

With me on the brief were Clifford D. Stromberg, Barbara F. Mishkin, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600. Arguing for the petitioners was William L. Williams, Sr., Assistant Attorney General, Mail Stop FZ-11, Olympia, WA 98504, (206) 586-1445. Arguing for the respondent was Brian Reed Phillips, 3223 Oakes Avenue, Everett, Washington 98201, (206) 252-3221. Arguing for the United States as *amicus curiae* was Paul J. Larkin, Jr., then Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

20. *South Dakota v. Dole*, 483 U.S. 203 (1987). Under federal law, a state is denied a portion of its federal highway funds if its laws allow persons under the age of 21 to purchase alcohol; South Dakota challenged this provision. The question before the Court was whether the law was a valid exercise of Congress's Spending Clause power. I participated in a brief filed on behalf of the National Beer Wholesalers' Association and 46 state beer, wine, and distilled spirits associations. We argued that the Twenty-First Amendment of the Constitution reserved to the States the authority to regulate alcohol and that Congress could not use its Spending Clause power to circumvent this limitation. The Court disagreed, holding that the provision was valid under the Spending Clause.

With me on the brief were E. Barrett Prettyman, Jr., Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, John F. Stasiowski, General Counsel, National Beer Wholesalers' Association, 5205 Leesburg Pike, Suite 505, Falls Church, VA 22041, (703) 578-4300. Arguing for the petitioner was Roger A. Tellinghuisen, Attorney General, State of South Dakota, State Capitol, Pierre, S.D. 57501; (605) 773-3215. Arguing for the respondent was Louis R. Cohen, then Deputy Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 633-2217.

While in private practice, I was also the counsel of record on the following petitions for certiorari, which did not result in an argument before the Court:

Mulvaney Mechanical, Inc. v. Sheet Metal Workers Intern. Ass'n, Local 38 (No. 02-924), *cert. granted and judgment vacated*, 538 U.S. 918 (2003).
Discover Bank v. Szetela (No. 02-829), *cert. denied*, 537 U.S. 1226 (2003).
Bazain v. United States (No. 02-616), *cert. denied*, 537 U.S. 1171 (2003).
Green Spring Health Services, Inc. v. Pennsylvania Psychiatric Society (No. 02-65), *cert. denied*, 537 U.S. 881 (2002).
Besser v. Hardy (No. 01-936), *cert. denied*, 535 U.S. 970 (2002).
National Union Fire Ins. Co. of Pittsburgh, PA v. Textron Financial Corp. (No. 01-176), *cert. granted and judgment vacated*, 534 U.S. 947 (2001).
Ritter v. Stanton (No. 01-1456), *cert. denied*, 536 U.S. 904 (2002).
Citizens Bank of Weston, Inc., v. City of Weston (No. 00-1876), *cert. denied*, 534 U.S. 824 (2001).
Litton Systems, Inc. v. Honeywell, Inc. (No. 00-1617), *cert. dismissed in light of an intervening decision*, 534 U.S. 1109 (2002).
Baltimore Scrap Corp. v. David J. Joseph Co. (No. 00-1592), *cert. denied*, 533 U.S. 916 (2001).

Smithfield Foods, Inc. v. United States (No. 99-1760), *cert. denied*, 531 U.S. 813 (2000).
 Mobil Oil Corp. v. McMahon Foundation (No. 99-1830), *cert. denied*, 530 U.S. 1263 (2000).
 Roberts v. United States (No. 99-1174), *cert. denied*, 529 U.S. 1108 (2000).
 NVR Homes, Inc. v. Clerks of the Circuit Courts for Anne Arundel County (No. 99-712), *cert. denied*, 528 U.S. 1117 (2000).
 Shoen v. Shoen (No. 99-662), *cert. denied*, 528 U.S. 1075 (2000).
 Mary Hitchcock Memorial Hosp. v. Klonoski (No. 98-1181), *cert. denied*, 526 U.S. 1039 (1999).
 U-Haul Co. of Cleveland v. Kunkle (No. 98-1097), *cert. denied*, 526 U.S. 1144 (1999).
 Kansas City Southern Ry. Co. v. McKenna (No. 98-479), *cert. denied*, 525 U.S. 1016 (1998).
 Shoen v. Shoen (No. 98-86), *cert. denied*, 525 U.S. 923 (1998).
 UNUM Corp. v. United States (No. 97-1679), *cert. denied*, 525 U.S. 810 (1998).
 Shakespeare Co. v. Silstar Corp. of America, Inc. (No. 97-580), *cert. denied*, 522 U.S. 1046 (1998).
 Delaware River and Bay Authority v. International Union of Operating Engineers, Local 68, AFL-CIO (No. 97-81), *cert. denied*, 522 U.S. 861 (1997).
 Hydranautics v. Filmtec Corp. (No. 95-1887), *cert. denied*, 519 U.S. 814 (1996).
 National Union Fire Ins. Co. of Pittsburgh, Pa. v. American Medical Intern., Inc. (No. 95-447), *cert. granted and judgment vacated*, 516 U.S. 984 (1995).
 Keystone Sanitation Co., Inc. v. Arcata Graphics Fairfield, Inc. (No. 95-273), *cert. denied*, 516 U.S. 928 (1995).
 State Farm Mut. Auto. Ins. Co. v. New Jersey Comm'r of Ins. (No. 95-184), *cert. denied*, 516 U.S. 1184 (1996).
 20th Century Ins. Co. v. Garamendi (No. 94-1119), *cert. denied*, 513 U.S. 1140 (1995) & 513 U.S. 1153 (1995).
 NationsBank of Texas, N.A. v. Executive Life Ins. Co. (No. 94-884), *cert. denied*, 513 U.S. 1147 (1995).
 Bellsouth Advertising & Pub. Corp. v. Donnelley Information Pub., Inc. (No. 93-862), *cert. denied*, 510 U.S. 1101 (1994).
 Pardee & Curtin Lumber Co. v. Webster County Comm'n (No. 93-226), *cert. denied*, 510 U.S. 990 (1993).

Finally, while in private practice, I was the counsel of record on the following oppositions to certiorari:

Renzi v. Connelly School of the Holy Child, Inc. (No. 00-1118), *cert. denied*, 531 U.S. 1192 (2001).
 Michigan v. EPA (No. 00-632) and Ohio v. EPA (No. 00-633), *cert. denied*, 532 U.S. 904 (2001).
 Anadarko Petroleum Corp. v. FERC (No. 99-1429), *cert. denied*, 530 U.S. 1213 (2000).
 Miccosukee Tribe of Indians of Fla. v. Tamiami Partners, Ltd. (No. 99-1013), *cert. denied*, 529 U.S. 1018 (2000).
 Rockwell Intern. Corp. v. Celeritas Technologies, Ltd. (No. 98-850), *cert. denied*, 525 U.S. 1106 (1999).

Goetz v. Glickman (No. 98-607), *cert. denied*, 525 U.S. 1102 (1999).

Kamilewicz v. Bank of Boston Corp. (No. 96-1184), *cert. denied*, 520 U.S. 1204 (1997).

Amoco Production Co. v. Public Service Co. of Colorado (No. 96-954), *cert. denied*, 520 U.S. 1224 (1997).

Rockland Industries, Inc. v. Chumbley (No. 87-1220), *cert. denied*, 485 U.S. 961 (1988).

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

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

If any of these cases has already been described in 15(D) above, it need not be repeated here.

