to place the balance of my remarks into the record, Mr. Chairman.

Senator Cornyn. Without objection.

Senator Warner. I have to join the members of the Intelligence Committee. We have got an emergency meeting at this point in time. So I am going to ask that the Chair allow my distinguished colleague and dear friend, Senator Allen, to complete my remarks on my behalf.

I thank you for the courtesies.

[The prepared statement of Senator Warner appears as a submissions for the record.]

Senator Cornyn. Thank you, Senator Warner.

Senator Allen, we would be pleased to hear any remarks you would like to make by way of introduction.

PRESENTATION OF WALTER D. KELLEY, JR., OF VIRGINIA, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA, BY HON. GEORGE ALLEN, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator Allen. I will. Thank you, Mr. Chairman and Senator Leahy, and I thank my colleague Senator Warner. I will put the rest of his statement in the record.

Senator Cornyn. Without objection.

Senator Allen. I was crossing through some of my remarks, so I will try not to repeat.

I am very happy to be here and pleased and honored to support Walter DeKalb Kelley, Jr.--we know him as ``Walt''--to serve as judge in the Eastern District of Virginia, U.S. District Court.

I have known Walt for a long period of time now, and I am always impressed by him. I will get into some of his background. But I have found him to always be even-tempered. No matter the situation, no matter how fractious things might be, he always had a good, steady demeanor, which I think is an important aspect for being a trial judge. Where things can get

a bit hectic, does someone keep their cool? Are they evenhanded? Are they fair-minded?

Senator Warner and I interviewed many outstanding nominees for this judgeship in the Eastern District of Virginia. The things I care about are experience, to the extent you can determine someone's experience as a judge, and also their judicial philosophy. On the latter point of judicial philosophy, Walt Kelley as a judge is one who understands the proper role of the judiciary, to adjudicate disputes based on the evidence before them and not make the law. This is something I know, Mr. Chairman, that you care a great deal about, as I do, and my colleague Senator Warner. It is important. And I feel very safe in saying that as a judge, Walt Kelley would understand the proper role of the judiciary.

As far as experience, while not a judge having judicial experience, he has a tremendous amount of experience in the courtroom, arguing and taking to final adjudication 25 cases in various Federal courts. That is an impressive number. He has been supported and endorsed by the Virginia Association of Defense Attorneys, the Virginia State Bar. The American Bar Association has given Walt Kelley a unanimous opinion of ``well qualified.'' He is rated ``AV'' by Martindale-Hubbell. The Virginia Bar Association supports his nomination as well as the Virginia Women Attorneys Association.

It is no wonder he has been listed since 1997 as one of the best lawyers in America for business litigation, and it may not sound all that great all the time, but in Virginia Business Magazine, they call him the ``legal elite,'' and he is amongst the legal elite, according to Virginia Business Magazine for civil litigation.

Senator Warner went through all his education, and other matters that I think are important are what he does in the community. He is the Chairman or Rector of the Board of Visitors at Old Dominion University in Norfolk. He is a trustee at Norfolk Collegiate School, where he attended and where his three children currently attend school. He is an adjunct professor in antitrust law at the law school at Regent University. He served on the Virginia Attorney General's Task Force on Higher Education. He also is the director of the Hampton Roads Salvation Army Adult Rehab Center Advisory Board, making sure that folks are rehabilitated from being addicted to drugs or using drugs, and to become more productive citizens.

Senator Warner has introduced his wife and twin sons and daughter and his mother, Frances. I know there are friends--Bev Graeber is back there, and he has a lot of support--that have come all the way up from Norfolk here.

I will just sum it up, Mr. Chairman and Senator Leahy. Walt Kelley is an outstanding individual. He has the experience, he has the temperament, and I think he will be an outstanding judge for many decades to come in the Norfolk division in the Eastern District of Virginia. He has the qualifications, he has the temperament, and he is a quality individual whom we will all be proud to support and watch as a judge.

I thank you for your time and your care, and I hope you will promptly move this nomination forward so he can get to work in handling the caseload there as soon as possible.

Senator Cornyn. Thank you, Senator Allen, for those glowing remarks, and we appreciate your time here very much.

At this time we would be delighted to recognize Senator Jeffords for any introductory remarks he may care to make.

