

**NOMINATIONS OF MICHAEL B. THORNTON,
JOSEPH W. NEGA, AND F. SCOTT KIEFF**

HEARING

BEFORE THE

**COMMITTEE ON FINANCE
UNITED STATES SENATE**

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

ON THE

NOMINATIONS OF

**MICHAEL B. THORNTON, TO BE A JUDGE OF THE UNITED STATES TAX
COURT; JOSEPH W. NEGA, TO BE A JUDGE OF THE UNITED STATES
TAX COURT; AND F. SCOTT KIEFF, TO BE A MEMBER OF THE UNITED
STATES INTERNATIONAL TRADE COMMISSION**

JULY 18, 2013



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THE UNITED STATES INTERNATIONAL
TRADE COMMISSION**

THURSDAY, JULY 18, 2013

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, DC.

The hearing was convened, pursuant to notice, at 2:50 p.m., in room SD-215, Dirksen Senate Office Building, Hon. Max Baucus (chairman of the committee) presiding.

Present: Senators Nelson, Hatch, and Thune.

Also present: Democratic Staff: Mac Campbell, General Counsel; Lisa Pearlman, International Trade Counsel; Rory Murphy, International Trade Analyst; and Tiffany Smith, Tax Counsel. Republican Staff: Everett Eissenstat, Chief International Trade Counsel; Shane Warren, International Trade Counsel; Nicholas Wyatt, Tax and Nominations Professional Staff Member; Rebecca Nasca, Staff Assistant; and Richard Chovanec, Detailee.

**OPENING STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR
FROM MONTANA, CHAIRMAN, COMMITTEE ON FINANCE**

The CHAIRMAN. The committee will come to order.

Winston Churchill once said, "All the great things are simple, and many can be expressed in single words: freedom, justice, honor, duty, mercy, hope." These principles guide our democracy, and, while simple in concept, they require vigilance to maintain. These principles require experienced citizens willing to embrace public service. They require a fair and reasonable legal system. They require public confidence in our government.

The nominees before us must be vigilant in honoring these principles. Between them, they have decades of experience and, if confirmed, they will play an important role in protecting the interests of millions of Americans.

Mr. Scott Kieff, you have been nominated by the President to serve as a Commissioner of the U.S. International Trade Commission, commonly referred to as the ITC. The ITC enforces our Nation's trade laws, including our trade remedy laws and section 337.

If confirmed, we will look to you to fairly and objectively enforce those laws. We will also call upon you and the rest of the ITC to provide the committee with economic research on issues affecting global trade. I can tell you, they are very important and mean a lot to us.

The ITC has provided us thorough reports in the past of the barriers U.S. exporters and innovators face in foreign markets. For example, Senator Grassley and I requested a ground-breaking ITC study on Chinese intellectual property theft. That study provided us with an independent, authoritative look at the impact of IP theft on U.S. jobs and our economy.

I can assure you, Mr. Kieff, it will keep you busy. The Finance Committee will continue to move forward with an ambitious trade agenda. We will look to you for objective analysis when shaping our policy.

As a graduate of MIT and the University of Pennsylvania, Mr. Kieff, you have spent your career working on issues related to international trade, in both the public and private sector and in academia. Over the past 15 years, you have been teaching law at some of the Nation's top universities, including George Washington, Chicago, Harvard, and my alma mater Stanford, and I know my colleagues on the committee will not hold that against you.

Also with us today are Judge Michael Thornton and Joseph Nega. You have both been nominated by President Obama to serve as judges on the U.S. Tax Court. Judge Thornton, this is a return engagement for you. You appeared before this committee about 15 years ago after being nominated to the U.S. Tax Court by President Clinton.

You cut your teeth as a tax counsel here on Capitol Hill for the Ways and Means Committee, then at the Treasury Department, serving under Secretary Rubin. Welcome back. You have done a great job at the Tax Court, rising up to become the chief judge. I am pleased that the President has re-nominated you.

Finally, we will consider the nomination of Mr. Joseph Nega to the U.S. Tax Court. Mr. Nega, you have dedicated your entire life, your entire career, to public service. You began as a young staffer in the House and served for the past 28 years on the Joint Committee on Taxation. You now serve as a senior legislative counsel at JCT. I do not know what this committee or this Congress would do without a great team at JCT, and that is very much an understatement. We very much value your work. You cannot believe how much we value your work.

As you know, Judge Thornton, and as you will soon learn, Mr. Nega, you are taking on a great responsibility at the United States Tax Court. The Court provides Americans a forum to address tax issues. Approximately 30,000 cases are filed in the Court annually. If confirmed, you will be the arbiter on these cases, and you must ensure that our tax codes are administered fairly.

In the wake of the IRS scandal, public confidence in our tax system is low. You must be thorough; you must give our citizens a fair day in court. Your work can go a long way toward restoring the public's confidence.

I thank all three of you for your willingness to serve in these positions to which you have been nominated. You will have the complex task of protecting and maintaining freedom, justice, honor, duty, mercy, and hope, the great things of which Winston Churchill spoke. Good luck.

[The prepared statement of Chairman Baucus appears in the appendix.]

The CHAIRMAN. Senator Hatch?

**OPENING STATEMENT OF HON. ORRIN G. HATCH,
A U.S. SENATOR FROM UTAH**

Senator HATCH. Well, thank you, Mr. Chairman. I welcome the opportunity to hear from our witnesses here today, and I am pleased to welcome Scott Kieff to the committee today. He is nominated to be a member of the U.S. International Trade Commission, and that is very important to me.

His distinguished career includes work as a law professor at several prestigious universities. He has also served as a law clerk to the Honorable Giles S. Rich of the U.S. Court of Appeals for the Federal Circuit and practiced law for 6 years in Chicago and New York.

Mr. Kieff is currently a senior fellow at Stanford's Hoover Institution, where he directs a project studying the law, economics, and the politics of innovation. I have to say to Mr. Kieff, your background is very impressive to me. I believe you will be an exceptional addition to the International Trade Commission, and I am looking forward to working with you and seeing things work a little bit better than they have.

I am particularly impressed with your extensive background in intellectual property issues. That is critical to our country and very much ignored by many in the world today. Intellectual property is the lifeblood of the U.S. economy, and providing adequate protection to intellectual property is fundamental to our continued ability to innovate and compete in the global economy.

The ITC plays an important role in administering the laws designed to protect U.S. intellectual property rights. For example, the ITC's section 337 process is a vital tool for U.S. companies that face unfair competition from foreign imports that infringe their intellectual property. I have a longstanding interest in making sure this process operates as effectively as possible.

Senator Baucus and I recently requested that the Government Accountability Office examine the effectiveness of the enforcement of ITC's section 337 exclusion orders. The ITC also conducts important analytical work related to intellectual property. For example, the ITC conducted an important study requested by this committee on the effects that intellectual property rights infringement and indigenous innovation policies in China have on U.S. jobs and, of course, our economy.

The ITC is also preparing a study requested by this committee examining digital trade in the U.S. and global economies, including the importance of effective intellectual property rights protection. So, although the ITC is not a policy-making agency, I believe Mr. Kieff's background and expertise on intellectual property issues

will bring an important perspective to the agency's work, and I intend to support you.

Today we will also hear from two nominees to the U.S. Tax Court. As we all know, the Tax Court is very important, as it is the only venue in which a taxpayer may challenge the government before paying an assessed tax liability. The court gives taxpayers a chance to be fully heard in a neutral and public forum.

One of the nominees before us today is Joseph Nega, who currently serves as Senior Legislative Counsel at the Joint Committee on Taxation. Here on the Finance Committee, we have benefitted from Mr. Nega's work for a long time. He will leave behind very big shoes to fill at the JCT. So we are proud of you and what you have been able to do.

We will also hear from Judge Michael Thornton, who has already served very well a term on the Tax Court. Should he be reconfirmed, taxpayers throughout the country will continue to benefit from having his knowledge and expertise on the Tax Court.

As is customary for Tax Court judges who are willing to continue serving after their terms expire, Chairman Baucus and I encouraged President Obama to reappoint Judge Thornton, and I am glad that he followed our advice—one of the few times that he has, of course. No, he has been pretty good about it.

In the same letter, we also recommended to the President that he reappoint Judge L. Paige Marvel, whose term has also expired. I hope that we will be able to consider that nomination soon. It is the taxpayers who will pay the price if the Tax Court is not kept staffed with qualified judges.

So, as you can see, we have some important positions to fill, and, from the looks of it, we have some very qualified nominees. So I want to thank you, Mr. Chairman, and I look forward to hearing from these nominees. I look forward to supporting all three of them.

The CHAIRMAN. Well, thank you, Senator, very, very much. I deeply appreciate working with you.

[The prepared statement of Senator Hatch appears in the appendix.]

The CHAIRMAN. I would now like to introduce the panel, but, before doing so, I would like to recognize two in the audience who are very important to the Court and very important to this committee: Judge John Colvin and Judge Elizabeth Paris from the U.S. Tax Court.

Would you both stand and be recognized, please? We honor you both very much for your service. It is good to see good people going on and continuing to perform good work in other areas as you have in the Tax Court. Thanks for your service.

The first witness is Judge Michael Thornton, nominated to his second term as judge on the U.S. Tax Court. The second witness is Joseph Nega, nominated to be a judge on the U.S. Tax Court. Finally is Scott Kieff, nominated to be a member of the U.S. International Trade Commission.

Judge Thornton, why don't you begin? You probably know our practice here, which is, your statement is automatically included in the record, and why don't you summarize for about 5 minutes? If

you want to speak longer and have great wisdom to impart, we are ready to learn.

Judge THORNTON. I will be very concise. Chairman Baucus, Ranking Member Hatch——

The CHAIRMAN. Actually, before you begin, I would like you to introduce your family.

Judge THORNTON. I will be glad to do that. I have with me today my wife, Alexandra Deane Thornton——

The CHAIRMAN. Hi.

Judge THORNTON [continuing]. And my daughter, Kaley Thornton.

The CHAIRMAN. Could you both stand again and be recognized? [Applause.]

Go ahead.

STATEMENT OF HON. MICHAEL B. THORNTON, NOMINATED TO BE A JUDGE OF THE UNITED STATES TAX COURT, WASHINGTON, DC

Judge THORNTON. So, Chairman Baucus, Ranking Member Hatch, distinguished members of the committee, thank you for the privilege of appearing before you today. I last appeared before this committee a little over 15 years ago, after I was nominated for my first term as a Tax Court judge. I am grateful to President Obama for nominating me for a second term on the Court, and I am grateful to you and the committee's outstanding staff for processing my nomination so promptly.

When she attended my first confirmation hearing, Kaley here, who is sitting behind me, was just 3 years old and was looking forward to entering preschool. It is a vivid reminder of the passage of time that she is now looking forward to attending Duke University in the fall. My other daughter, Camille, unfortunately cannot be here today because she is attending a summer camp out of town.

I came to the Tax Court after years of tax experience in private practice, on the Hill, and in the Treasury Department. That was all good preparation for the past 15 highly rewarding years on the Tax Court, where I have endeavored to maintain the Court's long tradition and high standards of resolving tax controversies fairly, impartially, and expeditiously, in accordance with congressional intent.

In addition to trying and deciding hundreds of cases, I have worked actively to better the Court administratively in ways such as modernizing its rules and bringing the Court more up to date with the use of technology for e-filing and providing remote electronic access to the Court's records.

Last year I was honored to have been elected by my colleagues for a term as Chief Judge. If confirmed for another term on the Court, I would hope to continue to help maintain and enhance the public's confidence in the Tax Court as the forum of choice for litigating Federal tax controversies.

Thank you very much. I would be happy to answer any questions you might have.

The CHAIRMAN. Thank you, Judge.

[The prepared statement of Judge Thornton appears in the appendix.]

The CHAIRMAN. You are next, Mr. Nega. If you could introduce your family, that would be great, too.

Mr. NEGA. My wife Cecily Rock is here, and my sons David and Philip.

The CHAIRMAN. Could you all stand, please? All three? Great. Thanks. [Applause.]

Why don't you proceed?

**STATEMENT OF JOSEPH W. NEGA, NOMINATED TO BE A
JUDGE OF THE UNITED STATES TAX COURT, WASHINGTON, DC**

Mr. NEGA. Thank you. Chairman Baucus, Ranking Member Hatch, distinguished members of the Finance Committee, it is a privilege for me to be here today. Thank you for holding this hearing to consider my nomination to be a judge on the U.S. Tax Court. I am very grateful to President Obama for nominating me.

I would also like to thank the Finance Committee staff members who have been generous with their time while working with me on my nomination. It is with mixed emotions that I appear before you here today after 28 years as a member of the staff of the Joint Committee on Taxation on Capitol Hill. I have truly enjoyed serving members of the House and Senate on tax legislative matters, both on tax policy questions and technical tax issues.

When I came to Capitol Hill in 1985 as a young attorney, it was at the beginning of the legislative process which culminated in the passage of the Tax Reform Act of 1986. Since then, as a Joint Tax Committee staffer, I have provided assistance to members and their staffs, as well as to committee staffs, on tax proposals covering a range of subject areas.

During the 1980s, I attended Georgetown Law School at night and earned a master's degree in tax law. I believe that my training and my professional experience in the tax field give me the background I will need to serve as a Tax Court judge and to fairly and impartially apply the tax law.

I owe a great debt of thanks to all my colleagues on the staff of the Joint Committee on Taxation, especially our chief of staff, Tom Barthold. The tax lawyers, accountants, and economists of the staff of the Joint Committee on Taxation have shown me over and over the value of teamwork among knowledgeable professionals with a wide range of expertise.

The clerks and support staff are among the best on the Hill. When I leave Capitol Hill, I will miss the sense of shared work and public service with these individuals and all the many staffers who assist Congress in their attempts to serve the American people. Sorry about this, Senator. This is not my usual role. [Laughter.]

I would like to thank my parents, who instilled in me a strong sense of public service. I suspect my mother will be tuning in to C-SPAN to watch this hearing in Chicago.

I would also like to thank my wife of 24 years, Cecily Rock, who is here today, and my sons David and Philip for their love and support. If confirmed, I will work diligently to resolve tax controversies fairly and expeditiously. Thank you for the opportunity to testify.

The CHAIRMAN. Thank you, sir, very much.

[The prepared statement of Mr. Nega appears in the appendix.]

The CHAIRMAN. Mr. Kieff, your family?

Mr. KIEFF. If I may, since we have a large group and I will briefly introduce them in the remarks, may I just ask my family to stand, please, and be recognized?

The CHAIRMAN. Sure.

Mr. KIEFF. I thank them all for coming, many from great distances. [Applause.]

The CHAIRMAN. I think you have the record. [Laughter.]

Mr. KIEFF. They are a supportive bunch.

STATEMENT OF F. SCOTT KIEFF, NOMINATED TO BE A MEMBER OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION, WASHINGTON, DC

Mr. KIEFF. Chairman Baucus, Ranking Member Hatch, and members of the committee, thank you for inviting me to appear before you today to consider my nomination. I am grateful to President Obama for nominating me, to Minority Leader McConnell for supporting my nomination, and to Chairman Baucus and to Ranking Member Hatch for bringing us together for this confirmation hearing.