1. *United States v. Halper*, 490 U.S. 435 (1989). While in private practice, I was appointed by the Supreme Court to file a brief and present oral argument in support of the judgment below in this case. See *United States v. Halper*, 488 U.S. 906 (1988) (order of appointment). Mr. Halper, the appellee, had proceeded pro se in the lower court; I was the only counsel briefing and arguing in the Supreme Court against the appellant, the United States. I handled the case on a pro bono basis.

The question presented was whether the Double Jeopardy Clause barred the imposition of civil penalties under federal law against an individual who had been convicted and punished under federal criminal law for the same conduct. Mr. Halper had been convicted of filing false Medicaid claims, had paid a fine, and served a sentence of imprisonment. The government thereafter sought to impose civil penalties under the False Claims Act for the same false Medicaid claims. It was at the time generally assumed that the Double Jeopardy Clause applied only to successive criminal prosecutions, and had no applicability in the civil context.

In briefing and arguing the case, I sought to distinguish the strong line of precedent holding that the Double Jeopardy Clause did not apply to civil cases. My argument distinguished that aspect of the Clause forbidding successive prosecutions — which did not apply to civil cases — from that aspect of the Clause forbidding successive punishments — which, I argued, had no such limitation. In a unanimous opinion authored by Justice Blackmun, the Court agreed with this analysis. 490 U.S. 435 (1989). The case was important in establishing that the protections of the Double Jeopardy Clause are not

limited to the criminal context, and the decision had a significant effect on the government's imposition of sanctions in a wide range of areas. It was later sharply restricted, however, if not overruled, in *Hudson v. United States*, 522 U.S. 101 (1997).

I had no co-counsel assisting me. Arguing for the United States was Assistant to the Solicitor General Michael R. Dreeben, Department of Justice, Washington, D.C. 20530, (202) 514-2217.

2. *United States v. Kokinda*, 497 U.S. 720 (1990). I participated in the briefing and presented argument before the Supreme Court on behalf of the United States in this criminal case, which involved a challenge to Postal Service regulations making it a misdemeanor to solicit funds on "postal premises," defined to include the exterior walkways adjacent to and surrounding a suburban post office building, but not the public sidewalks alongside the street. The Court of Appeals for the Fourth Circuit had struck down the convictions of two individuals for soliciting contributions for their organization on the walkway, holding that such activities could not be banned consistent with the First Amendment. The Supreme Court ruled in the government's favor and reversed. Writing for a plurality of four Justices, Justice O'Connor agreed with us that the postal walkway was not a public forum, but instead government property set aside to facilitate particular government business — in this case, the handling of the mails. Since solicitation of contributions to organizations by private individuals would interfere with the conduct of postal business and since the regulation did not discriminate on the basis of viewpoint, Justice O'Connor concluded that the ban on solicitation was valid. Justice Kennedy concurred, relying on our alternative argument that the ban was a valid time, place, and manner restriction.

Other counsel on the brief with me were Kenneth W. Starr, then Solicitor General, then Assistant Attorney General Edward S.G. Dennis, Jr., then Assistant to the Solicitor General Amy L. Wax, and Thomas E. Booth, Department of Justice, Washington, D.C. 20530, (202) 514-2217. Counsel for the opposing parties was Jay Alan Sekulow, American Center for Law & Justice, P.O. Box 64429, Virginia Beach, VA 23467, (757) 226-2489.

3. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). The Court of Appeals for the District of Columbia Circuit had allowed an organization to challenge over a thousand individual land use decisions affecting millions of acres of public land on the basis of the affidavits of two individuals asserting an interest in the decisions. As Acting Solicitor General, I authorized and participated in the preparation of a petition for certiorari seeking Supreme Court review on behalf of the Secretary of the Interior. The Court granted our petition, and I participated in the briefing on the merits and presented oral argument on behalf of the government.

We contended that the general allegations of injury that the two individuals had presented were not specific enough to entitle them to mount a broad-based challenge to the thousands of agency decisions affecting millions of acres about which they complained. The Court, in a 5-4 decision, agreed with our analysis. Justice Scalia, writing

for the majority, held that vague and conclusory allegations of injury did not suffice to confer a right to challenge an entire agency program, and that the federal courts could not “presume” the specific facts necessary to establish adequate injury. Justice Blackmun, for the dissenters, argued that the affidavits should have sufficed at the summary judgment stage.

Co-counsel for the United States assisting me were then Assistant Attorney General Richard Stewart, then Deputy Solicitor General Lawrence G. Wallace, then Assistant to the Solicitor General Lawrence Robbins, Peter Steenland, Anne Almy, Fred Disheroon, and Vicki Plaut, Department of Justice, Washington, D.C. 20530, (202) 514-2217. E. Barrett Prettyman, Jr., Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5685, argued the case for the respondent.

4. *National Collegiate Athletic Association v. Smith*, 525 U.S. 459 (1999). After the Court of Appeals for the Third Circuit ruled against the NCAA in this case, I was retained to seek Supreme Court review, and to brief and argue for the NCAA on the merits in the event the Court elected to hear the case. The Third Circuit had ruled that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* — which applies only to organizations that receive federal financial assistance — applied to the NCAA, because it received dues from entities that receive federal financial assistance. We argued in our petition for certiorari that hinging coverage on such indirect receipt of financial assistance conflicted with Supreme Court precedent, and the Supreme Court granted review.

The issue on the merits was what it meant to “receiv[e] Federal financial assistance” under the terms of the statute. We argued in our briefs that the Supreme Court had developed a contract theory of coverage with respect to legislation, such as Title IX, enacted pursuant to Congress’ Spending Clause powers. Under that theory, entities that knowingly and voluntarily accept federal funding are subject to the restrictions that come with it. The necessary implication of this theory is that coverage under the statute is limited to direct recipients of the funding — those who knowingly entered into a bargain by accepting the funding — and does not “follow [] the aid past the recipient to those who merely benefit from the aid.” *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 607 (1986). The NCAA, we argued, was accordingly not covered simply because its dues-paying members were.

In a unanimous opinion written by Justice Ginsburg, the Supreme Court agreed with our position. The Court explained that, at most, the NCAA’s “receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage.” 525 U.S. at 468.

Appearing on the briefs with me in this case were Martin Michaelson, Gregory G. Garre, and Lorane F. Hebert of Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, John J. Kitchin and Robert W. McKinley of Swanson, Midgley, Gangwere, Kitchin & McLarney, 922 Walnut Street, Suite 1500, Kansas City, MO 64106, (816) 842-6100 and Elsa Kircher Cole, General Counsel, National Collegiate Athletic Association, One NCAA Plaza, 700 West Washington Street, Indianapolis, IN

46204, (317) 917-6222. Representing the respondent was Carter Phillips, Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006, (202) 736-8000.

5. *Rice v. Cayetano*, 528 U.S. 495 (2000). I was retained by the State of Hawaii to brief and argue this case after a petition for certiorari was granted to review what for the State had been a favorable decision by the Court of Appeals for the Ninth Circuit. That court had upheld a Hawaiian statute providing that only Native Hawaiians could vote for the trustees who administered certain trusts established to benefit Native Hawaiians. The issue before the Supreme Court was whether such a restriction violated the Fourteenth and Fifteenth Amendments as racial discrimination.

On behalf of the State, we defended the state law and favorable Court of Appeals decision by arguing that the classification drawn by the statute was not drawn on the basis of race. Instead, the statute simply restricted the franchise to beneficiaries of the underlying trusts. The petitioner had not challenged those trusts, and it was rational to limit voting to those most directly affected by how the trusts were administered.