Senator Leahy. Incidentally, I might mention, Mr. Kelley may want to save a transcript of what you and Senator Warner

said. Those are glowing tributes from two Senators I respect greatly, and I have a feeling if his career is like anybody else's career in the judiciary or anything else, there may be occasions when some, probably as he sentences them to prison or something, may have less flattering things to say. So this will give him something to look at.

[Laughter.]

Senator Allen. Thank you, Senator Leahy. Appreciate it.

PRESENTATION OF PETER W. HALL, NOMINEE TO BE CIRCUIT JUDGE FOR
THE SECOND CIRCUIT, BY HON. JIM JEFFORDS, A U.S. SENATOR FROM
THE STATE OF VERMONT

Senator Jeffords. Well, thank you. I am very pleased to be here. I know Senator Leahy agrees with me wholeheartedly in what I will say, and I will agree wholeheartedly with whatever he says. I just want to let you know that we believe that Peter W. Hall for a seat on the United States Second Circuit Court of Appeals is a most qualified individual and are delighted to recommend him.

But I am also a bit melancholy because the nomination is for the seat that was held by my very close friend, the late Fred Parker. The loss of Judge Parker created a tremendous void in the legal community of Vermont and the Second Circuit. Judge Parker left some big shoes to fill, both literally and figuratively. But Peter is the ideal candidate to accomplish this task.

Peter and I both live in the Rutland area of Vermont. This has permitted me to know him and closely follow his career for over 20 years. The insight and knowledge allowed me to confidently nominate Peter in 2001 to serve as the U.S. Attorney for Vermont, and now enthusiastically support his nomination for a position on the Second Circuit Court of Appeals.

I have the utmost faith in his ability to continue the line of excellent judges from Vermont in the Second Circuit Court of Appeals. The nomination comes from a Committee with strong support of a large bipartisan group of Vermonters. Jim Douglas, the Governor of Vermont, offered Peter's name to the President as the nominee for this seat, and both Senator Leahy and I supported this nomination. In addition, my constituents believe Peter will be an outstanding judge on the Second Circuit Court of Appeals, and I know from so many members of the bar letting me know how they feel that he will certainly be welcomed by the Vermont Bar Association and their members.

Peter will come to the Second Circuit with an extensive and wide knowledge of the law. Following law school, he clerked for Hon. Albert W. Coffrin, a U.S. District Court Judge for Vermont. Peter has also worked for a prestigious law firm in Rutland and held a variety of positions in the United States Attorney's Office, most recently as a U.S. Attorney for Vermont, a position for which the Senate unanimously confirmed him in 2001.

In all these positions, Peter has excelled and done extraordinary work. I have heard nothing except praise from his colleagues and firmly believe he will continue this record of excellence on the Second Circuit.

Peter has also exhibited a proper temperament to be an exceptional jurist. I believe this comes naturally to Peter through his upbringing in Vermont, and I know that Peter will serve in the Vermont tradition of prudence and fairness.

I appreciate this opportunity to introduce Peter Hall to

you for a seat in the Second Circuit Court of Appeals. I believe you will see in him what I have seen in many years, an individual who has strong values and exceptional judgment. I hope the Senate will swiftly confirm him to the seat, thus extending the line of excellent Vermont judges on the Second Circuit.

Thank you.

Senator Cornyn. Thank you, Senator Jeffords.

Senator Leahy?

PRESENTATION OF PETER W. HALL, NOMINEE TO BE CIRCUIT JUDGE FOR THE SECOND CIRCUIT, BY HON. PATRICK LEAHY A U.S. SENATOR FROM THE STATE OF VERMONT

Senator Leahy. Well, thank you, Mr. Chairman, and like Senator Jeffords, I am very pleased to introduce and recommend Peter Hall to the Committee. We have been saying such nice things about him. I wonder, Peter, if you might just stand up so we can see who it is we are talking about. In a few minutes, you will get a chance to introduce everybody else who is with you, and I might mention that I see with Mr. Hall one of his predecessors as U.S. Attorney, Charlie Tetzlaff, who was also a superb U.S. Attorney, and both long-time friends.