I also am grateful for the love and support from my family, several of whom are with me today: my wife Rebecca, my mom Jacqueline, my sister Elizabeth and brother-in-law Tom, their children Asher and Estelle, my uncle Nelson, and my parents-in-law Terrie and Roy. Although he could not be here today, I give special thanks to my 4-month-old son Evan for being such a great sounding board during his midnight feedings. [Laughter.]

And recognizing how hard it can be for the doctor to become the patient, I know how much my father Elliott and brother David wanted to be here today. I wish my dad a speedy recovery and appreciate David covering for mom on dad's care so she could travel to be here.

I am particularly honored and humbled to be here across the river from Arlington National Cemetery, where two of my grandparents are buried, as we discuss this opportunity for me to continue my family's tradition of public service.

The opportunity to engage each area of the Commission's wide-ranging docket would call upon many favored aspects of the work I have long enjoyed throughout my career working as a practitioner, an academic, mediator, arbitrator, and consultant.

The title 7 antidumping and countervailing duty portion of the docket would provide a welcome opportunity to continue my work, applying diverse statutory injury factors to the facts and circumstances of specific industries and products.

I would take particular pleasure in the section 337 portion of the Commission's docket, as I have throughout my 2 decades of devotion to the field of intellectual property. And the Commission's research activities on industry and economic analysis relating to section 332 and other statutory duties to prepare reports and provide trade policy support, offer a fascinating range of opportunities to continue my academic commitment to exploring and explaining real-world impacts of various approaches to trade.

In all of these areas, I would greatly enjoy working with the other members of the Commission and the Commission staff as we exchange ideas and learn from each others' diverse wealth of expe-

riences and perspectives. Having long enjoyed working as a neutral mediator and arbitrator selected by all sides of a given dispute, if I were confirmed to this post I would enjoy faithfully and impartially working within the legal framework applicable to each matter then before the Commission to enforce the law based on the particular facts.

Several areas of the Commission's docket have been the focus of increasing attention and policy debates, and I understand the many diverse perspectives that have been offered. But I take seriously the limited role of a Commissioner and recognize that any legal change would be the domain of this committee, the Congress, and the President, with interpretation when appropriate from courts that review the Commission's work.

Over the past few months, I have enjoyed frank, substantive discussions with several of you and your staffs, and I look forward to answering any questions you may have. Thank you.

The CHAIRMAN. Thank you, Mr. Kieff.

[The prepared statement of Mr. Kieff appears in the appendix.]

The CHAIRMAN. Judge Thornton, what are your thoughts now that you have been on the Court 15 years? Do you have some ideas about the tax laws we pass here, which ones maybe make sense and which ones do not, which ones are unnecessarily complicated?

As you know, we are working on passing tax reform legislation in this Congress. Is there any advice you could give us as a judge to minimize litigation or to get more clarity, perhaps? I do not know if that is going to minimize litigation, but just give us any thoughts that you might have in proceeding forward. I would ask the same question of you, Mr. Nega. Although you do not have experience as a Tax Court judge, you certainly do over at the Joint Committee on Taxation.

Judge THORNTON. With all due respect, I would have to defer to the Congress and the policies that are enacted into tax law. I think as a general principle, simpler is better. Probably simpler tax laws, I imagine, contribute to fewer controversies, even though there are a lot of factors that would go into determining the case load at the Court.

The experience of the Tax Reform Act of 1986 is probably instructional. In the mid-1980s, the Tax Court experienced an explosion of case filings. After the Tax Reform Act of 1986, there was a diminishing of the cases filed. I think the Tax Reform Act of 1986 was partially responsible for that, some of the simplification matters and the base-broadening matters—not entirely responsible, but partly. That is probably a good example.

Another example: in 1993 when Congress enacted section 197, which provided a way of reducing controversy about the amortization of intangibles, I think that has been a very successful provision, and very few cases that I see come into controversy about that. So, just as a general proposition, I think measures to simplify the tax code probably result in benefits to the Court in terms of fewer controversies.

The CHAIRMAN. In what area do you find most litigation? Over what section or area of the code?

Judge THORNTON. You know, that is a hard question to answer. Most of our petitioners are pro se, unrepresented taxpayers. Most

of them have fairly small amounts at issue. So most of the types of issues that we see from them are the types of issues you might expect: substantiation issues, unreported income, that type of thing. So, given the broad base of people, the 30,000 cases a year that are filed in our court, most of those people tend to have fairly run-of-the-mill type issues like that.

The CHAIRMAN. All right.

Mr. Nega, from your perspective on the Joint Committee, is there any advice you have? I mean, you all are going to get confirmed, so do not worry about that. [Laughter.]

So just be candid, knowing you are going to get confirmed.

Mr. NEGA. Well, thank you, Senator. Well, this is my last opportunity to discuss tax policy because, as a member of the judiciary, it will be my job to take the tax laws as passed by Congress and signed by the President and enforce them expeditiously.

So I will take the opportunity to say that I agree with Judge Thornton: simpler is better. The experience of the 1986 act taught us that. I do recognize that there are countervailing factors that members of Congress have to take into account, whether or not it is social or fiscal policy. As a general rule, simpler is better in most things, especially in the tax law.

The CHAIRMAN. We all think that. Sometimes it is hard to know what simple is. I mean, the statute might be simple, but it can be applied in a near-infinite number of circumstances. Take the First Amendment of the Constitution, "Congress shall pass no law abridging the freedom of speech." Well, what in the heck does that mean? I mean, when you say "simpler," you mean, what? Base-broadening, fewer provisions? Does that help or what?

Mr. NEGA. What they taught me back in my JD and my LLM programs was, as a general rule, remember four words: "base-broadening" and "lower rates." In my role as staff person, that is something that I have always taken to heart in trying to advise other staff people. I think that there are going to be exceptions from that rule. It is a very complicated economy, and Congress has to respond to the complicated world we live in. But if you will remember broad base, lower rates, you are a long way towards improving the tax system.

The CHAIRMAN. Mr. Kieff, we are going to take up trade legislation this year, and certainly Trade Promotion Authority. It might be an opportunity to also address legislation as it affects the ITC. Your thoughts, ideas, recommendations? Again, you are going to be confirmed too, so do not worry.

Mr. KIEFF. Well, you are very kind, Chairman Baucus. As my colleagues at the table have expressed, I too would be in a role that would be, not a policy role, it would be a role in which I would be constrained to apply the law to the facts.

But I hear what you are saying and agree that there are important issues, and I really enjoyed writing about and working on them for many years. I think that the Commission itself has taken some steps in this area to improve the efficiency of dispute processing, so electronic dockets, things like that, e-discovery—and I understand that the committee is considering a number of approaches as well.

The CHAIRMAN. Thank you.

I have four obligatory questions I have to ask each of the three of you before proceeding with Senator Hatch. If you could all answer, please. I will ask the same question of all three, but I will start with you, Judge Thornton. You have been through this drill before.

Is there anything that you are aware of in your background that might present a conflict of interest with the duties of the office to which you have been nominated?

Judge THORNTON. No, sir.

Mr. NEGA. No, sir.

Mr. KIEFF. No, sir.

The CHAIRMAN. Thank you. Do you know of any reason, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

Judge THORNTON. No, sir.

Mr. NEGA. No, sir.

Mr. KIEFF. No, sir.

The CHAIRMAN. Do you agree, without reservation, to respond to any reasonable summons to appear and testify before any duly constituted committee of Congress, if confirmed?

Judge THORNTON. Yes, sir, I do.

Mr. NEGA. Yes, sir.

Mr. KIEFF. Yes, sir.

The CHAIRMAN. And finally, do you commit to provide a prompt response in writing to any questions addressed to you by any Senator of this committee?

Judge THORNTON. Yes, sir, I do.

Mr. NEGA. Yes, sir.

Mr. KIEFF. Yes, sir.

The CHAIRMAN. Thank you.

Senator Hatch?

Senator HATCH. Well, thank you.

Mr. Kieff, as you are no doubt aware, intellectual property is an important part of our U.S. economy. In my State of Utah, IP is the lifeblood of our industries, from information technology to the life sciences. As I mentioned in my opening, the ITC provides a vital tool for U.S. companies that face unfair competition from foreign imports that infringe their IP.

Would you be kind enough to share your thoughts on the section 337 process and what you would do to make it as effective as possible?

Mr. KIEFF. Well, thank you, Senator. Those are really important areas, and I have enjoyed working on these issues for a long time. Certainly, if confirmed, I would work within the law at the time, given the particular facts of each case, to apply that law. I take it what you are asking for is a general overview, is that right?

Senator HATCH. Well, really how you make it work better, and how you make that particular section as effective as possible.

Mr. KIEFF. Yes. The Commission, with assistance from many others including the Federal Circuit, the body that reviews the Commission's work, has worked to already start the process of improving procedures, to have them move faster, to look for ways to make them more efficient. And, as someone who has really enjoyed work-

ing on improving procedural efficiencies in different government roles in the past as an advisor, if confirmed I would really enjoy working with my colleagues at the Commission and with the Commission staff to continue that process.

Senator HATCH. All right.

In your testimony, you mentioned how important economic analysis provided by the ITC is to helping to explain the impacts of international trade on the U.S. economy. Can you tell us what steps you would take, if confirmed as an International Trade Commissioner, to ensure that the ITC provides Congress and the public with the best, most reliable economic analysis available?

Mr. KIEFF. Yes. I think the short answer is that I would engage, sleeves rolled up, pen in hand, reading glasses on, working with my colleagues to really dive into the facts of those matters, because I think the Commission has a great staff that really has a tradition of engaging the serious economic issues. It would be fun for me to work with them.

Senator HATCH. Can you share with us some of your thoughts on how the ITC can assist Congress and the administration to develop and implement effective trade policy to best benefit American manufacturers, farmers, and service providers?

Mr. KIEFF. Yes. The Commission has their tradition of working with both the legislative branch and the executive branch to provide analysis and factual data to support you in your policy role. So I would continue that tradition, if confirmed.

Senator HATCH. All right. To both of you Tax Court folks: you know you are going to be trying cases that are worth millions of dollars, and some that are worth hundreds; some that are for very wealthy people, some for people who are not so wealthy.

As a Tax Court judge, I would like each of you to answer this question. Like I say, you are going to preside over many cases that involve unsophisticated taxpayers with few resources to deploy while making their cases. What lessons do you take from your prior professional experiences to ensure that you will treat these taxpayers with respect and understanding while stopping short of awarding them an advantage that they do not deserve? Mr. Thornton?

Judge THORNTON. Senator Hatch, in the last 15 years I have been on the Court, I have been particularly impressed with the number of unrepresented taxpayers who come before our court. The Tax Court has a long tradition of trying to develop rules and procedures that are friendly to those taxpayers.

I think our judges collectively have an attitude of trying to do what we can to assist those taxpayers. The Court is especially proud of our efforts to make sure that every taxpayer has an opportunity for access to justice through taxpayer clinics and pro bono programs.

So I personally am committed to doing everything I can to assist taxpayers without becoming an advocate for the taxpayer, but at least trying to make sure they understand the procedure. Many of the taxpayers who come to the Court are very intimidated by the entire judicial process. Maybe they have never been to court before.

I think part of our job is to try to set them at ease, try to help them understand what they need to do to comply with the Court's

rules and procedures but, as you say, without becoming their advocate, but making sure they have an opportunity for access to justice as they might desire it.

Senator HATCH. Well, thank you.

Mr. Nega?

Mr. NEGA. I do not think I can say it better than Judge Thornton, but I will say it slightly differently. I realize that the Tax Court experience might be the most important experience that each taxpayer has with the Federal Government, and I think it is important that you treat them with respect, but again without crossing over the line and becoming an advocate for a pro se taxpayer. So I think you just have to start each day trying to apply the laws fairly on each case.

Senator HATCH. Well, thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Senator Thune?

Senator THUNE. Thank you, Mr. Chairman. Mr. Chairman, I think we ought to have these nominees think that their confirmation is still in doubt until they answer these questions and make sure we get the right answers. [Laughter.]

I want to direct this question to Mr. Thornton and Mr. Nega. I appreciate the fact that it may not be appropriate to comment on specific cases before the Tax Court, but I want to raise a recent Tax Court decision that caught my attention, and it was *Morehouse v. IRS*. The Court recently ruled that Conservation Reserve Program payments are subject to self-employment taxes, even where the individual receiving the payments is not actively farming the land. In this particular case, the individual inherited the land in my State of South Dakota, but he lived in Minnesota and was not actively engaged in farming.

Yet, the Tax Court broke with prior decisions in finding that the taxpayer had to pay self-employment taxes on the CRP payments, whereas prior court decisions had found that a CRP participant needed to materially participate in the farming operation in order to be liable for any self-employment taxes.

This decision causes concerns for a lot of reasons because, the heavier CRP payments are taxed, the less likely it is that owners of environmentally sensitive farmland will want to participate in this important conservation program, which will increase taxpayer liabilities under crop insurance and disaster programs by moving land into crop production as opposed to keeping it in CRP.

So I guess I just would be curious if either of you have any views on this issue of whether these types or forms of payments, Conservation Reserve or CRP payments, should be subject to self-employment tax in instances where the owner of the farmland is not actively—or is not considered, I should say—actively engaged in farming.

Judge THORNTON. Senator Thune, I would address the question more generally, I suppose, by explaining the process of the Court. All the Court's opinions are reviewed by the entire Court. We have 19 active judges when we are fully staffed, and we all review all the decisions.

In making that decision, we try to adhere the best we can to other judicial precedents. I believe in that particular case there

were other appeals court cases that the Court looked to. The Tax Court sits in 74 cities throughout the country, and cases are appealed in 12 different circuits, so we are bound to apply the law of that circuit wherever the case might arise.

So it is those types of considerations that play into the Court's decision, trying to make sure we are in the mainstream of the legal system, trying to be consistent with the jurisprudence of the appeals circuit in which the case originates. But I assure you that every case is decided only after very careful consideration by the entire Court of the particular facts of the case, the law of the case, and how the Court believes Congress intended the law to apply.

As to the specifics of the outcome of this case, I am not in a very good position to comment on that, but that is the general process by which we try to decide all our cases.

Senator THUNE. Anything to add, Mr. Nega?

Mr. NEGA. I have to admit that I am not familiar with the facts of the case, so I am really not in a position to respond at this point.

Senator THUNE. All right. I understand. Like I said, it is a pending case. But I just think, in terms of tax principle, tax policy, the payroll tax, self-employment tax, is a Federal tax and, in the past, has never been applied unless there was material participation in a farming operation. This is a pretty important precedent for a lot of reasons, like I said, one of which is that we are doing everything we can to keep some of these environmentally sensitive lands in the CRP program.

This is yet another disincentive toward that, if those who own farmland—perhaps are not materially participating in its operation but are benefitting from the CRP payments—are assessed self-employment taxes. That is obviously a tax consequence that is going to affect the decision that they make, the economic decision, about whether or not to keep it in the program. So, just put it on your radar screen if nothing else.