We also argued that the classification was not based on race but instead on the congressionally-recognized political status of Native Hawaiians as an indigenous people. This ground had been relied on by the Supreme Court and other courts to uphold classifications involving Native Americans in the lower 48 states and Native Alaskans, and we argued that the same rationale should apply to the indigenous people of the Hawaiian Islands.

The Court rejected our arguments, 7-2. Justice Kennedy, writing for the majority, rejected our attempted analogy between Native Hawaiians and other Native Americans, reasoning that Congress had not dealt with Native Hawaiians as members of politically-organized tribes, as was the case with respect to other Native Americans. The majority also rejected our argument that the classification should be regarded as being based on beneficiary status rather than race. Justice Breyer, joined by Justice Souter, concurred in the result, also rejecting the analogy to Native American classifications on the ground that Native Hawaiians were not organized into tribes. Justice Stevens, joined by Justice Ginsburg, dissented, arguing that the Hawaiian statute should be upheld in light of the unique history of Hawaii and the analogy to principles of American Indian law.

On the brief with me were Gregory G. Garre and Lorane F. Hebert of Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Attorney General Earl L. Anzai and Deputy Attorneys General Girard D. Lau, Dorothy Sellers, and Charleen M. Aina of the State of Hawaii, 425 Queen Street, Honolulu, HI 96813, (808) 586-1360. Counsel for petitioner was Theodore B. Olson, Gibson, Dunn & Crutcher, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

6. *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23 (2001). The issue in this patent and trade dress case was whether the subject matter of a utility patent can be protected as trade dress after the patent expires. Marketing Displays had patented a dual-spring base design that made road signs more resistant to wind. Traffix Devices copied

and improved upon the design after Marketing Displays' patent expired. The Sixth Circuit Court of Appeals concluded that the distinctive appearance of the Marketing Displays sign stand design could be protected from such copying as trade dress. I was retained by Traffix Devices to seek Supreme Court review and brief and argue the case on the merits if review were granted. We argued in our petition for certiorari that the Sixth Circuit decision conflicted with other circuit court decisions and Supreme Court precedent, and the Supreme Court granted review.

In our briefs on the merits and in oral argument before the Court, I argued that the ruling below was inconsistent with the basic "patent bargain" recognized by the Supreme Court: society grants a patent holder the exclusive rights to his invention for a limited period of time, on the condition that the right to practice the invention becomes public property when the patent expires. Allowing the patent holder to extend the period of exclusive use after the expiration of the patent, under the guise of trade dress, would deprive the public of the benefit of this bargain. We also explained that this was the basis for the trade dress "functionality" doctrine, barring protection for functional features.

The Supreme Court agreed with our position in a unanimous opinion authored by Justice Kennedy. The Court explained that the sign stand design was functional, as evidenced by the fact that it had qualified for and enjoyed patent protection. Because the design was functional, the Court ruled, it could not qualify for trade dress protection.

Co-counsel with me on our briefs were Gregory G. Garre, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, and Jeanne-Marie Marshall and Richard W. Hoffmann, Reising, Ethington, Barnes, Kisselle, Learman & McCulloch, P.C., 201 W. Big Beaver, Suite 400, Troy, MI, 48084, (248) 689-3500. John A. Artz, Artz & Artz, P.C., 28333 Telegraph Road, Suite 250, Smithfield, MI 48034, (248) 223-9500, argued for the respondent.

7. Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002). The Tahoe Regional Planning Agency (TRPA) instituted two successive moratoria that restricted virtually all development in the Lake Tahoe region for 32 months. In the interim, TRPA sought to develop a comprehensive plan to protect the water quality of the Tahoe region. A group of Tahoe-area property owners challenged the moratoria in federal court on the ground that TRPA's actions constituted a *per se* taking, in violation of the Takings Clause of the United States Constitution. The Ninth Circuit Court of Appeals rejected plaintiffs' claim, ruling that the moratoria were more appropriately analyzed using the fact-specific inquiry set forth in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978). I was retained by TRPA to defend that decision before the Supreme Court.

I participated in briefing on appeal and presented oral argument before the Supreme Court. We argued that the moratoria did not constitute a *per se* taking. The Court's earlier decisions made clear, we contended, that *per se* takings are the exception — limited to situations involving physical occupation of property or a permanent prohibition.

on productive use. Neither was involved here, and we argued that the moratoria should therefore be evaluated under the factors laid out in *Penn Central*.

The Court, in a 6-3 decision, agreed with our position. Writing for the majority, Justice Stevens noted that the proper inquiry under the Takings Clause considers interference with the rights of the property as a whole. A temporary ban on use, the Court ruled, is not transformed into a total ban — and consequently, a *per se* taking — simply because the right to use the property can be divided into discrete increments of time. Chief Justice Rehnquist, writing for the three dissenters, would have ruled that the moratoria constituted a *per se* taking.

I shared oral argument with Theodore B. Olson, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and now with Gibson, Dunn & Crutcher L.L.P., 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8668, appearing on behalf of the United States as *amicus curiae* supporting the respondents. With me on the brief were E. Clement Shute, Jr., Fran M. Layton, and Ellison Folk of Shute, Mihaly & Weinberger L.L.P., 396 Hayes Street, San Francisco, CA 94102, (415) 552-7272, John L. Marshall, Tahoe Regional Planning Agency, P.O. Box 1038, Zephyr Cove, NV 89448, (775) 588-4547, and Richard J. Lazarus, 600 New Jersey Avenue, N.W., Washington, D.C. 20001, (202) 662-9129. The petitioners were represented by Michael M. Berger of Berger & Norton Law Corporation, 1620 26th Street, Suite 200, South Santa Monica, CA 90404, (310) 449-1000.

8. *Smith v. Doe*, 538 U.S. 84 (2003). In 1994, the State of Alaska enacted the Alaska Sex Offender Registration Act, which required convicted sex offenders to register with the State and made offender information available to the public. The Act applied to any “sex offender or child kidnapper who is physically present in the state.” Two persons who had been convicted of sexual offenses prior to 1994 brought suit contending that applying the Act to them violated the Ex Post Facto Clause of the United States Constitution. A district court upheld the law, but was reversed by the Ninth Circuit Court of Appeals, which ruled that the Act could only be applied to offenders whose crimes were committed after the law’s enactment. I was asked by the Alaska officials named as defendants in the suit to seek Supreme Court reversal of the Ninth Circuit’s ruling.

I participated in preparation of briefs on the merits and presented oral argument before the Supreme Court. We argued that the Act was intended not to punish, but to protect the public by making truthful information about sex offenders available to those who wished to access it. Furthermore, we argued that the law was not punitive in effect under the seven-factor test outlined by the Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). As such, we contended, the Act did not implicate the Ex Post Facto Clause.

The Court agreed with our position and, in a 6-3 ruling, reversed the Ninth Circuit. The opinion for the majority by Justice Kennedy concluded that in enacting the sex offender law, Alaska intended to create a civil regulatory regime and that the law was not so punitive in character as to be effectively transformed into a criminal penalty.

I shared oral argument with Theodore B. Olson, then Solicitor General, Department of Justice, Washington, D.C. 20530, (202) 514-2217, and now with Gibson, Dunn & Crutcher L.L.P., 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8668, who appeared on behalf of the United States as *amicus curiae* in support of the petitioners. My co-counsel on the brief were Jonathan S. Franklin and Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5600, Cynthia M. Cooper, 3410 Southbluff Circle, Anchorage, AK 99515, (907) 349-3483, and Bruce M. Botelho, then Alaska Attorney General, P.O. Box 110300, Juneau, AK 99811, (907) 465-3600. Mr. Botelho is now mayor of the City and Bureau of Juneau, 155 S. Seward Street, Juneau, AK 99801, (907) 586-5240. Principal counsel for the respondents were Verne E. Rupright of Rupright & Foster, 322 Main Street, Wasilla, AK 99654, (907) 373-3215, and Daryl L. Thompson of Daryl L. Thompson P.C., 841 I Street, Anchorage, AK 99501, (907) 272-9322.