In this position, the President, as has been said, has nominated Mr. Hall for a seat on the Second Circuit. By tradition, Vermont has had one of the seats on the Second Circuit. And in mentioning that, I should say, as Senator Jeffords has, there is a reason this seat is vacant. There was a superb Second Circuit judge, Fred Parker, who was there. Fred was a close friend of mine, of Senator Jeffords, of Mr. Hall, Mr. Tetzlaff, and so many others. He died tragically of a heart attack this past summer. And Judge Parker had been appointed to the U.S. District Court for Vermont back in 1990 by the first President Bush and the strong recommendation of Senator Jeffords and with my support. He was a well-known Republican and the deputy attorney general, and later he was appointed to the Second Circuit by President Clinton, again on my recommendation and Senator Jeffords' recommendation. It was maintaining the sense that we have tried to stay out of partisan politics in our judges. Fred was a good man, a good lawyer, and a good judge. I was a schoolmate of his at Georgetown. I knew him from that time on as a man of integrity and intelligence, and he is missed.

Now, I mention all these things because it is fitting that we have Peter Hall, our current U.S. Attorney, again carrying on this tradition of bipartisanly supported, nonpartisan judges. He was appointed U.S. Attorney by President Bush. He has the strong support of Governor Jim Douglas, a Republican Governor of Vermont, of Senator Jeffords, Independent Senator from Vermont, and of this Democratic Senator from Vermont. And I think he is up to the job.

Now, he did have certain problems, I should point out, to be honest, Mr. Chairman. He had the nerve to be born in Connecticut. If only someone had spoken to him in time. He went all the way to North Carolina for college. He attended law school in New York. But he did finally come to his senses as he graduated from law school. He came back and worked as a clerk for Judge Albert Coffrin, actually a man who had been appointed by President Nixon to the court, and both Mr. Tetzlaff and I had worked in the law firm that Mr. Coffrin had been in before.

After he completed that clerkship, he joined the United States Attorney's Office in Vermont. He was a Federal

prosecutor for the next 18 years, becoming first assistant, later named U.S. Attorney.

During those years, he gained invaluable trial experience, which is so beneficial for any judge. He also learned about the Federal criminal law. So Mr. Hall's experience is not just Government service. In 1986, he began a 15-year career in the private practice of law, in civil practice, with a particular emphasis on mediation. But he also used that time to serve the State Bar Association. He provided ethics training to Vermont State prosecutors. He held the Office of the President of the Vermont Bar Association where he advocated funding for public defenders and equal access to justice. And he also found time for pro bono work, something I think is so important for those who are going to be considered as judges, getting involved in the Vermont family court system, serving as guardian ad litem for children caught up in disputes between their parents.

He has been a tough but fair prosecutor. His Republican credentials--and I will put all that in the record--are very clear: a member of the National Republican Party and so on. He also held one of the most important offices a citizen can hold in Vermont--he was a member of the Select Board of the Town of Chittenden, which is in Rutland County, not Chittenden County. Mr. Hall has proven--I think everybody who has been involved with him as a prosecutor would agree that, there has never been any indication in his work as a prosecutor that anybody is treated differently because of their political affiliation. They are all treated fairly. They are all treated honestly. The public has been served.

So I will put the rest of my statement in, but I also wanted to put in, Mr. Chairman, a letter from our Governor, Governor Douglas, addressed to both Senator Hatch and myself, strongly supporting him.

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

Senator Cornyn. Thank you, Senator Leahy, for those remarks.

At this time it is my pleasure to recognize the other Senator from Texas, Senator Hutchison, for any introductory remarks you care to make.

PRESENTATION OF JANE J. BOYLE, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, BY HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator Hutchison. Well, thank you very much, Mr. Chairman. I am very pleased to have the opportunity to introduce our candidate, our joint candidate for U.S. District Judge for the Northern District of Texas. It sits in Dallas. Jane Boyle is the current U.S. Attorney for the Northern District of Texas. Previously, she served for 12 years as the U.S. Magistrate Judge for the Northern District of Texas and gained significant judicial experience in the region. She earned her undergraduate degree with honors from my alma mater, the University of Texas at Austin, and she earned her law degree from SMU, Southern Methodist University, School of Law.

She has received outstanding reviews of her job as U.S. Attorney. She took this job at a fairly tough time, and I have talked to lawyers throughout the region who believe that she has done a wonderful job of being totally fair and balanced, and everyone has great confidence in the job that she is doing.