Mr. Kieff, the ITC has many important functions. The Commission has recently received a good deal of attention around these 337 cases which you mentioned, which are cases where one party is asking the Commission to issue an order stopping the importation of another company's product.

As you know, these cases often involve high-tech companies that find themselves at odds over patent disputes. Given your expertise in this area, I would be curious to know if you believe the ITC process for considering these cases is currently working, or if these cases would not be better suited to district court, where monetary damages could be awarded, as opposed to these exclusion orders.

Mr. KIEFF. Thank you, Senator. I think you are absolutely right that these are important issues and that they do have impact. The Commission has a tradition of wrestling with these issues pretty well, and, like many things in life, it can be improved, and the Commission has taken steps to find ways to help resolve disputes quickly that really should not be in the dispute process.

So, there is a faster way to make earlier decisions in the matter, when it just seems like there really is no dispute, no genuine dispute. That is a tool that district courts have. They have rule 12, they have rule 56. The Commission has developed its versions of those approaches, and so far those seem to be meeting with good

results. Other techniques can be tried as well, and I would enjoy working with my colleagues to help do that, if confirmed. Ultimately though, it is up to this body and the Congress and the President to decide whether the Commission has this role.

Senator THUNE. Yes. Do you think, though, that these cases are better suited to district courts, where you can have actual monetary damages awarded as opposed to the outcomes, the reliefs, that are allowed for under your jurisdiction?

The CHAIRMAN. Let me just break in here. You can continue as long as you want, Senator. I must leave right now. There is a vote occurring right now too. But it is up to you. You can speak as long as you want, but I just—

Senator THUNE. Do you want me to just gavel us out, or are you coming back?

The CHAIRMAN. You can gavel us out. Yes. I am not coming back; I cannot.

Senator THUNE. So I should pronounce them confirmed? [Laughter.]

I am sure they might appreciate that.

The CHAIRMAN. You could tell them that we are going to schedule a vote on their confirmation as quickly as we possibly can.

Senator THUNE. All right. Thank you, Mr. Chairman.

Judge THORNTON. Thank you, Mr. Chairman.

Mr. NEGA. Thank you, Mr. Chairman.

Mr. KIEFF. Thank you, Mr. Chairman.

Senator Thune, please.

Senator THUNE. Well, yes. I was just going to ask you again to give me your thoughts about whether or not these cases are better suited for district court.

Mr. KIEFF. Yes. So I think that there is a lot of interesting work that has been done to analyze how district court proceedings, on their own terms, work, how Commission proceedings at the ITC work. There seems to be a pretty good consensus that there are a lot of pluses and minuses to both venues and to both types of remedies. So the district courts, as you point out, have the remedies available, damages and injunctions, and the ITC has its remedy available, the exclusion order. Those really are different things.

My understanding, having really enjoyed working on these issues for a very long time in each of those settings, is that there are pluses and minuses to each of them, which then means trade-offs have to be made. Those are ultimately policy questions.

Senator THUNE. All right.

Do you guys have anything?

[No response.]

Senator THUNE. I guess that is a wrap. Thank you all very much. This hearing is adjourned. Thanks.

[Whereupon, at 3:30 p.m., the hearing was concluded.]

A P P E N D I X

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Hearing Statement of Senator Max Baucus (D-Mont.) Regarding Tax Court and International Trade Commission Nominations

Winston Churchill once said, "All the great things are simple, and many can be expressed in single words: freedom, justice, honor, duty, mercy, hope."

These principles guide our democracy, and while simple in concept, they require vigilance to maintain. These principles require experienced citizens willing to embrace public service. They require a fair and reasonable legal system. And they require public confidence in our government.

The nominees before us must be vigilant in honoring these principles. Between them they have decades of experience. If confirmed, they will play important roles in protecting the interests of millions of Americans.

Mr. Scott Kieff, you have been nominated by the President to serve as a Commissioner at the United States International Trade Commission, commonly referred to as the ITC.

The ITC enforces our nation's trade laws, including our trade remedy laws and section 337. This committee has jurisdiction over these matters and, if confirmed, we will look to you to fairly and objectively enforce those laws.

We will also call on you and the rest of the ITC to provide the committee with economic research on issues affecting global trade. The ITC has provided us thorough reports in the past on the barriers U.S. exporters and innovators face in foreign markets.

For example, Senator Grassley and I requested a ground-breaking ITC study on Chinese intellectual property theft. That study provided us with an independent, authoritative look at the impact of IP theft on U.S. jobs and our economy.

I assure you, Mr. Kieff, that we will keep you busy. The Finance Committee will continue to move forward with an ambitious trade agenda, and we will look to you for objective analysis when shaping this policy.

A graduate of MIT and the University of Pennsylvania, Mr. Kieff has spent his career working on issues related to international trade, in both the public and private sectors and in academia.

For the past 15 years, he has been teaching law at some of our nation's top universities, including George Washington, Chicago, Harvard, and at my alma mater, Stanford. I hope my colleagues on the committee don't hold that against you.

Also with us today are Judge Michael Thornton and Mr. Joseph Nega. You have both been nominated by President Obama to serve as judges on the United States Tax Court.

Judge Thornton, this is a return engagement for you. You appeared before this committee about 15 years ago after being first nominated to the U.S. Tax Court by President Clinton.

You cut your teeth as a tax counsel here on Capitol Hill for the Ways and Means Committee; then at the Treasury Department serving under Secretary Rubin.

Welcome back. You've done a great job at the Tax Court, rising up to become the chief judge. I am pleased that the President re-nominated you.

And finally, we will consider the nomination of Mr. Joseph Nega to the U.S. Tax Court. Mr. Nega has dedicated his entire career to public service. He began as a young staffer in the House and has served for the past 28 years on the Joint Committee on Taxation.

He now serves as the senior legislation counsel at JCT. I don't know what this committee — or this Congress — would do without the great team at JCT.

As you know, Judge Thornton, — and as you will soon learn Mr. Nega — you are taking on a great responsibility at the U.S. Tax Court.

The Tax Court provides Americans a forum to address tax issues. Approximately 30,000 cases are filed in the Court annually. If confirmed, you will be the arbiter on these cases, and you must ensure our tax laws are administered fairly.

In the wake of the IRS scandal, public confidence in our tax system is low. You must be thorough, and you must give our citizens a fair day in court. Your work can go a long way in restoring the public's confidence.

I thank all three of you for your willingness to serve. From the positions to which you've been nominated, you will have the complex task of protecting and maintaining freedom, justice, honor, duty, mercy and hope — the great things of which Churchill spoke.

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**STATEMENT OF HON. ORRIN G. HATCH, RANKING MEMBER
U.S. SENATE COMMITTEE ON FINANCE HEARING OF JULY 18, 2013
NOMINATIONS OF MICHAEL B. THORNTON, JOSEPH W. NEGA,
AND F. SCOTT KIEFF**

WASHINGTON – U.S. Senator Orrin Hatch (R-Utah), Ranking Member of the Senate Finance Committee, today delivered the following remarks during a Senate Finance Committee hearing considering the nominations of Michael B. Thornton and Joseph W. Nega to serve as Judges of the U.S. Tax Court, and F. Scott Kieff to be a member of the U.S. International Trade Commission:

Thank you Mr. Chairman. I welcome the opportunity to hear from our trade and tax nominees in today's hearing. I appreciate their presence here before the committee as well as their willingness to serve.

I am pleased to welcome Scott Kieff to the Committee today.

Mr. Kieff is nominated to be a member of the United States International Trade Commission. His distinguished career includes work as a law professor at several prestigious universities. He also served as a law clerk to the Honorable Giles S. Rich of the U.S. Court of Appeals for the Federal Circuit and practiced law for over six years in Chicago and New York.

Mr. Kieff is currently a Senior Fellow at Stanford's Hoover Institution, where he directs a project studying the law, economics, and politics of innovation.

I have to say that Mr. Kieff's background is very impressive. I believe he will be an exceptional addition to the International Trade Commission.

I am particularly impressed with Mr. Kieff's extensive background in intellectual property issues.

Intellectual property is the life-blood of the U.S. economy. Providing adequate protection to intellectual property is fundamental to our continued ability to innovate and compete in the global economy.

The ITC plays an important role in administering laws designed to protect U.S. intellectual property rights. For example, the ITC's Section 337 process is a vital tool for U.S. companies that face unfair competition from foreign imports that infringe their intellectual property, and I have a longstanding interest in making sure this process operates as effectively as possible.

Senator Baucus and I recently requested that the Government Accountability Office examine the effectiveness of the enforcement of ITC Section 337 exclusion orders.

The ITC also conducts important analytical work related to intellectual property. For example, the ITC conducted an important study requested by this Committee on the effects that intellectual property rights infringement and indigenous innovation policies in China have on U.S. jobs and the economy.

The ITC is also preparing a study requested by this Committee examining digital trade in the U.S. and global economies, including the importance of effective intellectual property rights protection.

So although the ITC is not a policy making agency, I believe Mr. Kieff's background and expertise in intellectual property issues will bring an important perspective to the agency's work.

Today, we will also hear from two nominees to the United States Tax Court.

The Tax Court is very important as it is the only venue in which a taxpayer may challenge the government before paying an assessed tax liability. The court gives taxpayers a chance to be fully heard in a neutral and public forum.

One of the nominees before us today is Joseph Nega, who currently serves as Senior Legislative Counsel at the Joint Committee on Taxation. Here on the Finance Committee, we have benefitted from Mr. Nega's work for a long time, and he will leave behind big shoes to fill at the JCT.

We'll also hear from Judge Michael Thornton, who has already served a term on the Tax Court. Should he be reconfirmed, taxpayers throughout the country will continue to benefit from having his knowledge and expertise on the Tax Court.

As is customary for Tax Court Judges who are willing to continue serving after their terms expire, Chairman Baucus and I encouraged President Obama to reappoint Judge Thornton, and I'm glad that he followed our advice.

In the same letter, we also recommended to the President that he reappoint Judge L. Paige Marvel, whose term has also expired. I hope that we will be able to consider that nomination soon. It is the taxpayers who will pay the price if the Tax Court is not kept staffed with qualified judges.

So, as you can see, we have some important positions to fill. And, from the looks of it, we've got some very qualified nominees to fill them. Thank you Mr. Chairman. I look forward to hearing from these nominees.

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Opening Statement by F. Scott Kieff
Nominee to be Member of the United States International Trade Commission
Before Senate Committee on Finance Confirmation Hearing
July 18, 2013

Chairman Baucus, Ranking Member Hatch, and Members of the Committee: Thank you for inviting me to appear before you today as you consider my nomination.

I am grateful to President Obama for nominating me; to Minority Leader McConnell for supporting my nomination, and to Chairman Baucus and Ranking Member Hatch for bringing us together for this confirmation hearing.

I also am grateful for the love and support from my family, several of whom are with me today: my wife Rebecca, my mom Jacqueline, my sister Elizabeth, and brother-in-law Tom, their children Asher and Estelle, my uncle Nelson, and my parents-in-law Terrie and Roy. Although he couldn't be here today, I give special thanks to my four-month-old son Evan for being such a great sounding board during his mid-night feedings.

And recognizing how hard it can be for the doctor to become the patient; I know how much my father Elliott and brother David wanted to be here today. I wish Dad a speedy recovery and appreciate David covering for Mom on Dad's care so she could travel to be here.

I am particularly honored and humbled to be here across the river from Arlington National Cemetery where two of my grandparents are buried as we discuss this opportunity for me to continue my family's tradition of public service.

The opportunity to engage each area of the Commission's wide-ranging docket would call upon many favorite aspects of the work I have long enjoyed throughout my career working as a practitioner, academic, mediator, arbitrator, and consultant.

The Title VII anti-dumping and countervailing duty portion of the docket would provide a welcome opportunity to continue my work applying diverse statutory injury factors to the facts and circumstances of specific industries and products.

I would take particular pleasure in the Section 337 portion of the Commission's docket, as I have throughout my two decades of devotion to the field of intellectual property.

And the Commission's research activities on industry and economic analysis relating to Section 332 and other statutory duties to prepare reports and provide trade policy support offer a fascinating range of opportunities to continue my academic commitment to exploring and explaining real world impacts of various approaches to trade.

In all of these areas I would greatly enjoy working with the other members of the Commission and the Commission's staff, as we exchange ideas and learn from each other's diverse wealth of experiences and perspectives.

Having long enjoyed working as a neutral mediator and arbitrator selected by all sides of a given dispute, if I were confirmed to this post I would enjoy faithfully and impartially working within the legal framework applicable to each matter then before the Commission to enforce the law, based on the particular facts. Several areas of the Commission's docket have been the focus of increasing attention in policy debates, and I understand the many diverse perspectives that have been offered. But I take seriously the limited role of a Commissioner and recognize that any legal change would be the domain of this Committee, the Congress, and the President, with interpretation when appropriate from the courts that review the Commission's work.

Over the past few months I have enjoyed frank, substantive discussions with several of you and your staff and I look forward to answering any questions you may have.

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1. Name: (Include any former names used.)

Franklin Scott Kieff, a.k.a. F. Scott Kieff, or Scott.
2. Position to which nominated:

Member, United States International Trade Commission for the term expiring June 16, 2020, vice Daniel Pearson, term expired.
3. Date of nomination:

Initial nomination: September 11, 2012

Returned to the President under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate: January 3, 2013.

Re-nominated: February 04, 2013.
4. Address: (List current residence, office, and mailing addresses.)

5. Date and place of birth:

August 6, 1969, Chicago, IL.
6. Marital status: (Include maiden name of wife or husband's name.)

7. Names and ages of children:

8. Education: (List secondary and higher education institutions, dates attended, degree received, and date degree granted.)

MIT, 1987-1991, BS, degree granted June 1991.

U Penn School of Law, 1991-1994, JD, degree granted May 1994.

9. Employment record: (List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment.)

The George Washington University Law School

July, 2009 – Present

Washington, DC

Fred C. Stevenson Research Professor, October, 2012 – Present.

Professor, July, 2009 – September, 2012.

Washington University in Saint Louis School of Law

July, 2001 – July, 2009

St. Louis, MO

Professor, School of Law, July, 2007 – July, 2009.

Professor (by courtesy), School of Medicine, Department of Neurological Surgery, February, 2008 – July, 2009.

Associate Professor, School of Law, July, 2001 – July, 2007.

Stanford University's Hoover Institution

September, 2003 – Present

Stanford, CA

Ray and Louise Knowles Senior Fellow (by adjunct), regular appointment, September, 2009 – Present.

Senior Fellow (by adjunct); regular appointment, September, 2008 – September, 2009.

Research Fellow, regular appointment, September 2005 – September, 2008.

W. Glenn Campbell & Rita Ricardo-Campbell National Fellow and Robert Eckles Swain National Fellow, visiting appointments, September, 2003 – September, 2005.