9. *KenAmerican Resources, Inc. v. International Union, UMWA*, 99 F.3d 1161 (D.C. Cir. 1996). The issue in this case concerned the scope of an agreement to arbitrate. An arbitrator had ruled that certain coal companies owned by an individual stockholder were subject to arbitration because another company also owned by that same individual had subscribed to an arbitration agreement purporting to bind nonsignatory parents, subsidiaries, and affiliates. I was retained by the companies to overturn that result. I argued the case before the district court, lost on summary judgment, and appealed to the D.C. Circuit.

I participated in the briefing on appeal and presented oral argument before the Court of Appeals. We contended that the district court erred in deferring to the arbitrator on the issue of arbitrability and that the court should decide that issue *de novo*. On the merits, we relied heavily on the agreement documents and explained that the company that had signed the arbitration agreement had carefully limited the scope of its agreement in a manner that did not include the other companies owned by the common sole shareholder.

In a published opinion authored by Judge Silberman and joined by Judges Ginsburg and Rogers, the D.C. Circuit agreed with our arguments and reversed the district court decision enforcing the arbitration award. The Court of Appeals agreed that the lower court had erred in deferring to the arbitrator on the issue of arbitrability, and agreed with our construction of the agreements limiting the scope of the arbitration clause.

Co-counsel in the case were Daniel F. Attridge, Donald Kempf, John S. Irving, Jr., and Gary Brown of Kirkland & Ellis, 655 Fifteenth Street, N.W., Suite 1200, Washington, D.C. 20005, (202) 879-5000, and Jonathan S. Franklin, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5766. John R. Mooney, Mooney, Green, Gleason, Baker, Gibson & Saindon, P.C., 1920 L Street, N.W., Suite 400, Washington, D.C. 20036, (202) 783-0010, argued the appeal for the appellees.

10. *Litton Systems, Inc. v. Honeywell, Inc.*, 238 F.3d 1376 (Fed. Cir. 2001). This case was the third published opinion in a long-running, multi-billion dollar patent and state

law dispute between Litton and Honeywell over proprietary interests in laser gyroscope navigational systems for aircraft. Litton had won a \$1.2 billion jury verdict on patent and state tort grounds, but the district court entered judgment for Honeywell notwithstanding the verdict. The Federal Circuit reversed and remanded for a new trial. The district court did not hold a new trial but instead once again entered judgment for Honeywell. I was retained on appeal of that result.

I participated in the briefing and presented oral argument before the Federal Circuit. The patent law issue concerned whether Litton was estopped from arguing that Honeywell's technology infringed by equivalents, because Litton had amended its patent claims allegedly to exclude all but its precise embodiment of the invention. The answer turned on technical questions involving the operation of the respective ion guns used by Litton and Honeywell to create the perfectly-reflective mirrors employed in ring laser gyroscopes. The state law issues turned on whether there was sufficient evidence in the record to support the jury's finding that Honeywell had interfered with Litton's agreements with the inventor of the pertinent technology.

Our patent claims became moot after oral argument, when the Federal Circuit issued an en banc opinion in another case holding that the doctrine of equivalents was not available at all to a patentee who had amended his claims. The Federal Circuit, however, issued a published opinion agreeing with our position on the state law claims. The opinion was authored by Chief Judge Mayer and joined by Judge Rader. Judge Bryson concurred in part and dissented in part. The Court reversed the district court's grant of judgment for Honeywell, concluding that the lower court had erred in resolving disputed issues of fact. The case was remanded for a new trial on the state law claims.

I was assisted by Catherine E. Stetson of Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, (202) 637-5491, Frederick Lorig and Sidford Brown, Bright & Lorig, 633 West 5th Street, Los Angeles, California 90071, (213) 627-7774, and Rory Radding, Stanton Lawrence, and Carl Bretscher, Pennie & Edmonds L.L.P., 1667 K Street, N.W., Washington, D.C. 20006, (202) 496-4400. Richard G. Taranto, Farr & Taranto, 1220 19th Street, N.W., Suite 800, Washington, D.C. 20036, (202) 775-0184, argued for appellee Honeywell.

17. Citations: From your time as a judge, please provide:

- a. citations for all opinions you have written (including concurrences and dissents);

Fornaro v. James, 2005 WL 1719431 (D.C. Cir. July 26, 2005)

United States v. Jackson, 2005 WL 1704843 (D.C. Cir. July 22, 2005) (dissenting)

Brady v. FERC, 2005 WL 1591463 (D.C. Cir. July 08, 2005)

Booker v. Robert Half International, Inc., 2005 WL 1540796 (D.C. Cir. July 01, 2005)

Outlaw v. Airtech Air Conditioning and Heating, Inc., 2005 WL 1489687 (D.C. Cir. June 24, 2005)

Amoco Production Co. v. Watson, 410 F.3d 722 (D.C. Cir. 2005)

United States v. Lawson, 410 F.3d 735 (D.C. Cir. 2005)
AFL-CIO v. Chao, 409 F.3d 377 (D.C. Cir. 2005) (concurring in part and dissenting in part)
National Treasure Employees Union v. FLRA, 404 F.3d 454 (D.C. Cir. 2005) (concurring)
Universal City Studios LLLP v. Peters, 402 F.3d 1238 (D.C. Cir. 2005)
Public Service Commission of Kentucky v. FERC, 397 F.3d 1004 (D.C. Cir. 2005)
United States v. Toms, 396 F.3d 427 (D.C. Cir. 2005)
Taucher v. Brown-Hruska, 396 F.3d 1168 (D.C. Cir. 2005)
American Federation of State, County & Municipal Employees Capital Area Council 26 v. FLRA, 395 F.3d 443 (D.C. Cir. 2005)
AT&T Corp. v. FCC, 394 F.3d 933 (D.C. Cir. 2005)
Koszola v. FDIC, 393 F.3d 1294 (D.C. Cir. 2005)
United States v. Mellen, 393 F.3d 175 (D.C. Cir. 2004)
United States v. West, 392 F.3d 450 (D.C. Cir. 2004)
Hedgepeth ex rel. Hedgepeth v. Washington Metropolitan Area Transit Authority, 386 F.3d 1148 (D.C. Cir. 2004)
United States v. Tucker, 386 F.3d 273 (D.C. Cir. 2004)
United States v. Holmes, 385 F.3d 786 (D.C. Cir. 2004)
United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004)
In re England, 375 F.3d 1169 (D.C. Cir. 2004)
United States v. Arnett Smith, 374 F.3d 1240 (D.C. Cir. 2004), *reh'g denied*, 401 F.3d 497 (D.C. Cir. 2005) (per curiam)
Midwest ISO Transmission Owners v. FERC, 373 F.3d 1361 (D.C. Cir. 2004)
Williams Gas Processing - Gulf Coast Co. v. FERC, 373 F.3d 1335 (D.C. Cir. 2004)
National Council of Resistance of Iran v. Dep't of State, 373 F.3d 152 (D.C. Cir. 2004)
Independent Equipment Dealers Ass'n v. EPA, 372 F.3d 420 (D.C. Cir. 2004)
Jung v. Mundy, Holt & Mance, PC, 372 F.3d 429 (D.C. Cir. 2004)
Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004) (concurring)
Consumers Energy Co. v. FERC, 367 F.3d 915 (D.C. Cir. 2004)
Duchek v. National Transportation Safety Bd., 364 F.3d 311 (D.C. Cir. 2004)
International Action Center v. United States, 365 F.3d 20 (D.C. Cir. 2004)
PDK Laboratories Inc. v. U.S. DEA, 362 F.3d 786 (D.C. Cir. 2004) (concurring)
United States v. Stanfield, 360 F.3d 1346 (D.C. Cir. 2004)
In re Tennant, 359 F.3d 523 (D.C. Cir. 2004)
Graham v. Ashcroft, 358 F.3d 931 (D.C. Cir. 2004)
LeMoyne-Owen College v. NLRB, 357 F.3d 55 (D.C. Cir. 2004)
Sierra Club v. EPA, 353 F.3d 976 (D.C. Cir. 2004)
Stewart v. Evans, 351 F.3d 1239 (D.C. Cir. 2003)
BDPCS, Inc. v. FCC, 351 F.3d 1177 (D.C. Cir. 2003)
IT Consultants, Inc. v. Republic of Pakistan, 351 F.3d 1184 (D.C. Cir. 2003)
Sioux Valley Rural Television, Inc. v. FCC, 349 F.3d 667 (D.C. Cir. 2003)
Bloch v. Powell, 348 F.3d 1060 (D.C. Cir. 2003)
DSMC Inc. v. Convera Corp., 349 F.3d 679 (D.C. Cir. 2003)
Consumer Electronics Ass'n v. FCC, 347 F.3d 291 (D.C. Cir. 2003)
United States v. Bolla, 346 F.3d 1148 (D.C. Cir. 2003)