She is married to John Boyle, also an attorney, and has two children: her son, Joe, 15, who just became an Eagle Scout, and

her daughter, Casey, is 12.

I would like to ask her to stand and then introduce her family as well. Judge Boyle? And her father--well, let's see. Start with her husband, John Boyle, who is with her. Her father is Raymond Patvel, and her sister, Katie; her mother, Catherine Jackson; and her father, Richard Jackson. And I am sorry, that was her brother-in-law. I am very sorry. That is very nice of you to be here.

So we really are so pleased that all of you are here, and we welcome you.

Mr. Chairman, I know that you join me in giving our highest recommendation to Jane Boyle, and since she is the sitting U.S. Attorney, I would ask for as much of an expedited review of her as possible because we would like to not only fill the judgeship but also fill the U.S. Attorney position so that there is a seamless transition there.

I thank you.

Senator Cornyn. Thank you, Senator Hutchison, and I certainly concur in all of your remarks.

I know Senator Nelson is here, and I am going to defer any introductory remarks I might make so that he can speak, and then I will continue with a few remarks about this excellent nominee for the Northern District of Texas. Senator Nelson?

PRESENTATION OF MARCIA G. COOKE, NOMINEE TO BE DISTRICT JUDGE
FOR THE SOUTHERN DISTRICT OF FLORIDA, BY HON. BILL NELSON, A
U.S. SENATOR FROM THE STATE OF FLORIDA

Senator Nelson. Mr. Chairman, that is very kind of you. Thank you.

I am supposed to be going to Mars this afternoon. We have a hearing on Mars, so thank you for allowing me to go ahead. And I am here on behalf of Marcia Cooke to the United States District Court for the Southern District of Florida, and I am speaking on behalf of Bob Graham and myself. And if Ms. Cooke would stand up, and her family as well, the members of her family. Thank you all.

Senator Cornyn. Thank you all for being here.

Senator Nelson. Well, Mr. Chairman, our nominee comes to us originally from Michigan, then went to Georgetown University and the Wayne State University Law School. She has been a prosecutor, and at one point, as well as a public defender, plaintiff's attorney, and a defense attorney. She has been in private practice and Government service. She has represented all kinds of clients, the poor and the wealthy. And she was 8 years as a U.S. magistrate judge in Michigan.

She came to Florida and ended up in a legal position for our Governor and became quite familiar then with all of this wonderful diversity that we have in our State. Interestingly, if the Senate confirms the nomination, she will be the first female African-American Federal judge in Florida, and again, an important point to note because of Florida's considerable diversity.

She has been an instructor with the National Institute of Trial Advocacy. She has been an adjunct professor with Wayne State and the University of Miami Law School. And so I will submit this statement for the record, Mr. Chairman, but you can see that we have an extremely qualified candidate that is the nominee, and Senator Graham and I give her our wholehearted endorsement.

[The prepared statement of Senator Nelson appears as a submissions for the record.]

Senator Cornyn. Thank you, Senator Nelson, for those remarks, and of course your written statement, as well as those of the other Senators here today will be made part of the record without objection.

Senator Nelson. Thank you.

PRESENTATION OF JANE J. BOYLE, NOMINEE TO BE DISTRICT JUDGE FOR
THE NORTHERN DISTRICT OF TEXAS, BY HON. JOHN CORNYN, A U.S.
SENATOR FROM THE STATE OF TEXAS

Senator Cornyn. At this time I would like to make a few remarks in addition to those highly glowing remarks that Senator Hutchison has already made about Jane Boyle. She has had a long and distinguished career of public service, and rather than repeat some of the nice things that Senator Hutchison has already said about her, I know particularly if you are Ms. Boyle's family, you cannot hear enough nice things about her, and you agree with all of them.

Let me just read a couple of excerpts from letters that the Committee has received on her behalf. Susan Hayes, Chair of the Dallas County Democratic Party, said, ``Having worked on both sides of the bar, I can attest that both sides view Judge Boyle as a respected jurist who will follow the law regardless of any political pressures.'' And she continued, ``If any nominee is deserving of an election year confirmation, it is Judge Boyle.'' I would also note that a prominent Dallas Democratic Party activist and fund raiser, Mark Stanley, signed on to this letter as well.