Department of Defense

Special Government Employee (SGE) in the Senior Executive Service (SES)

November, 2008 – Present

Stanford Law School
Stanford, CA
January, 2007 – July, 2007
Stanford, CA
Visiting Professor for Spring Semester 2007

Harvard Law School
Cambridge, MA
July, 2001 – August, 2003
John M. Olin Senior Research Fellow in Law, Economics, and Business. Faculty
rank fellowships for 2001-2002 and 2002-2003 academic years.

University of Chicago Law School
Chicago, IL
March, 2001 – July, 2001
Visiting Assistant Professor for Spring Quarter 2001.

Northwestern University School of Law
September, 1998 – July, 2001
Chicago, IL
Visiting Assistant Professor for 1999-2000 and 2000-2001 academic years.
Visiting Scholar and Adjunct Professor for 1998-1999 academic year.

Jenner & Block
Chicago, IL
September, 1998 – April, 2000
Counsel (1999-2000). Associate (1998-1999).

Hon. Giles S. Rich
September, 1996 – September, 1998
Washington, DC
Law Clerk to the Hon. Giles S. Rich, United States Court of Appeals for the
Federal Circuit.

Pennie & Edmonds
New York, NY
September, 1994 – September, 1996 & Summer, 1993
Associate and summer associate.

Hale and Dorr
Washington, DC
Summer, 1992
Summer Associate.

10. Government experience: (List any advisory, consultative, honorary, or other part-time service or positions with Federal, State or local governments, other than those listed above.)

Inaugural Appellate Mediation Panel for the United States Court of Appeals for the Federal Circuit, member, 2005 to 2007.

Public Patent Advisory Board, Department of Commerce, member, 2008 through 2010.

11. Business relationships: (List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, other business enterprise, or educational or other institution.)

Munich Intellectual Property Law Center at the Max Planck Institute in Munich, Germany, faculty member, 2003 to present.

FedArb, Inc., private arbitration and mediation services. Arbitrator, mediator, and member of Advisory Board, 2007 to present.

Please see enclosed list of Testimony as Expert Witness.

Please see enclosed list of Other Work as a Mediator, Arbitrator, or Consultant.

12. Memberships: (List all memberships and offices held in professional, fraternal, scholarly, civic, business, charitable, and other organizations.)

European Academy of Sciences and Arts, member in the Class for Social Sciences, Law, and Economics, 2012 to present.

Bar of the New York State Supreme Court, member, 1995 to present.

Bar of the District of Columbia Court of Appeals, member, 1997 to present.

Bar of the Illinois State Supreme Court, member, 1999 to present.

Bar of the U.S. Patent and Trademark Office, member, 1997 to present.

Bar of the Supreme Court of the United States of America, member, 1998 to present.

Bar of the U.S. Court of Appeals for the Federal Circuit, member, 1995 to present.

Bar of the U.S. District Court, SD NY, member, 1995 to present.

Bar of the U.S. District Court, ED NY, member, 1995 to present.

General Bar of the U.S. District Court, ND IL, member, 1999 to present.

Bar of the U.S. District Court, ND CA, member, 1995 to present.

Trial Bar of the U.S. District Court, ND IL, member, 1999 to present.

American Intellectual Property Law Association, member, 1994 to present.

Bar Association of the City of New York, member, 1994 to 1996.

American Bar Association, member, 1994 to 1996.

Federal Circuit Bar Association, member, 1994 to present.

Federal Circuit Historical Society, co-founder, trustee, member, 1999 to present.
Vice President, April 1999 to June 2009. President, June 2009 – June 2011.

Federalist Society for Law and Public Policy. Intellectual Property Practice Group, member of executive committee, 2002 to present. Chair, 2003, 2004, 2012. Financial Services and Electronic Commerce Practice Group, member of executive committee, 2011 to present.

Washington University Center for Study of Ethics and Human Values, chair, research committee, 2007 to 2009.

Washington University Center for Innovation in Neuroscience Technology, Member of governance committee and member of founding faculty, 2007 to 2009.

Washington University Center for Security Technology, Group Leader for Law, Economics, Political Science, and Public Policy Group; 2003 to 2008.

American Intellectual Property Law Association Quarterly Journal. Member, Board of Editors, 2002 to 2005.

Intellectual Property Modeling Group of the Centre for Intellectual Property Policy at McGill University's Faculty of Law, member of founding faculty, 2003 to September.

Inflexion Point investment bank, which represents technology companies and institutional investors in buying, selling, and investing in intellectual property. Member of advisory board, 2007 to 2008.

The Sedona Conference Working Group 4: The Intersection of the Antitrust Laws and the Patent Law and Working Group 5: The *Markman* Process and Claim Construction, which are think-tanks consisting of jurists, lawyers, experts and consultants brought together by a desire to address various "tipping point" issues. Member. 2005 to 2008.

Conflict of Interest Committee for Immune Tolerance Network, a 7-year, \$144 million research initiative funded by National Institute of Allergy and Infectious Diseases. Member, appointed through MacLean Center for Clinical Medical Ethics at University of Chicago. 1999 to 2006.

St. Albans Tennis Club, member, 2011 to present.

The Harvard Club of New York, member, 2003 to present.

The Penn Club of New York, former member, 1994 to 2003.

Theta Delta Chi International Fraternity, member, 1991 to present. Member during college from 1987 to 1991 of the Theta Deuteron chapter at the Massachusetts Institute of Technology, social chairman in the sophomore and junior years and senior executive in the senior year. In the senior year also served in the international fraternity as Treasurer of the Grand Lodge and for the first few years after graduation as Graduate Treasurer of the Grand Lodge. For several years after graduation also held offices in the affiliated Theta Delta Chi Educational Foundation as trustee and Treasurer.

13. Political affiliations and activities:

- a. List all public offices for which you have been a candidate.

None

- b. List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

During the 2008 Presidential Campaign, I contributed upon invitation some ideas through brief communications on a small number of occasions to an informal group that called itself "McCain-Palin Intellectual Property and International Trade Advisory Committee," which included approximately 10 people, several of whom I knew from previous work in the legal practice or legal academic communities.

- b. Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$50 or more for the past 10 years.

Bond, Christopher S, Via Kitpac, 12/12/2003, \$250

Talent, James Matthes, Via Talent For Senate Committee, 12/18/2003, \$250

McCain, John S., Via John McCain 2008 Inc., 08/30/2008, \$2,300

Huffman, James Lloyd II, Via Jim Huffman For Senate, 03/25/2010, \$500

Silverman, Matthew Douglass, 2012 Congressional Campaign (WI-02), 01/15/2012, \$180.

14. Honors and Awards: (List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals, and any other special recognitions for outstanding service or achievement.)

Selected as among the Nation's "Top 50 under 45" by the magazine, IP LAW & BUSINESS. May, 2008.

Selected as finalist in the law category for the World Technology Awards, 2006 & 2011.

Inducted as Member of the European Academy of Sciences and Arts, in the Class for Social Sciences, Law, and Economics. March, 2012.

15. Published writings: (List the titles, publishers, and dates of all books, articles, reports, or other published materials you have written.)

Please see enclosed list of publications.

16. Speeches: (List all formal speeches you have delivered during the past five years which are on topics relevant to the position for which you have been nominated. Provide the Committee with **two** copies of each formal speech.)

I did not deliver any formal speeches for which I prepared written scripts; and as a result I have no copies available. As is typical for law professors, I have given informal presentations for which I did not prepare written scripts at conferences among academics or practitioners as well as in the role of guest lecturer in classes. In some cases, my oral presentation was closely related to a written publication on which I was contemporaneously working; and such final publications are listed on the enclosed list of publications.

17. Qualifications: (State what, in your opinion, qualifies you to serve in the position to which you have been nominated.)

I believe that my years of experience as an academic, lawyer, and law clerk, working on a range of commercial law matters involving the law, economics, and business of trade at various levels, with a particular focus on intellectual property, qualify me for the position to which I have been nominated.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, associations, or organizations if you are confirmed by the Senate? If not, provide details.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the International Trade Commission's designated agency ethics official to identify potential need to sever connections of this type. In accordance with the terms of an ethics agreement that I have entered into with the Commission's designated agency ethics official, I will make all appropriate severances. One notable exception to the need to fully sever a connection, which is approved by the ethics agreement, is that I will take a leave of absence from my professorship at the George Washington University Law School.

2. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, provide details.

No.

3. Has any person or entity made a commitment or agreement to employ your services in any capacity after you leave government service? If so, provide details.

Pursuant to my ethics agreement described above, my present employer, George Washington University Law School, will allow me to return from a leave of absence without pay to again take up my current position.

4. If you are confirmed by the Senate, do you expect to serve out your full term or until the next Presidential election, whichever is applicable? If not, explain.

Yes. In keeping with University rules and practice, the leave of absence from my present professorship would be initially for two years, I would request extensions on a year-by-year basis through the end of my term, and I know of no reason the extensions would not be granted.

C. POTENTIAL CONFLICTS OF INTEREST

1. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the International Trade Commission's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Commission's designated agency ethics official and that has been provided to this Committee. I am not aware of any other potential conflicts of interest.

2. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the International Trade Commission's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Commission's designated agency ethics official and that has been provided to this Committee. I am not aware of any other potential conflicts of interest.

3. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy. Activities performed as an employee of the Federal government need not be listed.

As an academic and a consultant I provided public comment on various patent reform proposals over the past ten years, much of it leading up to the America Invents Act of 2011.

4. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items. (Provide the Committee with **two** copies of any trust or other agreements.)

In connection with the nomination process, I have consulted with the Office of Government Ethics and the International Trade Commission's designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the Commission's designated agency ethics official and that has been provided to this Committee. I am not aware of any other potential conflicts of interest.

5. **Two** copies of written opinions should be provided directly to the Committee by the designated agency ethics officer of the agency to which you have been nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position.
6. The following information is to be provided only by nominees to the positions of United States Trade Representative and Deputy United States Trade Representative:

Have you ever represented, advised, or otherwise aided a foreign government or a foreign political organization with respect to any international trade matter? If so, provide the name of the foreign entity, a description of the work performed (including any work you supervised), the time frame of the work (e.g., March to December 1995), and the number of hours spent on the representation.

N/A

D. LEGAL AND OTHER MATTERS

1. Have you ever been the subject of a complaint or been investigated, disciplined, or otherwise cited for a breach of ethics for unprofessional conduct before any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.

No, except for the following:

- Early in 2011, I received a summons issued by the City of St. Louis asserting, incorrectly, that I had not filed my City of St. Louis tax return for the year 2009. That same day, after speaking with the office that sent the summons, I faxed to them the proof that I had indeed filed the correct return in a timely fashion. In the next day or so, I called back to ask about the status of the matter and was told that (1) although labeled as a summons this was not a judicial matter but rather an administrative tax matter; (2) the summons had been issued in error and that it was being cancelled; and (3) I was in full compliance with my obligations and did not need to take any further steps. I subsequently received a written notice dated three days after the summons was received confirming that the summons had been canceled.

2. Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority for a violation of any Federal, State, county or municipal law, regulation, or ordinance, other than a minor traffic offense? If so, provide details.

No.

3. Have you ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.

No.

4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? If so, provide details.

No.

5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

None.

E. TESTIFYING BEFORE CONGRESS

1. If you are confirmed by the Senate, are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so?

Yes.

2. If you are confirmed by the Senate, are you willing to provide such information as is requested by such committees?

Yes.

Kieff List of Testimony as Expert Witness

Within the past several years I have served as an expert witness in several matters involving patents and patent assignments in the domestic and international setting. Most of these matters involved work that is protected from disclosure by various court orders and confidentiality agreements. Several of those proceedings progressed sufficiently far along for me to have been found qualified to give testimony as an expert. I have never been found unqualified to give testimony. Many of the matters on which I have worked have spanned multiple years and in general the information I provide below is focused on showing the time frames within which my involvement in the particular matter began. Throughout my service as a full time academic, I have only agreed to take on projects where I think the issues are of particular interest to my academic work and where I think I can make a particularly positive intellectual contribution. I have declined to participate in most of the matters I have been invited to consider and I have withdrawn from working on a matter whenever I come to the understanding that my views are sufficiently inconsistent with those being pursued by party that retained me. At all times my work in this area has been consistent with ordinary conflict of interest and conflict of commitment obligations at my host academic organizations and has been reported and approved through customary review by those organizations for compliance with those obligations. To the extent that I am allowed under existing obligations of confidentiality, I provide below a more detailed listing of my prior work as an expert; and if even more detail is requested I will endeavor to provide it.

- I was called by the federal government to testify as an expert witness for the day of April 10, 2002 before the United States Federal Trade Commission and the United States Justice Department Antitrust Division for their Joint Hearings on Competition and Intellectual Property. My written submission in advance of testifying and the official transcript of my actual testimony are both available for free from the Federal Trade Commission web site at www.ftc.gov and are relied upon by the Commission in the final report it issued in October, 2003, which also is available for free on the Commission's web site.
- Later in 2002, I was retained by the law firm of Kirkland & Ellis as counsel for the Board of Trade of the City of Chicago in the case eSpeed, Inc. & Electronic Trading Sys. Corp., v. The Board of Trade of the City of Chicago and The Chicago Mercantile Exchange, Civil Action No. 3:99-CV-1016-M, Judge Barbara M.G. Lynn, United States District Court, Northern District of Texas, Dallas Division. In that matter, I provided a written Preliminary Expert Witness Report and a videotaped and transcribed deposition. Kirkland & Ellis told me after motions in limine had been filed, briefed, and argued, that the Court ordered that I was found fit to provide live testimony in court during trial; and at the firm's request I prepared to provide live testimony at trial. The case settled just before trial. Due to the Court's secrecy order and a confidentiality agreement I do not have available the materials I provided in that case.

- Around the end of 2002 or beginning of 2003, I was retained by the law firm of Oblon, Spivak, McClelland, Maier & Neustadt as counsel for Ramtron International Corporation in the case National Semiconductor Corp., v. Ramtron International Corp., Civil Action No. 03cv61, Judge Richard W. Roberts, US District Court for the District of Columbia. Due to the Court's secrecy order and a confidentiality agreement, I do not have available the materials I provided in that case, which I understand is still pending.
- In early 2004, I was retained by the law firm of Oblon, Spivak, McClelland, Maier & Neustadt as counsel for a party in an action pending before a US District Court. Due to the Court's secrecy order and a confidentiality agreement, I do not have available additional information about that case.
- In the Spring of 2004, I was retained by the law firm of Kirkland & Ellis as counsel for International Game Technology, in the case Alliance Gaming Corp., Bally Gaming Int'l, and Bally Gaming, Inc. v. International Game Tech., Anchor Gaming, & Does 1-50, Civil Action No. CV-S-03-0965-PMP-PAL, Judge Philip M. Pro, Magistrate Judge Peggy A. Leen, United States District Court for the District of Nevada. That case settled after I prepared my preliminary expert report, which I understand was submitted. Due to the Court's secrecy order and a confidentiality agreement I do not have available the materials I provided in that case.
- Around the beginning of the summer in 2004, I was retained by the law firm of Fried, Frank, Harris, Shriver & Jacobson LLP, to work with them in collaboration with the law firms of Paul, Hastings, Janofsky & Walker LLP,

and Jones Day as counsel for Roche Molecular Systems Inc., in the arbitration Chiron Corp. v. Roche Molecular Sys. Inc., before retired US District Judge Charles B. Refrew, as Arbitrator, who applied the Federal Rules of Civil Procedure and the Federal Rules of Evidence to the proceedings, which were essentially conducted as a bench trial. Pursuant to an order by the Judge after motions in limine had been filed and argued, I was found qualified to testify as an expert on patent law and practice and was called to testify and provided live testimony for the entire morning of June 25, 2004. The matter settled after the trial. Due to a confidentiality agreement I do not have available the materials I provided in that case.