Ramaprakash v. FAA, 346 F.3d 1121 (D.C. Cir. 2003)
Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003) (dissenting from denial of rehearing en banc)

b. a list of cases in which appeal or certiorari has been requested or granted;

United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 2257 (May 16, 2005)

United States v. Holmes, 385 F.3d 786 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1388 (Feb. 22, 2005)

In re England, 375 F.3d 1169 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1343 (Feb. 22, 2005)

Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004) (concurring opinion), *cert. denied*, 125 S. Ct. 1928 (Apr. 25, 2005)

Graham v. Ashcroft, 358 F.3d 931 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 83 (Oct. 4, 2004)

Sioux Valley Rural Television, Inc. v. FCC, 349 F.3d 667 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2042 (Apr. 19, 2004)

Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003) (dissent from denial of rehearing en banc), *cert. denied*, 124 S. Ct. 1506 (Mar. 1, 2004)

c. a list of all appellate opinions where your decision was reversed or where your judgment was affirmed;

None.

d. a list of and copies of all your unpublished opinions;

On the D.C. Circuit, panels traditionally issue unpublished decisions per curiam, instead of under one judge's name. Accordingly, this list includes all the per curiam, unpublished decisions of all the merits panels on which I have sat.

Flynn v. Ohio Building Restoration, Inc. (June 27, 2005)

Pennsylvania Mun. Auth. Ass'n v. Leavit (June 3, 2005)

Interstate Industrial Corp. v. Sec. of Labor (May 19, 2005)

Swinson v. Coates & Lane, Inc. (May 18, 2005)

Mercy Medical Skilled Nursing Facility v. Leavitt (May 18, 2005)

i2way Corp. v. FCC (Mar. 23, 2005)

Muckle v. Gonzalez (Mar. 21, 2005)

Richardson v. Loyola (Mar. 4, 2005)

U.S. Ship Management, Inc. v. U.S. Maritime Admin. (Mar. 3, 2005)

United States v. Fornah (Mar. 1, 2005)

Nat'l Alt. Fuels Ass'n v. EPA (Feb. 25, 2005)

Hernandez v. Norinco (Jan. 21, 2005)

Willson v. SunTrust Bank (Dec. 21, 2004)

United States v. Catlett (Nov. 24, 2004)

Pugh v. Socialist People's Libyan Arab Jamahiriya (Nov. 22, 2004)
United States v. Darko (Sep. 24, 2004)
Jacobson v. Dep't of Agriculture (June 1, 2004)
United States v. Kevin Johnson (May 26, 2004)
Communications Workers of America, Local 13000 v. NLRB (May 24, 2004)
Kruvant v. District of Columbia (May 24, 2004)
Teamsters Union Local 557 v. NLRB (Mar. 30, 2004)
Mendoza v. Social Security Commissioner (Mar. 25, 2004)
United States v. Jimmy Johnson (Mar. 19, 2004)
United States v. Cunningham (Mar. 19, 2004)
United States v. Reid (Mar. 15, 2004)
Ulico Casualty Co. v. Superior Management Services (Mar. 11, 2004)
Lopez Contractors, Inc. v. F&M Bank Allegiance (Feb. 18, 2004)
National Cable & Telecomm. Ass'n v. FCC (Feb. 17, 2004)
Hunt v. FCC (Feb. 4, 2004)
Newborn v. United States (Dec. 29, 2003)
Wadley v. International Telecomm. Satellite Org. (Dec. 2, 2003)
Adams Communications Corp. v. FCC (Nov. 24, 2003)
In re Sealed Case (Nov. 14, 2003) (order not available)
Mobilfone Service, Inc. v. FCC (Oct. 24, 2003)
Brown v. Koester Environmental Services, Inc. (Oct. 17, 2003)
Riverdale Mills Corp. v. Sec. of Labor (Oct. 3, 2003)
United States v. McDade (Sep. 16, 2003)

e. and citations to all cases in which you were a panel member.

In addition to the cases cited in parts *a.* and *d.* of this question:

Hamdan v. Rumsfeld, 2005 WL 1653046 (D.C. Cir. July 15, 2005)
National Ass'n of Home Builders v. Norton, 2005 WL 1591058 (D.C. Cir. July 8, 2005)
Porter v. Natsios, 2005 WL 1540797 (D.C. Cir. July 1, 2005)
ITT Industries, Inc. v. NLRB, 2005 WL 1513091 (D.C. Cir. June 28, 2005)
Town of Springfield, NJ v. Surface Transportation Bd., 2005 WL 1489865 (D.C. Cir. June 24, 2005)
TMR Energy Ltd. v. State Property Fund of Ukraine, 411 F.3d 296 (D.C. Cir. 2005)
Taylor v. U.S. Probation Office, 409 F.3d 426 (D.C. Cir. 2005)
City of Naples Airport Authority v. FAA, 409 F.3d 431 (D.C. Cir. 2005)
United States v. Watson, 409 F.3d 458 (D.C. Cir. 2005)
Luck's Music Library, Inc. v. Gonzales, 407 F.3d 1262 (D.C. Cir. 2005)
Wagener v. SBC Pension Benefit Plan-Non Bargained Program, 407 F.3d 395 (D.C. Cir. 2005)
Xcel Energy Services Inc. v. FERC, 407 F.3d 1242 (D.C. Cir. 2005) (per curiam)
SBC Communications Inc. v. FCC, 407 F.3d 1223 (D.C. Cir. 2005)
In re Cheney, 406 F.3d 723 (D.C. Cir. 2005) (en banc)
Wal-Mart Stores, Inc. v. Sec. of Labor, 406 F.3d 731 (D.C. Cir. 2005)
Kreis v. Sec. of Air Force, 406 F.3d 684 (D.C. Cir. 2005)