I would also like to read excerpts of a letter from Congressman Martin Frost, Democrat from the 24th District of Texas. He noted, ``I believe that she is an extraordinarily qualified candidate who should be confirmed by the Senate with ease. She has a strong legal background and commitment to service in the community, and I believe she will serve on the Federal Bench with honor and distinction.''

Finally, I would like to read a few words from Ken Mulberg, the Senior Member of the Texas State Democratic Executive Committee and the former Dallas County Democratic Chair. He said, ``It is seldom that I have written in support of a judicial nominee, particularly one submitted by the opposition party. It is more likely you have heard from me in opposition to various nominees. The nomination of Jane Boyle, however, merits different comment.'' He went on to add, ``Judge Boyle possesses an ability to be firm and fair in the adjudicatory process. She was always well studied and prepared in her intellect. Preparedness and perception are top notch.'' He closed, ``I urge a speedy confirmation of this excellent nominee.''

Judge Boyle, I just want to add that there were Republicans who said nice things about you too.

[Laughter.]

Senator Cornyn. Without objection, I will submit these letters and another letter from the Texas Employment Lawyers Association to be made a part of the record, without objection.

Would each of the nominees please step forward so I can administer the oath, please? Raise your right hands, please.

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

Judge Cooke. I do.

Mr. Hall. I do.

Mr. Kelley. I do.

Ms. Boyle. I do.

Senator Cornyn. Thank you. Please have a seat.

Mr. Hall, we would be glad to hear any opening statements or comments you would care to make.

STATEMENT OF PETER W. HALL, NOMINEE TO BE CIRCUIT JUDGE FOR THE
SECOND CIRCUIT

Mr. Hall. Thank you, Mr. Chairman. I do not have any specific opening comments, but I would like, if I may, to take this opportunity to thank the President of the United States for placing my name in nomination, to thank you as Chair for convening this hearing to hear the nomination.

If I may, may I introduce the three persons who are here from Vermont, who have been kind enough to show up to watch this process go forward?

Senator Cornyn. You mean other than the Ranking Member, who I know has already spoken glowingly on your behalf? But please go ahead and do so.

Mr. Hall. Thank you. I would like to introduce Lilly Sojourner and Elizabeth Woodcock, if they would stand up. Ms. Sojourner is a close friend of my daughter's and is here at college at Georgetown, graduating this year. Ms. Woodcock is an Assistant U.S. Attorney, and has lived here in Washington, came up to Vermont to be an Assistant U.S. Attorney in the Office.

Then the third person here has already been mentioned by Senator Leahy as Charles Tetzlaff, who was my predecessor as U.S. Attorney and a close friend.

Senator Cornyn. Welcome.

Thank you very much for introducing them.

Mr. Hall. Thank you, Mr. Chairman.

[The biographical information of Mr. Hall follows:]

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[GRAPHIC] [TIFF OMITTED] T5617.711

[GRAPHIC] [TIFF OMITTED] T5617.712

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[GRAPHIC] [TIFF OMITTED] T5617.720

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[GRAPHIC] [TIFF OMITTED] T5617.738

[GRAPHIC] [TIFF OMITTED] T5617.739

[GRAPHIC] [TIFF OMITTED] T5617.740

[GRAPHIC] [TIFF OMITTED] T5617.741

[GRAPHIC] [TIFF OMITTED] T5617.742

[GRAPHIC] [TIFF OMITTED] T5617.743

[GRAPHIC] [TIFF OMITTED] T5617.744

Senator Cornyn. Professor Kelley, we would be glad to hear any opening comments or statement you care to make.

STATEMENT OF WALTER D. KELLEY, JR., NOMINEE TO BE DISTRICT
JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA

Mr. Kelley. I do not have any opening statement, Senator. I too would like to thank President Bush and this Committee, President Bush for the nomination, this Committee for affording me the opportunity to have a hearing, and look forward to answering your questions.

[The biographical information of Mr. Kelley follows:]

[GRAPHIC] [TIFF OMITTED] T5617.745

[GRAPHIC] [TIFF OMITTED] T5617.746

[GRAPHIC] [TIFF OMITTED] T5617.747

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Senator Cornyn. Thank you.

Judge Cooke, we would be glad to hear your opening.