- In the fall of 2004, I was retained by the law firm of Kirkland & Ellis as counsel for counsel for Whirlpool Corporation in the case Maytag Corporation v. Whirlpool Corporation, Civil Action No. 4:03-CV-10568, Judge Ronald E. Longstaff, United States District Court for the Southern District of Iowa, Central Division. In that matter, I provided a written Preliminary Expert Witness Report, a written Preliminary Rebuttal Expert Witness Report, and a videotaped and transcribed deposition. Kirkland & Ellis told me after motions in limine had been filed, briefed, and argued, that the Court ordered that I was found fit to provide live testimony in court during trial; and at the firm's request I prepared to provide live testimony at trial. The case settled before trial. Due to the Court's secrecy order and a confidentiality agreement I do not have available the materials I provided in that case.

- In the spring of 2008 I was retained by counsel for the Monsanto Company in the case Monsanto Technology LLC, v. The Brazilian Patent and Trademark Office pending before the Brazilian Federal Court of Appeals. In that matter, I provided a written Expert Opinion; and due to a confidentiality agreement I do not have available the materials I provided in that case.
- During the winter of 2009-2010, I was retained by the law firm of Williams & Connolly as counsel for Apieron, Inc., in the case Apieron, Inc., v. Aerocrine AB, et al., pending before the District Court of Mannheim Germany with a co-pending action before the US District Court for the District of Delaware. In that matter, I provided a written Expert Opinion that was submitted to the German Court and that was relied upon by that court in reaching a judgment on the issues relating to patent agreements that were the topic of my opinion in a way that was consistent with my Opinion and inconsistent with the Expert Opinion filed by the opposing expert witness, Prof. Robert E. Scott, Alfred McCormack Professor of Law and Director, Center for Contract and Economic Organization at Columbia University Law School. The set of cases settled soon after the German court reached its judgment; and due to a confidentiality agreement I do not have available the materials I provided in that case.
- In the spring of 2009, I was retained by the law firm of DLA Piper as counsel for Sunbeam Products, Inc. doing business as Jarden Consumer Solutions, in the matter of Sunbeam Products, Inc. D/B/A Jarden Consumer Solutions, v. Homedics, Inc., Civil Action No.: 3:08-CV-00376-SLC, Magistrate Judge

Stephen L. Crocker, pending in the United States District Court for the Western District of Washington. In that matter, I provided a written Preliminary Expert Witness Report. Due to the Court's secrecy order and a confidentiality agreement I do not have available the materials I provided in that case.

- I was called again by the federal government to testify as an expert witness on March 19, 2009, before the US Federal Trade Commission for their Hearings on The Evolving IP Marketplace. The official transcript of my actual testimony is also available from the Federal Trade Commission web site and is relied upon in the report issued by the Commission in March of 2011.
- In the winter of 2010-2011, I was retained by the law firm of Fish & Richardson as counsel for Hoffmann-La Roche Inc. in the case Hoffmann-La Roche Inc., v. Mylan Inc., and Mylan Pharmaceuticals Inc., 2:09-cv-01692-WJM-CCC, pending before the United States District Court for the District of New Jersey. In that matter, I provided a written Preliminary Expert Witness Report and gave deposition testimony. The case is presently pending and due to the Court's secrecy order and a confidentiality agreement I do not have available the materials I provided in that case.
- In the spring of 2011, I was retained by Bausch & Lomb, Inc. through its law firms Harris Beach PLLC and Fox Rothschild LLP, in the dispute Rembrandt Vision Technologies, LP, Rembrandt IP Fund, LLLP, Rembrandt Technologies Management, LLC, and Rembrandt IP Management, LLC, v. Bausch & Lomb, Inc., Case No. 14 122 Y 00403 09, pending before the American Arbitration

Association. In that matter, I provided a written Expert Opinion as well as oral testimony. I was told the case has been settled and due to a confidentiality agreement I do not have available the materials I provided in that case.

- In the spring of 2011, I was retained by KemPharm, Inc., and Dr. Travis C. Mickle through their law firm McAndrews Held & Malloy, Ltd., in the dispute Shire LLC, v. Travis C. Mickle, Ph.D., and Kempharm, Inc., Civil Action No. 7:10-CV-00434, pending before the United States District Court for the Western District of Virginia Roanoke Division. In that matter, I provided a written Preliminary Expert Report as well as a deposition. The case settled before trial; and due to the Court's secrecy order and a confidentiality agreement I do not have available the materials I provided in that case.
- In the summer of 2011, I was retained by the law firm of Cravath Swain & Moore on behalf of their client Qualcomm to submit my own opinions to the Federal Trade Commission in response to certain recommendations of the Federal Trade Commission March 2011 report entitled "The Evolving IP Marketplace," and the FTC's "Request for Comments and Announcement of Workshop on Standard-Setting Issues," Project No. P111204, dated May 13, 2011. On August 5, 2011, I submitted a paper entitled "The FTC's Proposal for Regulating IP through SSOs Would Replace Private Coordination with Government Hold-Up" that I co-authored with Richard A. Epstein and Daniel F. Spulber, a copy of which is available from the Federal Trade Commission web site.

- In the spring of 2012, I was retained by the office of the General Counsel at TiVo, Inc. in the Opposition Proceedings Re European Patent 1 101 356 pending before the European Patent Office (EPO). In that matter, I provided a written Expert Opinion; and due to a confidentiality agreement I do not have available the materials I provided in that case.

As outlined in the terms of my retainer agreements relating to my work as a mediator, arbitrator, testifying expert or consulting expert, and in keeping with my ordinary practice, relationships such as these can be easily terminated by myself or my counter-parties by either of us merely deciding on our own to so terminate. My ordinary practice when terminating is to then cooperate with the relevant parties to settle up, in most cases simply by issuing my final bill and by returning any unbilled retainer balance. I plan to sever any ties relating to the private sector as suggested by appropriate ethics counsel if I am confirmed.

Kieff List of Other Work as a Mediator, Arbitrator, or Consultant

I have been retained as a consulting expert on matters that are now concluded by the following law and business firms: Ariad Pharmaceuticals, C.R. Bard, DataTreasury, Husch Blackwell, Kirkland & Ellis, McCullough Ginsberg & Montano, Munger Tolles & Olson, Nix Patterson & Roach, Perkins Coie, Protecting Assets of the Mind, Rambus, Ryndak & Suri, Stadheim & Gear, TiVo, Qualcomm. In some of these cases I provided written materials that were distributed publicly and remain available publicly. If copies are desired I will endeavor to provide them. Due to confidentiality agreements I do not have available other materials from those matters; and if more detail is requested I will endeavor to provide it.

In October 2005, I was appointed by the US Court of Appeals for the Federal Circuit to serve as member of the court's inaugural mediation panel. In this post I mediated several complex patent cases, and consulted with fellow panelists on our collective efforts to mediate the vast majority of patent appeals across the country that went to that court. I resigned my post on that panel in November 2007; and since that time I have continued to work as private mediator and arbitrator in matters involving patent litigations pending in United States federal courts, both on my own and through an organization called FedArb (www.fedarb.com), which is run by a group of former federal judges. Through this private work, I have been retained as a mediator or arbitrator by the following law firms and business firms in various matters:

- Mediator in patent litigation Caddy Products v. American Seating. Fabyanske, Westra, Hart & Thomson for Caddy Products; and, Fisher & Dickinson and Clark & Brody for American Seating. Fall and winter 2006.
- Arbitrator in patent interference proceeding before the US Patent and Trademark Office Board of Patent Appeals and Interferences Zyzak, et al., Junior Party, (Application 10/606,137, Assigned to the Procter & Gamble Company), v. Elder, et al., Senior Party (Patent No. 7,037,540, Assigned to Frito-Lay North America Inc.). Retained directly by FLNA and P&G. Decision dated March 13, 2008.
- Mediator in patent litigation Tesseron v. EFL. Retained by Taft Stettinius & Hollister for Tesseron; and Howrey for EFL. Summer 2008.
- Mediator in patent litigation Tesseron v. Kodak. Taft Stettinius & Hollister for Tesseron; and Crowell & Moring for Kodak. Spring through fall 2008.
- Mediator in patent litigation Tesseron v. for R. R. Donnelley & Sons. Retained by Taft Stettinius & Hollister for Tesseron; and Sidley Austin for R. R. Donnelley & Sons. Fall and winter 2008.
- Mediator in patent litigation IP Holding v. Wescast. Retained by Taft Stettinius & Hollister for IP Holdings; and Jones Day for Wescast. Spring 2009.
- Court-appointed mediator in the patent infringement case Tesseron v. Oce, No. 6:10-cv-00909-GAP-GJK, Judge Gregory A. Presnell, Magistrate Judge

Gregory J. Kelly. Retained by Baker & Hostetler for Tesserone; and Sheppard Mullin Richter & Hampton for Punch Graphix and Xeikon. Summer 2011.

- Court-appointed mediator in patent litigation Tesserone v. Oce, No. 6:10-cv-00909-GAP-GJK, Judge Gregory A. Presnell, Magistrate Judge Gregory J. Kelly. Retained by Baker & Hostetler for Tesserone; and Reed Smith for Oce. Spring 2012 (ongoing).

In addition to those named above, I am presently retained as a testifying or consulting expert working with the following firm in a matter that is ongoing: Steptoe & Johnson.

As outlined in the terms of my retainer agreements relating to my work as a mediator, arbitrator, testifying expert or consulting expert, and in keeping with my ordinary practice, relationships such as these can be easily terminated by myself or my counter-parties by either of us merely deciding on our own to so terminate. My ordinary practice when terminating is to then cooperate with the relevant parties to settle up, in most cases simply by issuing my final bill and by returning any unbilled retainer balance. I plan to sever any ties relating to the private sector as suggested by appropriate ethics counsel if I am confirmed.

Kieff List of Publications

Books

- Perspectives on Commercializing Innovation, Cambridge University Press (2011). Co-edited with Troy A. Paredes. Edited book based on academic conference with two chapters co-authored by Kieff & Paredes including "Introduction," and "Engineering a Deal: Toward a Private Ordering Solution to the Anticommons Problem."
- Principles of Patent Law, University Casebook Series, Foundation Press (teaching book and treatise) (5th ed. 2011, 4th ed. 2008), co-authored with Herbert F. Schwartz, Henry E. Smith, and U.S. Circuit Judge Pauline Newman.
- Perspectives on Corporate Governance, Cambridge University Press (2010). Co-edited with Troy A. Paredes. Edited book based on academic conference with two chapters co-authored by Kieff & Paredes including "Introduction," and "The CEO and the Board: On CEO Overconfidence and Institutionalizing Dissent in Firms."
- International, United States, and European Intellectual Property: Selected Source Material, Aspen/Wolters Kluwer (1st ed. 2007-08, 2nd ed. 2010-11). Co-edited with Ralph Nack.
- Principles of Patent Law, University Casebook Series, Foundation Press (teaching book and treatise) (3rd ed. 2004, 2d ed. 2001, 1st ed. 1998), co-authored with Donald S. Chisum, Craig A. Nard, Herbert F. Schwartz, and U.S. Circuit Judge Pauline Newman (including associated supplements and teachers manuals).
- Perspectives on Properties of the Human Genome Project, Academic Press, an imprint of Elsevier (2003). Edited book based on academic conference with four chapters authored by Kieff including "Introduction," "Perusing Property Rights In DNA," "How Ordinary Judges and Juries Decide the Seemingly Complex Technological Questions of Patentability over the Prior Art," and "Conclusion").

Articles & Book Chapters

- The FTC, IP, and SSOs: Government Hold-Up Replacing Private Coordination, Competition, 8 J. Compet. L. & Econ. 1 (2012), co-authored with Richard A. Epstein & Daniel F. Spulber.
- Removing Property from Intellectual Property: (Intended?) Pernicious Impacts on Innovation and Competition, 19 Sup. Ct. Econ. Rev. 11 (2011). Reprinted in Competition Policy and Patent Law under Uncertainty: Regulating Innovation (Geoffrey A. Manne & Joshua D. Wright, eds.) Cambridge University Press (2011).
- Questioning the Frequency and Wisdom of Compulsory Licensing for Pharmaceutical Patents, 78 U. Chi. L. Rev. 71 (2011), co-authored with Richard A. Epstein.

- Wrong Incentives from Financial System Fixes, in *Reacting to the Spending Spree: Policy Changes We Can Afford* (Terry Anderson & Richard Sousa, eds.) Hoover Press (2009). Co-authored with Stephen H. Haber.
- How Not to Invent a Patent Crisis, in *Reacting to the Spending Spree: Policy Changes We Can Afford* (Terry Anderson & Richard Sousa, eds.) Hoover Press (2009). Co-authored with Henry E. Smith.
- The Case for Preferring Patent Validity Litigation over Second Window Review and Gold Plated Patents: When One Size Doesn't Fit All, How Could Two Do The Trick?, 157 U. Penn. L. Rev. 101 (2009).
- *Quanta v. LG Electronics*: Frustrating Patent Deals by Taking Contracting Options off the Table?, 2007-2008 Cato S. Ct. Rev. 315 (2008).
- On the Importance to Economic Success of Property Rights in Finance and Innovation, 26 Wash U. J. L. & Pol'y 215 (2008) (symposium: Law & The New Institutional Economics). Co-authored with Stephen H. Haber and Troy A. Paredes.
- On the Economics of Patent Law and Policy, in *Patent Law and Theory: A Handbook of Contemporary Research* (Toshiko Takenaka, ed.) Research Handbooks in Intellectual Property Series, Edward Elgar Press (2009).
- The Treatment Of Know-How In International R&D Cooperation: The United States of America, in "The Treatment of Know How in International R&D Cooperations" ("Umgang mit Know-how in internationalen F&E-Kooperationen"), edited by Peter Ganea and Nina Klunker for the Fraunhofer Institute for Manufacturing Technology, the Machine Tool Laboratory (Werkzeugmaschinenlabor, WZL) of the Technical University of Aachen and the Munich Intellectual Property Law Center (MIPLC) under the German Ministry of Research and Education project "Igniting Ideas" ("Ideen Zünden"), available online at <http://www.ideen-zuenden.de/en/350.php>.
- Economic Perils of U.S. Patent Reform: Flexibility's Achilles Heel, in *Patents and Technological Progress in a Globalized World: Liber Amicorum Joseph Straus*, Springer-Verlag Berlin Heidelberg (Prinz zu Waldeck und Pyrmont, et al.) (2009) (released in 2008).
- On the Comparative Institutional Economics of Intellectual Property in Biotechnology, Meredith Memorial Lectures, Faculty of Law, McGill University, published by Les Editions Yvon Blais Inc., a division of Thomson Carswell (2007).
- On Coordinating Transactions in Information: A Response to Smith's Delineating Entitlements in Information, 117 Yale L.J. Pocket Part 101 (2007).
- Coordination, Property & Intellectual Property: An Unconventional Approach to Anticompetitive Effects & Downstream Access, 56 Emory L. J. 327 (2006).
- Engineering a Deal: Toward a Private Ordering Solution to the Anticommons Problem, 47 B.C. L. Rev. 111 (2006), coauthored with Troy Paredes.
- Evidence and Anecdotes: An Analysis of Human Gene Patenting Controversies, 24 Nature Biotech. 1091 (2006), co-authored with Timothy Caulfield, Robert M. Cook-Deegan, & John P. Walsh.