CSX Transp., Inc. v. Williams, 406 F.3d 667 (D.C. Cir. 2005) (per curiam)
Columbia Gas Transmission Corp. v. FERC, 404 F.3d 459 (D.C. Cir. 2005)
Robertson v. American Airlines, Inc., 401 F.3d 499 (D.C. Cir. 2005)
Jombo v. Commission of Internal Revenue Service, 398 F.3d 661 (D.C. Cir. 2005)
United States v. Garner, 396 F.3d 438 (D.C. Cir. 2005)
DTE Energy Co. v. FERC, 394 F.3d 954 (D.C. Cir. 2005)
Thomas v. Principi, 394 F.3d 970 (D.C. Cir. 2005)
United States v. Moore, 394 F.3d 925 (D.C. Cir. 2005)
Carus Chemical Co. v. EPA, 395 F.3d 434 (D.C. Cir. 2005)
Hutchinson v. CIA, 393 F.3d 226 (D.C. Cir. 2005)
Manion v. American Airlines, Inc., 395 F.3d 428 (D.C. Cir. 2004)
Northern California Power Agency v. Nuclear Regulatory Comm'n, 393 F.3d 223 (D.C. Cir. 2004)
United States v. Morgan, 393 F.3d 192 (D.C. Cir. 2004)
National Treasury Employees Union v. FLRA, 392 F.3d 498 (D.C. Cir. 2004)
Entergy Services, Inc. v. FERC, 391 F.3d 1240 (D.C. Cir. 2004)
United States v. Morton, 391 F.3d 274 (D.C. Cir. 2004)
Resort Nursing Home v. NLRB, 389 F.3d 1262 (D.C. Cir. 2004)
Mick's at Pennsylvania Ave., Inc. v. BOD, Inc., 389 F.3d 1284 (D.C. Cir. 2004)
Fox v. American Airlines, Inc., 389 F.3d 1291 (D.C. Cir. 2004)
United States ex rel. Williams v. Martin-Baker Aircraft Co., Ltd., 389 F.3d 1251 (D.C. Cir. 2004)
Price v. Socialist People's Libyan Arab Jamahiriya, 389 F.3d 192 (D.C. Cir. 2004)
Delta Radio, Inc. v. FCC, 387 F.3d 897 (D.C. Cir. 2004)
Carter v. George Washington University, 387 F.3d 872 (D.C. Cir. 2004)
United States v. Eli, 379 F.3d 1016 (D.C. Cir. 2004)
United States v. McLendon, 378 F.3d 1109 (D.C. Cir. 2004)
Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123 (D.C. Cir. 2004)
Communications and Control, Inc. v. FCC, 374 F.3d 1329 (D.C. Cir. 2004)
BP West Coast Products, LLC v. FERC, 374 F.3d 1263 (D.C. Cir. 2004) (per curiam)
United States v. Brown, 374 F.3d 1326 (D.C. Cir. 2004)
Jaffe v. Pallotta TeamsWorks, 374 F.3d 1223 (D.C. Cir. 2004)
Verizon Telephone Companies v. FCC, 374 F.3d 1229 (D.C. Cir. 2004)
Stokes v. U.S. Parole Comm'n, 374 F.3d 1235 (D.C. Cir. 2004)
Barbour v. Washington Metropolitan Area Transit Authority, 374 F.3d 1161 (D.C. Cir. 2004)
United States v. Quigley, 373 F.3d 133 (D.C. Cir. 2004)
United States v. Ellerbe, 372 F.3d 462 (D.C. Cir. 2004)
Raytheon Co. v. Ashborn Agencies, Ltd., 372 F.3d 451 (D.C. Cir. 2004)
Fletcher v. District of Columbia, 370 F.3d 1223 (D.C. Cir. 2004), *vacated in part*, 391 F.3d 250 (D.C. Cir. 2004)
Herero People's Reparations Corp. v. Deutsche Bank, AG, 370 F.3d 1192 (D.C. Cir. 2004)
Stanford Hosp. and Clinics v. NLRB, 370 F.3d 1210 (D.C. Cir. 2004)
United States v. Hayes, 369 F.3d 564 (D.C. Cir. 2004)
American Postal Workers Union, AFL-CIO v. NLRB, 370 F.3d 25 (D.C. Cir. 2004)

American Federation of Government Employees, AFL-CIO v. Loy, 367 F.3d 932 (D.C. Cir. 2004)

National R.R. Passenger Corp. v. Lexington Ins. Co., 365 F.3d 1104 (D.C. Cir. 2004)

National Ass'n of Government Employees, Local R5-136 v. FLRA, 363 F.3d 468 (D.C. Cir. 2004)

Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB, 363 F.3d 437 (D.C. Cir. 2004)

Evergreen America Corp. v. NLRB, 362 F.3d 827 (D.C. Cir. 2004)

SA Storer and Sons Co. v. Sec. of Labor, 360 F.3d 1363 (D.C. Cir. 2004)

United States v. Thomas, 361 F.3d 653 (D.C. Cir. 2004), *cert. granted, judgment vacated in light of United States v. Booker*, 125 S.Ct. 1056 (Jan. 24, 2005)

Association of Civilian Technicians, Wichita Air Capitol Chapter v. FLRA, 360 F.3d 195 (D.C. Cir. 2004)

United States v. Williams, 358 F.3d 956 (D.C. Cir. 2004)

Godwin v. Sec'y of Housing and Urban Development, 356 F.3d 310 (D.C. Cir. 2004)

English-Speaking Union v. Johnson, 353 F.3d 1013 (D.C. Cir. 2004)

Harris v. FAA, 353 F.3d 1006 (D.C. Cir. 2004)

Whitaker v. Thompson, 353 F.3d 947 (D.C. Cir. 2004)

Warren v. District of Columbia, 353 F.3d 36 (D.C. Cir. 2004)

Natural Resources Defense Council v. Dep't of Energy, 353 F.3d 40 (D.C. Cir. 2004) (per curiam)

American Federation of Government Employees, Nat. Veterans Affairs Council 53 v. FLRA, 352 F.3d 433 (D.C. Cir. 2003)

Recording Industry Ass'n of America, Inc. v. Verizon Internet Services, Inc., 351 F.3d 1229 (D.C. Cir. 2003)

United States v. Riley, 351 F.3d 1265 (D.C. Cir. 2003)

Lohrenz v. Donnelly, 350 F.3d 1272 (D.C. Cir. 2003)

United States v. Howard, 350 F.3d 125 (D.C. Cir. 2003)

Tax Analysts v. IRS, 350 F.3d 100 (D.C. Cir. 2003)

International Union of Operating Engineers, Local 470, AFL-CIO v. NLRB, 350 F.3d 105 (D.C. Cir. 2003)

City of Roseville v. Norton, 348 F.3d 1020 (D.C. Cir. 2003)

United States v. Seiler, 348 F.3d 265 (D.C. Cir. 2003)

Williams Companies v. FERC, 345 F.3d 910 (D.C. Cir. 2003)

Marseilles Land and Water Co. v. FERC, 345 F.3d 916 (D.C. Cir. 2003)

18. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Prior to first joining Hogan & Hartson in 1986, the significant legal activities I pursued generally did not involve litigation. My duties as Associate Counsel to the

President and Special Assistant to Attorney General William French Smith are discussed in the response to question 15b. Among the more significant of those activities were the review of legislation submitted to the President, as well as the drafting and review of executive orders, Presidential proclamations, and other Presidential documents.