STATEMENT OF MARCIA G. COOKE, NOMINEE TO BE DISTRICT JUDGE FOR
THE SOUTHERN DISTRICT OF FLORIDA

Judge Cooke. Good afternoon. I do not have an opening, but I would of course like to thank President Bush for the nomination, the cooperation of my two State Senators, Senators Nelson and Graham, and to introduce my friends who managed to make it here from Florida today, Cynthia Johnson-Stacks; Cynthia Everett; my colleague from the Georgetown University Board of Directors, Jack Cassidy; Karl Pilger, a fellow teacher of mine with the National Institute of Trial Advocacy; my college roommate, who proves that I still have long-serving friends, Gwendolyn Baylor and her daughter Samantha.

Senator Cornyn. Welcome to all of you. Thank you for being here today.

[The biographical information of Judge Cooke follows:]

[GRAPHIC] [TIFF OMITTED] T5617.792

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[GRAPHIC] [TIFF OMITTED] T5617.839

[GRAPHIC] [TIFF OMITTED] T5617.840

Senator Cornyn. Ms. Boyle, I would be glad to hear any opening comments you would care to make.

STATEMENT OF JANE J. BOYLE, NOMINEE TO BE DISTRICT JUDGE FOR
THE NORTHERN DISTRICT OF TEXAS

Ms. Boyle. Chairman Cornyn, I do not have an opening either, but I would like to thank you for your kind remarks, and also than Senator Leahy and the rest of the Committee for having this hearing and including me on the panel. I appreciate that very much.

I also would like to thank Senator Hutchison for her kind remarks as well.

You have met my family, so I will not reintroduce them, but it is a tremendous honor to be here today. Thank you.

[The biographical information of Ms. Boyle follows:]

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[GRAPHIC] [TIFF OMITTED] T5617.885

Senator Cornyn. Thank you very much.

Of course, each of you have been through some investigation and background check before you had gotten here today, so this is not meant to be a reiteration of that, but I know Senator Leahy and I will probably have a few questions for each of you.

Let me just start with Mr. Hall, and ask each of you to comment on this. I know we frequently hear reference to judicial activism in the media and sometimes I wonder if we all mean the same thing when we talk about judicial activism, but I think what most people mean, whether they approach it from the left or the right, is a judge who takes some liberty with either a statute or precedents that state what the common law is, or with a constitutional interpretation and an attempt to perhaps pursue some agenda other than faithfully interpreting the law.

I wonder if, starting with you, Mr. Hall, if you could comment on that and what you consider to be illegitimate judicial law making from the bench.

Mr. Hall. Thank you, Mr. Chairman. That is obviously an important issue as one considers and hopes that one will become a judge, a Federal judge. If I may, let me answer by way of giving you my philosophy on that, and that really is that it is up to Congress essentially to pass the laws of this country. It is up to the Supreme Court of the United States ultimately to interpret the Constitution and to provide final interpretation on the laws.

It would be my intention as a judge, if I am confirmed, to follow the laws as closely as I could to divine Congress's intention from the written text of those laws and from the legislative history if there were a question around them, and to be bound by those laws and to be bound by the interpretation of the U.S. Supreme Court.

Senator Cornyn. I noticed you used the word ``divine'' and that may be an appropriate word in some instances, to try to figure out what Congress did mean by a statute, not always an easy task.

Mr. Kelley, would you care to comment, please?

Mr. Kelley. I concur with everything my colleague just said I would add from the perspective of a District Court Judge, the constraints within which we operate would be even more narrow than those that an Appeals Court Judge would operate. Again, looking at it from the practical, trying to get the cases moved and get them done right in a manner that is fair to the litigants, if you end up taking a judicial activist view, one that seeks to achieve present results as opposed to following the law, you are going to end up with a wide variety of decisions on very similar facts which is going to have the effect of encouraging more litigation because it destroys the notions of predictability upon which our legal system is based. So from a would-be District Court Judge perspective, precedent and stare decisis, and the words that Congress have used are really everything that we need in our jobs.

Senator Cornyn. I certainly agree with you that predictability is a very important function of the rule of law, so people know what the rules are and can order their personal and business and other affairs accordingly. If they do not like the way the law is, then certainly we in this country recognize

the right of every citizen to petition for a change of that law, and to work to see the law changed. So thank you for those comments.