- IP Transactions: On the Theory & Practice of Commercializing Innovation, 42 Houston L. Rev. 727 (2005).
- The Basics Matter: At the Periphery of Intellectual Property, 73 Geo. Wash. L. Rev. 174 (2004), coauthored with Troy Paredes, also published as Chapter 9, of Lisa N. Takeyama et al, *Developments in the Economics of Copyright*, by Edward Elgar (2005).
- An Approach to Intellectual Property, Bankruptcy, and Corporate Control, 82 Wash U. Law. Q. 1313 (2004), coauthored with Troy Paredes.
- Contrived Conflicts: The Supreme Court vs. The Basics of Intellectual Property Law, 30 William Mitchell L. Rev. 1717 (2004).
- The Case for Registering Patents and the Law and Economics of Present Patent-Obtaining Rules, 45 B.C. L. Rev. 55 (2003).
- Patents for Environmentalists, 9 Wash. U.J.L. & Pol'y 307 (2002), also 8 Engage 106 (2007).
- Facilitating Scientific Research: Intellectual Property Rights and the Norms of Science - A Response to Rai & Eisenberg, 95 NW. U. L. Rev. 691 (2001).
- Property Rights and Property Rules for Commercializing Inventions, 85 Minn. L. Rev. 697 (2001).
- Isolation of Mutants of *S. Cerevisiae* Requiring DNA Topoisomerase, 141 Genetics 465-479 (Oct., 1995), co-authored with Ben Sadoff, Sharon Heath-Pagliuso, Irene Castano, Yingfan Zhu, and Michael F. Christman.

Testimony

- The FTC's Proposal for Regulating IP through SSOs Would Replace Private Coordination with Government Hold-Up, Submitted in Response to the FTC's Request for Comments and Announcement of Workshop on Standard-Setting Issues, Project No. P111204 (Aug. 5, 2011). Co-authored with Richard A. Epstein and Daniel F. Spulber.
- Comment on Intellectual Property, Concentration and the Limits of Antitrust in the Biotech Seed Industry, filed with the Department of Justice Antitrust Division on as "Comments Regarding Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy" in response to the DOJ/USDA request for public comments for the agencies' joint workshops on antitrust issues in the agricultural sector (Dec. 31, 2009). Co-authored with Geoffrey A. Manne, Michael E. Sykuta, and Joshua D. Wright.
- Transcript of Testimony before United States Federal Trade Commission Panel on Economic Perspectives on IP and Technology Markets, part of the FTC Hearings on the Evolving IP Marketplace - The Operation of IP Markets (Mar. 19, 2009). Invited testimony, available at: http://htc-01.media.globix.net/COMP008760MOD1/ftc_web/transcripts/031909_sess1.pdf.
- Comments Regarding Competition and Intellectual Property – Summary of Proposed Testimony, this submission was the basis for the invitation to present further oral testimony, and is available at: www.ftc.gov/os/comments/intelpropertycomments/index.html.

- Transcript of Testimony before United States Federal Trade Commission and Department of Justice Antitrust Division Joint Hearings on Competition and Intellectual Property (Apr. 10, 2002). Invited testimony, available at: www.ftc.gov/opp/intellect/detailsandparticipants.htm#April%209-11.

Amici Briefs

- Brief of Ananda Chakrabarty as Amicus Curiae in Support of Petitioners in *Bilski v. Kappos*, Supreme Court of the United States, No. 08-964 (Aug. 6, 2009). Co-authored with Richard A. Epstein.
- Brief of Various Law Professors as Amici Curiae in Support of the Respondent in *Quanta v. LG Elecs.*, Supreme Court of the United States, No. 06-937 (Dec. 10, 2007). Co-authored with Troy A. Paredes and R. Polk Wagner.
- Brief of Business & Law Professors as Amici Curiae in Support of the Respondents in *KSR v. Teleflex*, Supreme Court of the United States, No. 04-1350 (Oct. 16, 2006). Co-authored with Chris Catropia, Gregory Mandel, Mark Lemley, and R. Polk Wagner.
- Brief of Various Law & Economics Professors as Amici Curiae in Support of Respondent, *eBay v. MercExchange*, Supreme Court of the United States, No. 05-130 (Mar. 10, 2006). Co-authored with Richard Epstein, David Teece, and R. Polk Wagner.

Others

- Patently Bad Policy, *Defining Ideas* (Nov. 16, 2011).
- File First, Invent Later?, *Defining Ideas* (Jun. 13, 2011).
- Patent Reform Goes Haywire, *Defining Ideas* (Jun. 10, 2011).
- Welcome to Patent Purgatory, *Defining Ideas* (Jun. 9, 2011).
- The Perils of Patent Reform, *Defining Ideas* (Jun. 7, 2011).
- Why Business Isn't Getting 'in the Game,' *Investor's Bus. Daily*, opinion (Feb. 11, 2011). Co-authored with Stephen H. Haber.
- The Patent Process Run Amok, *Defining Ideas* (Feb. 1, 2011).
- An Inconvenient School of Thought, 61 *Ala. L. Rev.* 591 (2010). Book review of Michael Carrier, *Innovation for the 21st Century: Harnessing the Power of Intellectual Property & Antitrust*, Oxford University Press (2009).
- The Importance of Finality in Patent Litigation, *Nat'l L. J.*, opinion (Dec. 6, 2010).
- Book Review: *Pharmaceutical and Biotech Patent Law*, *NY L. J.* (Aug. 29, 2008).
- Should the Music Stop for iTunes?, *IP Law & Business* 27, point of view (Jul. 2008).
- Keep Patent Bill Tabled, *Nat'l L. J.* (June 2, 2008). Co-authored with Charles Burson
- Let the Markets Regulate Microsoft, *Forbes.com*, commentary (Mar. 11, 2008), alternative version published as *Windows of Opportunity*, *Hoover Digest* (2008, No. 3).

- Perils of Patent Reform: Flexibility's Achilles Heel, 13 IP Litigator 11 (Sept./Oct/ 2007).
- Just Say No: Because Strong Patents Advance Science, Calls in the US for an Expanded Research Use Exemption Must be Rejected, Intellectual Asset Management 25 (Oct./Nov. 2007). Co-authored with Stephen Haber and Troy Paredes.
- EU Antitrust Nonsense: Microsoft Comes under Fire, Op/ed, Wash. Times, A19 (Oct. 5, 2007). Co-authored with Stephen Haber and Troy Paredes.
- How Patents Can Help Those Interested in the Environment and World Health, 8 Engage 102 (2007).
- Patent Reform Legislation: No Final Cut for Examiners, Nat'l L. J. (May 14, 2007). Co-authored with Stephen Haber and Troy Paredes.
- Flexible Patent Law ... and Its Achilles Heel, Letter to the Editor, Wall St. J., A19 (May 11, 2007). Co-authored with Richard A. Epstein.
- Microsoft's European Experience Troubling for U.S. Companies, Opinion, San Jose Mercury News (Mar. 15, 2007). Co-authored with Stephen H. Haber and Troy A. Paredes.
- A Keiretsu Approach to Patents, Intellectual Asset Management 51 (Feb./Mar. 2007), alternative version published as Patent Power, Hoover Digest (2007, No. 3).
- Smart Pills, IP Law & Business, 36 (Oct. 2006), alternative version published as The Importance of Patents, Op/Ed., Nat'l L. J. (Aug. 14, 2006).
- Patent Law, Injunctions and the Public Interest, Letter to the Editor, Wall St. J., A19 (Mar. 10, 2006). Co-authored with Richard E. Epstein and R. Polk Wagner.
- Testing Patent Protections, Op/ed, Wash. Times (May 30, 2006). Co-authored with R. Polk Wagner.
- Public Choice, Patents, and the FTC: Comments on the Commission's October 2003 Report on the Interface Between Patents and Antitrust, 5 Engage 84 (2004).
- A Reemergence of Regulation at the Interface between Patents and Antitrust, 4 Engage 97 (2003), coauthored with the Hon. Gerald J. Mossinghoff.
- Book Review: Joseph Straus, Grace Periods and the European and International Patent Law: Analysis of Key Legal and Socio-Economic Aspects, 34 Int'l Rev. Indus. Prop. & Copyright L. (IIC) 347 (2003), and also 4 Engage 160 (2003).
- Accessibility and the Appellate Brief, Geo. Wash. L. Sch. Dir. of Interscholastic Moot Ct. Competitions, 1 (11th ed., 1998-1999), co-authored with M. Scott Deehr.
- Latent Cures For Patent Pathology: Do Our Civil Juries Promote Science and the Useful Arts?, presented in The Crisis of Science and the Law, at Science in Crisis at the Millennium (an International Symposium), The George Washington University Center for History of Recent Science, (Sept. 19, 1996), and printed in Chisum et al. Principles of Patent Law 1368 (1st ed. 1998), 1024 (2nd ed. 2001). Coauthored with S. Leslie Misrock.

- The Use Of Alternative Dispute Resolution Methods For Civil Actions Against The Patent Office: A letter to the Editor, 79 J. Pat. & Trademark Off. Soc'y 29 (1997), and Executive Order Allows PTO Action Arbitration – ADR Can Resolve Civil Claims By Private Parties Against the PTO, 19 Nat'l L. J. C18 (col. 4), (Jan. 27, 1997). Both co-authored with Charles Miller and Bart van den Broek.
- It's Your Turn But It's My Move – Intellectual Property Protection for Sports Moves, published in redacted form as A New Hook For IP Practice – Intellectual Property Protection For Sports Moves, Nat'l L. J., C1-C5 (May 20, 1996), co-authored with Robert M. Kunstadt and Robert G. Kramer, updated version published at 25 Santa Clara Computer & High Tech. L.J. 765 (2009).

Responses of Mr. F. Scott Kieff to
FINANCE COMMITTEE QUESTIONS FOR THE RECORD

United States Senate
Committee on Finance

Hearing on
Confirmation of Mr. F. Scott Kieff to be a
Member of the United States International Trade Commission
July 18, 2013

Questions from Senator Wyden

Question 1

Mr. Kieff, you have extensive credentials and views about intellectual property rights, particularly in the area of patents. This experience is important and informative in terms of your potential role at the ITC to investigate claims that certain imports infringe on IPR.

But much of what the ITC does is determine whether illegally dumped and subsidized merchandise is harming American manufacturers. The ITC role in anti-dumping and countervailing duty investigations is critical if the U.S. is going to stand up for American businesses and the workers upon which they rely to remedy unfair trade practices.

Are you committed to taking this aspect of your job at the ITC seriously and vigorously working to see that the trade remedy laws are fully enforced pursuant to Congress' instructions?

Answer:

Yes, I recognize the importance of antidumping and countervailing duty investigations and I am committed to taking this aspect of the Commission's mandate seriously. If confirmed, I would vigorously work to see that the trade remedy laws are fully enforced in accordance with Congressionally-enacted statutes. I have more than two decades of experience applying statutory injury factors to the facts and circumstances of particular matters in many areas of the law, including significant experience focusing on antidumping and countervailing duty matters arising before the ITC. I would apply this experience to the Title VII antidumping and countervailing duty portion of the ITC's docket, working faithfully and impartially within the legal framework applicable to each matter then before the Commission to enforce the law, based on the particular facts in the record.

Question 2

I'd like to focus on how you will handle your job in terms of 337 investigations. These are the investigation in which the ITC determines whether to ensure that certain imports are blocked at the border because they infringe upon intellectual property rights.

You added your name to the amicus brief on what is commonly known as the "eBay case." In it, you say that *"whenever a plaintiff shows that a defendant has infringed a valid patent, an injunction should issue in the absence of special circumstances."* You go on to say, however, that "introducing discretion into these areas makes the court arbiters not of the patents but of industrial policy, on which they have little competence."

As I understand your argument, it is one that says that if someone infringes a valid patent, an injunction should basically always be issued by the court.

I have three questions.

One, do you stand behind this amicus brief? If so, do you still maintain that it is in the public's interest that the court always issue an injunction [or exclusion order] should any valid patent be infringed?

Answer:

Yes, the views I hold today are consistent with the views reflected in the *eBay* amicus brief, which I prepared in my role as a legal academic writing about policy, to contribute ideas and analysis to the Court before its decision.

My views are consistent with the Court's decision in *eBay*, which acknowledges that there are widely recognized exceptions to the general practice of issuing injunctions in patent cases in district court litigation after a patent has been adjudicated to be infringed and not invalid. Significant debate remains among courts and scholars about the state of the law and practice with respect to the issuing of injunctions in patent cases before the Supreme Court's *eBay* decision as well as what impact that decision has had and will have in federal court.

As an ITC Commissioner, I would be serving in a different role than that of a legal scholar contributing to a debate before the Court. If confirmed to the Commission I would carefully adhere to the statutory requirements of Section 337, as Congress enacted it and the Commission's reviewing courts have interpreted it. The Federal Circuit has held that Commission remedy determinations under Section 337 are based on specific statutory criteria, unlike the federal court remedy determinations at issue in *eBay*, which are granted in accordance with the principles of equity.

Two, are there any types of patents that you believe should receive more scrutiny for purposes of determining whether an injunction or an exclusion order should be granted?

Answer:

If confirmed as an ITC Commissioner, I intend to faithfully and impartially apply the law as written, based on the facts of each particular case. If the Commission finds importation of articles that infringe a valid and enforceable patent, and the domestic industry requirement is satisfied, Section 337 directs the Commission to consider whether an exclusion order and/or cease and desist order is appropriate. In making that decision, Congress has directed the Commission to consider four statutory public interest factors: the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers. The Commission must consider the facts and evidence in the record pertaining to a violation and pertaining to the public interest factors. In some investigations, there may be particular facts and evidence that raise concerns pertaining to the statutory public interest factors, and I will carefully consider such evidence.

Different types of patents may be associated with different facts to be considered in the context of the four public interest factors. For example, the factual record of an investigation concerning a patent on medical devices may be relevant to the public health and welfare public interest factor in a way different from an investigation concerning patents related to consumer electronics. Some categories of investigations may raise factual questions concerning competitive conditions in the U.S. economy that are not present in investigations involving others. In each case, I would carefully consider the four public interest factors that Congress has instructed the Commission to evaluate in the context of the factual record of each investigation.