Significant non-litigation legal activities since 1986 have focused on improving the quality of appellate practice before the Courts of Appeals and the Supreme Court. In addition to involvement with the American Academy of Appellate Lawyers and the recently-established Edward Coke Appellate Inn of Court, I regularly participated in moot court programs designed to improve the advocacy of those presenting cases before the Supreme Court, in particular the programs sponsored by the State and Local Legal Center and the Georgetown University Law Center Supreme Court Institute. I have also assisted the American Bar Association in presenting its programs on appellate advocacy, appearing as an advocate in its programs, and I write and speak regularly on the subject.

I have also been active in the area of legal reform. I have participated in the work of the American Law Institute, and currently serve on the United States Judicial Conference Advisory Committee on Appellate Rules. I am scheduled to assume the chairmanship of that Committee in October 2005. I served on that Committee as a lawyer prior to assuming the bench and was reappointed as a judicial member after my confirmation. Another example of such activity was my work on the bipartisan Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the Brookings Institution, co-chaired by former Senators Robert Dole and George J. Mitchell. That work is discussed in greater detail in response to question 26.

In perhaps an excess of caution, I filed a report under the Lobbying Disclosure Act in 1998 in connection with legal work for the Western Peanut Growers Association and the Panhandle Peanut Growers Association. These were clients of the firm primarily represented by another partner. My activities involved legal analysis to assist the partner; I do not recall meeting with any government officials in connection with the representation.

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

I undertook my first effort at teaching, apart from occasional guest lecture stints, this summer, co-teaching a course on International Trade as part of the Georgetown Law School summer program at University College London. I was to teach the first two weeks of the course; Judge Timothy Stanceu of the U.S. Court of International Trade was to teach the second two weeks. My teaching was abbreviated due to the present nomination, and Judge Stanceu took over after I had taught only four classes. The topics I taught included the arguments in favor of free trade and in favor of protection, the allocation of authority in domestic law to regulate international trade, the international

law basis for international trade regulation, and the basic features of the General Agreement on Tariffs and Trade and the World Trade Organization.

20. **Party to Civil Legal or Administrative Proceedings:** State whether you, or any business of which you are or were an officer, have ever been a party or otherwise involved as a party in any civil, legal or administrative proceedings. If so, please describe in detail the nature of your participation in the litigation and the final disposition of the case. Include all proceedings in which you were a party in interest.

I am the subject of Judicial Council Complaint No. 05-13, filed June 6, 2005, by Keith Russell Judd. Acting Chief Judge Harry Edwards issued an order dismissing the complaint on July 7, 2005. Mr. Judd filed an appeal to the Judicial Council on July 19, 2005; that appeal is now pending. The complaint charges me with practicing medicine without a license in connection with an order disposing of complainant's motion to proceed *in forma pauperis*. Mr. Judd, who had incurred three qualifying dismissals under 28 U.S.C. § 1915(g), moved to proceed *in forma pauperis* on the ground that he was "under imminent danger of serious physical injury." The order denying Mr. Judd's motion ruled that "[c]hronic medical conditions such as the hernia discussed in appellant's motion generally do not represent an 'imminent danger of physical injury' for purposes of 28 U.S.C. § 1915(g)."

I am a named party in *Rodriguez, et al. v. Nat'l Ctr. for Missing & Exploited Children, et al.*, No. 03-cv-00120 (D.D.C. filed Jan. 27, 2003), *appeal docketed*, No. 05-5202 (D.C. Cir. May 23, 2005). I was added as a named defendant — along with eight other judges on the D.C. Circuit, Chief Justice Rehnquist, and several judges from other circuits — in plaintiff's First Amended Complaint, filed on March 8, 2005. On March 31, 2005, the District Court for the District of Columbia dismissed the action with regard to the defendants in the original complaint, and ordered the amended complaint stricken. A notice of appeal was filed by Mr. Rodriguez on May 23, 2005. According to published judicial opinions in the matter, Mr. Rodriguez is a Virginia resident with ties to Colombia. He lived in Colombia for much of the period between 1987 and 1999 and there fathered a child, Isidoro, in 1989. In 2001, Isidoro and his mother visited Mr. Rodriguez in Virginia. Near the end of the visit, Mr. Rodriguez would not allow Isidoro to return to Colombia and filed a petition to modify custody in a Fairfax County, Virginia, court. Isidoro's mother answered with a suit in federal district court for the Eastern District of Virginia under the Hague Convention on the Civil Aspects of International Child Abduction; she won, and won again on appeal. Mr. Rodriguez now alleges a conspiracy on the part of numerous federal and private defendants to deprive him of his constitutional rights.

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

None.

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

If confirmed, I would resolve any conflict of interest by looking to the letter and spirit of the Code of Conduct for United States Judges (although it is not formally binding on members of the Supreme Court of the United States), the Ethics Reform Act of 1989, 28 U.S.C. § 455, and any other relevant prescriptions. I would recuse myself from any matter involving my former law firm or former clients for whom I did work, for the periods specified in the Judicial Conference Guidelines. I would also recuse myself from matters in which I participated while a judge on the court of appeals.

23. **Outside Commitments During Court Service:** Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

Prior to this nomination, I had agreed to teach a seminar on Supreme Court Litigation beginning in January 2006, at the Georgetown University Law Center.

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

A copy of the financial disclosure report is attached.

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

See attached Statement of Net Worth.

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

I participated in the briefing and orally argued *Barry v. Little*, 669 A.2d 115 (D.C. 1995), before the District of Columbia Court of Appeals, entirely on a pro bono basis. My client in that appeal was a class of District of Columbia residents receiving general public

assistance benefits — the neediest people in the District. On behalf of that class, we argued that a change in eligibility standards that resulted in a termination of general public assistance benefits without an individual evidentiary hearing denied class members procedural due process. We asserted that class members had a limited entitlement to continued receipt of welfare benefits, and that even if new standards were to be applied, benefits could not be terminated in the absence of an individual evidentiary hearing. My co-counsel in that proceeding included the Washington Legal Clinic for the Homeless, Legal Counsel for the Elderly, the American Civil Liberties Union Fund of the National Capital Area, the Information, Protection & Advocacy Center for Handicapped Individuals, Inc., and the Neighborhood Legal Services Program. I personally spent over 110 hours handling the appeal and related matters. The Court of Appeals ruled against our position and upheld the legislative alteration of standards and accompanying automatic termination of benefits.

I briefed and argued *United States v. Halper*, 490 U.S. 235 (1989), before the Supreme Court entirely on a pro bono basis. The federal government sought to assess civil penalties against Mr. Halper, who had previously been convicted under federal criminal law for the same conduct giving rise to the civil penalties. Mr. Halper was not represented by counsel in the district court. When the Supreme Court agreed to hear the government's direct appeal of the judgment in Mr. Halper's favor, the Court invited me to brief and argue in defense of the judgment below. I personally spent over 200 hours briefing and arguing the case, which resulted in a unanimous Supreme Court decision in Mr. Halper's favor.

In addition to the foregoing, I participated personally in other pro bono efforts in which my former law firm, Hogan & Hartson, had been involved. Hogan & Hartson has a historic commitment to providing legal services to the disadvantaged, a commitment embodied in its Community Services Department. That department is devoted exclusively to rendering legal services to those who cannot afford them. I assisted personally in various of the firm's efforts in this area, including spending 25 hours assisting in the firm's representation of an inmate on Florida's death row. I regularly assisted the firm's pro bono efforts in my area of specialization, not only by handling pro bono appeals myself, as in *Barry v. Little* and *United States v. Halper*, but also by helping prepare colleagues handling pro bono appeals for oral argument. I have done the latter with respect to pro bono matters involving such issues as termination of parental rights, minority voting rights, noise pollution at the Grand Canyon, environmental protection of Glacier Bay, Alaska, and election law challenges. Each of these moot court projects involves study of the briefs in the case, participation in one or often more moot court practice sessions for the arguing attorney, and discussion of ways to improve that attorney's presentation and the substantive legal arguments.