Judge Cooke, would you care to comment on that issue?

Judge Cooke. Thank you, Senator. I support my colleagues in that. I think that it is important for a judge, a United States District Judge, to follow precedent and stare decisis, and if confirmed, I plan to do that. I plan to respect the three branches of Government and to respect the role that a United States District Court Judge should play, and that is to decide the matter before him or her, and to proceed from well-recognized stare decisis and precedent.

Senator Cornyn. Thank you very much.

Ms. Boyle.

Ms. Boyle. Senator Cornyn, I think that my colleagues have stated very eloquently my views on the issue of judicial activism. Just to say that it is a basic premise of our Founding Fathers and the whole idea of separation of powers as the Judicial Branch interprets the law, and that is what we do. We do not make the law.

Senator Cornyn. Thank you, Ms. Boyle. Your comments remind me of something I have learned since I have come here to the Senate, that is, the saying that everything has been said but not everyone has said it yet.

[Laughter.]

Senator Cornyn. Which seems to be a commonly observed proposition here in Congress. But in all seriousness, thanks to each of you for your answers, and I will be glad to recognize Senator Leahy for any questions he may have at this time.

Senator Leahy. Thank you, Mr. Chairman. I might say, in the time that Senator Cornyn has been here, he has obviously learned all about the right of unlimited debate in the Senate, when you have 100 who want to say something.

I ask this question both of Mr. Hall and Ms. Boyle. Obviously, in Vermont, between the papers of the various cases or at least a lot of the cases that go through the U.S. Attorney's Office, and I realize there are a lot of prosecutors there, but you are responsible for all of the cases being brought or dismissed or prosecuted.

It has been in my experience as a prosecutor that if somebody gets convicted and gets any period of time, you know they are going to appeal if they possibly can. Some of those appeals will circulate up to the Second Circuit. If you are confirmed, what would be your practice if a case came to the Second Circuit that had been in the U.S. Attorney's Office when you were there, even if you were not the attorney handling that particular case?

Mr. Hall. I would recuse myself, Senator. That is an excellent question. It is certainly a matter that I have thought about and that I have had to think about as I transitioned from private practice to becoming United States Attorney. But I think Section 455 of Title 28, if I am recalling the section correctly, quite clearly would mandate that I be recused--that I recuse myself from any matter that had been in the office while I was there. And as head of the office, it is really assumed under the Code of Professional Responsibility, that I have knowledge of that case, so that is my answer.

Senator Leahy. I would expect in the Second Circuit, considering the jurisdiction of all of New York State and Connecticut, as well as Vermont, that the Chief Judge would probably be able to find enough other cases to assign to than

just those from Vermont.

Ms. Boyle, let me ask the same question. A case you have been involved as a prosecutor, is now, for whatever reason, now percolating to the District Court. What do you do?

Ms. Boyle. Absolutely, Senator, and I really appreciate the question because I think the issue of fairness--both fairness and fact and the appearance of fairness is crucially and critically important to a sound judiciary.

What I would do--and I have thought about this ahead of time, is I do not plan to be involved in any cases that were in any way in my office, either as an investigative matter or as an indicted matter once I am on the bench. So I will talk to the Clerk of Court, as well as the General Counsel's Office at the Administrative Office of U.S. Courts for guidance on how we determine and ferret those out as to which ones they are. But I would not preside over any case that was in the office in any capacity since I have been U.S. Attorney.

Senator Leahy. Thank you.

Judge Cooke, you have seen--I am not asking you for a listing of it--but you have seen good judges and bad judges in your career. And I am going to ask the same question of Mr. Kelley. The glories of our system, and also it can be a real problem in our system of Federal judges, is the lifetime tenure. Obviously, the Founders wanted to give as much independence as possible. I happen to agree with that. But I have seen judges who take on themselves the idea that now they are so much different than the rest of the world, and they will take it out on lawyers. They will treat lawyers in such a way. The question has often been asked, I mean it is a question of judicial temperament, something that we normally see. What is your view? You are going to have plaintiffs, defendants, rich, poor, every other kind coming in. Are you prepared from your past experience at all to keep telling yourself, okay, we have to be even-handed on this?