Three, the 337 statute requires the ITC to seek guidance from the Department of Justice and the Federal Trade Commission when conducting its investigations and making determinations. The Obama Administration has clearly come down on the side of the “eBay decision,” which is that injunctions and exclusion orders should not be automatically issued if there is a broader determination that such an order would not be in the public interest. This position appears to be at odds with your own. How do you square the ITC’s independent responsibility – and yours as a potential commissioner – to apply a public interest test to 337 exclusion orders with the statutory requirement mandated by Congress to consult and seek guidance from the Obama Administration?

Answer:

If confirmed, I would look forward to following Congress’ statutory mandate that the Commission consult with and seek advice and information from the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and other federal departments and agencies. The Commission has a long tradition of giving careful consideration to all advice and information received from all such federal

departments and agencies during the course of each investigation. If confirmed, I am committed to continuing that practice.

For example, I understand that the Commission notifies the federal agencies identified in the statute by letter of the institution of each Section 337 case, and requests comment from all interested government agencies on public interest and remedy. After recent rule changes to improve this procedure, the Commission now collects more information on public interest concerns at earlier stages of investigations and more frequently throughout the investigation. The Commission also instructs the ALJ to compile a record of public interest evidence in appropriate cases.

I understand that when other federal agencies provide comments in specific cases the Commission considers them carefully. If confirmed, I am committed to doing so as well.

The law requires the Commission to reach its remedy decisions by considering specific statutory public interest factors in the context of the facts of each case. In contrast, the President has an opportunity (now delegated to USTR) to disapprove that order “for policy reasons.”

Questions from Senator Brown

Question 1:

The antidumping and countervailing duty laws are an integral part of the rules based international trading system, and have been vital to retaining and creating jobs in Ohio. Do you agree that the use and enforcement of our trade remedy laws creates and preserves American jobs?

Answer:

Yes, I agree that the use and enforcement of our trade remedy laws can create and preserve American jobs.

What can you say to assure my constituents of the importance you place on the antidumping and countervailing duty laws and their enforcement?

Answer:

I recognize the importance of antidumping and countervailing duty laws and their enforcement and, if confirmed, am committed to taking all aspects of the Commission's mandates seriously. I would vigorously work to see that the trade remedy laws are fully enforced pursuant to the statutory mandates. I have more than two decades of experience applying statutory injury factors to the facts and circumstances of particular matters in many areas of the law, including significant experience focusing on antidumping and countervailing duty matters arising before the ITC. I would apply this experience to the Title VII antidumping and countervailing duty portion of the ITC's docket, working faithfully and impartially within the legal framework applicable to each matter then before the Commission to enforce the law, based on the particular facts in the record.

Question 2:

The statutory definition of material injury in an antidumping duty case is "harm which is not inconsequential, immaterial, or unimportant." The ITC and the courts have stated that a domestic industry can be "materially injured," even if it remains profitable.

Do you agree that a domestic industry may suffer material injury from dumped and subsidized imports even though it manages to remain profitable?

Answer:

Yes. The applicable statute, Section 771(7)(B) of the Tariff Act of 1930, as amended, directs the Commission to consider the volume, price, and impact of dumped or subsidized imports on the affected domestic industry in determining whether a domestic industry is materially injured by reason of dumped or subsidized imports. Section 771(7)(C) provides extensive instruction on how to evaluate these relevant statutory

factors, and in particular specifies seventeen separate factors for the Commission to examine in ascertaining the impact of dumped or subsidized imports, of which profit is one. Section 771(7)(E) further indicates that the presence or absence of any single factor shall not necessarily give decisive guidance to a material injury determination.

Questions from Senator Casey

Question 1

It is imperative that we enforce our trade laws to ensure our manufacturers can compete on a level playing field.

I would ask a simple question- are you absolutely committed to full and effective enforcement of our trade laws as written?

Answer:

Yes, I am committed to full and effective enforcement of our trade laws as written. If confirmed, I would vigorously work to see that the trade remedy laws are fully enforced in accordance with Congressionally-enacted statutes. I have more than two decades of experience applying statutory injury factors to the facts and circumstances of particular matters in many areas of the law, including significant experience focusing on antidumping and countervailing duty matters arising before the ITC. I would apply this experience to the Title VII antidumping and countervailing duty portion of the ITC's docket, working faithfully and impartially within the legal framework applicable to each matter then before the Commission to enforce the law, based on the particular facts in the record.

Question 2

In the past questions have been raised as to whether certain Commissioners at the ITC agreed with the underlying policy represented by our antidumping and anti-subsidy laws.

Can you assure me that you will apply the statute - which requires only a showing of injury that is not "inconsequential, immaterial or unimportant" - exactly as written and intended by Congress?

Answer:

Yes, I recognize the importance of our antidumping and countervailing duty laws, which state that "[t]he term 'material injury' means harm that is not inconsequential, immaterial, or unimportant." I assure the Committee that if confirmed I would apply the statute exactly as written and Congress intended and would enjoy working faithfully and impartially within the legal framework applicable to each matter before the Commission to enforce the laws, based on the particular facts in the record.

Questions from Senator Portman**Question 1:**

How do you believe the ITC should consider the public interest factors when deciding whether to issue an exclusion order in a 337 case? Should the ITC look only at the public interest ramifications of the exclusion order at issue, or should it consider broader, long-term public interest effects? For example, in a case involving a standard-essential patent (SEP), should the ITC consider whether an exclusion order will enable patent hold-up and undermine the standards-setting process?

Answer:

Congress has given the Commission instructions as to what it should consider when determining whether to issue an exclusion order in an investigation brought under Section 337. According to the statute, the Commission must consider the effect of remedial orders on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers. The Commission has significant experience in evaluating these factors and the expertise to do so. If confirmed, I intend to perform faithfully the public interest analysis mandated by Congressionally-enacted statute.

Every investigation is different. The potential effect of a remedial order under consideration on each of the statutory public interest factors may therefore vary from investigation to investigation. The Commission is statutorily mandated to ground its decisions in the facts of record of the particular investigation in all matters, including when performing its public interest analysis. The Commission has a long track record of soliciting, compiling, and considering a wealth of evidence from the parties, from other federal departments and agencies, and from the public. Consistent with this track record, if confirmed I would, when evaluating the choice of remedy, carefully consider submissions that include facts demonstrating broader, long-term public interest effects as well as facts regarding potential hold-up, or impairment of a standard-setting process.

Question 2:

You have written that SEP holders retain the right to exclude unwilling licensees, despite the SEP holder's commitment to license on reasonable and non-discriminatory (RAND) terms. What information should the ITC consider when determining whether a SEP licensee is willing, and what standard should the ITC use in considering that question? How should the ITC assess whether a SEP holder is making a reasonable offer?

Answer:

A significant amount of my work has focused on issues concerning SSOs, SEPs, and RAND commitments. I take seriously the risk of hold-up and have written about the importance of not allowing patentees to engage in wrongs the courts and the Commission

have long recognized, including those known generally as patent misuse, antitrust violations, or breach of contractual commitments. If confirmed I would, when evaluating defenses and potential remedies in a particular investigation, carefully consider the factual record in the context of the applicable law concerning, *inter alia*, the real-world actions and legal commitments of each party and organization relevant to the dispute, including the patentee, potential licensees, SSOs, and others. For example, when an SEP holder has an obligation to make a reasonable licensing offer in a RAND setting, the evaluation of that issue may include analysis of, *inter alia*, the terms of the commitment, the parties' actions, industry practice, and the significant case law from the courts in this area. The actions of both the SEP holder and the potential licensee are each part of that analysis. The Congressionally enacted statutes require the Commission to apply the legal standards established by Congress and the courts for evaluating such issues, including the law of contracts, estoppel, patent misuse, etc.

Question 3:

Do SEP holders retain the right to exclude willing licensees as well, despite SEP holders' RAND commitments?

Answer:

SEP holders, and other patentees, are not allowed to engage in wrongs the courts and the Commission have long recognized, including those known generally as patent misuse, antitrust violations, or breach of contractual commitments. The elements of patent misuse and related antitrust and unfair competition doctrines are well established, and may include, for example, exploiting market power to leverage the patent right beyond that granted by Congress. These doctrines may have application to an investigation brought at the Commission by an SEP owner attempting to exclude a willing licensee. Other related doctrines may apply as well, including those of contract law, and would be based on the real-world actions and legal commitments of each party and organization relevant to the dispute, including the patentee, potential licensees, SSOs, and others.

Question 4:

You have written about the best way for courts to implement the *eBay* factors in considering whether to issue an injunction in patent cases. Do you think a court applying the *eBay* factors should generally decline to issue an injunction to a SEP holder claiming infringement, given the availability of monetary damages? Do you think monetary damages are generally a sufficient remedy in SEP cases?

Answer:

The views I hold today, which are consistent with my academic writing, are also consistent with the Court's decision in *eBay* in acknowledging that there are widely recognized exceptions to the general practice of issuing injunctions in patent cases in district court litigation after a patent has been adjudicated to be infringed and not invalid.

Significant debate remains among courts and scholars about the state of the law and practice with respect to the issuing of injunctions in patent cases before the Supreme Court's *eBay* decision as well as what impact that decision has had and will have in federal court.

The Supreme Court's *eBay* decision directs federal district courts to consider whether monetary damages are a sufficient remedy for patent infringement when evaluating an equitable remedy, such as an injunction. Whether monetary damages are a sufficient remedy will vary depending on the specific facts of each case, according to the principles of equity.

As an ITC Commissioner, I would be serving in a different role than that of a district court judge making equitable remedy determinations. If confirmed to the Commission I would carefully adhere to the statutory requirements of Section 337, as enacted by Congress and interpreted by the reviewing courts. The Federal Circuit has held that Commission remedy determinations under Section 337 are based on specific statutory criteria, unlike the federal court remedy determinations at issue in *eBay*, which are granted in accordance with the principles of equity.

Question 5:

At a time when manufacturing workers in Ohio and across the country continue to face challenges, it is vital that we strictly enforce America's trade laws and allow our manufacturers to compete on a level playing field. Are you committed to full, strict and effective enforcement of our trade laws?

Answer:

Yes, I am committed to full, strict, and effective enforcement of our trade laws.

With respect to antidumping and countervailing duty laws, I recognize the importance of such investigations and I am committed to taking this aspect of the Commission's mandate seriously. If confirmed, I would vigorously work to see that the trade remedy laws are fully enforced in accordance with Congressionally-enacted statutes. I have more than two decades of experience applying statutory injury factors to the facts and circumstances of particular matters in many areas of the law, including significant experience focusing on antidumping and countervailing duty matters arising before the ITC. I would apply this experience to the Title VII antidumping and countervailing duty portion of the ITC's docket, working faithfully and impartially within the legal framework applicable to each matter then before the Commission to enforce the law, based on the particular facts in the record.

With respect to section 337 investigations, if confirmed as an ITC Commissioner, I intend to faithfully and impartially apply the law as written, based on the facts of each particular case. If the Commission finds importation of articles that infringe a valid and enforceable patent, and the domestic industry requirement is satisfied, Section 337 directs

the Commission to consider whether an exclusion order and/or cease and desist order is appropriate. In making that decision, Congress has directed the Commission to consider four statutory public interest factors: the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers. The Commission must consider the facts and evidence in the record pertaining to a violation and pertaining to the public interest factors. In some investigations, there may be particular facts and evidence that raise concerns pertaining to the statutory public interest factors, and I will carefully consider such evidence.

**Opening Statement Of Joseph W. Nega
Nominee For Judge, United States Tax Court
Senate Committee On Finance
July 18, 2013**

Chairman Baucus, Ranking Member Hatch, and distinguished members of the Finance Committee -- it is a privilege for me to be here today. Thank you for holding this hearing to consider my nomination to be a judge on the United States Tax Court.

I am very grateful to President Obama for nominating me. I would also like to thank the Finance Committee staff members who have been generous with their time while working with me on my nomination.

It is with mixed emotions that I appear before you today after 28 years as a member of the staff of the Joint Committee on Taxation here on Capitol Hill. I have truly enjoyed serving Members of both the House and the Senate on tax legislative matters, both on tax policy questions and on technical tax issues. When I came to Capitol Hill in 1985 as a young lawyer, it was at the beginning of the legislative process that eventually resulted in the Tax Reform Act of 1986. Since then, as a Joint Tax Committee staffer, I have provided assistance to Members and their staffs, as well as to committee staffs, on tax proposals covering a range of subject areas. During the 1980s, I attended Georgetown Law School at night and earned a masters degree in tax law. I believe that my training and my professional experience in the tax field give me the background I will need to serve as a Tax Court judge and to fairly and impartially apply the tax law.

I owe a great debt of thanks to all of my colleagues on the staff of the Joint Committee on Taxation, especially our Chief of Staff, Tom Barthold. The tax lawyers, accountants, and economists on the staff of the Joint Tax Committee have shown me over and over the value of teamwork among knowledgeable professionals with a wide range of expertise. The clerks and support staff are among the best on the Hill. When I leave Capitol Hill, I will miss the sense of shared work in public service with these individuals and all the many other staffers who assist Congress in its efforts to serve the American people.

I would like to thank my parents, who instilled in me a strong sense of public service. I suspect my mother will be tuning in to CSPAN to watch this hearing back in Chicago. I would also like to thank my wife of 24 years, Cecily Rock, who is here today, as well as my two sons, David and Philip, for their love and support.

If confirmed, I will work diligently to resolve tax controversies fairly and expeditiously. Thank you for the opportunity to testify.

**SENATE FINANCE COMMITTEE
STATEMENT OF INFORMATION REQUESTED OF NOMINEE**

A. BIOGRAPHICAL INFORMATION

1. Name: (Include any former names used.)
Joseph Walter Nega
2. Position to which nominated:
Judge, United States Tax Court
3. Date of nomination:
May 9, 2013
4. Address: (List current residence, office, and mailing addresses.)
5. Date and place of birth:
September 11, 1960 -- Chicago IL
6. Marital status: (Include maiden name of wife or husband's name.)
7. Names and ages of children:
8. Education: (List secondary and higher education institutions, dates attended, degree received, and date degree granted.)

Georgetown University School of Law, M.L.T. (Taxation), 1986 (Attended 1984-1986)

DePaul University School of Law, J.D., 1984 (Attended 1981-1984)

DePaul University College of Commerce, B.S.C. (Accounting), 1981 (completed 4-year course in 3 years -- 1978-1981)

9. Employment record: (List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment.)

Staff of Congressman Daniel Rostenkowski (1981-1985)

- Congressional Aide in District offices -- Chicago, IL
- Office duties including casework, constituent services, outreach efforts

Staff of the Joint Committee on Taxation of the United States Congress, 1985 - present

- Legislation Attorney, 1985 - 1989
- Legislation Counsel, 1989 - 2008
- Senior Legislation Counsel, 2008-Present
- Location: Washington, D.C.
- Duties: Responsible for review of staff work and management of committee publications; analysis and development of tax legislative proposals; writing of committee reports, markup documents, hearing pamphlets and other descriptive tax legislative materials; participation in statutory drafting of tax legislative proposals; development and writing of studies published by the Joint Committee on Taxation.