My pro bono legal activities were not restricted to providing services for the disadvantaged. For example, I participated on a pro bono basis in a program sponsored by the National Association of Attorneys General to help prepare representatives of state and local governments to argue before the Supreme Court of the United States. Several times per year, I reviewed the briefs in selected cases, and then met with state or local counsel

for a moot court session prior to counsel's Supreme Court argument. Several of the Supreme Court Justices have commented on the need to improve the quality of state and local representation before the Court and I considered participation in the NAAG program to be a positive contribution to that end. By the same token, I assisted other attorneys from both the public and private sectors on a pro bono basis by participating in a similar moot court program conducted by the Supreme Court Institute at the Georgetown University Law Center. I also helped present programs on appellate advocacy sponsored by the American Bar Association Appellate Practice Institute, which has a similar objective of improving the quality of appellate advocacy.

I have also sought to assist in improving public understanding of our legal system. Every year I participate in a program jointly sponsored by Street Law, Inc., and the Supreme Court Historical Society, which brings selected high school teachers from around the country to Washington, D.C. to learn about the Supreme Court, so that they might return home better equipped to teach their students and assist other teachers. I have continued my participation in that program after becoming a judge. I also regularly hosted groups of students from the National Youth Leadership Forum and the American University Washington semester program who are studying the legal system and the Supreme Court. With respect to legal education, I have served as a judge for the moot court competition sponsored by the National Black Law Students Association, and participated in my firm's "Introduction to Legal Reasoning" program. That program — sponsored by the Washington Lawyers' Committee for Civil Rights and Urban Affairs — helps prepare entering first year law students from disadvantaged or traditionally underrepresented backgrounds for law study.

In addition, I also actively participated on a pro bono basis in efforts to achieve legal reform. My activities in connection with the Advisory Committee on Appellate Rules and the American Law Institute reflect this commitment. To cite another example, in 1999 I was asked to participate in the Joint Project on the Independent Counsel Statute sponsored by the American Enterprise Institute and the Brookings Institution, co-chaired by former Senators Robert Dole and George J. Mitchell. This bi-partisan group (other members were Zoe Baird, Drew Days, Carla Hills, Bill Paxon, David Skaggs, Richard Thornburgh, and Mark Tuohey) was convened to consider and propose legislative amendments to the Independent Counsel Statute. The group issued a comprehensive report, and I joined Drew Days in testifying together with Senators Dole and Mitchell before Congress on the results of our efforts.

27. Selection Process:

- a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). List all interviews or communications you had with the White House staff or the Justice Department regarding this nomination, the dates of such interviews or communications, and all persons present or participating in such interviews or communications.

I was interviewed on April 1, 2005 by the Attorney General. I was next interviewed on May 3, 2005 by a group including the Vice President, Attorney General, Chief of Staff Andrew Card, Counsel to the President Harriet Miers, Deputy Chief of Staff Karl Rove, and the Vice President's Chief of Staff I. Lewis Libby. On May 23, 2005, I was interviewed by Ms. Miers separately. I had a telephone interview with Ms. Miers and Deputy Counsel to the President William K. Kelley on July 8, 2005. I had several telephone conversations with Mr. Kelley between July 8 and July 19, 2005. Finally, I was interviewed by the President on July 15, 2005; Ms. Miers was present for that interview. There were also telephone conversations with Mr. Kelley arranging the foregoing interviews.

- b. Has anyone involved in the process of selecting you as a judicial nominee (including but not limited to any member of the White House staff, the Justice Department, or the Senate or its staff) discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully. Please identify each communication you had during the six months prior to the announcement of your nomination with any member of the White House staff, the Justice Department or the Senate or its staff referring or relating to your views on any case, issue or subject that could come before the Supreme Court of the United States, state who was present or participated in such communication, and describe briefly what transpired.

No.

28. **Judicial Activism:** Please discuss your views on the following criticism involving "judicial activism."

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

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

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

It is difficult to comment on either “judicial activism” or “judicial restraint” in the abstract, without reference to the particular facts and applicable law of a specific case. On the one hand, courts should not intrude into areas of policy making reserved by the Constitution to the political branches. As Justice Frankfurter has noted, “Courts are not representative bodies. They are not designed to be a good reflex of a democratic society.” In our democratic system, responsibility for policy making properly rests with those branches that are responsible and responsive to the people. It was precisely because the Framers intended the judiciary to be insulated from popular political pressures that the Constitution accords judges tenure during good behavior and protection against diminution of salary. To the extent the term “judicial activism” is used to describe unjustified intrusions by the judiciary into the realm of policy making, the criticism is well-founded.

At the same time, the Framers insulated the federal judiciary from popular pressure in order that the courts would be able to discharge their responsibility of interpreting the law and enforcing the limits the Constitution places on the political branches. Thoughtful critics of “judicial activism”— such as Justices Holmes, Frankfurter, Jackson, and Harlan — always recognized that judicial vigilance in upholding constitutional rights was in no sense improper “activism.” It is not “judicial activism” when the courts carry out their constitutionally-assigned function and overturn a decision of the Executive or Legislature in the course of adjudicating a case or controversy properly before the courts. Chief Justice Marshall made the point clearly in his opinion for the Court in *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821):

We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. . . . Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty.

It is not part of the judicial function to make the law — a responsibility vested in the Legislature — or to execute the law — a responsibility vested in the Executive. As Marshall wrote in his most famous opinion, however, “[it] is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177 (1803). When doing so results in checking the Legislature or Executive, the judiciary is not engaged in “activism;” it is rather carrying out its duty under the law.

The proper exercise of the judicial role in our constitutional system requires a degree of institutional and personal modesty and humility. This essential modesty manifests itself in several ways:

First, judges must be constantly aware that their role, while important, is limited. They do not have a commission to solve society’s problems, as they see them, but simply to decide cases before them according to the rule of law. When the other branches of government exceed their constitutionally-mandated limits, the courts can act to confine them to the proper bounds. It is judicial self-restraint, however, that confines judges to their proper constitutional responsibilities.

Second, a judge needs the humility to appreciate that he is not necessarily the first person to confront a particular issue. Precedent plays an important role in promoting the stability of the legal system, and a sound judicial philosophy should reflect recognition of the fact that the judge operates within a system of rules developed over the years by other judges equally striving to live up to the judicial oath.

Third, a judge must have the humility to be fully open to the views of his fellow judges on the court. Collegiality is an essential attribute of judicial decision-making at the appellate level. This does not refer to personal friendliness, but instead an appreciation that fellow judges have read the same briefs, studied the same precedent and record, and participated in the same oral argument. Their views on the appropriate analysis or outcome accordingly deserve the most careful and conscientious consideration.

A good judge must be a thoughtful skeptic at each stage of the appellate process. Just as a firm view on the correct result should not be reached after reading only the opening brief, so too such a settled view should not be reached simply after studying the briefs without reviewing the record, or reading the precedent without testing the lawyers' contentions during oral argument, or analyzing the different positions without receptive consideration of the views of the other judges. Writing the opinion is a critical part of this decision process. I and most judges have had the experience of attempting to draft an opinion that would just "not write" — because the analysis could not withstand the discipline of careful, written exposition. When that happens, it is time to sit down with the other judges on the panel and revisit the preliminary resolution. All this requires a degree of modesty and humility in the judge, an ability to recognize that preliminary perceptions may turn out to be wrong, and a willingness to change position in light of later insights.