Judge Cooke. Thank you, Senator Leahy, that is a very important question. Yes, that is, if confirmed, what I plan to do. I think it is important to remember that every person that approaches the bar in any capacity is a person that should be treated politely, courteously, and always with respect.

Senator Leahy. Professor Kelley, in your work you have been in and out of courts enough you know what I am saying about the, ``Oh, my God, not him or her as a judge,' ' as compared to, ``We are going to get a fair shake here.' '

Mr. Kelley. Through 23 years of private practice, I have been on the receiving end.

Senator Leahy. Of the ``Oh, my God, not him.' '

Mr. Kelley. Of an imperious judge here or there, so I understand well what you are saying. One of the things about those kinds of experiences is the effect to me that it has on the litigants. We lawyers are somewhat hardened to it. You know, it is just another day at the battle, and some days you get the bear and some days the bear gets you.

To the litigant whose case it is, to encounter a judge who comes into a hearing or a trial with his mind made up, and acts in an imperious fashion that does not allow people really the opportunity to state their case, is very destructive of the public respect for the judicial system, and while not everyone ends up in Federal Court, people who do have friends. They talk at the neighborhood picnic, and pretty soon there is a notion that somehow the game is rigged and you are not really able to say your case.

One of the most important things to me is not only being

courteous, but having the patience to allow people to state their position. Whether you ultimately agree or disagree with that position, if the litigants feel like they have had their day in court, they will respect to result that comes out of it.

Senator Leahy. Thank you. What you say about the litigants, this may be their one time ever in the court. We have to remind ourselves of that here in the Senate. We sort of take it for granted. You come in, park your car and go up to your office and get on with the day, and walk by the monuments and go into the hearings and all, and it is sometimes probably more routine than it should be, but I am brought up short every so often when I have somebody, a constituent from home, never been here before, and what they thought about it in seeing it, or somebody who is testifying before a Committee for just a few minutes, and this is a major event in their life, and may be one of 20 we will see that day. You have to stop and remind yourself that we do have a responsibility.

Our Federal Courts--and I will stop with this, Mr. Chairman, I do not mean to give everybody a lecture--but our Federal Courts, their independence, their standards, the fact that we see people of the quality of the four of you, this is something, this is a glory in our country that we have this, and we have to constantly, all of us, do our best for this.

I say to the families and friends who are here with all of you, you should be very proud to have this opportunity.

And with that, because some of you may want to go other places, Mr. Chairman, I will stop, and thank you very much.

Senator Cornyn. Thank you, Senator Leahy for those questions, and thanks to each of you for your comments.

I am tempted to philosophize some about the role about the Federal Judiciary, but in the interest of time, I will not.

I will just tell you that each of these very bright young men and women who sit behind us, help us go through each of your records, and we have excellent staff. So please do not assume because we are not asking you by cross-examining you or grilling you today, that we are not very interested in your record and your attitude and your thoughts about how you will perform on the Federal Bench, because I agree with Senator Leahy. Once you get on the Federal Bench, you are virtually untouchable, some would say unaccountable, but I would say even untouchable. But I appreciate the comments that you made, Mr. Kelley, and others about your responsibility because even though as a judge you are interpreting precedent or a statute or the Constitution, it is a tremendous responsibility, and it is one that gives you tremendous power over the lives of the individuals that come before your court.

It is also important--and I will stop with this bit of preaching--to keep the public trust and confidence. When people see judges making it up, or perhaps pursuing some agenda that is not readily apparent in anything the legislature has written, or the Founding Fathers wrote, or any precedent written by the superior court, then they begin to wonder about the very legitimacy of the rule of law itself. So it is a very important work that you are undertaking, and I know each of you take that very seriously, and I trust you will discharge your responsibilities to the very best of your duty.

We will keep the record open for a week until Wednesday the 17th, in case there are any additional written questions that either Senator Leahy or I or any other member of the Committee would like to send to you, and we would of course like you to answer those.

I have also submitted a written statement from Chairman

Hatch for the record, which will be made, without objection, a part of the record.

Senator Leahy. I would, if I might submit also for the record, an editorial in the Burlington Free Press today, our State's largest newspaper, very supportive of Mr. Hall.

Senator Cornyn. Very good. With that, we will conclude this hearing, and thanks to all of you and good luck to you as well.

[Whereupon, at 3:23 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

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