10. Government experience: (List any advisory, consultative, honorary, or other part-time service or positions with Federal, State or local governments, other than those listed above.)

None.

11. Business relationships: (List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, other business enterprise, or educational or other institution.)

None

12. Memberships: (List all memberships and offices held in professional, fraternal, scholarly, civic, business, charitable, and other organizations.)

- Polish National Alliance (1978 - present)
- Knights of Columbus (1987 - present)
- Illinois State Bar Association (1984 - present)

13. Political affiliations and activities:

- a. List all public offices for which you have been a candidate.

None.

- b. List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

None.

- c. Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$50 or more for the past 10 years.

None.

14. Honors and Awards: (List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals, and any other special recognitions for outstanding service or achievement.)

None.

15. Published writings: (List the titles, publishers, and dates of all books, articles, reports, or other published materials you have written.)

None.

16. Speeches: (List all formal speeches you have delivered during the past five years which are on topics relevant to the position for which you have been nominated. Provide the Committee with **two** copies of each formal speech.)

None.

17. Qualifications: (State what, in your opinion, qualifies you to serve in the position to which you have been nominated.)

My educational background in the tax field is complemented by long experience working on Capitol Hill. I have over 28 years working in the areas of tax policy and tax administration in various positions on the staff of the Joint Committee on Taxation. My extensive work in federal tax law, as well as my familiarity with the tax legislative process gives me a skill set that prepares me for the Tax Court. I

hope that this experience combined with a measured temperament mean that I am well qualified to serve on the Tax Court. If given the opportunity to continue my lifetime of public service, I believe that I can render fair and equitable decisions as a Tax Court judge.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, associations, or organizations if you are confirmed by the Senate? If not, provide details.

Yes.

2. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, provide details.

No.

3. Has any person or entity made a commitment or agreement to employ your services in any capacity after you leave government service? If so, provide details.

No.

4. If you are confirmed by the Senate, do you expect to serve out your full term or until the next Presidential election, whichever is applicable? If not, explain.

Yes.

C. POTENTIAL CONFLICTS OF INTEREST

1. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the AOUSC designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the AOUSC designated agency ethics official and that has been provided to this Committee. I am not aware of any potential conflicts of interest.

2. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

In connection with the nomination process, I have consulted with the Office of Government Ethics and the AOUSC designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the AOUSC designated agency ethics official and that has been provided to this Committee. I am not aware of any potential conflicts of interest.

3. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy. Activities performed as an employee of the Federal government need not be listed.

I have engaged on no such activities.

4. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items. (Provide the Committee with two copies of any trust or other agreements.)

In connection with the nomination process, I have consulted with the Office of Government Ethics and the AOUSC designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the AOUSC designated agency ethics official and that has been provided to this Committee. I am not aware of any potential conflicts of interest.

5. Two copies of written opinions should be provided directly to the Committee by the designated agency ethics officer of the agency to which you have been

nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position.

6. The following information is to be provided only by nominees to the positions of United States Trade Representative and Deputy United States Trade Representative:

Have you ever represented, advised, or otherwise aided a foreign government or a foreign political organization with respect to any international trade matter? If so, provide the name of the foreign entity, a description of the work performed (including any work you supervised), the time frame of the work (e.g., March to December 1995), and the number of hours spent on the representation.

Not applicable.

D. LEGAL AND OTHER MATTERS

1. Have you ever been the subject of a complaint or been investigated, disciplined, or otherwise cited for a breach of ethics for unprofessional conduct before any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.

No.

2. Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority for a violation of any Federal, State, county or municipal law, regulation, or ordinance, other than a minor traffic offense? If so, provide details.

No.

3. Have you ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.

No.

4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? If so, provide details.

No.

5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

Not applicable.

E. TESTIFYING BEFORE CONGRESS

1. If you are confirmed by the Senate, are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so?

Yes.

2. If you are confirmed by the Senate, are you willing to provide such information as is requested by such committees?

Yes.

**Opening Statement of Michael Bert Thornton
Nominee for Judge, U.S. Tax Court
Senate Committee on Finance
July 18, 2013**

Remarks as Prepared for Delivery

Chairman Baucus, Ranking Member Hatch, and distinguished members of the Committee, thank you for the privilege of appearing before you today. I last appeared before this Committee a little over 15 years ago after I was nominated for my first term as a Tax Court Judge. I am grateful to President Obama for nominating me for a second term on the Court. And I am grateful to you and to the Committee's outstanding staff for processing my nomination so promptly.

I would like to introduce my wife Alexandra Deane Thornton, who is here with me today, as well as my daughter Kaley. When she attended my first confirmation hearing, Kaley was just three years old and was looking forward to entering preschool. It is a vivid reminder of the passage of time that she is now looking forward to attending Duke University this Fall. My other daughter, Camille, unfortunately could not be here today because she is out of town for a summer camp.

I came to the Tax Court after years of tax experience in private practice, on the Hill, and in the Treasury Department. That was all good preparation for my past 15 highly rewarding years on the Tax Court, where I have endeavored to maintain the Court's long tradition and high standards of resolving tax controversies fairly, impartially, and expeditiously in accordance with Congressional intent. In addition to trying and deciding hundreds of cases, I have worked actively to better the Court administratively, in ways such as modernizing its rules and bringing the Court more up to date with the use of technology for eFiling and providing remote electronic access to the Court's records. Last year I was honored to have been elected by my colleagues for a term as Chief Judge. If confirmed for another term on the Court, I would hope to continue to help maintain and enhance the public's confidence in the Tax Court as the forum of choice for litigating Federal tax controversies.

Thank you very much. I would be happy to answer any questions you might have.

- 1. Name: (Include any former names used.)**
Michael Bert Thornton
- 2. Position to which nominated:**
Judge, United States Tax Court
- 3. Date of nomination:**
May 9, 2013
- 4. Address: (List current residence, office, and mailing addresses.)**
- 5. Date and place of birth:**
February 9, 1954
Hattiesburg, Mississippi
- 6. Marital status: (Include maiden name of wife or husband's name.)**

7. **Names and ages of children:**

8. **Education: (List secondary and higher education institutions, dates attended, degree received, and date degree granted.)**

Blair High School, Hattiesburg, Mississippi
 Attended 1969-1972
 High school diploma conferred 1972

University of Southern Mississippi, Hattiesburg, Mississippi
 1972-1977
 B.S. in Accounting (summa cum laude) conferred May 1976
 M.S. in Accounting conferred May 1977

University of Tennessee, Knoxville, Tennessee
 1977-1978
 M.A., English Literature, conferred June 1978

Duke University School of Law, Durham, North Carolina
 1979-1982
 J.D. (with distinction) conferred May 1982

9. **Employment record: (List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment.)**

Judge
 United States Tax Court, Washington, D.C.
 Appointed on March 8, 1998, for a term ending March 7, 2013
 Elected as Chief Judge for a two-year term effective June 1, 2012

Deputy Tax Legislative Counsel (Tax Legislation)
 U.S. Department of the Treasury, Washington, D.C.
 May 1995-February 1998

Attorney-Advisor, Office of Tax Policy
 U.S. Department of the Treasury, Washington, D.C.
 February-April, 1995

Chief Minority Tax Counsel
 Committee on Ways and Means
 U.S. House of Representatives, Washington, D.C.
 January 1995

Tax Counsel
Committee on Ways and Means
U.S. House of Representatives, Washington, D.C.
June 1988-December 1994

Associate Attorney
Miller & Chevalier, Chartered, Washington, D.C.
January 1985-May 1988

Law Clerk
The Honorable Charles Clark, Chief Judge
U.S. Court of Appeals for the Fifth Circuit, Jackson, Mississippi
July 1983-July 1984

Associate Attorney
Sutherland, Asbill & Brennan, Washington, D.C.
June 1982-December 1982

Summer Associate
Sutherland, Asbill & Brennan, Washington, D.C.
May 1981-August 1981

Law Clerk
Butler, Snow, O'Mara, Stevens & Cannada, Jackson, Mississippi
May 1980-August 1980

Law School Library Assistant
Duke Law School, Durham, North Carolina
September 1980-May 1982

Staff Auditor
Touche Ross & Company, Nashville, Tennessee
January 1979 -August 1979

Graduate Teaching Assistant
University of Tennessee, Knoxville, Tennessee
September 1977-May 1978

Graduate Teaching Assistant
University of Southern Mississippi, Hattiesburg, Mississippi
September 1976-August 1977

Assistant Internal Auditor
University of Southern Mississippi, Hattiesburg, Mississippi
March-August 1977

10. **Government experience: (List any advisory, consultative, honorary, or other part-time service or positions with Federal, State or local governments, other than those listed above.)**

None

11. **Business relationships: (List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, other business enterprise, or educational or other institution.)**

None.

12. **Memberships: (List all memberships and offices held in professional, fraternal, scholarly, civic, business, charitable, and other organizations.)**

District of Columbia Bar (1982 – present)
Duke Alumni Association (1982 – present)
Great Falls Swim and Tennis Club (2001 - present)
Tax Court Bar Association (1987 - present)

13. **Political affiliations and activities:**

- a. **List all public offices for which you have been a candidate.**

None.

- b. **List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.**

None.

- c. **Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$50 or more for the past 10 years.**

None.

14. **Honors and Awards: (List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals, and any other special recognitions for outstanding service or achievement.)**

Secretary's Annual Award, 1997, U.S. Department of the Treasury
(group award for work on higher education tax incentives)

Mississippi Society of CPAs' Gold Medal for highest marks on Fall 1977 CPA examination

Duke Law School (1979-1982):

Merit Scholarship
Order of the Coif
Duke Law Journal (Editorial Board)

University of Southern Mississippi (1972-1977):

Phi Kappa Phi Silver Bowl (highest academic standing in graduating class)
Hall of Fame
Outstanding Senior in Accounting Award
Mississippi Society of CPAs Scholarship Award
Faculty Award
Honors Program and Scholarship

15. **Published writings: (List the titles, publishers, and dates of all books, articles, reports, or other published materials you have written.)**

"Intimations of Federal Removal Jurisdiction in Labor Cases," 1981 Duke Law Journal
743

16. **Speeches: (List all formal speeches you have delivered during the past five years which are on topics relevant to the position for which you have been nominated. Provide the Committee with two copies of each formal speech.)**

Remarks to the Court Procedure and Practice Committee
American Bar Association
January 25, 2013

Remarks to the Court Procedure and Practice Committee
American Bar Association
September 14, 2012

Remarks to the Court Procedure and Practice Committee
American Bar Association
May 11, 2012

See attachment 1 for text of remarks listed above.

17. Qualifications: (State what, in your opinion, qualifies you to serve in the position to which you have been nominated.)

During my 15 years on the bench of the United States Tax Court, I have presided over hundreds of trials, involving both unrepresented taxpayers and sophisticated legal counsel. I have authored hundreds of opinions and endeavored to maintain the high standards of this Court to resolve tax disputes fairly, consistently, and expeditiously. I have gained a keen appreciation of the need to make special efforts to ensure that unrepresented taxpayers, who may be unable to afford counsel, have adequate access to justice. As Chief Judge, I have worked to continue the expansion of the Court's clinical and pro bono programs. As Chair of the Court's Rules Committee for a number of years, I worked to modernize the Court's Rules and bring them into closer conformance with the Federal Rules of Civil Procedure. I have also been heavily involved in the Court's technological advances, including eFiling, greater public access to the Court's electronic files, and enhancement of the Court's website. I have worked with the American Bar Association and the Office of Chief Counsel to help the Court better serve the needs of the litigants who appear before it. My professional career before coming to the Court provided me extensive and varied experience in the formulation, implementation, and practice of tax law. I am committed to public service and to maintaining high standards of personal integrity. If confirmed for an additional term as a Judge of the U.S. Tax Court, I will continue to uphold its reputation for fairness, thoroughness, and justice.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. **Will you sever all connections with your present employers, business firms, associations, or organizations if you are confirmed by the Senate? If not, provide details.**

Yes

2. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, provide details.**

No

3. **Has any person or entity made a commitment or agreement to employ your services in any capacity after you leave government service? If so, provide details.**

No

4. **If you are confirmed by the Senate, do you expect to serve out your full term or until the next Presidential election, whichever is applicable? If not, explain.**

Under current law, I will be unable to serve out my full term as I will reach the mandatory age of 70 before completing a new 15-year term. I would contemplate remaining active in senior status, if circumstances permit.

C. POTENTIAL CONFLICTS OF INTEREST

- 1. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.**

In connection with the nomination process, I have consulted with the Office of Government Ethics and the Administrative Office of the U.S. Courts (AOUSC) designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the AOUSC designated agency ethics official and that has been provided to this Committee. I am not aware of any potential conflicts of interest.

- 2. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.**

In connection with the nomination process, I have consulted with the Office of Government Ethics and the AOUSC designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the AOUSC designated agency ethics official and that has been provided to this Committee. I am not aware of any potential conflicts of interest.

- 3. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy. Activities performed as an employee of the Federal government need not be listed.**

I have engaged in no such activities.

- 4. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items. (Provide the Committee with two copies of any trust or other agreements.)**

In connection with the nomination process, I have consulted with the Office of Government Ethics and the AOUSC designated agency ethics official to identify potential conflicts of interest. Any potential conflicts of interest will be resolved in accordance with the terms of an ethics agreement that I have entered into with the AOUSC designated agency ethics official and that has been provided to this Committee. I am not aware of any potential conflicts of interest.

- 5. Two copies of written opinions should be provided directly to the Committee by the designated agency ethics officer of the agency to which you have been nominated**

and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position.
Provided.

6. The following information is to be provided only by nominees to the positions of United States Trade Representative and Deputy United States Trade Representative:
Have you ever represented, advised, or otherwise aided a foreign government or a foreign political organization with respect to any international trade matter? If so, provide the name of the foreign entity, a description of the work performed (including any work you supervised), the time frame of the work (e.g., March to December 1995), and the number of hours spent on the representation.
Not applicable

D. LEGAL AND OTHER MATTERS

1. Have you ever been the subject of a complaint or been investigated, disciplined, or otherwise cited for a breach of ethics for unprofessional conduct before any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.
No
2. Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority for a violation of any Federal, State, county or municipal law, regulation, or ordinance, other than a minor traffic offense? If so, provide details.
No
3. Have you ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.
I was named as a defendant in a petition for mandamus in a case in the United States Court of Appeals for the Fifth Circuit, Docket Number 04-50047, filed May 19, 2004. The petition was summarily dismissed on May 5, 2004, without my personal involvement in the case, apart from representation provided me by the Department of Justice.
4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? If so, provide details.
No
5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.
None to my knowledge.

E. TESTIFYING BEFORE CONGRESS

1. **If you are confirmed by the Senate, are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so?**

Yes

2. **If you are confirmed by the Senate, are you willing to provide such information as is requested by such committees?**

Yes

